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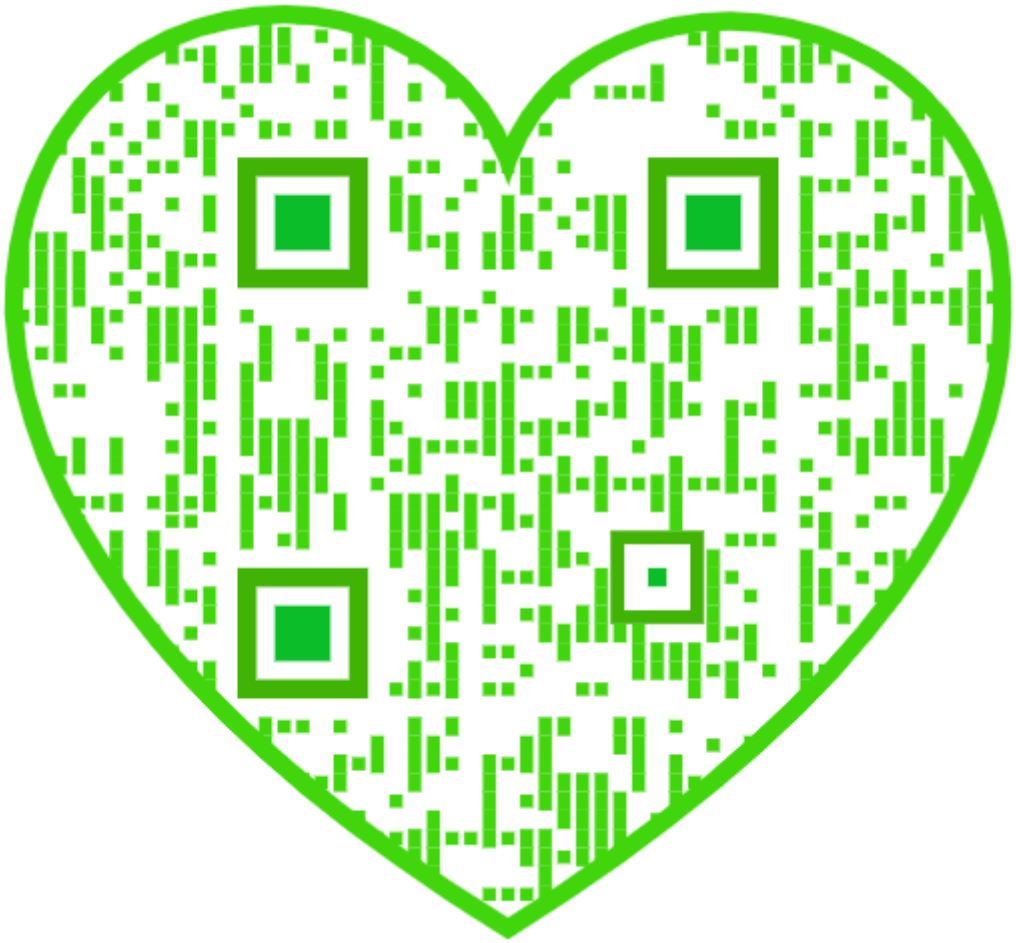

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By Joseph A. Joyce* and Howard C. Joyce.†

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I. DEFINITIONS.

Ejectment is defined to be an action to recover immediate possession of real property;[1] an action to try the right of possession to the land in controversy;[2] a possessory action.[3]

1. Leprell *v.* Kleinschmidt, 112 N. Y. 364, 369, 19 N. E. 812; Risley *v.* Rice, 3 N. Y. St. 168, 169; N. Y. Code Civ. Proc. § 3343, subd. 20.

2. Wood *v.* Grundy, 3 Harr. & J. (Md.) 13, 19.

"Ejectment is designed to protect and enforce the right of possession derived from ownership or title." Dyer *v.* Reitz, 14 Mo. App. 45, 46.

3. Pearce *v.* House, 4 N. C. 722, 725.

It is also defined as "a possessory action ex delicto, founded upon a trespass, actual or supposed, committed by defendant in wrongfully obtaining possession of plaintiff's land." Henninger *v.* Boyer, 10 Pa. Co. Ct. 506, 508.

II. RIGHT OF ACTION.

A. Nature and Scope of Remedy[4]— 1. NATURE OF REMEDY. This action, which was originally employed in England to enable the lessee of lands, who had been ejected therefrom during his term, to recover damages therefor, was subsequently enlarged to enable him also to recover possession of the land. In later years it has been used both in England and in this country to try questions involving the title to real estate.[5] Ejectment has been held to be a mixed action;[6] and although it was converted from its original character into a fictitious proceeding[7] and became a common method of trying title to lands,[8] nevertheless in its general and strict sense the action is a possessory one.[9]

2. AS AFFECTED BY STATUTE.[10] Except as modified by statute[11] the common-law principles pertaining to ejectment are applicable to actions of ejectment, to

4. Extent of recovery and relief see *infra*, VIII, E, 3.

Remedy for damages, mesne profits, and improvements see *infra*, IX; X.

What is nature and scope of equitable ejectment see *infra*, XI.

5. Murphy *v.* Bolger, 60 Vt. 723, 725, 15 Atl. 365, 1 L. R. A. 309.

Ejectment was first in reality an action by a lessee against an intruder commenced by writ, but afterward became a fiction both as to lease and lessee, and was commenced by declaration and notice, and, the lessor being the person really interested, it was then used for the purpose of trying his title or right to make a lease, and the tenant could call to his aid, not only any title which he might have, but also the title of another from whom he derived his possession; and, as there might be negligence on the tenant's part or collusion between him and the lessee of plaintiff, especially after fiction was introduced into the action, the tenant's landlord was first permitted to interpose, which interposition was afterward sanctioned and regulated by statute. Crockett *v.* Lashbrook, 5 T. B. Mon. (Ky.) 530, 17 Am. Dec. 98.

6. Betz *v.* Mullin, 62 Ala. 365; McBride *v.* McBride, 82 Ga. 714, 9 S. E. 111; Winona *v.* Huff, 11 Minn. 119. And see 3 Blackstone Comm. 199.

Ejectment is classified in some statutes as a real action; in the cases it is spoken of sometimes as a personal action (Miles *v.* Caldwell, 2 Wall. (U. S.) 35, 17 L. ed. 755); and sometimes as a real action (Crandall *v.* Gallup, 12 Conn. 365, 370; Guyer *v.* Wookey, 18 Ill. 536, 537; Goodtitle *v.* Tombs, 3 Wils. C. P. 118, 120).

7. "Ejectment is a fictitious action and is moulded by courts to subserve the purposes of justice in a manner peculiar to itself, . . . but its professed object is to try the titles of the parties." McArthur *v.* Porter, 6 Pet. (U. S.) 205, 211, 8 L. ed. 371.

8. 3 Blackstone Comm. 197–207.

Ejectment has become a real action, under statute. Guyer *v.* Wookey, 18 Ill. 536; Hubbard *v.* Godfrey, 100 Tenn. 150, 47 S. W. 81.

9. *California.*— Payne *v.* Treadwell, 5 Cal. 310.

Colorado.— Sears *v.* Taylor, 4 Colo. 38, 41.

Florida.— Barco *v.* Fennell, 24 Fla. 378, 385, 5 So. 9.

Illinois.— Guyer *v.* Wookey, 18 Ill. 536.

Tennessee.— Hubbard *v.* Godfrey, 100 Tenn. 150, 47 S. W. 81.

United States.— Cincinnati *v.* White, 6 Pet. 431, 442, 8 L. ed. 452.

See 17 Cent. Dig. tit. "Ejectment," § 4.

All that is involved is the right of possession without regard to where the ultimate fee may be. Hoboken Land, etc., Co. *v.* Hoboken, 36 N. J. L. 540, 543. See also Jersey City *v.* Dummer, 20 N. J. L. 86, 40 Am. Dec. 213; Farley *v.* Craig, 15 N. J. L. 191, 203.

Ejectment is brought for the sole purpose of obtaining possession. Spaulding *v.* Bartlett, 55 N. H. 304, 307.

Ejectment was originally classed as a possessory action. Tennessee, etc., R. Co. *v.* East Alabama R. Co., 75 Ala. 516, 524, 51 Am. Rep. 475.

Possessory or petitory action.— Plaintiff cannot sequester in a possessory action, unless he has been evicted by violence or has reason to apprehend that defendant wastes the property. Copley *v.* Bonner, 7 La. Ann. 578. And one who obtains possession, not as owner, but under another's authorization, cannot sue the latter in a possessory action. Anderson *v.* Smith, 4 La. Ann. 525. But an action by a judgment creditor to recover land from his debtor in the hands of a third person is not a revocatory but a petitory action. Spencer *v.* Goodman, 33 La. Ann. 898. An action is not, however, made a petitory one by an allegation that plaintiff possesses the property as owner, as it is necessary to allege that he possesses as owner or in some other capacity to entitle him to possession. Huyghe *v.* Brickman, 37 La. Ann. 240. Nor does a proceeding by seizure and sale of land in possession of third parties for more than thirty years force them into the attitude of plaintiffs in a petitory action; their possession being secure till a better title is shown contradictorily. Lavedan *v.* Trinchard, 35 La. Ann. 540.

10. Statutory provisions as to damages, etc., see *infra*, IX; X.

11. See the statutes of the several states and cases cited *infra*, notes 12, 13.

actions in the nature of ejectment, and to actions substituted by statute for the common-law action of ejectment.[12] Some statutes merely abolish the fictitious proceedings,[13] leaving the action in other respects as at common law.[14]

3. QUESTIONS TRIABLE.[15] Although ejectment is not brought to try the mere abstract right to the soil,[16] its object being to determine the right of possession[17]

As to retroactive effect of statute as to purchasers of Indian lands see Lemert *v.* Barnes, 18 Kan. 10.

12. *Alabama.*— Williams *v.* Hartshorn, 30 Ala. 211, 212.

Colorado.— Chivington *v.* Colorado Springs Co., 9 Colo. 597, 602, 14 Pac. 212.

Georgia.—Georgia Iron, etc., Co. *v.* Allison, 116 Ga. 444, 42 S. E. 794; Dodge *v.* Williams, 107 Ga. 410, 33 S. E. 468; Brewster *v.* Wooldridge, 100 Ga. 305, 28 S. E. 43.

Illinois.— Mills *v.* Graves, 44 Ill. 50, 51.

Indiana.— See Stehman *v.* Crull, 26 Ind. 436 [*cited* in Rowe *v.* Beckett, 30 Ind. 154, 161, 95 Am. Dec. 676].

Indian Territory.— See Wilson *v.* Owens, 1 Indian Terr. 163, 38 S. W. 976.

Michigan.— Michigan Cent. R. Co. *v.* McNaughton, 45 Mich. 87, 7 N. W. 712.

New York.— See Aiken *v.* Benedict, 39 Barb. 400.

North Carolina.— Kitchen *v.* Wilson, 80 N. C. 191. See also Foster *v.* Hackett, 112 N. C. 546, 17 S. E. 426.

South Dakota.— Wood *v.* Conrad, 2 S. D. 405, 50 N. W. 903.

See 17 Cent. Dig. tit. "Ejectment," § 3.

13. Wilkerson *v.* McDougal, 48 Ala. 517; Percifull *v.* Platt, 36 Ark. 456; Hogan *v.* Kurtz, 94 U. S. 773, 24 L. ed. 317; Barrows *v.* Kindred, 4 Wall. (U. S.) 399, 18 L. ed. 383.

14. Wilkerson *v.* McDougal, 48 Ala. 517. See also Barrows *v.* Kindred, 4 Wall. (U. S.) 399, 18 L. ed. 383.

The statutory action was not intended as substitute for common-law writ of right, but applies only to those cases in which ejectment was previously the proper remedy. Henry *v.* Thorpe, 14 Ala. 103. See also Hogan *v.* Kurtz, 94 U. S. 773, 24 L. ed. 317.

While the primary object of the code is to determine the question of title to the land, that question arises in litigation about the possession. The action therein contemplated is the common-law action of ejectment with the added incident of determining the paramount legal or equitable title and with the departure of permitting the action to be brought against one not in possession, but who claims title to or interest in the land. Smith *v.* Wingard, 3 Wash. Terr. 291, 13 Pac. 717.

15. Scope of inquiry at trial see *infra*, VIII, A, 4.

16. Cincinnati *v.* White, 6 Pet. (U. S.) 431, 442, 8 L. ed. 452 [*cited* in Winona *v.* Huff, 11 Minn. 119].

The subject-matter of the litigation is not the land itself. Porter *v.* Garrissino, 51 Cal. 559.

17. Porter *v.* Garrissino, 51 Cal. 559. See also Long *v.* Neville, 29 Cal. 133, 135; Grady *v.* Early, 18 Cal. 108, 111; Taylor *v.* Horde, 1 Burr. 60.

Legal right of possession and not the ultimate title to the land is the subject of controversy. Doe *v.* West, 1 Blackf. (Ind.) 133.

Questions triable: The construction of a will bequeathing the legal title (Head *v.* Phillips, 70 Ark. 432, 68 S. W. 878), or a will on which defendant's claim of possession is based and the rights of the heir at law thereunder (Kelley *v.* Kelley, 80 Wis. 486, 50 N. W. 334). The execution or validity of a will so far as it purports to devise real estate. Bennett *v.* Vonder Bosch, 26 N. Y. App. Div. 311, 313, 49 N. Y. Suppl. 802 [*citing* Corley *v.* McElmeel, 149 N. Y. 228, 43 N. E. 628]. The exact location of an obliterated boundary. Kittel *v.* Jenssen, 37 Nebr. 685, 56 N. W. 487. The true position of a boundary line between lots (Archer *v.* Kilton, 24 U. C. C. P. 195. See also Mozier *v.* Keegan, 13 U. C. C. P. 547; Hunter *v.* Baptie, 23 U. C. Q. B. 43; Bowles *v.* Taughney, 21 U. C. Q. B. 391; Sexton *v.* Paxton, 21 U. C. Q. B. 389, 2 Err. & App. 217; Irwin *v.* Sager, 21 U. C. Q. B. 373, 22 U. C. Q. B. 22), although it is decided that the court will discourage except when bound by a well established rule the practice of trying questions of boundary in ejectment, the legitimate object of which is to try titles (Peters *v.* Nixon, 6 U. C. C. P. 451. See Lund *v.* Savage, 12 U. C. C. P. 143). The validity of a tax deed. Baker *v.* Kelley, 11 Minn. 480. So a latent ambiguity in a deed may be explained without resort to equity. Dart *v.* Barbour, 32 Mich. 267.

Questions not triable: Advancements, the orphans' court having conclusive jurisdiction of the subject. Holliday *v.* Ward, 19 Pa. St. 485, 57 Am. Dec. 671. Enforcement of covenants. Soper *v.* Guernsey, 71 Pa. St. 219; Perry *v.* Scott, 51 Pa. St. 119; Garver *v.* McNulty, 39 Pa. St. 473; Cook *v.* Trimble, 9 Watts [Pa.] 15. See also Du Bree *v.* Albert, 100 Pa. St. 483. Enforcement of the support of a testator's widow charged on land devised to his son. Craven *v.* Bleakney, 9 Watts (Pa.) 19. Rights of one in possession of land under a lease giving him the option of purchasing the land, and who has given notice of his election to purchase. Mack *v.* Dailey, 67 Vt. 90, 30 Atl. 686. Whether a conveyance to a husband and wife by entireties was a fraud on the husband's creditors. Corinth *v.* Emery, 63 Vt. 505, 22 Atl. 618, 25 Am. St. Rep. 780. Nor can the action be maintained in behalf of an heir against an administrator to recover possession of land to which the latter is entitled as an asset of the estate. Barco *v.* Fennell, 24 Fla. 378, 5 So. 9. See also Campau *v.* Dubois, 39 Mich. 274.

and to obtain actual possession [18] or to enforce a right of entry,[19] yet the issue may rest either upon the question of possession alone,[20] upon the question of title,[21] or upon both,[22] subject to statutory modifications.[23] The inquiry has also, however, been confined to the legal title exclusive of matters of trust,[24] and purely equitable relief cannot be granted.[25]

4. PROPRIETY OF REMEDY [26] — a. When Proper and Adequate. Ejectment is a proper remedy against one in possession claiming in hostility to the owner's title;[27] or where it is sought to obtain possession and try title in case the legal

Ejectment is premature where a deed containing restrictions or conditions on which the suit is based has not been given and there is no written contract except a receipt for a portion of the purchase-money reciting that the deed would be given. Jump River Lumber Co. *v.* Moore, 70 Wis. 173, 35 N. W. 360.

18. Cincinnati *v.* White, 6 Pet. (U. S.) 431, 442, 8 L. ed. 452 [*cited* in Winona *v.* Huff, 11 Minn. 119].

19. Smith *v.* Revels, 79 Hun (N. Y.) 213, 29 N. Y. Suppl. 658.

Four things were necessary to support ejectment, namely, title, lease, entry, and ouster. Payne *v.* Treadwell, 5 Cal. 310; 3 Blackstone Comm. 197–204.

Actual damage by ouster is not necessary to a recovery where there is a right of possession and a withholding thereof. Dilley *v.* Sherman, 2 Nev. 67.

Although there is an intrusion on land, yet if it is not treated as a disseizin ejectment will not lie. Zander *v.* Valentine Blatz Brewing Co., 95 Wis. 162, 70 N. W. 164.

20. Thomas *v.* Baillo, 7 La. 410.

In mere actions recuperandæ possessionis possessionis alone is at issue. Meeker *v.* Williamson, 4 Mart. (La.) 625. *Compare* Young *v.* Wilson, 34 La. Ann. 385; St. Amand *v.* Long, 25 La. Ann. 164.

21. Smith *v.* McCann, 24 How. (U. S.) 398, 16 L. ed. 714.

Ejectment is not adequate means to try title to all estates. Farley *v.* Craig, 15 N. J. L. 191, 201 [*citing* 3 Blackstone Comm. 206].

Parties will be relegated to a petitory action where there are claims and counterclaims involving title. Huyghe *v.* Brinkman, 38 La. Ann. 836.

An action will be regarded as brought under the forcible entry and detainer act, where plaintiff fails to set forth the nature of his estate, since such act expressly forbids inquiry into questions of title in such actions. Thompson *v.* Wolf, 6 Oreg. 308.

22. Cagger *v.* Lansing, 64 N. Y. 417. See also Guyer *v.* Wookey, 18 Ill. 536.

23. Phillips *v.* Gorham, 17 N. Y. 270.

Statutes generally see *supra*, II, A, 2.

24. Mulford *v.* Tunis, 35 N. J. L. 256. See also Davis *v.* Atkinson, 63 N. C. 210. But examine Mester *v.* Hauser, 94 Ill. 433; Brolaskey *v.* McClain, 61 Pa. St. 146.

Exception in cases of purely resulting trust see Dixon *v.* Doe, 23 Miss. 84.

Plaintiff claiming under trust deed securing a debt can recover only upon the same principle that a mortgagee could recover the mortgaged premises, that is, merely as a means of obtaining satisfaction of the secured indebtedness. Mester *v.* Hauser, 94 Ill. 433.

25. Birmingham Bldg., etc., Assoc. *v.* Boggs, 116 Ala. 587, 22 So. 852, 67 Am. St. Rep. 147. See also Johnson *v.* Watson, 87 Ill. 535; Fleming *v.* Carter, 70 Ill. 286; Ballance *v.* Tesson, 12 Ill. 326; Perkins *v.* Meighan, 147 Mo. 617, 49 S. W. 498, 71 Am. St. Rep. 586.

A bill in equity does not lie where it sets up a legal right for which ejectment is an adequate and complete remedy. Tillmes *v.* Marsh, 67 Pa. St. 507. See also Long's Appeal, 92 Pa. St. 171.

Equitable ejectment see *infra*, XI.

Equitable estoppel see *infra*, II, C, 6, b.

Equitable title see *infra*, II, C, 6.

Equities of parties may be adjudicated on trial. Howard *v.* Murray, 203 Pa. St. 464, 53 Atl. 342.

Equities of plaintiff cannot be inquired into on complaint for legal right of possession. Rowe *v.* Beckett, 30 Ind. 154, 95 Am. Dec. 676.

Facts authorizing recovery in quia timet action cannot be availed of in ejectment. McMasters *v.* Torsen, 5 Ida. 536, 51 Pac. 100.

In ejectment to recover land sold for taxes, the court cannot consider rights arising from plaintiff's offer to repay defendant all back taxes and to redeem the land, since that is a matter of a purely equitable nature. Ward *v.* Huggins, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285.

The court is governed by rules of law or has equitable control according to the questions determinable. Thus questions of title are within the first rule and legal fictions giving form to the action are within the second rule. Snedecker *v.* Allen, 2 N. J. L. 35.

26. **Adequacy of remedy to defeat suit in equity** see EQUITY.

Conditional verdict see *infra*, VIII, C, 3, b.

Inadequacy of remedy at law generally see EQUITY.

27. Lawe *v.* Kaukauna, 70 Wis. 306, 35 N. W. 561. See also Nesqually Catholic Bishop Corp. *v.* Gibbon, 1 Wash. 592, 21 Pac. 315.

Ejectment is the proper remedy whereby the holder of a legal title may enforce it against one in possession claiming under an invalid title (King *v.* Carpenter, 37 Mich. 363), or where the legal title is only opposed by a mere naked possession by defendant (Shaeffer *v.* Matzen, (Cal. 1884) 3 Pac.

title is not clear,[28] even where as in certain cases defendant disclaims title to the particular land in question;[29] where defendant is not in possession but claims under an adverse title;[30] or where the remedy by forcible entry and detainer is not exclusive but merely cumulative.[31]

b. When Not Proper and Adequate. Ejectment is not appropriate where another remedy is exclusive thereof.[32]

B. Property Subject to Action — 1. General Rule. In determining what property is subject to ejectment it is a general rule that in order to maintain the action a right of entry must exist,[33] and the interest be visible and tangible[34] so that possession can be delivered by the sheriff on execution.[35]

2. Property Recoverable. Ejectment lies only for a corporeal hereditament.[36]

95). And a person not in possession of land to which he claims title in fee simple cannot obtain the aid of a court of equity to supply a defect in his title, as in the case of a lost deed. His remedy is by an action of ejectment against the party in possession. Burton *v.* Gleason, 56 Ill. 25. And whenever one person enters upon and takes permanent possession of the real property of another claiming title thereto, whether it arises over a disputed boundary or otherwise, an unlawful entry and ouster has been made for which an action of ejectment is the appropriate and only sufficient remedy. Leprell *v.* Kleinschmidt, 112 N. Y. 364, 19 N. E. 812.

Grantor may maintain ejectment as to adverse holder, even though on the principle of estoppel a deed of lands held adversely to the grantor is good as between the parties. Harvey *v.* Doe, 23 Ala. 635. See also 6 Cyc. 867–879.

Refusal to surrender possession by one who purchased from a grantee and repudiates the contract, the first grantee having received the land so granted in exchange, entitles the original grantor to maintain ejectment. Graves *v.* White, 87 N. Y. 463.

Where premises are vacant and unoccupied ejectment may lie under the Illinois statute. Converse *v.* Dunn, 166 Ill. 25, 46 N. E. 747.

28. Hoffman *v.* Beard, 22 Mich. 59.

29. Drake *v.* Happ, 92 Mich. 580, 52 N. W. 1023.

30. Stearns *v.* Harman, 80 Va. 48.

When ejectment lies against one out of possession see *infra*, II, E, 2, b.

31. Abbott *v.* Coates, 62 Nebr. 247, 86 N. W. 1058.

32. Ejectment is not appropriate where the remedy is by summary proceeding (Shaw *v.* Hill, 83 Mich. 322, 47 N. W. 247, 21 Am. St. Rep. 607), by an action to redeem (Smith *v.* Gardner, 42 Barb. (N. Y.) 356), by a suit for division of land, plaintiff having only an undivided interest therein (Higgins *v.* Howard, 61 S. W. 1016, 22 Ky. L. Rep. 1863), or by a suit in equity for partition (Reed *v.* Robertson, 45 Mo. 580); where an action on the case is the proper remedy neither the land nor the interest thereon being held adversely (Ezzard *v.* Findley Gold Min. Co., 74 Ga. 520, 58 Am. Rep. 445); where covenant is the proper remedy (Blair *v.* Peck, 1 Pennyp. (Pa.) 247); where an action for nuisance is an effectual remedy (Aiken *v.* Benedict, 39 Barb. (N. Y.) 400 [substantially *overruling* Sherry *v.* Frecking, 4 Duer (N. Y.) 452]); where statute provides another remedy for encroachment of wall (Frizzell *v.* Murphy, 19 App. Cas. (D. C.) 440); or where statute provides that a certain remedy shall be exclusive (Owens *v.* Yazoo-Mississippi Delta, 74 Miss. 269, 21 So. 12). And the owners of estates wrongfully forfeited, under the New Jersey act of Dec. 11, 1778, have no remedy by ejectment to recover the property forfeited, but can only proceed by writ of error according to the statute. Kemp *v.* Kennedy, 14 Fed. Cas. No. 7,686, Pet. C. C. 30 [*affirmed* in 5 Cranch 173, 3 L. ed. 70].

33. **Right of entry necessary.**— Payne *v.* Treadwell, 5 Cal. 310; Jones *v.* Lofton, 16 Fla. 189; Lawrence *v.* Hunter, 9 Watts (Pa.) 64. And see *infra*, II, D.

Ejectment does not lie for rent, because no entry can be made upon it. Farley *v.* Craig, 15 N. J. L. 191, 201 [*citing* 3 Blackstone Comm. 206, and *distinguishing* Jackson *v.* Collins, 11 Johns. (N. Y.) 1]. *Compare* People *v.* New York, 28 Barb. (N. Y.) 240.

34. Southern Pac. Co. *v.* Burr, 86 Cal. 279, 34 Pac. 1032; Nichols *v.* Lewis, 15 Conn. 137; Winona *v.* Huff, 11 Minn. 119; Aiken *v.* Benedict, 39 Barb. (N. Y.) 400; Champlain, etc., R. Co. *v.* Valentine, 19 Barb. (N. Y.) 484; Rowan *v.* Kelsey, 18 Barb. (N. Y.) 484; Jackson *v.* Buel, 9 Johns. (N. Y.) 298.

35. Beatty *v.* Gregory, 17 Iowa 109, 85 Am. Dec. 546; Farley *v.* Craig, 15 N. J. L. 191; Child *v.* Chappell, 9 N. Y. 246; Smith *v.* Revels, 79 Hun (N. Y.) 213, 29 N. Y. Suppl. 658; Jackson *v.* May, 16 Johns. (N. Y.) 184; Hancock *v.* McAvoy, 151 Pa. St. 460, 25 Atl. 47, 31 Am. St. Rep. 774, 18 L. R. A. 781; Buller Nisi Prius 99. *Compare* Ezzard *v.* Findley Gold Min. Co., 74 Ga. 520, 58 Am. Rep. 445.

Recovery is not precluded where sheriff cannot deliver possession because the land is inaccessible at the time of trial or judgment. Woodhull *v.* Rosenthal, 61 N. Y. 382.

Where the code provides for the levy of execution against a corporation authorized to receive tolls and upon its franchises, rights, and privileges, it operates to change the law as to ejectment before such statute. Southern Pac. Co. *v.* Burr, 86 Cal. 279, 24 Pac. 1032.

36. Mahon *v.* San Rafael Turnpike Co., 49 Cal. 269; Wood *v.* Truckee Turnpike Co., 24 Cal. 474; Beatty *v.* Gregory, 17 Iowa 109, 85

It may be maintained to recover possession of a church or chapel;[37] of a house, a room, or a chamber therein,[38] or an upper story thereof,[39] held separately from the land;[40] of an acre of land, described only by the name of land, although there are a wall and a porch, and part of a house built thereon;[41] of a barn and outhouse standing on a close;[42] of a toll-house and gates;[43] or of land under water,[44] below high-water mark,[45] but not below low-water mark.[46] So ejectment may be maintained for the recovery of a fixture,[47] a pier,[48] or a wharf.[49]

8. PROPERTY NOT RECOVERABLE. The action cannot be maintained for an incorporeal hereditament;[50] nor for a messuage or tenement,[51] for a prebendal stall

Am. Dec. 546; Farley *v.* Craig, 15 N. J. L. 191; Rowan *v.* Kelsey, 18 Barb. (N. Y.) 484.

Easements, servitudes, etc., see *infra*, II, C, 1, f.

37. Van Deuzen *v.* Ft. Edward Presb. Congregation, 3 Keyes (N. Y.) 550, 4 Abb. Dec. (N. Y.) 465, 3 Transcr. App. (N. Y.) 39; Lucas *v.* Johnson, 8 Barb. (N. Y.) 244.

Lies to recover basement of a church, where the deed vests a fee in the grantee with the reservation of an easement only, but the use is limited to a special purpose and persons use it for other purposes, but judgment should award possession subject to easement. Gallupville Reformed Church *v.* Schoolcraft, 65 N. Y. 134 [*reversing* 5 Lans. 206].

38. Otis *v.* Smith, 9 Pick. (Mass.) 293; White *v.* White, 16 N. J. L. 202, 31 Am. Dec. 232; Stancel *v.* Calvert, 60 N. C. 104; Gilliam *v.* Bird, 30 N. C. 280, 49 Am. Dec. 379.

39. Asheville Div. No. 15 S. of T. *v.* Aston, 92 N. C. 578.

Where right to build second story is a mere easement, as in case of a grant thereof in perpetuity, the grantee cannot recover such story as a part of the land. Thorn *v.* Wilson, 110 Ind. 325, 11 N. E. 230, 59 Am. Rep. 209.

40. Otis *v.* Smith, 9 Pick. (Mass.) 293.

41. Goodtitle *v.* Alker, 1 Burr. 133, 1 Ld. Ken. 427.

42. Anthony *v.* Haneys, 8 Bing. 186, 1 L. J. C. P. 81, 1 Moore & S. 300, 21 E. C. L. 499.

43. Doe *v.* Booth, 2 B. & P. 219, 5 Rev. Rep. 575. See also Bennington *v.* Goodtitle, Andr. 106, 2 Str. 1084.

44. Blakslee Mfg. Co. *v.* Blakslee's Sons Iron-Works, 129 N. Y. 155, 29 N. E. 2 [*affirming* 59 Hun 209, 13 N. Y. Suppl. 493]; Lowndes *v.* Huntington, 153 U. S. 1, 14 S. Ct. 758, 38 L. ed. 615. See also New York *v.* Law, 125 N. Y. 380, 26 N. E. 471 [*affirming* 6 N. Y. Suppl. 628].

Where lands under water are granted for specific purpose such as erection of docks, etc., by the state, actual occupation is required. Champlain, etc., R. Co. *v.* Valentine, 19 Barb. (N. Y.) 484.

45. Action lies against a disseizor for land below high-water mark to the channel, filled up by the riparian proprietor. Nichols *v.* Lewis, 15 Conn. 137.

Right of possession to uplands or tide lands in Alaska may be determined in ejectment. Carroll *v.* Price, 81 Fed. 137.

Riparian owner must have reclaimed the shore bordering on the tide-water in front of him to maintain the action. Stockham *v.* Browning, 18 N. J. Eq. 390. See also People *v.* Mauran, 5 Den. (N. Y.) 389.

46. Action does not lie by the riparian owner of lands bounded by navigable rivers, for land below high-water mark, against one who has erected structures in front of said owner's land. Parker *v.* West Coast Packing Co., 17 Oreg. 510, 21 Pac. 822, 5 L. R. A. 61.

47. Stancel *v.* Calvert, 60 N. C. 104. The action lies for anything attached to the soil. Jackson *v.* May, 16 Johns. (N. Y.) 184.

Where machinery is erected on plaintiff's land at the joint expense of himself and defendant, and under an agreement to use the same in common without limitation as to time, the interests are real estate; and if one exclude the other ejectment will lie to enforce the agreement. Hill *v.* Hill, 43 Pa. St. 521.

48. Crooked Lake Nav. Co. *v.* Keuka Nav. Co., 26 N. Y. Wkly. Dig. 145 [*affirmed* in 115 N. Y. 667, 22 N. E. 1126].

49. Coburn *v.* Eames, 52 Cal. 385, 28 Am. Rep. 634.

Right to use a wharf see *infra*, p. 24 note 5.

50. *Alabama.*— Louisville, etc., R. Co. *v.* Massey, 136 Ala. 156, 33 So. 896, 96 Am. St. Rep. 17.

California.— Swift *v.* Goodrich, 70 Cal. 103, 11 Pac. 561; Wood *v.* Truckee Turnpike Co., 24 Cal. 474.

Iowa.— Beatty *v.* Gregory, 17 Iowa 109, 85 Am. Dec. 546.

Michigan.— Taylor *v.* Gladwin, 40 Mich. 232.

Minnesota.— Winona *v.* Huff, 11 Minn. 119.

New Jersey.— Farley *v.* Craig, 15 N. J. L. 191.

New York.— Child *v.* Chappell, 9 N. Y. 246; Jackson *v.* May, 16 Johns. (N. Y.) 184.

Oregon.— Parker *v.* West Coast Packing Co., 17 Oreg. 510, 21 Pac. 822, 5 L. R. A. 61.

Pennsylvania.— Hancock *v.* McAvoy, 151 Pa. St. 460, 25 Atl. 47, 31 Am. St. Rep. 774, 18 L. R. A. 781; Union Petroleum Co. *v.* Blinn Petroleum Co., 72 Pa. St. 173; Black *v.* Hepburne, 2 Yeates 331.

See 17 Cent. Dig. tit. "Ejectment," § 7.

Rule is not universal that ejectment will not lie for incorporeal hereditament, as the action lies for tithes and for common appurtenant. Nichols *v.* Lewis, 15 Conn. 137, 144.

51. Although if it is for a messuage and tenement, the words "and tenement" may be struck out. Goodright *v.* Flood, 3 Wils. C. P.

and house, for a canonry as such,[52] for a rectory against a person who has been simoniacally presented,[53] for dower which has not been assigned,[54] for pews in a church,[55] for a ferry franchise,[56] for a projecting cornice,[57] or for an encroachment upon land by overhanging eaves or gutters.[58]

C. Title to Support Action — 1. In General — a. Valid and Legal Title — (i) *Generally.* Subject to certain exceptions,[59] it is necessary in order to recover that plaintiff should have in himself a good and valid[60] legal[61] title or interest in

23. See also Doe *v.* Plowman, 1 East 441; Doe *v.* Denton, 1 T. R. 11.

52. Doe *v.* Musgrave, 4 Jur. 631, 9 L. J. C. P. 318, 1 M. & G. 625, 1 Scott N. R. 451, 39 E. C. L. 942.

53. Doe *v.* Fletcher, 8 B. & C. 25, 6 L. J. K. B. O. S. 282, 2 M. & R. 206, 15 E. C. L. 22.

54. Doe *v.* Nutt, 2 C. & P. 430, 12 E. C. L. 658.

55. Ridout *v.* Harris, 17 U. C. C. P. 88.

56. New York *v.* Union Ferry Co., 55 How. Pr. (N. Y.) 138. See also Rees *v.* Lawless, Litt. Sel. Cas. (Ky.) 184, 12 Am. Dec. 295.

57. Vrooman *v.* Jackson, 6 Hun (N. Y.) 326.

58. Aiken *v.* Benedict, 39 Barb. (N. Y.) 400 [*overruling* Sherry *v.* Frecking, 4 Duer (N. Y.) 452].

But where a roof projects over another's land it is held that ejectment lies. Murphy *v.* Bolger, 60 Vt. 723, 15 Atl. 365, 1 L. R. A. 309. But see Rasch *v.* Noth, 99 Wis. 285, 74 N. W. 820, 57 Am. St. Rep. 858, 40 L. R. A. 577.

59. **Ejectment based on prior possession** see *infra*, II, C, 4.

Equitable estoppel see *infra*, II, C, 6, b.

60. *California.*—Busenius *v.* Coffee, 14 Cal. 91.

Florida.— Burt *v.* Florida Southern R. Co., 43 Fla. 339, 31 So. 265.

Indiana.— State *v.* State Bank, 5 Ind. 353.

Iowa.— Schlosser *v.* Cruikshank, 96 Iowa 414, 65 N. W. 344; Armstrong *v.* Pierson, 4 Greene 45.

Maryland.— Lannay *v.* Wilson, 30 Md. 536.

See 17 Cent. Dig. tit. "Ejectment," § 16 *et seq.*

Valid subsisting title or interest is necessary. Bay County *v.* Bradley, 39 Mich. 163, 33 Am. Rep. 367; Jackson *v.* Richmond, 4 Johns. (N. Y.) 483; McLeans *v.* Macdonald, 2 Edm. Sel. Cas. (N. Y.) 393; Eggleston *v.* Bradford, 10 Ohio 312; Hubbard *v.* Godfrey, 100 Tenn. 150, 47 S. W. 81.

Clear and substantial title to premises must be shown. Moore *v.* Tice, 22 Cal. 513.

Good title must be vested in a vendor in ejectment by him to recover payment of purchase-money. Creigh *v.* Shatto, 9 Watts & S. (Pa.) 82.

In a petitory action, before the lessee's possession can be disturbed, plaintiff must show a good and perfect title in himself. Young *v.* Chamberlin, 15 La. Ann. 454.

Title of plaintiff is not speculative because his deed contains a covenant of warranty which he intends to enforce if he fails in the suit. Bradley *v.* Drayton, 48 S. C. 234, 26 S. E. 613.

Children may recover homestead after arrival of youngest child at majority after death of parents. Davis *v.* Jones, 95 Ga. 788, 23 S. E. 79.

Even against an invalid title plaintiff must show title in himself. Leonard *v.* Coleman, (Ark. 1890) 15 S. W. 14. *Compare* Sarver *v.* Beal, 36 Kan. 555, 13 Pac. 743.

Alienee of a disseizor in possession has a good title as against all persons not having a paramount title. Flagg *v.* Mann, 9 Fed. Cas. No. 4,847, 2 Sumn. 486.

61. *Alabama.*—Simmons *v.* Richardson, 107 Ala. 697, 18 So. 245; Slaughter *v.* McBride, 69 Ala. 510.

California.— Willis *v.* Wozencraft, 22 Cal. 607.

Connecticut.— Cahill *v.* Cahill, 75 Conn. 522, 54 Atl. 201, 732, 60 L. R. A. 206.

Florida.— Simmons *v.* Spratt, 20 Fla. 495; Jones *v.* Lofton, 16 Fla. 189.

Illinois.— Valette *v.* Bennett, 69 Ill. 632; Tilghman *v.* Little, 13 Ill. 239.

Indiana.— Stehman *v.* Crull, 26 Ind. 436 [*cited* in Rowe *v.* Beckett, 30 Ind. 154, 161, 95 Am. Dec. 676].

Iowa.— Kitteringham *v.* Blair Town Lot, etc., Co., 66 Iowa 280, 23 N. W. 668.

Maryland.—Hammond *v.* Inloes, 4 Md. 138; Mitchell *v.* Mitchell, 1 Md. 44; Wilson *v.* Inloes, 11 Gill & J. 351.

Mississippi.— Winn *v.* Cole, Walk. 119.

Missouri.—Nalle *v.* Thompson, 173 Mo. 595, 73 S. W. 599; Becker *v.* Stroeher, 167 Mo. 306, 66 S. W. 1083; Kingman *v.* Sievers, 143 Mo. 519, 45 S. W. 266.

New York.— Bennett *v.* Gray, 92 Hun 86, 36 N. Y. Suppl. 372.

Tennessee.— Hubbard *v.* Godfrey, 100 Tenn. 150, 47 S. W. 81; King *v.* Coleman, 98 Tenn. 561, 40 S. W. 1082; Hearn *v.* Jones, (Ch. App. 1900) 64 S. W. 344.

Virginia.— Russell *v.* Allmond, 92 Va. 484, 23 S. E. 895.

United States.— Smith *v.* McCann, 24 How. 398, 16 L. ed. 714; Stockley *v.* Cissna, 119 Fed. 812, 56 C. C. A. 324; Cleveland *v.* Bigelow, 98 Fed. 242, 39 C. C. A. 47; Bouldin *v.* Phelps, 30 Fed. 547.

See 17 Cent. Dig. tit. "Ejectment," § 16 *et seq.*

All of several plaintiffs must show legal title. Cheney *v.* Cheney, 26 Vt. 606.

Legal title is sufficient. Ryan *v.* Staples, 76 Fed. 721, 23 C. C. A. 541.

Title is sufficient: Where one is a vendee, under parol sale of land, to whom possession is delivered (Williams *v.* Landman, 8 Watts & S. (Pa.) 55); where a mortgagee sells, but the legal title remains in him (McClendon

the premises. And a legal title, estate, or interest under a contract to purchase may support ejectment, provided the conditions of the contract are complied with;[62] but there can be no recovery where plaintiff has forfeited his rights under the contract by refusing to comply with its terms.[63]

(II) *In Public Lands.* Ejectment for public lands may be maintained upon a legal estate or title[64] which is valid.[65] So ejectment may be maintained upon a

v. Equitable Mortg. Co., 122 Ala. 384, 25 So. 30); where heirs of an executor have acquired the legal estate (Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232); where one who has completed his title by deeds and an assignment so that he can claim the legal title (Roehm *v.* Zehren, 103 Wis. 287, 79 N. W. 406); where one is clothed by partition of the land with a perfect equity, the equivalent of a legal title, and defendant has no better title (Adams *v.* Spivey, 94 Ga. 676, 20 S. E. 422); where one holds the legal title in trust, as against everyone but the equitable owners (Brolaskey *v.* McClain, 61 Pa. St. 146); where a corporation holds an estate in fee, even though on its dissolution the estate might revert to the grantor (Mercer Academy *v.* Rusk, 8 W. Va. 373); where the conveyance to plaintiff vested title in him subject to certain rights of defendant under a tax deed which latter failed to convey title (Allen *v.* Fitzgerald, 23 Utah 597, 65 Pac. 592). See also Totten *v.* Halligan, 13 U. C. C. P. 567.

Title is insufficient: Where the assignment of a mortgage does not convey legal title (Sharpe *v.* Hyman, 123 Ala. 105, 26 So. 289); where one is the assignee of a trustee having the legal title, not required for the purposes of the trust, as he cannot recover from the owner of the equitable estate (Johnson *v.* Prairie, 91 N. C. 159); where one is a purchaser at a sale on execution, against a husband, of land standing in the name of the wife (Kingman *v.* Sievers, 143 Mo. 519, 45 S. W. 266); where plaintiff is the grantee of the wife's remainder and defendant is the grantee or lessee of the tenant by the curtesy (Shortall *v.* Hinckley, 31 Ill. 219); where children of the first wife bring suit to recover lands alleged to be held by their father as tenant by the curtesy, and the evidence is not satisfactory that the father entered on the land in right of his first wife, and there are other precluding circumstances (Woolfolk *v.* Richardson, 10 S. W. 320, 10 Ky. L. Rep. 690); where a deed absolute, intended as a mortgage, does not convey legal title (Van Vleck *v.* Enos, 88 Hun (N. Y.) 348, 34 N. Y. Suppl. 754; Snyder *v.* Parker, 19 Wash. 276, 53 Pac. 59, 67 Am. St. Rep. 726). See also Grant *v.* McLennan, 16 U. C. C. P. 395.

62. Anderson *v.* Rasmussen, 5 Wyo. 44, 36 Pac. 820.

Parol contract to convey land in payment for work and labor, which contract is not so far performed as to take it out of the statute of frauds, entitles owner to recover the land on his legal title. Miranville *v.* Silverthorn, 48 Pa. St. 147.

Trust to receive rents and profits vests the whole estate in law and equity subject to the execution of the trust, and will sustain an action of ejectment. McLeans *v.* Macdonald, 2 Edm. Sel. Cas. (N. Y.) 393.

Where an agreement to sell or a sale is subsequently canceled, the contract or sale will not prevent the maintenance of an action of ejectment by him who holds the legal title. Steed *v.* Knowles, 97 Ala. 573, 12 So. 75.

Where a paper was a will on its face giving certain property to a son, alleged to have been made in pursuance of a parol agreement to give him the farm for certain services, but the paper was in fact to take effect at death and the title was to vest then only, and the legal effect was that the maker of the will was entitled to retain possession until then, it was decided that he could maintain ejectment against his son in possession. Black *v.* Black, 89 Pa. St. 383.

So defendant's possession under a claim of title through purchase under an executory contract may defeat plaintiff's right to recover in ejectment. Conger *v.* Weyant, 132 N. Y. 578, 30 N. E. 867; Conger *v.* Treadway, 132 N. Y. 259, 39 N. E. 505 [*affirming* 3 Silv. Supreme 588, 7 N. Y. Suppl. 809].

63. Libbey *v.* Clark, 25 Kan. 496.

One claiming under a bond for title cannot assert an interest in the land against one holding under his vendor without showing compliance with terms of his bond. Lytle *v.* Anchor Duck Mills, 117 Ga. 869, 45 S. E. 271.

Where a vendee in possession, under an executory contract is in default, especially where the laches is great and no excuse shown, ejectment is the proper remedy, and the vendor is entitled to possession where no equitable relief is asked. Thompson *v.* Ellenz, 58 Minn. 301, 59 N. W. 1023.

64. Haltern *v.* Emmons, 46 Fed. 452. And see *infra*, II, C, 7.

A railroad company having a legal title can maintain ejectment against the holder under an invalid patent, granted pursuant to an entry as a mining claim, although the land was valuable only for agricultural purposes. Northern Pac. R. Co. *v.* Cannon, 46 Fed. 237.

Where the United States provides a mode of determining claims and issuing certificates to those having the right of preëmption, a stranger who takes no interest in a claim for many years after it was passed, but then claims under the settler's deed, has no such title as that he can recover in ejectment. Morehouse *v.* Phelps, 21 How. (U. S.) 294, 16 L. ed. 140.

65. Hand *v.* McKinney, 25 Ga. 648; Boreing *v.* Singery, 4 Harr. & M. (Md.) 398. See also Carroll *v.* Norwood, 4 Harr. & M. (Md.)

valid,[66] sufficient[67] confirmation[68] or approval thereof;[69] upon a patent;[70] upon a patent which is an escheat grant,[71] or which is issued after the death of the patentee;[72] upon a legal title derived from the original patentee;[73] upon a sufficient possession or grant[74] from the state[75] or municipal corporation as trustee;[76] upon a conditional grant from the United States *in præsenti* of lands to be thereafter

287; Johnston *v.* Horne, 32 Miss. 151; Wray *v.* Doe, 10 Sm. & M. (Miss.) 452; Denise *v.* Ruggles, 16 How. (U. S.) 242, 14 L. ed. 922; Gilmer *v.* Poindexter, 10 How. (U. S.) 257, 13 L. ed. 411; Boardman *v.* Reed, 6 Pet. (U. S.) 328, 8 L. ed. 415; St. Louis, etc., R. Co. *v.* Green, 13 Fed. 208, 4 McCrary 232.

Where a caveat is entered, in case of an application for land, neither party, where neither is in actual possession, has sufficient title to maintain ejectment until the right is determined. Schoenberger *v.* Baker, 22 Pa. St. 398.

66. Ashley *v.* Cramer, 7 Mo. 98.

67. Chastang *v.* Dill, 19 Ala. 421; Hall *v.* Doe, 19 Ala. 378; Landes *v.* Perkins, 12 Mo. 238.

68. Chastang *v.* Armstrong, 20 Ala. 609; Chastang *v.* Dill, 19 Ala. 421.

Plaintiff must show some title as against a title derived by confirmation. Robbins *v.* Eckler, 36 Mo. 494.

Confirmee of pueblo lands cannot maintain ejectment against claimants of excepted grants, under the decree of confirmation, until they have been finally confirmed and located by the approved survey; nor can the action be maintained pending an appeal from an order confirming the survey of the excepted portions. San José *v.* Uridias, 37 Cal. 339.

69. Long *v.* McDougald, 23 Ala. 413.

70. Savory *v.* Whayland, 1 Harr. & M. (Md.) 206; Bagnell *v.* Broderick, 13 Pet. (U. S.) 436, 10 L. ed. 235, 374.

Patent invalid on inspection is insufficient. Pollard *v.* Files, 3 Ala. 47.

Patents from one county convey no legal title to lands subsequently transferred to another county, as against the patentee of another county, even though said prior patent was recorded in the county where the lands were formally located. Alt *v.* Fullerton, 151 Mo. 598, 52 S. W. 400.

Voidable patent may convey a sufficient legal estate for this purpose. Romain *v.* Lewis, 39 Mich. 233.

Sufficiency and superiority of patent.— A patent, if uncontrolled and unaffected by the evidence of plaintiff's adversary, is sufficient. Bates *v.* Herron, 35 Ala. 117. It is also a better legal title than an entry (De Lassus *v.* Winn, 174 Mo. 636, 74 S. W. 635; Griffith *v.* Deerfelt, 17 Mo. 31); and an elder patent will prevail (Dorch *v.* Thompson, 12 B. Mon. (Ky.) 379). Nor can plaintiff recover on a patent of the same date as defendant's. Courtney *v.* Shropshire, 3 Litt. (Ky.) 265. *Compare* Karn *v.* Hughes, 3 Harr. & J. (Md.) 210.

71. Clement *v.* Ruckle, 9 Gill (Md.) 326; Hall *v.* Gittings, 2 Harr. & J. (Md.) 112.

72. Campbell *v.* Garven, 5 Ark. 485; Hartley *v.* Brown, 51 Cal. 465.

Grantee of preëmptor cannot recover from his heirs to whom a patent is issued under a statute providing for the issuance of the patent to heirs of a preëmptor dying without having consummated his claim. Tennessee Coal, etc., Co. *v.* Tutwiler, 108 Ala. 483, 18 So. 668.

73. De Lassus *v.* Winn, 174 Mo. 636, 74 S. W. 635.

74. **Concession for quarrying stone and use thereof** is insufficient possession under the act of congress confirming town and village lots in persons in possession. Clark *v.* Brazeau, 1 Mo. 290.

Concession or grant, which is a mere permission to appropriate land, and which does not effect a severance until an actual survey, is not a sufficient grant upon which to maintain ejectment. Ashley *v.* Cramer, 7 Mo. 98.

Elder entry in connection with the younger grant overreaches the elder grant for the same land, founded on younger entry, but the prior entry must be special, containing a definite description. Parrish *v.* Cummins, 11 Humphr. (Tenn.) 297.

Where both parties claim under similar confirmed concessions, the inquiry will be extended into the character of the original concessions, and, if this is unsatisfactory, reference must be had to the proceedings before the tribunals and officers of the United States before which the claims of the parties were determined. Miller *v.* Dale, 92 U. S. 473, 23 L. ed. 735.

75. Blakslee Mfg. Co. *v.* Blakslee's Sons Iron-Works, 59 Hun (N. Y.) 209, 13 N. Y. Suppl. 493 [*affirmed* in 129 N. Y. 155, 29 N. E. 2].

As to a grantee from the state of swamp lands where title has not vested in the state see Wright *v.* Roseberry, 63 Cal. 252; Owens *v.* Jackson, 9 Cal. 322.

Plaintiff may hold under a grant on an inclusive survey including prior reservations, where he brings himself within the bounds thereof, with reference to the specific and general reservations, excluding defendant's land. Stockton *v.* Morris, 39 W. Va. 432, 19 S. E. 531.

76. Palmer *v.* Galvin, 72 Cal. 183, 13 Pac. 476.

Conveyance from trustees of a town and the act establishing the town are a sufficient showing of title to recover a town lot, unless defendant claims under an older patent establishing the town. McMillan *v.* Brown, 1 A. K. Marsh. (Ky.) 153.

When a claim to a town lot by allotment as one of the original proprietors is unsupported see Sanger *v.* Merritt, 120 N. Y. 109, 24 N. E. 386.

located,[77] although conditions precedent to the vesting of title must be performed;[78] or upon an appropriation sufficiently evidenced.[79] So where plaintiff is the grantee of lands reserved from preëmption until the claims of the grantee are determined, he may maintain ejectment for the whole tract or any portion of it against claimants under the preëmption laws.[80]

b. Extent of Title. It is decided that plaintiff must have a complete title,[81] and that the land should be identified in accordance with the title shown,[82] the recovery being limited to that portion of the premises to which it applies,[83] although he may also recover to the extent of the title shown.[84] But if plaintiff's legal interest is divested there can be no recovery.[85]

c. Paramount Title. Plaintiff must recover, if at all, on the strength of his own title, and not because of the weakness or want of title in defendant.[86] Plain-

77. Northern Pac. R. Co. v. Majors, 5 Mont. 111, 2 Pac. 322.

78. Crowell v. Lanfranco, 42 Cal. 654.

If the grant is upon a condition precedent that a certain right is to be exercised within the prescribed time, if at all, it ceases upon non-performance; and a use for agricultural purposes in violation of the spirit of the grant is a usurpation of the property of the state. Parmelee v. Oswego, etc., R. Co., 7 Barb. (N. Y.) 599 [*affirmed* in 6 N. Y. 74].

Survey must be made within the prescribed time, and the fact that a survey was demanded but refused because of a conflict of title afterward in a suit between third parties, adjudged void, does not aid plaintiff. Holloway v. Holloway, 30 Tex. 164.

Under a grant of railroad lands compliance by claimant with conditions and exceptions is necessary. Corinne Mills, etc., Co. v. Johnson, 156 U. S. 574, 15 S. Ct. 409, 39 L. ed. 537 [*affirming* 7 Utah 327, 26 Pac. 922].

Where title is to remain in the state until the purchase-money is paid, ejectment does not lie before such payment against a subsequent grantee of the state. Stratton v. Cole, 78 Me. 553, 7 Atl. 472.

79. Dodge v. Yates, 76 Cal. 251, 18 Pac. 323; Sample v. Robb, 16 Pa. St. 305. See also Bassett v. Franklin, 15 R. I. 572, 10 Atl. 631.

80. Van Reynegan v. Bolton, 95 U. S. 33, 24 L. ed. 351.

Construing an Arkansas statute it was held that the legislature did not intend to confine the benefits of the act concerning ejectment to the purchaser in the first instance and to the preëmptor in the second instance, but equally to extend them to all persons who might lawfully succeed to their rights. Cloyes v. Beebe, 14 Ark. 489.

81. Cunningham v. Dean, 33 Miss. 46; McRaven v. McGuire, 9 Sm. & M. (Miss.) 34. See Doe v. Munro, 6 N. Brunsw. 92, holding that a lessor's title was incomplete.

Perfect legal paper title is not required in order to recover. Lantry v. Wolff, 49 Nebr. 374, 68 N. W. 494. See also Kernan v. Bahan, 45 La. Ann. 799, 13 So. 155.

82. Benz v. Hines, 3 Kan. 390, 89 Am. Dec. 594; McRaven v. McGuire, 9 Sm. & M. (Miss.) 34; Jarvis v. Lynch, 157 N. Y. 445, 52 N. E. 657 [*affirming* 59 Hun 624, 13 N. Y. Suppl. 703]; Prentice v. Northern Pac. R. Co., 154 U. S. 163, 14 S. Ct. 997, 38 L. ed. 947.

Title must cover the land in controversy. Martin v. Kelley, 30 S. W. 612, 17 Ky. L. Rep. 200.

Plaintiff must show title up to boundaries to which he claims, and he can recover no further than he proves his line to run. Maddux v. West, 6 Ohio Dec. (Reprint) 1010, 9 Am. L. Rec. 484. So in an action to recover a strip of land lying along a boundary line, it is not enough for plaintiff to show that defendant's lot, as possessed by him, is wider than the deeds under which he claims describe it to be, by the width of the disputed strip. Brady v. Hennion, 8 Bosw. (N. Y.) 528.

A sheriff's deed is insufficient on which to base ejectment, where the land sought to be recovered is improperly described therein, although the sheriff may have undertaken to convey the land in controversy. Robinson v. Claggett, 149 Mo. 153, 50 S. W. 280.

Identity and description of property see *infra*, V, A, 2; VII, C, 2.

83. Fenwick v. Gill, 34 Mo. 194. But *compare* Benz v. Hines, 3 Kan. 390, 89 Am. Dec. 504.

Recovery is limited to the actual boundary or specific interest. Foster v. Hackett, 112 N. C. 546, 17 S. E. 426.

84. Allen v. Trimble, 4 Bibb (Ky.) 21, 7 Am. Dec. 726.

If a sufficient title is shown in one of the lessors, in ejectment, to authorize a recovery, the mere non-production of proof, title, or authority from the other lessors is not sufficient to authorize the court to strike out the leases or demises. Martin v. Anderson, 21 Ga. 301.

Where the uncontradicted evidence showed that a part of the land claimed by defendant was claimed under a sheriff's deed by virtue of a judicial sale against plaintiff's grantor, made subsequent to a mortgage by him, under which plaintiff claimed title, an instruction that if the jury believed all of the evidence their verdict must be for plaintiff for the part so claimed was proper. Barron v. Barron, 122 Ala. 194, 25 So. 55.

85. Solcido v. Genung, (Ariz. 1896) 43 Pac. 527; Lannay v. Wilson, 30 Md. 536. See also Hobby v. Bunch, 83 Ga. 1, 10 S. E. 113, 20 Am. St. Rep. 301.

86. *Alabama.*—Jackson Lumber Co. v. McCreary, 137 Ala. 278, 34 So. 850; Bromberg v. Smee, 130 Ala. 601, 30 So. 483; Stiff v. Cobb, 126 Ala. 381, 28 So. 402, 85 Am. St.

tiff is also precluded from insisting that his adversary cannot set up an outstand-

Rep. 38; Feagin *v.* Jones, 94 Ala. 597, 10 So. 537; England *v.* Hatch, 80 Ala. 247; Garrett *v.* Lyle, 27 Ala. 586.

Arkansas.— Martin *v.* McDiarmid, 55 Ark. 213, 17 S. W. 877; Apel *v.* Kelsey, 47 Ark. 413, 2 S. W. 102; Rice *v.* Harrell, 24 Ark. 402.

California.— Cox *v.* Hayes, (1885) 7 Pac. 761; Moore *v.* Tice, 22 Cal. 513; Woodworth *v.* Fulton, 1 Cal. 295.

Colorado.—Chivington *v.* Colorado Springs Co., 9 Colo. 597, 14 Pac. 212.

Connecticut.— Tracy *v.* Norwich, etc., R. Co., 39 Conn. 382.

Delaware.— Pritchard *v.* Henderson, 3 Pennew. 128, 50 Atl. 217.

District of Columbia.— Posey *v.* Hanson, 10 App. Cas. 496.

Georgia.— Parker *v.* Martin, 68 Ga. 453; Stanford *v.* Mangin, 30 Ga. 355.

Illinois.— McCauley *v.* Mahon, 174 Ill. 384, 51 N. E. 829; Boyer *v.* Thornburg, 115 Ill. 540, 4 N. E. 253; Mester *v.* Hauser, 94 Ill. 433; Cobb *v.* Lavalle, 89 Ill. 331, 31 Am. Rep. 91; Vallette *v.* Bennett, 69 Ill. 632; Oetgen *v.* Ross, 54 Ill. 79; Hague *v.* Porter, 45 Ill. 318; Marshall *v.* Barr, 35 Ill. 106; Tilghman *v.* Little, 13 Ill. 239.

Indiana.— Wilson *v.* Carrico, 155 Ind. 570, 58 N. E. 847; Silver Creek Cement Corp. *v.* Union Lime, etc., Co., 138 Ind. 297, 35 N. E. 125, 37 N. E. 721; Shockley *v.* Starr, 119 Ind. 172, 21 N. E. 473; Riggs *v.* Riley, 113 Ind. 208, 15 N. E. 253; Walker *v.* Hill, 111 Ind. 223, 12 N. E. 387; Castor *v.* Jones, 107 Ind. 283, 6 N. E. 823; Coan *v.* Elliott, 101 Ind. 275; Cox *v.* Rash, 82 Ind. 519; Brandenburgh *v.* Seigfried, 75 Ind. 568; Smith *v.* Bryan, 74 Ind. 515; Stehman *v.* Crull, 26 Ind. 436.

Indian Territory.— Myers *v.* Mathis, 2 Indian Terr. 3, 46 S. W. 178.

Iowa.— Lathrop *v.* American Emigrant Co., 41 Iowa 547.

Kansas.— O'Brien *v.* Bugbee, 46 Kan. 1, 26 Pac. 428; Mitchell *v.* Lines, 36 Kan. 378, 13 Pac. 593; State *v.* Stringfellow, 2 Kan. 263.

Kentucky.— Simms *v.* Simms, 88 Ky. 642, 11 S. W. 665, 11 Ky. L. Rep. 131; Bailey *v.* Tygart Valley Iron Co., 10 S. W. 234, 10 Ky. L. Rep. 676; McDowell *v.* Wiseman, 3 Ky. L. Rep. 332.

Louisiana.— Marmion *v.* McPeak, 51 La. Ann. 1631, 26 So. 376; Chachere *v.* Block, 46 La. Ann. 1386, 16 So. 176; Font *v.* McConnell, 46 La. Ann. 215, 14 So. 522; Landry *v.* Landry, 45 La. Ann. 1113, 13 So. 672; Buras *v.* O'Brien, 42 La. Ann. 527, 7 So. 632; Zeringue *v.* Williams, 15 La. Ann. 76.

Maine.— Stetson *v.* Adams, 91 Me. 178, 39 Atl. 575; Coffin *v.* Freeman, 82 Me. 577, 20 Atl. 238; Chaplin *v.* Barker, 53 Me. 275.

Maryland.—Mitchell *v.* Mitchell, 1 Md. 44; Hall *v.* Gittings, 2 Harr. & J. 112.

Massachusetts.— Frazee *v.* Nelson, 179 Mass. 436, 61 N. E. 40, 88 Am. St. Rep. 391.

Mississippi.— Lum *v.* Reed, 53 Miss. 73; Winn *v.* Cole, Walk. 119.

Missouri.—Creech *v.* Childers, 156 Mo. 338, 56 S. W. 1106; Burnham *v.* Hitt, 143 Mo. 414, 45 S. W. 368; Parker *v.* Cassingham, 130 Mo. 348, 32 S. W. 487; West *v.* Bretell, 115 Mo. 653, 22 S. W. 705; Siemers *v.* Schrader, 14 Mo. App. 346.

Nebraska.— Abbott *v.* Coates, 62 Nebr. 247, 86 N. W. 1058; Comstock *v.* Kerwin, 57 Nebr. 1, 77 N. W. 387; Chicago, etc., R. Co. *v.* Schalkopf, 54 Nebr. 448, 74 N. W. 826; Omaha Real Estate, etc., Co. *v.* Kragscow, 47 Nebr. 592, 66 N. W. 658; O'Brien *v.* Gaslin, 24 Nebr. 559, 39 N. W. 449.

New Hampshire.— Spaulding *v.* Bartlett, 55 N. H. 304.

New Jersey.— Meyers *v.* Conover, 67 N. J. L. 187, 46 Atl. 709; Meeker *v.* Boylan, 28 N. J. L. 274.

New York.— Roberts *v.* Baumgarten, 110 N. Y. 380, 18 N. E. 96; Fox *v.* Fee, 24 N. Y. App. Div. 314, 49 N. Y. Suppl. 292; Richardson *v.* Pulver, 63 Barb. 67; Brady *v.* Hennion, 8 Bosw. 528.

North Carolina.— Beddard *v.* Harrington, 124 N. C. 51, 32 S. E. 377; Pearson *v.* Simmons, 98 N. C. 281, 3 S. E. 503; Graybeal *v.* Davis, 95 N. C. 508.

Oklahoma.— Hurst *v.* Sawyer, 2 Okla. 470, 37 Pac. 817.

Pennsylvania.— Burford *v.* McCue, 53 Pa. St. 427; Kennedy *v.* Skeer, 3 Watts 95; Covert *v.* Irwin, 3 Serg. & R. 283; Lane *v.* Reynard, 2 Serg. & R. 65; Airey *v.* Kunkle, 7 Pa. Super. Ct. 112.

Rhode Island.— Smith *v.* Haskins, 22 R. I. 6, 45 Atl. 741.

South Carolina.— Harrelson *v.* Sarvis, 39 S. C. 14, 17 S. E. 368; Weaver *v.* Whilden, 33 S. C. 190, 11 S. E. 686; Johnson *v.* Johnson, 27 S. C. 309, 3 S. E. 606, 13 Am. St. Rep. 636.

South Dakota.—Evenson *v.* Webster, 5 S. D. 266, 58 N. W. 669.

Tennessee.— Winters *v.* Hainer, 107 Tenn. 337, 64 S. W. 44; Woods *v.* Bonner, 89 Tenn. 411, 18 S. W. 67; Coal Creek Min., etc., Co. *v.* Ross, 12 Lea 1; Winton *v.* Rodger, 2 Overt. 185.

Texas.— Sebastian *v.* Martin Brown Co., 75 Tex. 291, 12 S. W. 986; Soape *v.* Doss, 18 Tex. Civ. App. 649, 45 S. W. 387; McCoy *v.* Pease, 17 Tex. Civ. App. 303, 42 S. W. 659.

Virginia.— Reusens *v.* Cassell, 100 Va. 143, 40 S. E. 616; McKinney *v.* Daniel, 90 Va. 702, 19 S. E. 880.

West Virginia.— Holly River Coal Co. *v.* Howell, 36 W. Va. 489, 15 S. E. 214; Low *v.* Settle, 32 W. Va. 600, 9 S. E. 922; Bradley *v.* Ewart, 18 W. Va. 598.

Wisconsin.— Brown *v.* Baraboo, 98 Wis. 273, 74 N. W. 223; Hacker *v.* Horlemus, 74 Wis. 21, 41 N. W. 965; Kelley *v.* McKeon, 67 Wis. 561, 31 N. W. 324; Nys *v.* Biemeret, 44 Wis. 104; Gardiner *v.* Tisdale, 2 Wis. 153, 60 Am. Dec. 407.

United States.— King *v.* Mullins, 171 U. S. 404, 925, 18 S. Ct. 925, 43 L. ed. 214; Watts *v.* Lindsey, 7 Wheat. 158, 5 L. ed. 423; Cleveland *v.* Bigelow, 98 Fed. 242, 39 C. C. A. 47; Texas, etc., R. Co. *v.* Smith, 91 Fed. 483, 33

ing title or that defendant is a trespasser;[87] and if neither party has any legal title plaintiff cannot recover.[88] But it is decided that the general rule that recovery must be based upon the strength of plaintiff's title does not apply where plaintiff's title is documentary and accompanied by possession, and defendant is a mere trespasser, as in such a case he can recover on prior peaceable possession alone.[89] And the rule is further qualified to the extent that good title actively asserted may become fixed in plaintiff by statutory bar of defendant's claim.[90]

C. C. A. 648; Stone *v.* Perkins, 85 Fed. 616; Bouldin *v.* Phelps, 30 Fed. 547; Gray *v.* Jones, 14 Fed. 83, 4 McCrary 515; Young *v.* Dunn, 10 Fed. 717, 4 Woods 331; Turner *v.* Aldridge, 24 Fed. Cas. No. 14,249, 1 McAll. 229.

See 17 Cent. Dig. tit. "Ejectment," § 18.

Other statements of this rule or of the principle underlying it may be found in the following cases:

Alabama.—Alabama Mineral Land Co. *v.* Baker, 119 Ala. 351, 24 So. 706.

California.— Busenius *v.* Coffee, 14 Cal. 91.

Illinois.— Hammond *v.* Shepard, 186 Ill. 235, 57 N. E. 867, 78 Am. St. Rep. 274; Coombs *v.* Hertig, 162 Ill. 171, 44 N. E. 392.

Indiana.— Rowe *v.* Beckett, 30 Ind. 154, 95 Am. Dec. 676.

Kansas.— Benz *v.* Hines, 3 Kan. 390, 89 Am. Dec. 594.

Kentucky.— Lewis *v.* Miles, 44 S. W. 120, 19 Ky. L. Rep. 1676; Martin *v.* Kelley, 30 S. W. 612, 17 Ky. L. Rep. 200.

Michigan.— Van Vleet *v.* Blackwood, 39 Mich. 728.

Mississippi.— Johnson *v.* Futch, 57 Miss. 73.

North Carolina.— Sinclair *v.* Huntley, 131 N. C. 243, 42 S. E. 605; Wilson *v.* Western North Carolina Land Co., 77 N. C. 445; Hipp *v.* Forester, 52 N. C. 599; Clarke *v.* Diggs, 28 N. C. 159, 44 Am. Dec. 73.

Ohio.— Wood *v.* Pindall, Wright 507.

Tennessee.— Winters *v.* Hainer, 107 Tenn. 337, 64 S. W. 44.

Washington.— State *v.* Johanson, 26 Wash. 668, 67 Pac. 401.

Wisconsin.— Nys *v.* Biemeret, 44 Wis. 104.

The rule applies to petitory actions (Rowson *v.* Barbe, 51 La. Ann. 347, 25 So. 139; Lafauci *v.* Kinler, 27 Fed. 442), and to actions of revindication (Baines *v.* Burbridge, 15 La. Ann. 628). Plaintiff cannot recover in a petitory action where he shows no title sufficient even against a naked trespasser. Chewning *v.* Johnson, 5 La. Ann. 678, 52 Am. Dec. 610. The rule also applies where plaintiff does not rely on possession. Graham *v.* Eastman, 75 Ga. 889.

Without title plaintiff is not entitled to recover part of the land by showing that defendant is in possession without right. Tryon *v.* Tryon, 16 Vt. 313.

Deed showing on its face that it is an assignment by insolvent in proceedings to obtain his discharge, unless accompanied by proof that jurisdiction was obtained as provided by statute cannot recover, as plaintiff must rely upon the strength of his own title. Rockwell *v.* Brown, 11 Abb. Pr. N. S. (N. Y.) 400, 42 How. Pr. (N. Y.) 226.

The legal title must prevail in ejectment (Nowlen *v.* Hall, 128 Mich. 274, 87 N. W. 222; Moran *v.* Moran, 106 Mich. 8, 63 N. W. 989, 58 Am. St. Rep. 462; Marshall *v.* Ladd, 131 U. S. appendix lxxxix, 19 L. ed. 153; Mowry *v.* Cummings, 34 Fed. 713; Doe *v.* Wharton, 8 T. R. 2. See also Weakly *v.* Rogers, 5 East 138 note; Doe *v.* Reade, 8 T. R. 118; Goodtitle *v.* Jones, 7 T. R. 43; Doe *v.* Staple, 2 T. R. 684, 1 Rev. Rep. 545; Roe *v.* Lowe, 1 H. Bl. 446; Dusenbury *v.* Palmatier, 21 U. C. Q. B. 462), when no equitable defense is made (Goepinger *v.* Ringland, 62 Iowa 76, 17 N. W. 181).

Priority and superiority of instrument or title deraigned see *infra*, II, C, 5, b.

87. Hammond *v.* Shepard, 186 Ill. 235, 57 N. E. 867, 78 Am. St. Rep. 274. See also Baines *v.* Burbridge, 15 La. Ann. 628.

Plaintiff cannot recover against an outstanding title, although defendant is unable to connect himself therewith. Stuart *v.* Dutton, 39 Ill. 91.

Defendant setting up outstanding title see *infra*, III, H.

The presumption of an outstanding title may be rebutted by plaintiff. Mowry *v.* Cummings, 34 Fed. 713. It is declared, however, that neither party can set up facts showing that equitably the other party is the rightful owner. Marshall *v.* Ladd, 131 U. S. appendix lxxxix, 19 L. ed. 153.

Equitable title see *infra*, II, C, 6.

88. Spaulding *v.* Bartlett, 55 N. H. 304; Winnard *v.* Robbins, 3 Humphr. (Tenn.) 614. See also Feagin *v.* Jones, 94 Ala. 597, 10 So. 537; Murfree *v.* Carmack, 4 Yerg. (Tenn.) 270, 26 Am. Dec. 240.

Where both parties claim by virtue of levies on the land under executions, and the levies of both are defective, plaintiff cannot recover. Starr *v.* Leavitt, 2 Conn. 243, 7 Am. Dec. 268.

Where the pretensions of each party are about equal in law and equity the party in possession will not be disturbed. Hooter *v.* Tippett, 5 Mart. N. S. (La.) 109. See also Rachal *v.* Irwin, 8 Mart. N. S. (La.) 331.

Equitable ejectment see *infra*, XI.

Equitable title, rule, and exceptions see *infra*, II, C, 6, a.

Prior possession and neither party having title see *infra*, II, C, 4, a.

89. Turner *v.* Aldridge, 24 Fed. Cas. No. 14,249, 1 McAll. 229.

Prior possession to support action generally see *infra*, II, C, 4, a.

90. Harrelson *v.* Sarvis, 39 S. C. 14, 17 S. E. 368.

Title by adverse possession see *infra*, II, C, 4, a *et seq.*

An exception also exists in the case of mining claims; defendant cannot in such a case rely upon the weakness of plaintiff's title.[91]

d. Title in Third Person. Plaintiff need not show a good title against all the world. It is sufficient to establish his right to recover against defendant,[92] even though another person might recover it from him.[93] But recovery cannot be had on a showing of title in a third party, against one in possession;[94] although a demise may be laid in the name of a third party when plaintiff clearly has a *bona fide* claim to premises.[95]

e. Leasehold Interest[96] — (I) *Recovery by Lessee.* Ejectment lies for the recovery of a term,[97] and it may be maintained upon a lease passing a legal interest and conferring the right of possession.[98] The lessee may also recover a part of the premises.[99]

(II) *Tenant at Will.* A tenant at will may maintain ejectment under certain decisions,[1] but under other adjudications he cannot.[2]

f. Easement, Servitude, License, or Privilege[3] — (I) *General Rule.* It may be stated generally that ejectment does not lie for a right of way,[4] or other

91. Thomas *v.* Chisholm, 13 Colo. 105, 21 Pac. 1019; and, generally, MINES AND MINERALS.

92. Jamison *v.* Smith, 35 La. Ann. 609; Trager *v.* Shepherd, (Miss. 1895) 18 So. 122; Johnson *v.* Futch, 57 Miss. 73; Lantry *v.* Wolff, 49 Nebr. 374, 68 N. W. 494.

Without first impeaching by direct action the conveyance made by such ancestor, an action will not lie against third persons in possession of lands derived by regular conveyance from plaintiff's ancestor. Calvit *v.* Mulhollan, 11 La. Ann. 681.

93. Garrett *v.* Lyle, 27 Ala. 586; Gaines *v.* New Orleans, 6 Wall. (U. S.) 642, 18 L. ed. 950.

Plaintiff may recover on better title, although the true owner afterward dispossess him. Jackson *v.* Boston, etc., R. Co., 1 Cush. (Mass.) 575.

94. Hogans *v.* Carruth, 19 Fla. 84. But *compare* Bledsoe *v.* Simms, 53 Mo. 305, holding that a party may prove title in his wife to show himself entitled to possession.

No recovery can be had on any equities of a third party in premises. Mester *v.* Hauser, 94 Ill. 433.

95. Couch *v.* Turner, 17 Ga. 489. See also Brooking *v.* Dearmond, 27 Ga. 58.

If paramount title is left outstanding in another, who alone could dispossess defendant, plaintiff cannot recover. Oetgen *v.* Ross, 54 Ill. 79.

Plaintiff must connect himself with third person's title where he relies thereon. Ballance *v.* Flood, 52 Ill. 49.

96. Leasehold interests generally see LANDLORD AND TENANT.

97. Duchane *v.* Goodtitle, 1 Blackf. (Ind.) 117 (holding that an executor could maintain ejectment for lands held for his testator for a term of years); Hodgkins *v.* Price, 137 Mass. 13 (action was by assignee of a lease for a term); Olendorf *v.* Cook, 1 Lans. (N. Y.) 37; Hurst *v.* Sawyer, 2 Okla. 470, 37 Pac. 817.

Lessee cannot recover unexpired term from a grantee of his lessor where an assignee of a sublessee had surrendered the premises to defendant. Austin *v.* Kimball, 167 Mass. 300, 45 N. E. 627.

One being possessed of a long term for years conveyed them to a trustee to receive the rents and profits, and apply them to the support of B during her natural life, and after her death, he by the same instrument conveyed the premises to C, her heirs and assigns. It was held that the trust ceased at the death of B, and that the residue of the term then vested in possession in C, and that the trustee could not afterward maintain ejectment against a stranger therefor. Nicoll *v.* Walworth, 4 Den. (N. Y.) 385.

98. Tarpey *v.* Deseret Salt Co., 5 Utah 205, 14 Pac. 338.

Lease of lands from the people to individuals gives lessee a right to recover possession of the premises. People *v.* New York, 28 Barb. (N. Y.) 240. See also Gilbert *v.* Lee, 4 Harr. & M. (Md.) 487.

Right of possession under lease is the basis of the recovery. Campbell *v.* Hunt, 104 Ind. 210, 2 N. E. 363, 3 N. E. 879.

99. Muzzy *v.* Allen, 25 N. J. L. 471.

Partial recovery generally see *infra*, VIII, E, 3, b.

1. Buntin *v.* Duchane, 1 Blackf. (Ind.) 26; Joyce *v.* Lynch, (Pa. 1886) 2 Atl. 494.

2. Sallabah *v.* Marsh, 34 La. Ann. 1053.

Where the interest of a judgment debtor in land at the time of the docketing of the judgment is only a tenancy at will, a sale on the execution will pass no title to the land to the purchaser which will enable him to maintain ejectment. Colvin *v.* Baker, 2 Barb. (N. Y.) 206.

3. Enforcement of right acquired by condemnation see EMINENT DOMAIN.

4. *California.*— Wood *v.* Truckee Turnpike Co., 24 Cal. 474.

New Hampshire.— Smith *v.* Wiggin, 48 N. H. 105.

New York.— Northern Turnpike Road Co. *v.* Smith, 15 Barb. 355.

Vermont.— Judd *v.* Leonard, 1 D. Chipm. 204.

easement,[5] as against the owner of the fee rightfully in possession;[6] nor will ejectment lie to be let into the use or occupation of a servitude;[7] or for a mere license or right of use, or privilege,[8] except perhaps where there is evidence of prior possession.[9] The reason for the rule is that ejectment will not lie for an incorporeal hereditament.[10] Thus a privilege to dig not amounting to an actual demise of the mines is an incorporeal hereditament for which ejectment does not lie.[11] So where mineral rights are or must include incorporeal hereditaments, such as rights of way and the like, they cannot recovered under this remedy.[12] Again the exclusive right of boring for oil, which is merely an experimental one giving the right to the oil as a chattel, if found, is only a grant of an incorporeal hereditament on which ejectment cannot be based;[13] but lessees of petroleum and gas privileges may maintain ejectment against subsequent lessees of the lessor;[14] or

Wisconsin.— Buckner *v.* Hutchings, 83 Wis. 299, 53 N. W. 505; Fritsche *v.* Fritsche, 77 Wis. 270, 45 N. W. 1089.

See 17 Cent. Dig. tit. "Ejectment," § 25.

Claim to "certain entrances and exits" is only an incorporeal right, although it might be construed to mean a right of way, and ejectment does not lie therefor. Roberts *v.* Trujillo, 3 N. M. 50, 1 Pac. 855.

5. *Alabama.*—Tennessee, etc., R. Co. *v.* East Alabama R. Co., 75 Ala. 516, 51 Am. Rep. 475.

California.— Southern Pac. Co. *v.* Burr, 86 Cal. 279, 24 Pac. 1032; Wood *v.* Truckee Turnpike Co., 24 Cal. 474.

Michigan.— Taylor *v.* Gladwin, 40 Mich. 232.

Minnesota.— Winona *v.* Huff, 11 Minn. 119.

Pennsylvania.— Clement *v.* Youngman, 40 Pa. St. 341; Caldwell *v.* Fulton, 31 Pa. St. 475, 72 Am. Dec. 760.

Vermont.— Judd *v.* Leonard, 1 D. Chipm. 204.

See 17 Cent. Dig. tit. "Ejectment," § 25.

This rule applies: To a reservation to inhabitants of a town of the privilege of taking seaweed from the shores of the common lands of a town. Southampton *v.* Betts, 163 N. Y. 454, 57 N. E. 762 [*affirming* 21 N. Y. App. Div. 435, 47 N. Y. Suppl. 697]. To the use of an alley. Taylor *v.* Gladwin, 40 Mich. 232. To a tin-bound. Doe *v.* Alderson, 4 Dowl. P. C. 701, 1 Gale 441, 5 L. J. Exch. 153, 1 M. & W. 210, 1 Tyrw. & G. 543. To a right to use a wharf in common with others. Child *v.* Chappell, 9 N. Y. 246. See also Parker *v.* West Coast Packing Co., 17 Oreg. 510, 21 Pac. 822, 5 L. R. A. 61. But see Frisbie *v.* McClernin, 38 Cal. 568; and *supra*, II, B, 2.

Ownership of mill and fixtures coupled with an easement in the land necessary for the contemplated use of buildings and also a life-interest, with a condition annexed to be void as to the land upon abandoning the milling business and taking off the buildings and fixtures, constitutes a sufficient interest on which to base ejectment. Stancel *v.* Calvert, 60 N. C. 104.

Where the sole and exclusive use and enjoyment of an alley way constitutes the interest reserved and it is not a mere easement or right to pass or repass over the strip of land, ejectment lies at the instance of a subsequent grantee. Remson *v.* Hyams, 35 Misc. (N. Y.) 345, 71 N. Y. Suppl. 1002.

6. Cornick *v.* Arthur, 31 Tex. Civ. App. 579, 73 S. W. 410.

7. Tennessee, etc., R. Co. *v.* East Alabama R. Co., 75 Ala. 516, 51 Am. Rep. 475.

8. Black *v.* Hepburne, 2 Yeates (Pa.) 331; Richardson *v.* Louisville, etc., R. Co., 169 U. S. 128, 18 S. Ct. 268, 42 L. ed. 687 [*affirming* 38 Fla. 90, 20 So. 815].

Grant of a privilege to erect a machine and building on land, without defining the place where they are to be erected, or the quantity of ground which is to be occupied, does not without an actual entry and location confer such a right as to enable the lessee to maintain ejectment. Jackson *v.* May, 16 Johns. (N. Y.) 184.

Grant of exclusive right of interment in certain burial lots see 6 Cyc. 717 note 50.

9. Richardson *v.* Louisville, etc., R. Co., 169 U. S. 128, 18 S. Ct. 268, 42 L. ed. 687 [*affirming* 38 Fla. 90, 20 So. 815].

10. See *supra*, II, B, 3.

11. Beatty *v.* Gregory, 17 Iowa 109, 85 Am. Dec. 546.

The right to quarry and remove lime constitutes a sufficient interest to maintain ejectment under the Virginia statute. Reynolds *v.* Cook, 83 Va. 817, 3 S. E. 710, 5 Am. St. Rep. 317.

12. Louisville, etc., R. Co. *v.* Massey, 136 Ala. 156, 33 So. 896, 96 Am. St. Rep. 17.

Mines and minerals generally see MINES AND MINERALS.

A lease giving lessee to the extent of an undivided part interest the right to enter on the lands and open and work such mines as he may think proper, and the right to cut wood and timber needed in his mining business gives only a mere incorporeal right too indefinite to be enforced in ejectment. Harlow *v.* Lake Superior Iron Co., 36 Mich. 105. See also Moore *v.* Brown, 139 N. Y. 127, 34 N. E. 772 [*reversing* 16 N. Y. Suppl. 592].

13. Union Petroleum Co. *v.* Bliven Petroleum Co., 72 Pa. St. 173.

The right to take all the oil that may be found in a tract of land is not a corporeal right, nor such a right as passes anything for which ejectment will lie. Dark *v.* Johnston, 55 Pa. St. 164, 93 Am. Dec. 732.

14. Henderson *v.* Ferrell, 183 Pa. St. 547, 38 Atl. 1018. But see Duffield *v.* Hue, 136 Pa. St. 602, 20 Atl. 526.

against the lessor for wrongful ouster from such actual or qualified possession as was essential to operate for oil under the lease.[15]

(II) *Right of Way of Railroad.* While as a general rule ejectment will not lie for an easement or to be let into the use or occupation of a servitude, it will lie for the recovery of land claimed and condemned as a road-bed and right of way of a railroad.[16]

g. Fee Subject to Easement — (I) *Private Easement.* The owner of a fee subject to a private easement may recover possession, subject to the easement, against the dominant tenant.[17]

(II) *Public Easement.* So the owner of the fee subject to a public easement may under certain circumstances recover the land subject to the public

15. Karns *v.* Tanner, 66 Pa. St. 297.

16. Tennessee, etc., R. Co. *v.* East Alabama R. Co., 75 Ala. 516, 524, 51 Am. Rep. 475, where it is said: "Lands claimed and condemned as road-bed and right of way of a railroad stand in a different category from that of ordinary easements. Over them is acquired, not the right of use to be enjoyed in common with the public, or with other persons. The right and use are exclusive, and no one else has any right of way thereon."

Railroad corporation has sufficient occupation of the land to maintain ejectment, where it has a track of iron rails securely fastened to wooden ties imbedded in the earth, on the land of another, over which trains of cars pass and repass at intervals. Syracuse Gas Light Co. *v.* Rome, etc., R. Co., 11 N. Y. Civ. Proc. 239 [*modified* in 51 Hun 119, 5 N. Y. Suppl. 459].

Where, by its charter, a railroad corporation is seized and possessed of lands condemned for its right of way it may maintain ejectment to recover possession thereof. Rutland R. Co. *v.* Chaffee, 71 Vt. 84, 42 Atl. 984, 48 Atl. 699.

Where it has a right to use it or a right of way over it a railroad corporation may also maintain an action for the possession of land. Carolina Cent. R. Co. *v.* McCaskill, 94 N. C. 746.

Where it has the exclusive right of possession of all the land embraced in its right of way a railroad company may bring ejectment for its possession. Southern Pac. Co. *v.* Burr, 86 Cal. 279, 24 Pac. 1032. See also Graham *v.* St. Louis, etc., R. Co., 69 Ark. 562, 65 S. W. 1048, 66 S. W. 344.

Railroad company is not an "actual occupant" so as to maintain ejectment under 2 N. Y. Rev. St. p. 204, § 4, where it has laid its rails on, and run its locomotives and cars through city streets without any title or claim beyond such use, the public using the street in the ordinary way. Redfield *v.* Utica, etc., R. Co., 25 Barb. (N. Y.) 54.

Ejectment where lands taken under act of parliament or Land Clauses Act see Doe *v.* North Staffordshire R. Co., 16 Q. B. 526, 15 Jur. 944, 20 L. J. Q. B. 249, 71 E. C. L. 526; Land Clauses Act (1845), §§ 85, 123 (railway); Jolly *v.* Wimbledon, etc., R. Co., 1 B. & S. 807, 8 Jur. N. S. 1037, 31 L. J. Q. B. 95, 5 L. T. Rep. N. S. 615, 10 Wkly. Rep. 253, 101 E. C. L. 807; Land Clauses Act, § 124 (railway); Doe *v.* Beaufort, 6 Exch. 498, 20 L. J. Exch. 251 (canal company). And see Doe *v.* Leeds, etc., R. Co., 16 Q. B. 796, 15 Jur. 946, 20 L. J. Q. B. 486, 71 E. C. L. 796.

Where plaintiff's estate was only a right to use land conveyed to a railroad company until the company should desire to use the same for railroad purposes, his estate, being one for an indefinite period, which period was not capable of being stated, is not an estate for which ejectment lies under Va. Code, §§ 2730, 2748. King *v.* Norfolk, etc., R. Co., 99 Va. 625, 39 S. E. 701.

Rights of owner of land taken in condemnation proceedings generally see EMINENT DOMAIN.

17. *Kentucky.*— West Covington *v.* Freking, 8 Bush 121, against an adverse claimant.

Maine.— Blake *v.* Ham, 50 Me. 311, 53 Me. 430.

Massachusetts.— Morgan *v.* Moore, 3 Gray 319.

Michigan.— Smeberg *v.* Cunningham, 96 Mich. 378, 56 N. W. 73, 35 Am. St. Rep. 613.

Mississippi.— Gordon *v.* Sizer, 39 Miss. 805.

New Jersey.— Burnet *v.* Crane, 56 N. J. L. 285, 28 Atl. 591, 44 Am. St. Rep. 395.

New York.— Wilson *v.* Wrightman, 36 N. Y. App. Div. 41, 55 N. Y. Suppl. 806.

Pennsylvania.— Tillmes *v.* Marsh, 67 Pa. St. 507.

Vermont.— Pomeroy *v.* Mills, 3 Vt. 279, 23 Am. Dec. 207.

See 17 Cent. Dig. tit. "Ejectment," § 26.

An outstanding easement in land in a third person does not bar a recovery thereof in ejectment. Tatum *v.* St. Louis, 125 Mo. 647, 28 S. W. 1002.

Trustees who hold the legal title to a cemetery may bring ejectment for it against a city which assumes and exercises exclusive control adverse to the trustees. Board of Health *v.* East Saginaw, 45 Mich. 257, 7 N. W. 808. See 6 Cyc. 717 note 50.

Ejectment will not lie where defendant claims and enjoys only an easement to flow the land, and subject to this easement plaintiff has undisputed control over the premises. Wilklow *v.* Lane, 37 Barb. (N. Y.) 244. It is also held that a person entitled to an easement cannot be disturbed in its enjoyment by an action of ejectment or writ of possession. Kurkel *v.* Haley, 47 How. Pr. (N. Y.) 75.

easement.[18] Thus he may maintain ejectment against an intruder who takes possession of and uses the land for other purposes,[19] or who claims exclusive possession thereof,[20] or against a permanent encumbrancer who occupies the land for a purpose repugnant to and inconsistent with the use for which it was dedicated.[21] But such owner cannot recover the road[22] or the right of way over the land.[23] The owners of the soil may also bring an action against a railroad company to recover the land, subject to the public easement, where such company has used

18. Taylor *v.* Armstrong, 24 Ark. 102; Com. *v.* Peters, 2 Mass. 125.

This rule also includes those claiming under the original owner. Gardiner *v.* Tisdale, 2 Wis. 153, 60 Am. Dec. 407.

19. *Arkansas.*— Taylor *v.* Armstrong, 24 Ark. 102.

California.— Weyl *v.* Sonoma Valley R. Co., 69 Cal. 202, 10 Pac. 510; Coburn *v.* Ames, 52 Cal. 385, 28 Am. Rep. 634; Porter *v.* Pacific Coast R. Co., (1888) 18 Pac. 428.

Georgia.— Savannah *v.* Georgia Steamboat Co., R. M. Charlt. 342.

Indiana.— Sharpe *v.* St. Louis, etc., R. Co., 49 Ind. 296.

Massachusetts.—Adams *v.* Emerson, 6 Pick. 57; Perley *v.* Chandler, 6 Mass. 454, 4 Am. Dec. 159; Com. *v.* Peters, 2 Mass. 125.

Missouri.— Thomas *v.* Hunt, 134 Mo. 392, 35 S. W. 581, 32 L. R. A. 857.

New Jersey.—Wright *v.* Carter, 27 N. J. L. 76.

New York.— Wager *v.* Troy Union R. Co., 25 N. Y. 526; Carpenter *v.* Oswego, etc., R. Co., 24 N. Y. 655; Syracuse Gas-Light Co. *v.* Rome, etc., R. Co., 51 Hun 119, 5 N. Y. Suppl. 459; Lozier *v.* New York Cent. R. Co., 42 Barb. 465; Northern Turnpike Road Co. *v.* Smith, 15 Barb. 355; Benedict *v.* Goit, 3 Barb. 459.

Pennsylvania.— Phillips *v.* Dunkirk, etc., R. Co., 78 Pa. St. 177.

Wisconsin.— Weisbrod *v.* Chicago, etc., R. Co., 21 Wis. 602.

England.— Goodtitle *v.* Alker, 1 Burr. 133, 1 Ld. Ken. 427 [*criticized* in Cincinnati *v.* White, 6 Pet. (U. S.) 431, 8 L. ed. 452].

See 17 Cent. Dig. tit. "Ejectment," § 26.

The heirs of a testator who directed his executors to convey land laid out in streets to the county board for the benefit of adjoining lot-owners had sufficient title to maintain ejectment as against the board. Somerville *v.* Johnson, 36 N. J. Eq. 211.

20. French *v.* Robb, 67 N. J. L. 260, 51 Atl. 509, 57 L. R. A. 956.

To maintain ejectment for any part of a public highway to which plaintiff has title subject to the public easement defendants must have taken exclusive possession of it or have imposed upon it some burden inconsistent with the public easement. Westlake *v.* Koch, 134 N. Y. 58, 31 N. E. 321.

Where the owner conveyed land, excepting therefrom the land within its boundaries which was included in the highway, he may maintain ejectment against the grantee for an encroachment on the highway, or for an exclusive use thereof by the latter. Etz *v.* Daily, 20 Barb. (N. Y.) 32.

Where proprietors have given up the use and control of lands for a highway, neither they nor the owners of the fee have the right to exclusive possession of the land, and they cannot maintain ejectment against adjoining landowners who have inclosed and taken exclusive possession of the highway, even though it is not needed for a highway. Stiles *v.* Curtis, 4 Day (Conn.) 328. But see Peck *v.* Smith, 1 Conn. 103, 6 Am. Dec. 216.

21. Gardiner *v.* Tisdale, 2 Wis. 153, 60 Am. Dec. 407.

Occupation in a manner not inconsistent with or repugnant to the public easement will not authorize an action of ejectment, as plaintiff must show that the whole purpose has ceased for which the dedication was made. Adams *v.* Saratoga, etc., R. Co., 11 Barb. (N. Y.) 414.

Ejectment cannot be maintained by an abutting owner against a railroad company operating its road on his half of a public street under permission from the city, he having no present right of possession, of which he has been deprived. Montgomery *v.* Santa Ana Westminster R. Co., 104 Cal. 186, 37 Pac. 786, 43 Am. St. Rep. 89, 25 L. R. A. 654.

22. Wood *v.* Truckee Turnpike Co., 24 Cal. 474.

Against the District of Columbia the owner of the legal title cannot maintain ejectment for land over which District has an easement for the highway. Lansburgh *v.* District of Columbia, 8 App. Cas. (D. C.) 10.

As no title to land taken by a town is given by the act of its selectmen in laying out a highway, ejectment will not lie against the town for the land so taken. Lynch *v.* Rutland, 66 Vt. 570, 29 Atl. 1015.

For land which is public highway ejectment does not lie. Sarnia *v.* Great Western R. Co., 21 U. C. Q. B. 59.

23. Mahon *v.* San Rafael Turnpike Road Co., 49 Cal. 269. But *compare* Warwick *v.* Mayo, 15 Gratt. (Va.) 528.

Ejectment against a municipal corporation cannot be sustained by showing that at the time of its commencement the *locus in quo* was in use as a public street. Such use is inconsistent with actual occupancy by defendant, and proves no claim of ownership or of interest, beyond a mere easement of passage not incompatible with the title or possession of plaintiff. Cowenhoven *v.* Brooklyn, 38 Barb. (N. Y.) 9.

If action is brought not to recover the right of way, but the possession of land occupied as a toll road, ejectment lies. Mahon *v.* San Rafael Turnpike Road Co., 49 Cal. 269.

a street without additional compensation to or license by the owners,[24] where the railroad corporation has appropriated the highway to its permanent use without legislative grant, express or implied,[25] or where the land has been condemned for a railroad right of way and the judgment for damages remains unpaid;[26] but it is also held that the action will not lie to recover lands on which a railroad is located, after public rights have intervened,[27] where the road-bed has been taken with the owner's consent and encouragement,[28] or where there is merely an illegal or excessive user of an admitted easement;[29] and where a street railway's use of a street under its franchise is interfered with by another railroad company, ejectment is not the proper remedy.[30] Again if land has been wrongfully taken and converted into a public road through action of the court it may be recovered in ejectment.[31] So plaintiff may maintain an action for possession of lots conveyed to a city for a public levee, where the latter has wrongfully leased such lots for private purposes.[32] On the other hand the action lies by a municipal or similar corporation to recover possession of land which has been dedicated to public use and which is wrongfully possessed by an individual, as in the case of a street[33] or a public park or square;[34] and this rule has been held to govern, whether the fee is owned by the corporation or the adjoining proprietor.[35]

24. Sharpe *v.* St. Louis, etc., R. Co., 49 Ind. 296 [*following* Cox *v.* Louisville, etc., R. Co., 48 Ind. 178]; Wager *v.* Troy Union R. Co., 25 N. Y. 526 [*following* Mahon *v.* New York Cent. R. Co., 24 N. Y. 658; Carpenter *v.* Oswego, etc., R. Co., 24 N. Y. 655; Williams *v.* New York Cent. R. Co., 16 N. Y. 97, 69 Am. Dec. 651].

Where a railroad company has appropriated land used as a street and has granted it to a city without additional compensation for the street use, the owners in fee may bring ejectment therefor. Strong *v.* Brooklyn, 68 N. Y. 1, 10.

25. Louisville, etc., R. Co. *v.* Liebfried, 92 Ky. 407, 17 S. W. 870, 13 Ky. L. Rep. 645.

26. Lake Erie, etc., R. Co. *v.* Kinsey, 87 Ind. 514.

27. Morgan *v.* Lake Shore, etc., R. Co., 130 Ind. 101, 28 N. E. 548.

28. Kanaga *v.* St. Louis, etc., R. Co., 76 Mo. 207.

29. Becker *v.* Lebanon, etc., R. Co., 195 Pa. St. 502, 46 Atl. 1096.

30. Fresno St. R. Co. *v.* Southern Pac. R. Co., 135 Cal. 202, 67 Pac. 773. An important factor in this case was that of consent to the use.

31. McCarty *v.* Clark County, 101 Mo. 179, 14 S. W. 51. In Armstrong *v.* St. Louis, 69 Mo. 309, 33 Am. Rep. 499, the court said: "The right to maintain ejectment against a party in possession does not depend upon the right he claims in the premises, but upon the wrong he has done the claimant if the true owner. If he has turned him out of possession and holds the premises against him it does not matter what interest he claims."

32. Sanborn *v.* Van Duyne, 90 Minn. 215, 96 N. W. 41.

33. San Francisco *v.* Grote, 120 Cal. 59, 52 Pac. 127, 65 Am. St. Rep. 155, 41 L. R. A. 335; Ocean Grove Camp Meeting Assoc. *v.* Berthall, 63 N. J. L. 312, 43 Atl. 887 [*reversing* 62 N. J. L. 88, 40 Atl. 779]; Cleveland *v.* Cleveland, etc., R. Co., 93 Fed. 113.

A city may maintain ejectment for a street, even though a railroad company may have a vested right to the use of one or more tracks thereon, where it denies the city's title. St. Louis *v.* Missouri Pac. R. Co., 114 Mo. 13, 21 S. W. 202.

Action lies by a borough.— South Amboy *v.* New York, etc., R. Co., 66 N. J. L. 623, 50 Atl. 368.

Ejectment does not lie in behalf of the public or the county to obtain possession of land appropriated for public streets, or to keep it clear of unauthorized impediments, under Mich. Comp. Laws, § 6206, providing that plaintiff must have "a valid subsisting interest in the premises claimed, and a right to recover the possession thereof." Bay County *v.* Bradley, 39 Mich. 163, 33 Am. Rep. 367.

34. Winona *v.* Huff, 11 Minn. 119; Weger *v.* Delran Tp., 61 N. J. L. 224, 39 Atl. 730; Jersey City *v.* Dummer, 20 N. J. L. 86, 40 Am. Dec. 213.

Unless a city, defendant, has been guilty of some unauthorized interference with property subject to a public easement, as in case of public squares or parks, judgment that plaintiff should have possession subject to such easement should not be rendered. De Witt *v.* Ithaca, 15 Hun (N. Y.) 568.

35. Eureka *v.* Gates, 120 Cal. 54, 52 Pac. 125; Visalia *v.* Jacob, 65 Cal. 434, 4 Pac. 433, 52 Am. Rep. 303 [*cited* in Southern Pac. Co. *v.* Burr, 86 Cal. 279, 24 Pac. 1032]; Covington *v.* Chesapeake, etc., R. Co., 20 S. W. 538, 14 Ky. L. Rep. 487. See also Asbury Park *v.* Hawxhurst, 67 N. J. L. 582, 52 Atl. 694. But see San Francisco *v.* Grote, (Cal. 1897) 47 Pac. 938, 36 L. R. A. 502.

If the city has fee and control of public streets it may maintain ejectment for the land. California *v.* Howard, 78 Mo. 88.

In New York city the fee is in the corporation; in other parts of the state the presumption is that the fee is in the owner of the lots.

h. Grant of Possibility of Reverter. Grant of possibility of reverter incapable of alienation, left in one who subsequently conveys the land, together with the reversion therein to another, does not confer upon the latter an estate upon which ejectment can be maintained.[36]

2. Title or Right at Time of Demise, Action, or Trial. Plaintiff must at the time of the demise and at the time of the commencement of the action have the proper title or interest to support the action of ejectment,[37] and he must also have the right to the possession of the land in dispute,[38] or a right of entry on the

Adams *v.* Saratoga, etc., R. Co., 11 Barb. (N. Y.) 414.

Where the public easement is such that possession exclusive of any interference by the owner of the fee is essential for its improvement the only appropriate action to obtain possession is ejectment. Hoboken Land, etc., Co. *v.* Hoboken, 36 N. J. L. 540.

Where title to land on which a road is located and bridge sites are fixed is in the commonwealth it or its grantee may maintain ejectment. James River, etc., Co. *v.* Thompson, 3 Gratt. (Va.) 270.

36. Davis *v.* Memphis, etc., R. Co., 87 Ala. 633, 6 So. 140.

37. *Alabama.*—Goodman *v.* Winter, 64 Ala. 410, 38 Am. Rep. 13; Wilkerson *v.* McDougal, 48 Ala. 517; Williams *v.* Hartshorn, 30 Ala. 211.

California.— Moore *v.* Tice, 22 Cal. 513.

Florida.— Paul *v.* Fries, 18 Fla. 573; Jones *v.* Lofton, 16 Fla. 189.

Georgia.— Goodtitle *v.* Roe, 20 Ga. 135. And see Hobby *v.* Bunch, 83 Ga. 1, 10, S. E. 113, 20 Am. St. Rep. 301; Foster *v.* Staller, 64 Ga. 766; Tompkins *v.* Williams, 19 Ga. 569.

Illinois.— Mills *v.* Graves, 44 Ill. 50; Joy *v.* Berdell, 25 Ill. 537; Pitkin *v.* Yaw, 13 Ill. 251.

Kentucky.— Boyd *v.* Barkley, 4 Dana 227; Redman *v.* Sanders, 2 Dana 68; Anderson *v.* Turner, 3 A. K. Marsh. 131; Coleman *v.* Mabberly, 3 T. B. Mon. 220; Coxe *v.* Joiner, 3 Bibb 297. See also Whitley *v.* Bramble, 9 B. Mon. 143.

Maryland.— Wilson *v.* Inloes, 11 Gill & J. 351.

Mississippi.— Laurissini *v.* Doe, 25 Miss. 177, 57 Am. Dec. 200.

Missouri.— Nalle *v.* Thompson, 173 Mo. 595, 73 S. W. 599; Finley *v.* Babb, 144 Mo. 403, 46 S. W. 165; Dunlap *v.* Henry, 76 Mo. 106; Buxton *v.* Carter, 11 Mo. 481.

Montana.— Herbert *v.* King, 1 Mont. 475.

New Hampshire.—Mills *v.* Peirce, 2 N. H. 9.

New York.— Scott *v.* Crego, 47 Barb. 595; Layman *v.* Whiting, 20 Barb. 559; Wright *v.* Douglas, 3 Barb. 554; McLeans *v.* Macdonald, 2 Edm. Sel. Cas. 393.

North Carolina.— Morehead *v.* Hall, 132 N. C. 122, 43 S. E. 542.

Pennsylvania.— Lawrence *v.* Hunter, 9 Watts 64.

Vermont.— Cheney *v.* Cheney, 26 Vt. 606; Tryon *v.* Tryon, 16 Vt. 313.

United States.— Smith *v.* McCann, 24 How. 398, 16 L. ed. 714; Lake Superior Ship Canal, etc., Co. *v.* Cunningham, 44 Fed. 587. See also Fenn *v.* Holme, 21 How. 481, 16 L. ed. 198.

See 17 Cent. Dig. tit. "Ejectment," § 17.

Rule applies whether action is statutory or the common-law action. Betz *v.* Mullin, 62 Ala. 365.

Patent to public lands takes effect when executed, and the legal title is then vested, even though it is not delivered until after suit brought. Wisconsin Cent. R. Co. *v.* Wisconsin River Land Co., 71 Wis. 94, 36 N. W. 837. See Pitts *v.* Booth, 15 Tex. 453. But *compare* Fipps *v.* McGehee, 5 Port. (Ala.) 413.

38. *Alabama.*— Cofer *v.* Schening, 98 Ala. 338, 13 So. 123; Grandin *v.* Hurt, 80 Ala. 116; Williams *v.* Hartshorn, 30 Ala. 211. *Compare* Betz *v.* Mullin, 62 Ala. 365.

California.— Hawxhurst *v.* Lander, 28 Cal. 331; Owen *v.* Morton, 24 Cal. 373; Owen *v.* Fowler, 24 Cal. 192; Moore *v.* Tice, 22 Cal. 513.

District of Columbia.— Lansburgh *v.* District of Columbia, 8 App. Cas. 10.

Illinois.— Converse *v.* Dunn, 166 Ill. 25, 46 N. E. 747.

Indiana.— Jackson *v.* Hughes, 1 Blackf. 421.

Kentucky.— Harle *v.* McCoy, 7 J. J. Marsh. 318, 23 Am. Dec. 407; Botts *v.* Shield, 3 Litt. 32.

Maryland.— Wilson *v.* Inloes, 11 Gill & J. 351; Harbaugh *v.* Moore, 11 Gill & J. 283.

Michigan.— Michigan Cent. R. Co. *v.* McNaughton, 45 Mich. 87, 7 N. W. 712; Van Vleet *v.* Blackwood, 39 Mich. 728.

Missouri.— Finley *v.* Babb, 144 Mo. 403, 46 S. W. 165; Carter *v.* Scaggs, 38 Mo. 302.

Montana.— Herbert *v.* King, 1 Mont. 475.

North Carolina.— Arrington *v.* Arrington, 114 N. C. 116, 19 S. E. 278.

Ohio.— William *v.* Burnet, Wright 53.

Oklahoma.— Hurst *v.* Sawyer, 2 Okla. 470, 37 Pac. 817.

Virginia.— Voight *v.* Ruby, 90 Va. 799, 20 S. E. 824.

West Virginia.— Adkins *v.* Spurlock, 46 W. Va. 139, 33 S. E. 121.

Wyoming.—Anderson *v.* Rasmusser, 5 Wyo. 44, 36 Pac. 820.

United States.— Smith *v.* McCann, 24 How. 398, 16 L. ed. 714; Hylton *v.* Brown, 12 Fed. Cas. No. 6,980, 1 Wash. 204.

See 17 Cent. Dig. tit. "Ejectment," § 17; and *infra*, II, D.

After conveyance to third person one having a lien on the land may maintain action. Miller *v.* Farmers' Bank, 75 S. W. 218, 25 Ky. L. Rep. 373.

premises.[39] This rule has also under some decisions been extended so as to apply even up to the time of the trial.[40]

3. Title Subsequent to Action Brought or Demise Laid. Ejectment cannot be supported by a title acquired after action commenced.[41] Nor can a defective title be aided by conveyances made pending suit,[42] although there may be a confirmation after suit of a title existing before action is brought;[43] and a title parted with after suit is commenced but revested before trial is sufficient.[44] So where title is complete before service of the declaration it will support the action.[45] Again where a deed is given after the date of the demise alleged recovery may be had.[46]

Complete right to possession prior to demise is necessary. Jackson *v.* Wheeler, 6 Johns. (N. Y.) 272.

The statute is positive that the time laid in the declaration of plaintiff's possession shall be subsequent to the time when his title accrued. Wood *v.* Morton, 11 Ill. 547.

Where tenant's term expires before bringing suit he cannot recover in ejectment. Horner *v.* Marietta, 135 Pa. St. 418, 19 Atl. 1029.

39. *California.*— Meeks *v.* Kirby, 47 Cal. 169; Kile *v.* Tubbs, 32 Cal. 332.

Florida.— Jones *v.* Lofton, 16 Fla. 189.

Georgia.— Scisson *v.* McLaws, 12 Ga. 166.

Kentucky.— Coleman *v.* Mabberly, 3 T. B. Mon. 220.

North Carolina.— Price *v.* Osborn, 34 N. C. 26.

Pennsylvania.— O'Neill *v.* Patterson, 27 Pittsb. Leg. J. 189.

See 17 Cent. Dig. tit. "Ejectment," § 17.

40. *Alabama.*—Bruce *v.* Bradshaw, 69 Ala. 360; Scranton *v.* Ballard, 64 Ala. 402; Wilkerson *v.* McDougal, 48 Ala. 517.

California.— Kile *v.* Tubbs, 32 Cal. 332.

Kentucky.— Downing *v.* Collins, 2 B. Mon. 95.

Maryland.— Cresap *v.* Hutson, 9 Gill 269; Carroll *v.* Norwood, 5 Harr. & J. 155.

North Carolina.— Arrington *v.* Arrington, 114 N. C. 116, 19 S. E. 278.

Vermont.— Cheney *v.* Cheney, 26 Vt. 606; Tryon *v.* Tryon, 16 Vt. 313.

United States.— Smith *v.* McCann, 24 How. 398, 16 L. ed. 714.

See 17 Cent. Dig. tit. "Ejectment," § 17.

Grantee is entitled to benefit of a recovery where plaintiff conveys pending suit and recovery is not therefore precluded. Mills *v.* Graves, 44 Ill. 50.

If title is terminated pending the action plaintiff cannot recover. Brunson *v.* Morgan, 86 Ala. 318, 5 So. 495.

That transfer pendente lite is not a good bar under the statute see Michigan Cent. R. Co. *v.* McNaughton, 45 Mich. 87, 7 N. W. 712. See also *infra*, III, H, 2, d.

Where lease has expired before trial no recovery can be had without amendment. Roe *v.* Doe, 30 Ga. 608.

41. *Alabama.*— Cofer *v.* Schening, 98 Ala. 338, 13 So. 123; Goodman *v.* Winter, 64 Ala. 410, 38 Am. Rep. 13.

Arkansas.— Perciful *v.* Platt, 36 Ark. 456.

California.— Sacramento Sav. Bank *v.* Hynes, 50 Cal. 195; Hestres *v.* Brennan, 37 Cal. 385; Kile *v.* Tubbs, 32 Cal. 332.

Florida.— Carn *v.* Haisley, 22 Fla. 317; Paul *v.* Fries, 18 Fla. 573.

Kansas.— Porter *v.* Wells, 6 Kan. 448.

Michigan.— Nowlen *v.* Hall, 128 Mich. 274, 87 N. W. 222.

Missouri.— Ford *v.* French, 72 Mo. 250; Norfleet *v.* Russell, 64 Mo. 176.

Pennsylvania.— McCulloch *v.* Cowher, 5 Watts & S. 427.

Texas.— Bradford *v.* Hamilton, 7 Tex. 55.

United States.— McCool *v.* Smith, 1 Black 459, 17 L. ed. 218; Lake Superior Ship Canal, etc., Co. *v.* Cunningham, 44 Fed. 587.

See 17 Cent. Dig. tit. "Ejectment," § 28. See also *infra*, III, H, 2, d.

Purchase of defendant's title by one of several plaintiffs inures to the benefit of other plaintiffs, although the purchaser has joined in the right of his wife. Lasley *v.* Patton, 4 Ky. L. Rep. 619.

Where a grant from the state is unregistered at the time action is brought, but is registered at the time of trial, ejectment cannot be maintained. Moorehead *v.* Hall, 132 N. C. 122, 43 S. E. 542.

42. Johnston *v.* Jones, 1 Black (U. S.) 209, 17 L. ed. 117.

43. Simmons *v.* McKissick, 6 Humphr. (Tenn.) 259.

Confirmation act cannot relate back to void selection of public lands so as to enable the grantee to maintain ejectment for lands on suit brought before the passage of the confirming act. Lake Superior Ship Canal, etc., Co. *v.* Cunningham, 44 Fed. 587.

Grant issued after demise laid and suit brought, reciting the date of the certificate of survey to be prior to the date of beginning the action, is not sufficient to show title without the certificate itself. Henderson *v.* Parker, 3 Harr. & J. (Md.) 117.

Nunc pro tunc order validating title and made pending the action only places on record the evidence of the court's approval actually made prior to the suit, of a guardian's sale through which the title was claimed, and this approval perfected the title. Reid *v.* Morton, 119 Ill. 118, 6 N. E. 414.

Where no title existed before suit a deed of confirmation after suit does not confer sufficient title. Schrack *v.* Zubler, 34 Pa. St. 38.

44. Edgerton *v.* Clark, 20 Vt. 464; Beach *v.* Beach, 20 Vt. 83.

45. Thompson *v.* Red, 47 N. C. 412.

46. Lewis *v.* Curry, 74 Mo. 49.

But, although the principle of remitter does not apply where one acquires title by his own act, yet it applies where one having wrongful possession has the title thrown on him by act of law.[47]

4. Prior or Adverse Possession[48] — a. Prior Possession in General — (i) *General Rule.* Ejectment may be maintained upon the prior possession of plaintiff, or of parties through whom he claims, such possession being a sufficient *prima facie* title.[49] Accordingly where no legal title is shown in either party, the party showing prior possession in himself or those through whom he claims will be held to have a better right.[50] Thus it has been held that plaintiff upon such a showing may recover in ejectment against a defendant who shows no better right or title;[51]

47. Williams *v.* Council, 49 N. C. 206.

48. Right of adverse claimant to maintain ejectment see Adverse Possession, 1 Cyc. 1138.

Elements of adverse possession see Adverse Possession, 1 Cyc. 981 *et seq.*

49. *California.*— Zilmer *v.* Gerichten, 111 Cal. 73, 43 Pac. 408; Leonard *v.* Flynn, 89 Cal. 543, 26 Pac. 1099; Nagle *v.* Macy, 9 Cal. 426; Bird *v.* Lisbros, 9 Cal. 1, 70 Am. Dec. 617; Plume *v.* Seward, 4 Cal. 94, 60 Am. Dec. 599; Hutchinson *v.* Perley, 4 Cal. 33, 60 Am. Dec. 577.

Florida.— Goodwin *v.* Markwell, 37 Fla. 464, 19 So. 885.

Indiana.— Robinoe *v.* Doe, 6 Blackf. 85.

Michigan.— Covert *v.* Morrison, 49 Mich. 133, 13 N. W. 390.

Pennsylvania.— Wentworth *v.* Mullen, 2 Chest. Co. Rep. 544.

Tennessee.— Cannon *v.* Phillips, 2 Sneed 211.

England.— Doe *v.* Dyball, 3 C. & P. 610, M. & M. 346, 14 E. C. L. 742; Davison *v.* Gent, 1 H. & N. 744, 3 Jur. N. S. 342, 26 L. J. Exch. 122, 5 Wkly. Rep. 229.

See 17 Cent. Dig. tit. "Ejectment," § 30.

Against mere wrong-doer prior possession is sufficient title. Doe *v.* Pearson, 5 N. Brunsw. 135.

Possession by the father of a minor will inure to the latter's benefit when taken under parol gift from the ancestor, and will constitute a basis for ejectment against one holding adversely. Dasher *v.* Ellis, 102 Ga. 830, 30 S. E. 544.

Sufficiency of possession of ancestor or grantor see the following cases:

Arkansas.— Weaver *v.* Rush, 62 Ark. 51, 34 S. W. 256; Wheeler *v.* Ladd, 40 Ark. 108; Ferguson *v.* Peden, 33 Ark. 150; Jacks *v.* Dyer, 31 Ark. 334.

Michigan.— Bennett *v.* Horr, 47 Mich. 221, 10 N. W. 347.

Minnesota.— Sherin *v.* Larson, 28 Minn. 523, 11 N. W. 70.

Nebraska.— Spitznagle *v.* Vanhessch, 13 Nebr. 338, 14 N. W. 417.

New York.— Dunham *v.* Townshend, 118 N. Y. 281, 23 N. E. 367 [*affirming* 43 Hun 580].

Where it is shown that the title is out of plaintiff, mere possession is not sufficient to sustain an ejectment against a wrong-doer. Nagle *v.* Shea, Ir. R. 8 C. L. 224.

50. *Alabama.*— Gist *v.* Beaumont, 104 Ala. 347, 16 So. 20; Dothard *v.* Denson, 72 Ala. 541; McCall *v.* Doe, 17 Ala. 533. See also Russell *v.* Irwin, 38 Ala. 44.

California.— Ayres *v.* Bensley, 32 Cal. 620.

Florida.— Goodwin *v.* Markwell, 37 Fla. 464, 19 So. 885; Florida Southern R. Co. *v.* Burt, 36 Fla. 497, 18 So. 581.

Georgia.— Bagley *v.* Kennedy, 85 Ga. 703, 11 S. E. 1091.

Kansas.— Hentig *v.* Pipher, 58 Kan. 788, 51 Pac. 229.

Kentucky.— McLawrin *v.* Salmons, 11 B. Mon. 96, 52 Am. Dec. 563. *Compare* Tucker *v.* Phillips, 2 Metc. 416.

Massachusetts.—Hubbard *v.* Little, 9 Cush. 475.

Michigan.— Kinney *v.* Harrett, 46 Mich. 87, 8 N. W. 708.

Minnesota.— Sherin *v.* Brackett, 36 Minn. 152, 30 N. W. 551.

Missouri.— Hall *v.* Gallemore, 138 Mo. 638, 40 S. W. 891.

Nevada.— Gonder *v.* Miller, 21 Nev. 180, 27 Pac. 333. See also Jackson *v.* Hubble, 1 Cow. (N. Y.) 613, qualifying rule when defendant's possession was adverse for the statutory period.

New Jersey.— Den *v.* Morris, 7 N. J. L. 6, 11 Am. Dec. 508.

New Mexico.— New Mexico, etc., R. Co. *v.* Crouch, 4 N. M. 141, 13 Pac. 201.

New York.— Thompson *v.* Burhans, 79 N. Y. 93 [*reversing* 15 Hun 580]; Hunter *v.* Starin, 26 Hun 529; Brewster *v.* Striker, 1 E. D. Smith 321.

North Carolina.— Yates *v.* Yates, 76 N. C. 142.

Oregon.— Oregon R., etc., Co. *v.* Hertzberg, 26 Oreg. 216, 37 Pac. 1019.

Texas.— House *v.* Reavis, 89 Tex. 626, 35 S. W. 1063.

Vermont.— Austin *v.* Bailey, 37 Vt. 219, 86 Am. Dec. 703.

United States.— Haws *v.* Victoria Copper Min. Co., 160 U. S. 303, 16 S. Ct. 282, 40 L. ed. 436; Sabariego *v.* Maverick, 124 U. S. 261, 8 S. Ct. 461, 31 L. ed. 430.

See also *supra*, II, C, 1, c.

51. Russell *v.* Irwins, 38 Ala. 44; Goodwin *v.* Markwell, 37 Fla. 464, 19 So. 885; Currier *v.* Gale, 9 Allen (Mass.) 522; Waite *v.* First German Evangelical Presb. Church, 8 Ohio S. & C. Pl. Dec. 158, 6 Ohio N. P. 434.

Possession gives right against everyone except the person legally entitled. Tucker *v.* Phillips, 2 Metc. (Ky.) 416.

Possession with the consent of the holders of legal title is better title than that of one

who shows neither a good legal [52] or a paper title,[53] nor a right of entry,[54] and is without title or claim;[55] whose title or claim is invalid,[56] was obtained by fraud,[57] or has been forfeited;[58] who sets up no lawful right or title[59] or evidence of ownership;[60] or who relies solely upon a later possession,[61] a possessory interest only,[62] upon a mere entry without lawful right or title,[63] or upon a mere naked possession,[64] showing no better right in himself than in plaintiff, being a mere intruder, trespasser,[65]

claiming under a tax-sale. Rockland, etc., Coal, etc., Co. *v.* McCalmont, 72 Pa. St. 221.

Prior possession without legal title is insufficient against a better title. McGuire *v.* Price, 132 Pa. St. 213, 19 Atl. 421.

52. Schultz *v.* Arnot, 33 Mo. 172.

53. Strange *v.* King, 84 Ala. 212, 4 So. 600.

54. Tapscott *v.* Cobbs, 11 Gratt. (Va.) 172.

55. Pierce *v.* Stuart, 45 Cal. 280; Burt *v.* Florida Southern R. Co., 43 Fla. 339, 31 So. 265; Seymour *v.* Creswell, 18 Fla. 29; Manspeaker *v.* Pipher, 5 Kan. App. 879, 48 Pac. 868 [*affirmed* in 58 Kan. 788, 51 Pac. 229]; Bains *v.* Bullock, 129 Mo. 117, 31 S. W. 342; Breck *v.* Young, 11 N. H. 485.

56. *Alabama.*—McCall *v.* Doe, 17 Ala. 533.

Maryland.— Hutchins *v.* Erickson, 1 Harr. & M. 339.

Mississippi.— Dingey *v.* Paxton, 60 Miss. 1038.

New York.— Carleton *v.* Darcy, 46 N. Y. Super. Ct. 484; Hopkins *v.* Mason, 42 How. Pr. 115.

Vermont.— Russell *v.* Brooks, 27 Vt. 640.

See 17 Cent. Dig. tit. "Ejectment," § 30 *et seq.*

57. Niles *v.* Anderson, 5 How. (Miss.) 365.

58. Coleman *v.* Stanacke, 15 S. D. 242, 88 N. W. 107.

59. Bradshaw *v.* Ashley, 14 App. Cas. (D. C.) 485; Warner *v.* Page, 4 Vt. 291, 24 Am. Dec. 607.

60. Nimmo *v.* Jackman, 21 Ill. App. 607.

61. Strange *v.* King, 84 Ala. 212, 4 So. 600; Tennessee, etc., R. Co. *v.* East Alabama R. Co., 75 Ala. 516, 51 Am. Rep. 475; Potter *v.* Knowles, 5 Cal. 87; Jackson *v.* Boston, etc., R. Co., 1 Cush. (Mass.) 575; Jackson *v.* Walker, 7 Cow. (N. Y.) 637.

62. Hanson *v.* Stinehoff, 139 Cal. 169, 72 Pac. 913.

63. Southmayd *v.* Henley, 45 Cal. 101; Watkins *v.* Nugen, 118 Ga. 372, 45 S. E. 262; Nolan *v.* Pelham, 77 Ga. 262, 2 S. E. 639; Johnson *v.* Lancaster, 5 Ga. 39.

64. Jackson *v.* Haisley, 35 Fla. 587, 17 So. 631; Dale *v.* Faivre, 43 Mo. 556.

65. *Alabama.*— Barrett *v.* Kelly, 131 Ala. 378, 30 So. 824; Bowling *v.* Mobile, etc., R. Co., 128 Ala. 550, 29 So. 584; Louisville, etc., R. Co. *v.* Philyaw, 88 Ala. 264, 6 So. 837; Ware *v.* Dewberry, 84 Ala. 568, 4 So. 404; Bradshaw *v.* Emory, 65 Ala. 208; Clarke *v.* Clarke, 51 Ala. 498; Hallett *v.* Eslava, 2 Stew. 115; Rochon *v.* Lecatt, 1 Stew. 609.

California.— Southmayd *v.* Henley, 45 Cal. 101; Wolfskill *v.* Malajowitch, 39 Cal. 276; Bequette *v.* Caulfield, 4 Cal. 278, 60 Am. Dec. 615; Hutchinson *v.* Perley, 4 Cal. 33, 60 Am. Dec. 578.

Connecticut.— Law *v.* Wilson, 2 Root 102; Martin *v.* Sterling, 1 Root 210.

District of Columbia.—Bradshaw *v.* Ashley, 14 App. Cas. 485.

Florida.— Jackson *v.* Haisley, 35 Fla. 587, 17 So. 638.

Georgia.— Horton *v.* Murden, 117 Ga. 72, 43 S. E. 786; Johnson *v.* Jones, 68 Ga. 825; Jones *v.* Easley, 53 Ga. 454; Buckner *v.* Chambliss, 30 Ga. 652; Jones *v.* Nunn, 12 Ga. 469; Johnson *v.* Lancaster, 5 Ga. 39.

Illinois.— Doe *v.* Herbert, 1 Ill. 354, 12 Am. Dec. 192.

Indiana.— Doe *v.* West, 1 Blackf. 133.

Kansas.— Redden *v.* Tefft, 48 Kan. 302, 29 Pac. 157; Mooney *v.* Olsen, 21 Kan. 691.

Kentucky.—Winn *v.* Wilhite, 5 J. J. Marsh. 521; Doe *v.* Million, 4 J. J. Marsh. 395; Fowke *v.* Darnall, 5 Litt. 316; Campbell *v.* Roberts, 3 A. K. Marsh. 623; Asher *v.* McCarty, 2 Ky. L. Rep. 218.

Michigan.— Shaw *v.* Hill, 79 Mich. 86, 44 N. W. 422.

Minnesota.— Sherin *v.* Brackett, 36 Minn. 152, 30 N. W. 551.

Mississippi.— Trager *v.* Shepherd, (1895) 18 So. 122; Dingey *v.* Paxton, 60 Miss. 1038; Lum *v.* Reed, 53 Miss. 73; Hicks *v.* Steigleman, 49 Miss. 377.

Missouri.— Hall *v.* Gallemore, 138 Mo. 638, 40 S. W. 891.

Nebraska.— Robinson *v.* Gantt, (1901) 95 N. W. 506.

New York.— Clute *v.* Voris, 31 Barb. 511; Immaculate Virgin Mission *v.* Cronin, 14 Misc. 372, 36 N. Y. Suppl. 77; Jackson *v.* Denn, 5 Cow. 200; Jackson *v.* Hazen, 2 Johns. 22.

Ohio.—Newnam *v.* Cincinnati, 18 Ohio 323; Ludlow *v.* Barr, 3 Ohio 388; Holt *v.* Hemphill, 3 Ohio 232.

Pennsylvania.— Kline *v.* Johnston, 24 Pa. St. 72; Shumway *v.* Phillips, 22 Pa. St. 151; Woods *v.* Lane, 2 Serg. & R. 53; Ackerman *v.* Nachbar, 3 Kulp 188; Wentworth *v.* Mullen, 2 Chest. Co. Rep. 544.

Vermont.— Reed *v.* Shepley, 6 Vt. 602; Ellithorp *v.* Dewing, 1 D. Chipm. 141.

Wisconsin.— Bates *v.* Campbell, 25 Wis. 613.

United States.— Campbell *v.* Silver Bow Basin Min. Co., 49 Fed. 47, 1 C. C. A. 155; American Mortg. Co. *v.* Hopper, 48 Fed. 47; Wilson *v.* Fine, 38 Fed. 789; Mickey *v.* Stratton, 17 Fed. Cas. No. 9,530, 5 Sawy. 475.

See 17 Cent. Dig. tit. "Ejectment," § 30 *et seq.*

But see Doe *v.* Howell, 1 Houst. (Del.) 178; Stockley *v.* Cissna, 119 Fed. 812, 56 C. C. A. 324.

or wrong-doer;[66] especially so when he has taken possession by force and violence,[67] tortiously and without authority,[68] or where he is estopped from disputing plaintiff's title.[69]

(II) *When Plaintiff Within Rule*—(A) *In General.* Although it is decided that there can be no recovery on possessory rights alone,[70] in the absence of a sufficient adverse possession,[71] and that something more than a mere naked prior possession is necessary as a basis for ejectment,[72] still as has been stated[73] possession is in general *prima facie* evidence of title,[74] and plaintiff may recover, although he shows no paper title;[75] but where he has failed to show a paper title he cannot recover unless he shows a possession anterior in date to the possession of defendant,[76] even if the latter be regarded as a mere naked trespasser.[77]

(B) *Character of Plaintiff's Possession*—(1) What Is Generally Sufficient. To entitle plaintiff to recover he must have been in peaceable[78] and actual[79]

Where the preëmption claimant is mere intruder the rule applies. Fletcher *v.* Mower, 56 Cal. 421.

66. Zilmer *v.* Gerichten, 111 Cal. 73, 43 Pac. 408; Wilson *v.* Palmer, 18 Tex. 592.

67. Haws *v.* Victoria Copper Min. Co., 160 U. S. 303, 16 S. Ct. 282, 40 L. ed. 436.

68. Tucker *v.* Phillips, 2 Metc. (Ky.) 416.

69. Payne *v.* Crawford, 102 Ala. 387, 14 So. 854; Ware *v.* Dewberry, 84 Ala. 568, 4 So. 404; Clarke *v.* Clarke, 51 Ala. 498; Spencer *v.* Tobey, 22 Barb. (N. Y.) 260; Mickey *v.* Stratton, 17 Fed. Cas. No. 9,530, 5 Sawy. 475.

70. Cahill *v.* Cahill, 75 Conn. 522, 54 Atl. 201, 732, 60 L. R. A. 706; Kitteringham *v.* Blair Town Lot, etc., Co., 66 Iowa 280, 23 N. W. 668; Breeding *v.* Taylor, 13 B. Mon. (Ky.) 477; Stockley *v.* Cissna, 119 Fed. 812, 56 C. C. A. 324.

A civil possession or possession in right will not of itself suffice in all cases. Ellis *v.* Prevost, 19 La. 251.

71. Breeding *v.* Taylor, 13 B. Mon. (Ky.) 477.

72. Alexander *v.* Campbell, 74 Mo. 142.

Where both sides show color of title plaintiff cannot recover on bare possession. Fowke *v.* Darnall, 5 Litt. (Ky.) 316.

73. See *supra*, II, C, 4, a, (I).

74. Plume *v.* Seward, 4 Cal. 94, 60 Am. Dec. 599; Hicks *v.* Davis, 4 Cal. 67; Hutchinson *v.* Perley, 4 Cal. 33, 60 Am. Dec. 578; Robinoe *v.* Doe, 6 Blackf. (Ind.) 85; Dale *v.* Faivre, 43 Mo. 556; Spencer *v.* Tobey, 22 Barb. (N. Y.) 260.

Possession is evidence of seizin in fee and sufficient. Keane *v.* Cannovan, 21 Cal. 291, 82 Am. Dec. 738.

75. Strange *v.* King, 84 Ala. 212, 4 So. 600. See also Den *v.* Morris, 7 N. J. L. 6, 11 Am. Dec. 508.

76. Stevens *v.* Quirk, 60 Cal. 161; Page *v.* O'Brien, 36 Cal. 559; Polack *v.* McGrath, 32 Cal. 15; Patterson *v.* Litton, 23 La. Ann. 274; Lynch *v.* Lawson, 8 Nev. 162.

77. Patterson *v.* Litton, 23 La. Ann. 274.

78. *Alabama.*— Payne *v.* Crawford, 102 Ala. 387, 14 So. 854; Beard *v.* Ryan, 78 Ala. 37; Dothard *v.* Denson, 72 Ala. 541; Bradshaw *v.* Emory, 65 Ala. 208; Clarke *v.* Clarke, 51 Ala. 498; Smoot *v.* Lecatt, 1 Stew. 590.

California.— Smith *v.* Hicks, 139 Cal. 217, 73 Pac. 144.

District of Columbia.— Bradshaw *v.* Ashley, 14 App. Cas. 485.

Florida.— Seymour *v.* Creswell, 18 Fla. 29.

Kansas.— Mooney *v.* Olsen, 21 Kan. 691.

Missouri.— Hall *v.* Gullemore, 138 Mo. 638, 40 S. W. 891.

New York.— Jackson *v.* Denn, 5 Cow. 200.

Pennsylvania.— Hoey *v.* Furman, 1 Pa. St. 295, 44 Am. Dec. 129; Ackerman *v.* Nachbar, 3 Kulp 188.

Virginia.— Tapscott *v.* Cobbs, 11 Gratt. 172.

United States.— Mickey *v.* Stratton, 17 Fed. Cas. No. 9,530, 5 Sawy. 475.

See 17 Cent. Dig. tit. "Ejectment," § 30 *et seq.*

79. *Alabama.*— Bowling *v.* Mobile, etc., R. Co., 128 Ala. 550, 29 So. 584; Louisville, etc., R. Co. *v.* Philyaw, 88 Ala. 264, 6 So. 837; Ware *v.* Dewberry, 84 Ala. 568, 4 So. 404.

Michigan.— Shaw *v.* Hill, 79 Mich. 86, 44 N. W. 422.

Missouri.— Bains *v.* Bullock, 129 Mo. 117, 31 S. W. 342.

Nebraska.— Robinson *v.* Gantt, (1901) 95 N. W. 506.

Wisconsin.— Elofrson *v.* Lindsay, 90 Wis. 203, 63 N. W. 89.

United States.— American Mortg. Co. *v.* Hopper, 48 Fed. 47.

See 17 Cent. Dig. tit. "Ejectment," § 30 *et seq.*

Actual or constructive possession from purchase at a treasurer's sale and subsequent payment of taxes entitles plaintiff to recover. Foster *v.* McDivit, 9 Watts (Pa.) 341.

Against one who enters for the government use and occupation are a sufficient legal estate in Alaska, until legislation is had to the contrary. Miller *v.* Brackett, 47 Fed. 547.

Possession is acquired by the actual and corporeal detention of the property; this is natural, or possession in fact. Ellis *v.* Prevost, 19 La. 251.

When actual possession with consent of all parties is sufficient see Wilson *v.* Triumph Consol. Min. Co., 19 Utah 66, 56 Pac. 300, 75 Am. St. Rep. 718.

or constructive[80] possession, holding under claim or color of title,[81] or exercising acts of ownership.[82] Plaintiff's possession must not, however, have been unlawful[83] or tortious.[84]

(2) WHAT IS GENERALLY NECESSARY. The possession must in order to justify a recovery be of such a character that a presumption of title follows.[85] Although ejectment may be maintained by one who has never been in actual possession, since an actual entry is not a prerequisite to a recovery,[86] and neither

80. Dodge *v.* Yates, 76 Cal. 251, 18 Pac. 323; McMasters *v.* Torsen, 5 Ida. 536, 51 Pac. 100; Clason *v.* Baldwin, 129 N. Y. 183, 29 N. E. 226, 21 N. Y. Civ. Proc. 383 [*modifying* and *affirming* 13 N. Y. Suppl. 681, 20 N. Y. Civ. Proc. 291].

Constructive possession under title see Gird *v.* Ray, 17 Cal. 352.

No constructive possession by conflicting claimants to the same land can exist in the absence of actual possession. If there be any constructive possession it must be in the holder of the best title, unless he has renounced it. Jones *v.* McCauley, 2 Duv. (Ky.) 14.

Trustees of a church can have only constructive possession of the church edifice. Lucas *v.* Johnson, 8 Barb. (N. Y.) 244.

81. *Alabama.*— Bowling *v.* Mobile, etc., R. Co., 128 Ala. 550, 29 So. 584; Louisville, etc., R. Co. *v.* Philyaw, 88 Ala. 264, 6 So. 837; Ware *v.* Dewberry, 84 Ala. 568, 4 So. 404; Doe *v.* Clayton, 73 Ala. 359; Anderson *v.* Melear, 56 Ala. 621; Russell *v.* Irwin, 38 Ala. 44.

California.— Smith *v.* Hicks, 139 Cal. 217, 73 Pac. 144; Stephens *v.* Hambleton, (1896) 47 Pac. 51; McKee *v.* Greene, 31 Cal. 418; Winans *v.* Christy, 4 Cal. 70, 60 Am. Dec. 597.

Colorado.— Milsap *v.* Stone, 2 Colo. 137.

Kansas.— Douglass *v.* Ruffin, 38 Kan. 530, 16 Pac. 783; Manspeaker *v.* Pipher, (1897) 48 Pac. 868 [*affirmed* in 58 Kan. 788, 51 Pac. 229].

Michigan.— Shaw *v.* Hill, 79 Mich. 86, 44 N. W. 422; Covert *v.* Morrison, 49 Mich. 133, 13 N. W. 390.

Minnesota.— Sherwood *v.* St. Paul, etc., R. Co., 21 Minn. 127.

Missouri.— Hall *v.* Gallemore, 138 Mo. 638, 40 S. W. 891; Dale *v.* Faivre, 43 Mo. 556.

New York.— Immaculate Virgin Mission *v.* Cronin, 14 Misc. 372, 36 N. Y. Suppl. 77; Jackson *v.* Walker, 7 Cow. 637.

North Carolina.— Gilchrist *v.* Middleton, 107 N. C. 663, 12 S. E. 85.

Vermont.— Warner *v.* Page, 4 Vt. 291, 24 Am. Dec. 607.

Virginia.—Flanagan *v.* Grimmet, 10 Gratt. 421.

United States.— Bradshaw *v.* Ashley, 180 U. S. 59, 21 S. Ct. 297, 45 L. ed. 423 [*affirming* 14 App. Cas. (D. C.) 485]; Sabareigo *v.* Maverick, 124 U. S. 261, 8 S. Ct. 461, 31 L. ed. 430.

See 17 Cent. Dig. tit. "Ejectment," § 30 *et seq.*

Although not justified by a claim of right title by conveyance and prior possession prevails, in the absence of a better title in defendant. Dunham *v.* Townshend, 118 N. Y. 281, 23 N. E. 367 [*affirming* 43 Hun 580].

Entry under deed is seizin under color of title. Breck *v.* Young, 11 N. H. 485.

Even though plaintiff entered without right he may recover. Foster *v.* McDivit, 9 Watts (Pa.) 341.

Possession must be sufficient to support the title. Russell *v.* Mark, 3 Metc. (Ky.) 37.

Possession under void deed will prevail when coupled with color of title, even over defendant's showing of valid title out of state. Gilchrist *v.* Middleton, 107 N. C. 663, 12 S. E. 85. See further as to validity of plaintiff's title Reay *v.* Butler, 95 Cal. 206, 30 Pac. 208; McFarland *v.* Culbertson, 2 Nev. 280; Deemer *v.* Falkenburg, 4 N. M. 57, 12 Pac. 717.

Rule applies to one of several cotenants. Benefield *v.* Albert, 132 Ill. 665, 24 N. E. 634.

82. Anderson *v.* Melear, 56 Ala. 621; McCall *v.* Doe, 17 Ala. 533; Hanson *v.* Stinehoff, 139 Cal. 169, 72 Pac. 913.

Possession and acts of ownership may be proven to show an actual legal title or conveyance in fact. Cahill *v.* Cahill, 75 Conn. 522, 54 Atl. 201, 732, 60 L. R. A. 706.

The intent with which the alleged acts were done, to be gathered from the acts themselves and the surrounding circumstances, may be material. Hutton *v.* Schumaker, 21 Cal. 453.

Intention to possess preserves civil possession after natural or corporeal is abandoned, unless usurped by another during the time required by law, or unless there is no possession for ten years. Handlin *v.* H. Weston Lumber Co., 47 La. Ann. 401, 16 So. 955. And see Ellis *v.* Prevost, 19 La. 251.

83. Moring *v.* Ables, 62 Miss. 263, 52 Am. Rep. 186.

84. Parmelee *v.* Oswego, etc., R. Co., 7 Barb. (N. Y.) 599 [*affirmed* in 6 N. Y. 74].

85. Hensler *v.* Hartman, 16 Abb. N. Cas. (N. Y.) 176 note.

86. *California.*—Soto *v.* Kroder, 19 Cal. 87.

Kentucky.— Miller *v.* Shackleford, 3 Dana 289; Innes *v.* Crawford, 2 Bibb 412.

Louisiana.— White *v.* Sheriff, 32 La. Ann. 130.

Maryland.— Matthews *v.* Ward, 10 Gill & J. 443; Mockbee *v.* Clagett, 2 Harr. & M. 1.

Michigan.— Crane *v.* Reeder, 21 Mich. 24, 4 Am. Rep. 430.

New Jersey.— Bouvier *v.* Baltimore, etc., R. Co., 65 N. J. L. 313, 47 Atl. 772, 67 N. J. L. 281, 51 Atl. 781, 60 L. R. A. 750; Cornelius

actual[87] nor personal residence[88] is necessary; yet in the absence of a sufficient constructive possession[89] it is decided that in cases depending upon prior possession as well as in those based upon adverse possession there must be an actual possession,[90] a *bona fide* occupation or *possessio pedis*[91] or subjection to the will and control of the possessor,[92] an exclusive dominion over the land,[93] and distinct

v. Ivins, 26 N. J. L. 376; Den *v.* Robinson, 5 N. J. L. 689.

New York.— Deering *v.* Riley, 38 N. Y. App. Div. 164, 56 N. Y. Suppl. 704; Tyler *v.* Heidorn, 46 Barb. 439; Jackson *v.* Crysler, 1 Johns. Cas. 125.

Pennsylvania.— Carlisle *v.* Stitler, 1 Penr. & W. 6. But see Watson *v.* Hue, 9 Pa. Dist. 519.

South Carolina.— Rugge *v.* Ellis, 1 Bay 107.

Vermont.— Rood *v.* Willard, Brayt. 67.

Virginia.— Clay *v.* White, 1 Munf. 162.

United States.— Wilkes *v.* Elliot, 29 Fed. Cas. No. 17,660, 5 Cranch C. C. 611.

See 17 Cent. Dig. tit. "Ejectment," § 30 *et seq.*

Although donor was never in possession of, and had no title to the property, plaintiff's claim of ownership may be supported by proof of a parol gift and entry thereunder, even though entry was not made until after the donor's death. Ellis *v.* Dasher, 101 Ga. 5, 29 S. E. 268.

87. Van Auken *v.* Monroe, 38 Mich. 725. See Dickson *v.* Marks, 10 La. Ann. 518, holding that the corporeal possession of land is a residence on, or occupation, or cultivation of the same, and the case was evidently that of a vendee of public land. *Contra*, see Pendo *v.* Beakey, 15 S. D. 344, 89 N. W. 655.

Where there is no residence for four months after location of a claim there is no protection under Wood Dig. 526, which was intended for the benefit of actual settlers. Gird *v.* Ray, 17 Cal. 352.

88. Dodge *v.* Yates, 76 Cal. 251, 18 Pac. 323, a case of ejectment for public lands, based on prior possession.

"Occupancy" and "residence" are not synonymous terms. An occupancy may exist without a residence. Chiles *v.* Jones, 4 Dana (Ky.) 479.

Residence is unnecessary where entry is made on unimproved land, and it is cleared and cultivated and possession held for the period of limitation. Hoey *v.* Furman, 1 Pa. St. 295, 44 Am. Dec. 129.

Where plaintiff takes possession and builds a house and puts a tenant therein, it is sufficient against one with no better title. Strange *v.* King, 84 Ala. 212, 4 So. 600.

89. Lane *v.* Gould, 10 Barb. (N. Y.) 254; Young *v.* Irwin, 3 N. C. 9.

That constructive possession is sufficient see *supra*, II, C, 4, a, (II), (B).

90. Chessen *v.* Harrelson, 119 Ala. 435, 24 So. 716; Searles *v.* Costillo, 12 La. Ann. 203; Dawson *v.* Headen, 4 La. Ann. 515; Spurlock *v.* Dougherty, 81 Mo. 171; Kraft *v.* Carlow, 9 Nev. 20.

"Actual possession" construed in Pendo *v.* Beakey, 15 S. D. 344, 89 N. W. 655 [*citing* Courtney *v.* Turner, 12 Nev. 345; Thompson *v.* Burhans, 79 N. Y. 93].

Actual ouster need not be shown. Sharp *v.* Ingraham, 4 Hill (N. Y.) 116.

Civil possession must have been preceded by natural possession, at some time, either in plaintiff or his authors (Searles *v.* Costillo, 12 La. Ann. 203); and a previous actual corporeal possession of the author of the title will inure to the benefit of plaintiff (Taylor *v.* Tille, 45 La. Ann. 124, 12 So. 118).

Disseizin is not essential under Colo. Code, § 248. Brown *v.* State, 5 Colo. 496.

Mortgagee cannot recover, he never having been in possession. Rountree *v.* Denson, 59 Wis. 522, 18 N. W. 518.

Peaceable possession prior to bringing suit and disturbance thereof by illegal acts of defendant must be shown in possessory action. Deuchatell *v.* Robinson, 24 La. Ann. 176.

That actual possession and ouster are necessary see State University *v.* Charlebois, (Ariz. 1894) 36 Pac. 32 (where the title to the land was in the United States and the contest was over the right of possession); McMasters *v.* Torsen, 5 Ida. 536, 51 Pac. 100; Lykens *v.* Whelan, 15 Pa. St. 483.

Unless one has been evicted by force, fraud, or artifice, a party having no title could not maintain a possessory action by the civil law; but if so evicted, he was entitled to possession without showing title. Sufiol *v.* Hepburn, 1 Cal. 254.

Wherein "does the actual possession required in the case of prior possession differ, if at all, from the actual possession demanded in adverse possession? We see no ground for drawing any distinction, and think none exists." Pendo *v.* Beakey, 15 S. D. 344, 350, 89 N. W. 655.

Where plaintiff has no prior possession to aid him, he must show title in himself, even against one in possession without title, unless defendant entered under him. Perry *v.* Whipple, 38 Vt. 278.

Where plaintiff or his ancestor or any one in his behalf was never in possession, and it had been for twelve years or more in possession of defendants under claim of title, no recovery can be had by plaintiff. Texas, etc., R. Co. *v.* Smith, 91 Fed. 483, 33 C. C. A. 648.

91. Murphy *v.* Wallingford, 6 Cal. 648 (except on compliance with the statute); Plume *v.* Seward, 4 Cal. 94, 60 Am. Dec. 599; Kraft *v.* Carlow, 9 Nev. 20. See also Seymour *v.* Creswell, 18 Fla. 29, holding that a prior possession must be actual as against a squatter or intruder.

92. Plume *v.* Seward, 4 Cal. 94, 60 Am. Dec. 599; Courtney *v.* Turner, 12 Nev. 345.

93. Page *v.* O'Brien, 36 Cal. 559.

acts[94] of ownership.[95] Again possession should not be based upon a mere assertion of title;[96] upon a mere entry without color of title[97] and the exercise of casual acts of ownership;[98] or upon the making of a survey and marking the boundaries,[99] unless in compliance with a statute,[1] or unless there are other acts done in conjunction therewith.[2] Paying taxes, however, under claim of title may constitute a sufficient possession.[3]

(3) CONTINUOUS POSSESSION AND ABANDONMENT. Unless plaintiff's right of entry is preserved by constructive possession,[4] his prior possession should be continuous to the time of ouster,[5] or at least not abandoned,[6] as prior possession may be lost by abandonment.[7] But to prevent recovery on prior possession alone by abandonment the abandonment must have been without any intention to resume; and if there is *animus revertendi*[8] exercised within a reasonable time plaintiff may recover.[9]

(4) DURATION OF POSSESSION. Possession need not necessarily be held by plaintiff for the time and in the manner required for a prescriptive or adverse title.[10]

94. Moore *v.* Pontalba, 13 La. 571.

95. Doe *v.* Clayton, 73 Ala. 359; Eakin *v.* Brewer, 60 Ala. 579.

96. Plume *v.* Seward, 4 Cal. 94, 60 Am. Dec. 599.

97. Murphy *v.* Wallingford, 6 Cal. 648.

But as to claim or color of title see *supra*, II, C, 4, a, (II), (B).

98. Page *v.* O'Brien, 36 Cal. 559; Plume *v.* Seward, 4 Cal. 94, 60 Am. Dec. 599; Kraft *v.* Carlow, 9 Nev. 20.

99. Murphy *v.* Wallingford, 6 Cal. 648; Kraft *v.* Carlow, 9 Nev. 20 (survey was made but nothing was done to indicate boundaries); Cobleigh *v.* Young, 15 N. H. 493.

1. Bird *v.* Dennison, 7 Cal. 297.

Clearly marking boundaries of timber land is sufficient. McFarland *v.* Culbertson, 2 Nev. 280.

2. Marking boundaries and bringing lumber on land to build is sufficient. Immaculate Virgin Mission *v.* Cronin, 14 Misc. (N. Y.) 372, 36 N. Y. Suppl. 77.

3. Redden *v.* Tefft, 48 Kan. 302, 29 Pac. 157. See also Christy *v.* Richolson, 48 Kan. 177, 29 Pac. 398.

Payment of taxes is not a sine qua non to a right to recover, unless such payment is one of the elements of plaintiff's title. Holly River Coal Co. *v.* Howell, 36 W. Va. 489, 15 S. E. 214. See Plume *v.* Seward, 4 Cal. 94, 60 Am. Dec. 599.

Where deeds fail to show grantor's possession payment of taxes does not as matter of law show possession of plaintiff. Florida Southern R. Co. *v.* Loring, 51 Fed. 932, 2 C. C. A. 546.

4. Young *v.* Irwin, 3 N. C. 9.

5. Spurlock *v.* Dougherty, 81 Mo. 171; Pendo *v.* Beakey, 15 S. D. 344, 89 N. W. 655; Wilson *v.* Palmer, 18 Tex. 592; Sabariego *v.* Maverick, 124 U. S. 261, 8 S. Ct. 461, 31 L. ed. 430. See also Pierce *v.* Stuart, 45 Cal. 280; Thompson *v.* Burhans, 79 N. Y. 93 [*reversing* 15 Hun 580, and *disapproving* Woods *v.* Banks, 14 N. H. 101]. See also *infra*, III, E.

Forfeiture of title does not arise from the fact that the owner of land has not had possession for more than twenty years, in the absence of any adverse possession or claim by another. Bernstein *v.* Humes, 78 Ala. 134. See also Van Cleve *v.* Rook, 40 N. J. L. 25.

It need not show that possession continued to time of, and was disturbed by, trespass. Louisville, etc., R. Co. *v.* Philyaw, 88 Ala. 264, 6 So. 837.

That actual possession at the time of disturbance is necessary see Taylor *v.* Telle, 45 La. Ann. 124, 12 So. 118; Millard *v.* Richard, 13 La. Ann. 572; Dickson *v.* Marks, 10 La. Ann. 518; Davis *v.* Dale, 2 La. Ann. 205; Code Pr. art. 47.

6. Wilson *v.* Palmer, 18 Tex. 592.

7. Daubeniss *v.* White, (Cal. 1892) 31 Pac. 360 (stating rule, but also holding that where after contest for a year one ceases to contend against a superior force maintaining an armed resistance, there is no abandonment); Bird *v.* Lisbros, 9 Cal. 1, 70 Am. Dec. 617; Pankau *v.* Larzelere, (Kan. App. 1898) 52 Pac. 906; Onderdonk *v.* Lord, Lalor (N. Y.) 129; Jackson *v.* Walker, 7 Cow. (N. Y.) 637; Austin *v.* Bailey, 37 Vt. 219, 86 Am. Dec. 703; Warner *v.* Page, 4 Vt. 291, 24 Am. Dec. 607.

Acquiescence or omission to object may constitute an abandonment. Whitney *v.* Wright, 15 Wend. (N. Y.) 171; Jackson *v.* Welden, 3 Johns (N. Y.) 283.

Want of due diligence is distinguished from abandonment in Holtzapple *v.* Phillibaum, 12 Fed. Cas. No. 6,648, 4 Wash. 356.

On abandonment original owners or their grantees need not take actual possession or make entry. Deering *v.* Riley, 38 N. Y. App. Div. 164, 56 N. Y. Suppl. 704.

8. Jones *v.* Nunn, 12 Ga. 469; Hicks *v.* Steigleman, 49 Miss. 377; Sabariego *v.* Maverick, 124 U. S. 261, 8 S. Ct. 461, 31 L. ed. 430.

Question is for the jury. Wilson *v.* Glenn, 68 Ala. 383.

9. Whitney *v.* Wright, 15 Wend. (N. Y.) 171.

10. *Alabama.*— Payne *v.* Crawford, 102 Ala. 387, 14 So. 854; Beard *v.* Ryan, 78 Ala.

b. Possession of Vacant or Unimproved Lands. The holder of the legal title to vacant land is deemed to be in possession thereof,[11] and one who enters upon such land, intending to acquire title under the laws of the state, may recover against another who wrongfully turns him out.[12] Again in case of unimproved lands a plaintiff without paper title does not by casual acts of ownership show such a peaceable and actual possession as to bring himself within the rule that color of title alone is sufficient against mere intruders.[13]

c. Use, Inclosure, and Improvements. Possession is evidenced by various things necessary to the beneficial use of the property, and what particular things are *indicia* thereof varies under different decisions according to locality and circumstances.[14] Whether improvements, such as fencing and inclosure of land, are necessary to constitute possession depends largely if not entirely upon the character of the land.[15] Thus, while it has been determined that the fencing and the cultivation of the land merely,[16] or the making of a few improvements thereon is not sufficient,[17] yet an inclosure, or fencing and occupation,[18] culti-

37; Bradshaw *v.* Emory, 65 Ala. 208; Eakin *v.* Brewer, 60 Ala. 579; Smoot *v.* Lecatt, 1 Stew. 590.

California.—Stephens *v.* Hambleton, (1896) 47 Pac. 51; Leonard *v.* Flynn, 89 Cal. 535, 26 Pac. 1097, 23 Am. St. Rep. 500.

Florida.— Jackson *v.* Haisley, 35 Fla. 587, 17 So. 631.

Illinois.— Bowman *v.* Wettig, 39 Ill. 416; Doe *v.* Herbert, 1 Ill. 354, 12 Am. Dec. 192.

Massachusetts.— Currier *v.* Gale, 9 Allen 522.

Missouri.—Hall *v.* Gallemore, 138 Mo. 638, 40 S. W. 891; Crockett *v.* Morrison, 11 Mo. 3.

New Jersey.— Den *v.* Morris, 7 N. J. L. 6, 11 Am. Dec. 508. And see Leport *v.* Todd, 32 N. J. L. 124; Penton *v.* Sinnickson, 9 N. J. L. 149.

New York.— Smith *v.* Lorillard, 10 Johns. 338; Jackson *v.* Hazen, 2 Johns. 22. See Dominy *v.* Miller, 33 Barb. 386; Jackson *v.* Harder, 4 Johns. 202, 4 Am. Dec. 262.

Pennsylvania.— Hoey *v.* Furman, 1 Pa. St. 295, 44 Am. Dec. 129.

Wisconsin.— Elofrson *v.* Lindsay, 90 Wis. 203, 63 N. W. 89.

See 17 Cent. Dig. tit. "Ejectment," § 33.

Possession however short is sufficient. Potter *v.* Knowles, 5 Cal. 87.

Recovery can be had on less period than sufficient to bar a real action. Clarke *v.* Clarke, 51 Ala. 498.

Such a possession as that trespass could be maintained is requisite where plaintiff has held for less than twenty years. Myers *v.* McMillan, 4 Dana (Ky.) 485.

11. Horbach *v.* Boyd, 64 Nebr. 129, 89 N. W. 644. See also *infra*, II, D.

As people of the state cannot be disseized, they as plaintiffs will have title until it is shown to be out of them, and the presumption is that defendant's possession is not adverse, so that their occupancy of vacant and unoccupied lands will be held in subordination to the title. It is sufficient therefore for plaintiffs to show in the first instance that the premises were vacant and unoccupied within the period necessary to constitute an adverse possession against them.

People *v.* Van Rensselaer, 8 Barb. (N. Y.) 189.

12. Kline *v.* Johnston, 24 Pa. St. 72.

Prior possession is insufficient against defendant, who came quietly and peaceably into its possession as vacant land, except plaintiff has held by an uninterrupted adverse possession for the requisite period on the part of his lessors, or those under whom they claim, or unless a right of possession is shown, by the death and seizin of some person under whom they claim in the manner prescribed by law. Moody *v.* McKim, 5 Munf. (Va.) 374.

13. Holloway *v.* Jones, 143 Pa. St. 564, 22 Atl. 710.

14. Courtney *v.* Turner, 12 Nev. 345.

15. Courtney *v.* Turner, 12 Nev. 345; McFarland *v.* Culbertson, 2 Nev. 282.

16. Spurlock *v.* Dougherty, 81 Mo. 171.

17. Kraft *v.* Carlow, 9 Nev. 20.

18. Tidwell *v.* Chiricahua Cattle Co., (Ariz. 1898) 53 Pac. 192 (public lands); Dodge *v.* Yates, 76 Cal. 251, 18 Pac. 323 (public lands); Slaughter *v.* Fowler, 44 Cal. 195 (public lands); Southmayd *v.* Henley, 45 Cal. 101; Page *v.* O'Brien, 36 Cal. 559; Polack *v.* McGrath, 32 Cal. 15; Douglass *v.* Ruffin, 38 Kan. 530, 16 Pac. 783. See Dickson *v.* Marks, 10 La. Ann. 518.

In the case of state lands natural barriers will be sufficient in lieu of an inclosure by fences. Smith *v.* Hicks, 139 Cal. 217, 72 Pac. 144.

Inclosure of part of a public domain withdrawn from settlement, and building a house within the inclosure is sufficient. New Mexico, etc., R. Co. *v.* Crouch, 4 N. M. 141, 13 Pac. 201.

It is for the jury to determine whether artificial barriers are sufficient evidence of ownership, in ejectment for public lands based on prior possession. Dodge *v.* Yates, 76 Cal. 251, 18 Pac. 323.

Plaintiff may avail himself of a barrier which incloses other lands in his possession, but owned by third parties, in addition to and in the same inclosure with the lands in controversy. Smith *v.* Hicks, 139 Cal. 217, 73 Pac. 144.

vation,[19] and making valuable[20] and lasting[21] improvements are sufficient.[22] But the property need not always be cultivated; nor is any particular kind of inclosure[23] or even any inclosure whatever required;[24] but in the case of a town lot inclosure or occupation for some useful purpose is held to be necessary,[25] and this is true in case of a mixed possession.[26] It is also decided that there must be a real substantial inclosure[27] to make out title to lands by adverse possession, where there is no deed or other written instrument,[28] and that actual improvements limit adverse possession.[29]

d. Possession of Part. Subject to certain qualifications[30] actual possession by plaintiff of a part of the land under a claim of title to the whole is sufficient, where the other requisite conditions as to possession exist, to entitle him to recover the entire tract of land in dispute;[31] especially so after the period of

19. Tidwell *v.* Chiricahua Cattle Co., (Ariz. 1898) 53 Pac. 192 (public lands); Hanson *v.* Stinehoff, 139 Cal. 160, 72 Pac. 913 (public land, river-bed). See Dickson *v.* Marks, 10 La. Ann. 518.

20. Eakin *v.* Brewer, 60 Ala. 579.

21. Redden *v.* Tefft, 48 Kan. 302, 29 Pac. 157.

22. Van Auken *v.* Monroe, 38 Mich. 725.

Actual possession may be gained by fencing the land or improving or cultivating it or by building upon it. Thompson *v.* Burhans, 79 N. Y. 93.

Improvements made by a disseizor or trespasser on lands of another gives him no title, unless in case of gross fraud on the part of the real owner. Holtzapple *v.* Phillibaum, 12 Fed. Cas. No. 6,648, 4 Wash. 356.

23. Plume *v.* Seward, 4 Cal. 94, 60 Am. Dec. 599.

That there were no barriers sufficient to turn stock does not prevent recovery. Smith *v.* Hicks, 139 Cal. 217, 73 Pac. 144.

24. Daubenbiss *v.* White, (Cal. 1892) 31 Pac. 360, public lands. *Contra*, see Pendo *v.* Beakey, 15 S. D. 344, 89 N. W. 655.

A defendant in ejectment to recover a piece of woodland adduced evidence of adverse possession for more than twenty years, and the action was discontinued. Subsequently plaintiff in the action from time to time walked in the wood and turned his cattle into it in order to assert his alleged right and to bar the statute of limitations. At length he cut down a tree in the wood, whereupon defendant filed a bill for an injunction. It was held that as the result of the action of ejectment showed defendant to that action to be in possession of the wood he was entitled to the injunction prayed for. Stanford *v.* Hurlstone, L. R. 9 Ch. 116, 30 L. T. Rep. N. S. 140, 22 Wkly. Rep. 422.

25. Pendo *v.* Beakey, 15 S. D. 344, 349, 89 N. W. 655 [*citing* Polack *v.* McGrath, 32 Cal. 15].

Whenever town lots are susceptible of inclosure there must be an actual inclosure to make out a case of adverse possession. Garrett *v.* Belmont Land Co., 94 Tenn. 459, 29 S. W. 726.

26. In case of mixed possession actual inclosure is necessary to defeat the title of the real owner. Armstrong *v.* Risteau, 5 Md. 256, 59 Am. Dec. 115.

27. Mere inclosure of a lot with a brush fence two to three feet high without any steps being taken to subject the property to any use whatever is insufficient to maintain ejectment. Hutton *v.* Schumaker, 21 Cal. 453.

28. Lane *v.* Gould, 10 Barb. (N. Y.) 254; Jackson *v.* Oltz, 8 Wend. (N. Y.) 440.

Possession by inclosure to be adverse must be exclusive, a real and substantial inclosure, an actual occupancy, definite, positive, and notorious, when that as a defense against a legal title and a partial inclosure leaving part of the boundary open is insufficient. Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255.

29. Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255.

30. **Plaintiff can recover for no more** than that for which he shows title. Johnson *v.* Norton, 3 B. Mon. (Ky.) 429.

Where each party is in actual possession under his own title, but neither incloses, cultivates, nor otherwise actually occupies the part included in interfering surveys, the law adjudges the possession to the rightful owner. Sheik *v.* McElroy, 20 Pa. St. 25.

Where the locus in quo is so uncertain that it is impossible to determine whether defendant's possession extends over any part of the land claimed by plaintiff he cannot recover. Morgan *v.* Driggs, 15 La. 451.

31. Bowling *v.* Mobile, etc., R. Co., 128 Ala. 550, 29 So. 584; McKee *v.* Greene, 31 Cal. 418; Bowman *v.* Wettig, 39 Ill. 416; Ridgely *v.* Ogle, 4 Harr. & M. (Md.) 123. See Handlin *v.* H. Weston Lumber Co., 47 La. Ann. 401, 16 So. 955; McElhinney *v.* Kraus, 10 Mo. App. 218; Schall *v.* Miller, 3 Whart. (Pa.) 250.

Actual possession of a part coupled with acts of possession of the remaining portion is a constructive possession of the whole tract in case of public lands. Dodge *v.* Yates, 76 Cal. 251, 18 Pac. 323.

A possessio pedis of part of a tract of land by him who is legally entitled to the entirety carries with it the possession to the extent of his legal rights. Armstrong *v.* Risteau, 5 Md. 256, 59 Am. Dec. 115.

If possession of part does not carry the whole tract or the part in dispute it is insufficient. Thompson *v.* Burhans, 61 N. Y. 52 [*reversing* 61 Barb. 260].

limitations;[32] and in the latter case recovery may be had, even though the plaintiff has not had *possessio pedis* of the particular part occupied by defendant.[33] There are cases, however, holding that recovery should be limited to that portion of which actual possession is taken.[34] But this distinction has been made: If a party does not make his entry under a proper title, his possession is considered adverse only to the portion actually occupied; but if he makes his entry under a conveyance of several adjoining tracts his actual occupancy of a part with a claim of title to the whole will inure as an adverse possession of the entire tract.[35]

e. Possession of Ancestor or Devisor. An heir or devisee is entitled to maintain ejectment, where his ancestor died in possession of the land under a *bona fide* claim of right;[36] and the actual possession and seizin of plaintiff's ancestor at his death casts the land by descent on the heir and gives him a sufficient title.[37]

Occupation of a part marked by distinct boundaries will carry possession of the whole tract. Plume *v.* Seward, 4 Cal. 94, 60 Am. Dec. 599.

Party's possession is not confined to part actually inclosed. Castro *v.* Gill, 5 Cal. 40.

Possession is not sufficient against a person in possession of part of the tract under a deed to the whole. Baldwin *v.* Simpson, 12 Cal. 560.

Visible and exclusive appropriation and use of a tract of land, claiming the whole under color of title, or a deed purporting to convey the whole, is in law an actual possession of the entire tract, except so far as adverse possession may exist. Keith *v.* Keith, 104 Ill. 397.

Where the grantee under a quitclaim enters and improves a part, the possession of the residue continuing in the grantor the possession of the grantor is the possession of the grantee and the latter may maintain ejectment. Jackson *v.* Hubble, 1 Cow. (N. Y.) 613.

Where plaintiff's grantors had had possession of a part and entered into possession of the whole they can recover. McKibben *v.* Newell, 41 Ill. 461.

32. Kerr *v.* Elliott, 61 N. C. 601; Gregg *v.* Tesson, 1 Black (U. S.) 150, 17 L. ed. 74.

33. Smith *v.* Bryan, 44 N. C. 180.

34. Slaughter *v.* Fowler, 44 Cal. 195; Thompson *v.* Burhans, 79 N. Y. 93 [*reversing* 15 Hun 580, and *disapproving* Woods *v.* Banks, 14 N. H. 101]; Davis *v.* Butterbach, 2 Yeates (Pa.) 211. See People *v.* Van Rensselaer, 9 N. Y. 291; Barnhart *v.* Pettit, 22 Pa. St. 135.

By Mexican and common law possession does not extend beyond the bounds of actual occupation, if plaintiff had no color of title. Sufiol *v.* Hepburn, 1 Cal. 254. See Wickliffe *v.* Ensor, 9 B. Mon. (Ky.) 253.

Naked possession as a foundation of an adverse claim cannot be extended beyond the limits of actual occupation. Joy *v.* Stump, 14 Oreg. 361, 12 Pac. 929.

Original division and possession under it controls, when possessed distinctly thereunder for thirty years, even though it is subsequently ascertained that one part had more land than the other. Jackson *v.* Long, 7 Wend. (N. Y.) 170.

Right acquired depending on actual adverse possession extends only to the lands actually occupied and draws to it no constructive possession. Ryan *v.* Kilpatrick, 66 Ala. 332.

35. Dills *v.* Hubbard, 21 Ill. 328.

36. Watkins *v.* Nugen, 118 Ga. 372, 45 S. E. 260; Wolfe *v.* Baxter, 86 Ga. 705, 13 S. E. 18; Bagley *v.* Kennedy, 85 Ga. 703, 11 S. E. 1091; Covert *v.* Morrison, 49 Mich. 133, 13 N. W. 390; Maltonner *v.* Dimmick, 4 Barb. (N. Y.) 566; Ludlow *v.* McBride, 3 Ohio 240. See Enders *v.* Sternbergh, 52 Barb. (N. Y.) 222 [*reversed* in 2 Abb. Dec. 31, 1 Keyes 264, 33 How. Pr. 464].

If a person to whom a particular estate is given by will for his life takes possession and is allowed to keep as part of that estate something not strictly belonging to it he cannot set up a title as gained by adverse possession against the remainder-man. Anstee *v.* Nelms, 1 H. & N. 225, 26 L. J. Exch. 5, 4 Wkly. Rep. 612.

That devisor's grantor was not in possession at the time of the grant is immaterial. Jones *v.* Bland, 112 Pa. St. 176, 2 Atl. 541.

Where the grantor delivers possession to the grantee, the grantor's heirs cannot recover the land against one in possession holding title under said grantee. Miller *v.* Holman, 1 Grant (Pa.) 245.

Where there is adverse possession, an heir at law who has never entered cannot make a conveyance so as to enable his vendee to recover in ejectment. Doe *v.* Grant, 3 U. C. Q. B. O. S. 511.

37. Boynton *v.* Brown, 67 Ga. 396; Spears *v.* Burton, 31 Miss. 547. See also Robinoe *v.* Doe, 6 Blackf. (Ind.) 85.

One claiming title by descent to lands wild and unoccupied when his title accrued may maintain ejectment on the seizin of his ancestor. Wilson *v.* Betts, 4 Den. (N. Y.) 201.

Titles to military bounty lands were vested in the officers and soldiers at the time of their respective deaths, without reference to the period of issuing the letters patent, and such soldier might devise the land to his father, and the same statute as to such titles would vest the lot in his father as heir at law to his son, the patentee, and although an adverse title would invalidate the devise, it would not prevent the descent, and the father, being plaintiff's grantor, plaintiff

So plaintiff as heir and holder of the legal title is entitled to possession.[38] The title of plaintiff's intestate may also be validly derived from an adverse possession,[39] and heirs may enforce an adverse possession under color of title.[40] Again partition proceedings may be such an open declaration of right to possession by agents of the heirs of former owners as to be tantamount to an occupation by the heirs themselves, through whom plaintiff in ejectment claims title.[41] But one should not rely on a title as heir to the remainder, where his title must be traced to the current life-estate.[42] And if the paramount title is left outstanding in the heirs of intestate they alone and not plaintiff can recover, where the latter is not in privity with them.[43]

f. Aggregating Different Possessions and Acts. Possession of one who is legally entitled to the entire land cannot be barred by adding together the different possessions and acts of defendant at long intervals, so as to make out the period requisite for adverse possession.[44]

g. Tacking. The possession of the mortgagor, continuing by the mortgagee's permission, is to be considered the possession of the mortgagee; so that where the latter could recover his deed assigning the mortgage will enable the assignee to recover in ejectment in like manner.[45]

5. Record or Paper Title[46] — a. Chain of Title From Government or Grantor. Where plaintiff seeks to recover on a record or paper title he must show a regular chain of title from the government or from some grantor in possession.[47] Some grantor must be shown to have been in possession claiming title to the premises

was entitled to recover the land in ejectment. Smith *v.* Van Dursen, 15 Johns. (N. Y.) 343.

38. Howard *v.* Murray, 203 Pa. St. 464, 53 Atl. 342.

Although the ancestor has a life-estate only, yet plaintiff may sufficiently perfect his title by deeds from other heirs, including the reversion, so that he maintain ejectment. Harrelson *v.* Sarvis, 39 S. C. 14, 17 S. E. 368.

Right of entry by heir of one without legal capacity is legal and perfect, without any restitution of the consideration paid to the ancestor. Wall *v.* Hill, 1 B. Mon. (Ky.) 290, 36 Am. Dec. 578. The title of the heirs in such case is legal and not equitable, and where the deed of the ancestor is void and not voidable, on the ground of the ancestor's insanity, the heirs take legal title by descent. Brown *v.* Freed, 43 Ind. 253. But that a deed is voidable merely see Nichol *v.* Thomas, 53 Ind. 42; Moran *v.* Moran, 106 Mich. 8, 63 N. W. 989, 58 Am. St. Rep. 462.

39. Baum *v.* Roper, 132 Cal. 42, 64 Pac. 128.

Plaintiff may show that the ancestor under whom he claims title as heir died in possession, and that his possession was continued by a tenant of the heirs until title by adverse possession was perfected, as against a defendant who has no title and is a mere intruder. Beam *v.* Gardiner, 18 Pa. Super. Ct. 245.

40. Hall *v.* Caperton, 87 Ala. 285, 6 So. 388. See Stephens *v.* Arnold, 35 S. W. 437, 18 Ky. L. Rep. 72.

Mere possession for more than twenty years confers upon the possessor a prima facie heritable and devisable interest in fee therein, good against all the world, but the true owner of the soil; and the devisee in fee of such possessor may maintain ejectment against any person whose title is founded merely on subsequent adverse possession for less than twenty years. Asher *v.* Whitlock, L. R. 1 Q. B. 1, 11 Jur. N. S. 925, 35 L. J. Q. B. 17, 13 L. T. Rep. N. S. 254, 14 Wkly. Rep. 26.

Right of heirs to show title by adverse possession is not limited to possession by their intestate. Alexander *v.* Gibbon, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep. 757.

41. Troth *v.* Smith, 68 N. J. L. 36, 52 Atl. 243.

42. Wells *v.* Steckelberg, 52 Nebr. 597, 72 N. W. 865, 66 Am. St. Rep. 529.

43. Oetgen *v.* Ross, 54 Ill. 79.

44. Armstrong *v.* Risteau, 5 Md. 256, 59 Am. Dec. 115. But see Hamilton *v.* Icard, 114 N. C. 532, 19 S. E. 607, where it is held that in order to show a grant from the state it is not necessary to show continuous and unceasing possession, and a break of a few years in the chain of title is not fatal where in the aggregate the actual possession has extended over the statutory period.

45. Chapman *v.* Armistead, 4 Munf. (Va.) 382.

46. **Title by prior or adverse possession** supporting right to recover see *supra*, II, C, 4; and Harrelson *v.* Sarvis, 39 S. C. 14, 17 S. E. 368. See also Plummer *v.* Lane, 4 Harr. & M. (Md.) 72, 1 Am. Dec. 395; Morris *v.* Brooke, 25 Alb. L. J. 90; Hubbard *v.* Godfrey, 100 Tenn. 150, 47 S. W. 81.

47. *Alabama.*— Jackson Lumber Co. *v.* McCreary, 137 Ala. 278, 34 So. 850; Florence Bldg., etc., Assoc. *v.* Schall, 107 Ala. 531, 18 So. 108.

California.— Payne *v.* Treadwell, 5 Cal. 310.

Delaware.— Morris *v.* Brooke, 25 Alb. L. J. 90.

Florida.—Florida Southern R. Co. *v.* Burt,

at or about the time his deed in the chain of title was made.[48] It follows therefore that if the person from whom plaintiff claims never entered on or claimed the land, and no other person in plaintiff's chain of title ever had any title or

36 Fla. 497, 18 So. 581; Dubois *v.* Holmes, 20 Fla. 834.

Georgia.— Fletcher *v.* Perry, 97 Ga. 368, 23 S. E. 824; Jones *v.* Sullivan, 33 Ga. 486.

Indiana.— Peck *v.* Louisville, etc., R. Co., 101 Ind. 366; Brandenburg *v.* Seigfried, 75 Ind. 568; Smith *v.* Bryan, 74 Ind. 515. But see Wood *v.* West, 1 Blackf. 133.

Kentucky.— Bailey *v.* Tygart Valley Iron Co., 10 S. W. 234, 10 Ky. L. Rep. 676.

Maryland.— Mitchell *v.* Mitchell, 1 Md. 44; Wood *v.* Grundy, 3 Harr. & J. 13; Plummer *v.* Lane, 4 Harr. & M. 72, 1 Am. Dec. 395.

Missouri.— Harvey *v.* Anderson, 129 Mo. 206, 31 S. W. 592.

New Jersey.— Troth *v.* Smith, 68 N. J. L. 36, 52 Atl. 243.

New York.— Ames *v.* Harper, 48 Barb. 56.

Pennsylvania.— Bonaffon *v.* Peters, 134 Pa. St. 180, 19 Atl. 499; Muhlenberg *v.* Druckenmiller, 103 Pa. St. 631; Hoak *v.* Long, 10 Serg. & R. 9.

South Carolina.— Geiger *v.* Kaigler, 15 S. C. 262.

Tennessee.— Hubbard *v.* Godfrey, 100 Tenn. 150, 47 S. W. 81; Cannon *v.* Phillips, 2 Sneed 211.

Virginia.— Tabb *v.* Baird, 3 Call 475.

United States.— Florida Southern R. Co. *v.* Loring, 51 Fed. 932, 2 C. C. A. 546.

See 17 Cent. Dig. tit. "Ejectment," § 47.

Sufficient or prima facie title is shown: Where the grantee traces a legal title to a public officer holding it as trustee. Smith *v.* Pipe, 3 Colo. 187. Where a society holding land for a particular use traces through a release and partition from another like society holding under grant from town, which holds under grant from state. Hanchett *v.* King, 4 Day (Conn.) 360. Where there is a joint demise by several heirs. Robinoe *v.* Colwell, 6 Blackf. (Ind.) 85. Where title is traced through an auction sale for the payment of debts, by devisees under a will so directing, to the testator. Keys *v.* Goldsborough, 2 Harr. & J. (Md.) 369. Where title to a lot in a former pueblo in San Francisco is deraigned from that city. Seale *v.* Mitchell, 5 Cal. 401. Where sufficient title in one lessor is shown. Martin *v.* Anderson, 21 Ga. 301. Where in ejectment by heirs of a donor under deed of gift no other title is shown in the ancestor than the execution of the deed of gift and entry and holding thereunder. Yonn *v.* Pittman, 82 Ga. 637, 9 S. E. 667. Where the testator's wife is devisee and traces title to her husband's grantor and shows that he took possession and treated the land as his. De Witt *v.* Bradbury, 94 Ill. 446. Where deeds comprise conveyances from one in possession for many years. Hoban *v.* Cable, 102 Mich. 206, 60 N. W. 466. Where the grantor is a tenant in common, even though he conveyed by metes and bounds. Crook *v.* Vandevoort, 13 Nebr. 505, 14 N. W. 470. Where conveyances are shown to one in possession and to his grantor, and plaintiff also has actual or constructive possession. Doherty *v.* Matsell, 11 N. Y. Civ. Proc. 392.

Sufficient title is not shown: Where suit is brought without authority of trustees of a church by a college which had deeded to the church. Central Female College *v.* Persons, 51 Ga. 486. Where the title is claimed under a commissioner's deed and it is not shown that they were duly appointed. Short *v.* Clay, 1 A. K. Marsh. (Ky.) 371. Where plaintiff claims under two leases, and one lessor has conveyed his title and the other is barred by a former recovery. Dearmond *v.* Roe, 30 Ga. 632. Where land is shown to have been dedicated, but by whom or how does not appear. Hillman *v.* White, 44 S. W. 111, 19 Ky. L. Rep. 1682. Where plaintiff claims under a deed which was never recorded from a grantor after the latter had obtained the grant, and defendant was in possession under a deed from the same grantor before the latter obtained his grant. Dudley *v.* Bradshaw, 29 Ga. 17. Where the deed to plaintiff's grantor included land to which his grantor had no title, and the former had exercised no acts of possession and had no claim of title or right of possession. Wheeler *v.* Barre School Dist. No. 13, 64 Vt. 184, 26 Atl. 1094.

If the action is based on a state title to forfeited lands, the state must have a valid title and plaintiff's deed must have been registered. Gatlin *v.* Hutchinson, 36 La. Ann. 350.

Regular paper title is sufficient in the absence of a better one in defendant. Gordon *v.* Kerr, 10 Fed. Cas. No. 5,611, 1 Wash. 322.

Recovery can be had only from the date of the deed. Slaughter *v.* McBride, 69 Ala. 510.

Title need not be shown out of proprietaries, in ejectment against any other than the proprietary or one claiming under him, if a right of entry be proved. Allen *v.* Lyons, 1 Fed. Cas. No. 227, 2 Wash. 475.

When it becomes necessary to connect recitals in a patent with an antecedent estate the titles to such estate must be produced, as the recitals give no right of action, antecedent to the date of the patent. Jones *v.* Inge, 5 Port. (Ala.) 327.

48. Hines *v.* Chancey, 47 Ala. 637; Florida Southern R. Co. *v.* Burt, 36 Fla. 497, 18 So. 581; Bartow *v.* Draper, 5 Duer (N. Y.) 130.

A perfect chain of title without proof that the parties to the deed had possession will not establish title in plaintiff against adverse claimants in possession. New York Cent., etc., R. Co. *v.* Brennan, 12 N. Y. App. Div. 103, 42 N. Y. Suppl. 529. And see Doherty *v.* Matsell, 11 N. Y. Civ. Proc. 392.

possession, plaintiff cannot recover.[49] Nevertheless there are exceptions to the above rule,[50] as where there is a common source, or where defendant is estopped to deny plaintiff's title,[51] or where plaintiff goes back far enough to show a better title than that of the tenant.[52] Again the rule is held not to apply as against one wrongfully in possession.[53]

b. Character and Requisites of Instrument or Title Deraigned — (i) *In General.* In order to maintain ejectment the instrument relied on or title deraigned must be sufficiently valid[54] and paramount[55] or superior to, older, or better than defendant's.[56] It is also decided that ejectment may be based upon a quitclaim

49. Sanger *v.* Merritt, 120 N. Y. 109, 24 N. E. 386. See also Eels *v.* Day, 4 Conn. 95.

50. Ahern *v.* White, 39 Md. 409.

Patentee of swamp lands need not show chain of title from the United States. Nitche *v.* Earle, 117 Ind. 270, 19 N. E. 749.

51. Geiger *v.* Kaigler, 15 S. C. 262.

Plaintiff and defendant claiming title from common source see *infra*, II, C, 8.

Where defendant has never been in possession, plaintiff must connect himself with government title or with some grantor who was the common source of title. Slauson *v.* Goodrich Transp. Co., 99 Wis. 20, 74 N. W. 574, 40 L. R. A. 825.

52. Hatch *v.* Brown, 63 Me. 410. See also Ahern *v.* White, 39 Md. 409.

53. Goodwin *v.* Markwell, 37 Fla. 464, 19 So. 885. And see *supra*, II, C, 1, c; II, C, 4.

54. *Alabama.*— Wilson *v.* Glenn, 62 Ala. 28; Tarver *v.* Smith, 38 Ala. 135.

California.— Leonard *v.* Darlington, 6 Cal. 123; Suñol *v.* Hepburn, 1 Cal. 254.

Georgia.— Heard *v.* Palmer, 72 Ga. 178.

Maryland.— Owings *v.* Norwood, 2 Harr. & J. 96.

Michigan.— Greenop *v.* Wilcox, 85 Mich. 49, 48 N. W. 47; Campau *v.* Campau, 37 Mich. 245.

Missouri.— Barnum *v.* Cook, 4 Mo. App. 590.

North Carolina.— Mercer *v.* Halstead, 44 N. C. 311.

Pennsylvania.— Grant *v.* Levan, 4 Pa. St. 393; Hamilton *v.* McCulloch, Add. 272.

West Virginia.— Witten *v.* St. Clair, 27 W. Va. 762.

See 17 Cent. Dig. tit. "Ejectment," § 53. See also *supra*, II, C, 1, a.

If the lessor was dead at the date of the demise plaintiff has no sufficient title. Goodtitle *v.* Roe, 20 Ga. 135; Coleman *v.* Mabberly, 3 T. B. Mon. (Ky.) 220. See Connor *v.* Bradley, 1 How. (U. S.) 211, 11 L. ed. 105; Baylor *v.* Neff, 3 Fed. Cas. No. 1,143, 3 McLean 302.

Where the demise is from an administrator appointed by a court without jurisdiction to grant letters title is not sufficient. Goodtitle *v.* Roe, 20 Ga. 135.

Where the instrument is a transfer not under seal, by a Creek Indian of his reservation under the treaty of 1832, it is insufficient, even though approved by the president. Dillingham *v.* Brown, 38 Ala. 311. But see Long *v.* McDougald, 23 Ala. 413.

Instrument or title is sufficiently valid: Where there is possession under a defective deed, executed, acknowledged, and delivered. Brashear *v.* Hewitt, 4 Harr. & M. (Md.) 222. Where plaintiff is not a purchaser for a valuable consideration. Hardwick *v.* Jones, 65 Mo. 54. Where the deed expresses a nominal consideration. Rockwell *v.* Brown, 54 N. Y. 210; Meakings *v.* Cromwell, 2 Sandf. (N. Y.) 512. But *contra*, where it is without any consideration. Catlin Coal Co. *v.* Lloyd, 180 Ill. 398, 54 N. E. 214, 72 Am. St. Rep. 216. See also the following decisions holding that an instrument or title deraigned is valid. Gunn *v.* Wades, 65 Ga. 537; Doe *v.* Roe, 30 Ga. 553; Taylor *v.* Young, 48 Mich. 268, 12 N. W. 208; Crane *v.* Reeder, 21 Mich. 24, 4 Am. Rep. 430; Canoy *v.* Troutman, 29 N. C. 155; Gwyn *v.* Stokes, 9 N. C. 235; Doe *v.* McKnight, 2 N. Brunsw. 376.

If the intent of a statute is to enable a grantee to avail himself of a valid title in his grantor, which title overreaches the right of an adverse possessor and bars him from objecting that plaintiff has parted with his title, such statute will not apply to a grantee under an executor's deed under an invalid power of sale, void by reason of adverse possession of third parties at the time of its execution, and such grantee cannot recover. Chamberlain *v.* Taylor, 105 N. Y. 185, 11 N. E. 625, 26 N. Y. Wkly. Dig. 478, 105 N. Y. 630, 11 N. E. 630. See further as to the construction of the instrument with reference to its validity and sufficiency Shilknecht *v.* Eastburn, 2 Gill & J. (Md.) 114; Midland Min. Co. *v.* Lehigh Valley Coal Co., 196 Pa. St. 444, 20 Atl. 634.

Ejectment cannot be maintained on written assignment, not under seal, of all tenant's right, title, and interest in the premises, it not being shown that he had any, or if so what his interest was. Doe *v.* Hodgson, (East T.) 3 Vict.

55. See *supra*, II, C, 1, c.

56. *Alabama.*— Hair *v.* Grigsby, 18 Ala. 45.

California.— Irwin *v.* Towne, 42 Cal. 326.

Indiana.— Hastings *v.* Brooker, 98 Ind. 158.

Kansas.— Sarver *v.* Beal, 36 Kan. 555, 13 Pac. 743.

Kentucky.— Coleman *v.* Talbot, 2 Bibb 129, 4 Am. Dec. 687; Talbot *v.* Calloway, Hard. 35.

Missouri.— Farrar *v.* Heinrich, 86 Mo. 521.

Nebraska.— Methodist Protestant Church *v.* Johnson, 22 Nebr. 163, 34 N. W. 221.

New York.— Baker *v.* Johns, 38 Hun 625.

See 17 Cent. Dig. tit. "Ejectment," § 53 *et seq.*

deed, where the grantor could have maintained the action;[57] upon an unrecorded deed, where such facts are shown as are sufficient to have put any one who was dealing with the estate on inquiry;[58] upon a deed by a husband, which conveys a sufficient interest in his wife's land;[59] or upon a deed by a husband and wife jointly of her lands, even though the latter's acknowledgment is defective.[60]

(II) *Title Based on Judgment, Decree, or Process.* A sufficient title may be based upon a valid judgment;[61] a judgment in favor of plaintiff's ancestor;[62] an authorized decree;[63] a possession based upon a satisfaction of a judgment under an agreement;[64] a creditor's momentary seizin of land under a levy,[65] a title acquired at a lawful judicial sale[66] or under a sheriff's deed[67] to an

57. Rego *v.* Van Pelt, 65 Cal. 254, 3 Pac. 867; Lawrence *v.* Ballou, 37 Cal. 518; Downer *v.* Smith, 24 Cal. 114; Sullivan *v.* Davis, 4 Cal. 291. See also Robinson *v.* Cahalan, 91 Ala. 479, 8 So. 415.

58. Clark *v.* Morris, 22 Ill. 434. *Compare* Armstrong *v.* White, 10 La. Ann. 607.

Lost deed never recorded is sufficient. Blackburn *v.* Blackburn, 8 Ohio 81. See also Donaldson *v.* Williams, 50 Mo. 407. But see Wynn *v.* Cory, 43 Mo. 301.

Where the deed before recording was retaken and destroyed by the grantor, without the consent of the grantee, under whom plaintiff claims, ejectment lies. Jennings *v.* Reevis, 101 N. C. 447, 7 S. E. 897.

59. Chambers *v.* Handley, 3 J. J. Marsh. (Ky.) 98; McClain *v.* Greeg, 2 A. K. Marsh. (Ky.) 454; Bryan *v.* Wear, 4 Mo. 106. See Turner *v.* Patterson, 5 Dana (Ky.) 292.

60. Wilson *v.* Albert, 89 Mo. 537, 1 S. W. 209. See Mercer *v.* Watson, 1 Watts (Pa.) 330.

61. Willoby *v.* Raiden, 113 Ga. 85, 38 S. E. 314.

Plaintiff must show some right, title, or interest in the judgment debtor. Jackson *v.* Town, 4 Cow. (N. Y.) 599, 15 Am. Dec. 405.

Summary judgment is sufficient. McPherson *v.* McCoy, 13 N. C. 391.

Void judgment in partition is insufficient. Jackson *v.* Brown, 3 Johns. (N. Y.) 459.

Where the judgment is based upon an attachment erroneously stating creditor's christian name the grantee of the judgment debtor, taking, while the land is under attachment, cannot recover from the grantee of the judgment creditor, the judgment and levy never having been set aside. Emerson *v.* Collamore, 33 Me. 581. And *compare* Schwartz *v.* Cowell, 71 Cal. 306, 12 Pac. 252.

62. Cagger *v.* Lansing, 64 N. Y. 417.

63. Ackley *v.* Dygert, 33 Barb. (N. Y.) 176.

Although the decree of foreclosure is the basis of plaintiff's title, he is not limited to a writ of assistance, but may bring ejectment even though the court refuses such writ. Dickey *v.* Gibson, 121 Cal. 276, 53 Pac. 704.

Conveyance by commissioners under a decree is sufficient (Logan *v.* Steele, 7 T. B. Mon. (Ky.) 101), unless too long a time elapses before the commissioners exercise their authority (Schrader *v.* Peach, 77 Ill. 615).

Decree is insufficient where it orders conveyance to plaintiff (Nelson *v.* Triplett, 81 Va. 236) or where it is against one not a party to the action and who has legal title (Eaton *v.* Smith, 19 Wis. 537).

Parol partition setting off the share of the absent party enables the latter to maintain ejectment against one who had it allotted to himself, even though the action is brought after sixteen years. McMahan *v.* McMahan, 13 Pa. St. 376, 53 Am. Dec. 481.

When the decree is to perform certain acts and they are performed, ejectment lies thereon against a stranger. Rood *v.* Willard, Brayt. (Va.) 66.

When the ejectment is based upon a legal and not an equitable title in case of the foreclosure of a mortgage and of a tax lien see Cole *v.* Rice, 74 Conn. 680, 51 Atl. 1083.

Where the decree leaves the life-estate in the husband in his wife's hands, but divests his legal title in trust for his children, he still has a possessory interest for life sufficient to maintain ejectment. Towns *v.* Towns, 121 Ala. 422, 25 So. 715.

Where a partition decree is taken against unknown owners, as confessed, and partition made and confirmed, unknown owners of the residue cannot bring ejectment against plaintiff in partition for the part assigned to him. Sharp *v.* Pratt, 15 Wend. (N. Y.) 610.

64. Knox *v.* Easton, 38 Ala. 345.

65. Stickney, etc., Coal Co. *v.* Goodwin, 95 Me. 246, 49 Atl. 1039, 85 Am. St. Rep. 408.

66. Isler *v.* Koonce, 81 N. C. 378. See Siglar *v.* Malone, 3 Humphr. (Tenn.) 16.

Although a trustee sells lands under a decree he may recover so much of the land as is not embraced in the deeds or to which he shows a right or title. Baltimore, etc., R. Co. *v.* Gould, 67 Md. 60, 8 Atl. 754.

Holder under a trust deed given, after reversal on appeal, by a defendant in the action, cannot maintain ejectment against a purchaser at a second judicial sale, the former having taken with notice of *lis pendens.* Real Estate Sav. Inst. *v.* Collonious, 63 Mo. 290.

Where the court orders a sale and the master makes the deed to the purchaser who sells to another, tenants in common at whose instance the order was made cannot maintain ejectment against such third person. Beard *v.* Hall, 63 N. C. 39.

67. Clute *v.* Emmerich, 99 N. Y. 342, 2 N. E. 6 [*affirming* 26 Hun 10].

ancestor;[68] a purchase under process at a sheriff's sale, provided such process is regular and not void;[69] or a purchase under execution.[70] But parties claiming under judgment grantees must have had prior possession as against defendant in possession.[71]

6. Equitable Title[72] — a. In General. Ejectment cannot be maintained upon a mere equitable title;[73] nor can a recovery be had in such action where the only

Sheriff's certificate of a sale and conveyance of land, or of improvements thereon, unwarranted by any law or order or process of any court conveys no sufficient title or right of possession. Hockett *v.* Alston, 110 Fed. 910, 49 C. C. A. 180 [*reversing* (Indian Terr. 1900) 58 S. W. 675].

Third person whose title sheriff's deed purports to convey must have had title. Dollarhide *v.* Mabary, 125 Mo. 197, 28 S. W. 332.

Title conveyed by patentee revests by sheriff's deed under a foreclosure sale of the premises mortgaged to the patentee by the vendee, even though before decree the former had assigned the mortgage. Pioche *v.* Paul, 22 Cal. 105.

68. Behm *v.* Molly, 133 Pa. St. 614, 19 Atl. 421, 562.

69. Snavely *v.* Wagner, 3 Pa. St. 275, 45 Am. Dec. 640.

Purchaser at a sheriff's sale of equity of redemption sold under execution does not acquire the legal title and cannot maintain ejectment. Cantzon *v.* Dorr, 27 Miss. 245.

70. Lee *v.* Bishop, 89 N. C. 256. See Whitney *v.* Rightclaim, 6 Blackf. (Ind.) 322.

Creditor of an occupant who has levied execution on buildings erected, the fee being in another, may maintain ejectment where a creditor of the fee owner has subsequently levied execution on the land, the buildings being reserved out of the original attachment and not being appraised in the levy. King *v.* Catlin, 1 Tyler (Vt.) 355.

Plaintiff claiming under an execution sale cannot avail himself of facts exclusively within equitable cognizance and which do not form any legal estoppel against defendants to dispute plaintiff's title. Maples *v.* Tunis, 11 Humphr. (Tenn.) 108, 53 Am. Dec. 779.

Purchaser under an execution may recover against one in possession without title, where the execution defendant had prior possession coupled with acts of ownership. Badger *v.* Lyon, 7 Ala. 564. *Compare* Logan *v.* Catron, 43 S. W. 213, 19 Ky. L. Rep. 1200.

71. Greenleaf *v.* Brooklyn, etc., R. Co., 141 N. Y. 395, 36 N. E. 393 [*affirming* 71 Hun 9!, 24 N. Y. Suppl. 526].

72. **Equitable ejectment** see *infra*, XI.

Pleading equitable title see *infra*, V, A, 3, e.

73. *Alabama.*— Sharpe *v.* Brantley, 123 Ala. 105, 26 So. 289; Simmons *v.* Richardson, 107 Ala. 697, 18 So. 245; Carrington *v.* Richardson, 79 Ala. 101; Searcey *v.* Oates, 68 Ala. 111.

Arkansas.— Perciful *v.* Platt, 36 Ark. 456.

California.— Buhne *v.* Chism, 48 Cal. 467. And see Felger *v.* Coward, 35 Cal. 650.

Delaware.— Windsor *v.* Bacon, 7 Houst. 1, 30 Atl. 638.

Georgia.— See Howell *v.* Ellsberry, 79 Ga. 475, 5 S. E. 96; Woodward *v.* Bivins, 71 Ga. 589; Nix *v.* Collins, 65 Ga. 219; Fahn *v.* Bleckley, 55 Ga. 81.

Illinois.— Valette *v.* Bennett, 69 Ill. 632; Fischer *v.* Eslaman, 68 Ill. 78; Rountree *v.* Little, 54 Ill. 323. And see Kirkland *v.* Cox, 94 Ill. 400.

Iowa.— Walker *v.* Kynett, 32 Iowa 524.

Kentucky.— Gilpin *v.* Davis, 2 Bibb 416, 5 Am. Dec. 622.

Maryland.— Paisley *v.* Holzshu, 83 Md. 325, 34 Atl. 832; Leonard *v.* Diamond, 31 Md. 536.

Mississippi.—Heard *v.* Baird, 40 Miss. 793; Moody *v.* Farr, 33 Miss. 192; Wolfe *v.* Doe, 13 Sm. & M. 103, 51 Am. Dec. 147; Thompson *v.* Wheatley, 5 Sm. & M. 499; Winn *v.* Cole, 1 Walk. 119. And see Dixon *v.* Doe, 23 Miss. 84.

Missouri.— Nalle *v.* Parks, 173 Mo. 616, 73 S. W. 596; Nalle *v.* Thompson, 173 Mo. 595, 73 S. W. 599; Crawford *v.* Whitmore, 120 Mo. 144, 25 S. W. 365; Thompson *v.* Lyon, 33 Mo. 219.

Nebraska.— Headley *v.* Coffman, 38 Nebr. 68, 56 N. W. 701; Morton *v.* Green, 2 Nebr. 441. And see Dale *v.* Hunneman, 12 Nebr. 221, 10 N. W. 711.

South Carolina.— Charleston Bank Nat. Banking Assoc. *v.* Dowling, 45 S. C. 677, 23 S. E. 982.

Tennessee.— Edwards *v.* Miller, 4 Heisk. 314; Lafferty *v.* Whitesides, 1 Swan 123; Hopkins *v.* Toel, 4 Humphr. 46.

Virginia.— See Slocum *v.* Compton, 93 Va. 374, 25 S. E. 3; Russell *v.* Allmond, 92 Va. 484, 23 S. E. 895 [*following* Suttle *v.* Richmond, etc., R. Co., 76 Va. 284].

Wisconsin.— Gillett *v.* Treganza, 13 Wis. 472.

United States.—Carter *v.* Ruddy, 166 U. S. 493, 17 S. Ct. 640, 41 L. ed. 1090; Langdon *v.* Sherwood, 124 U. S. 74, 8 S. Ct. 429, 31 L. ed. 344; Carpentier *v.* Montgomery, 13 Wall. 480, 20 L. ed. 698; Clagett *v.* Kilbourne, 1 Black 346, 17 L. ed. 213; Sheirburn *v.* De Cordova, 24 How. 423, 16 L. ed. 741; Smith *v.* McCann, 24 How. 398, 16 L. ed. 714; Fenn *v.* Holme, 21 How. 481, 16 L. ed. 198; Swayze *v.* Burke, 12 Pet. 11, 9 L. ed. 980; Lerma *v.* Stevenson, 40 Fed. 356; Bouldin *v.* Phelps, 30 Fed. 547; Young *v.* Dunn, 10 Fed. 717, 4 Woods 331; Carson *v.* Boudinot, 5 Fed. Cas. No. 2,462, 2 Wash. 33.

England.— Allen *v.* Woods, 68 L. T. Rep. N. S. 143, 4 Reports 249. See Saunders *v.* Merryweather, 3 H. & C. 902, 11 Jur. N. S. 655, 35 L. J. Exch. 115, 13 Wkly. Rep. 814.

See 17 Cent. Dig. tit. "Ejectment," § 56.

Ejectment does not lie: Where rights under a contract of sale are merely equitable. Ben-

remedy is in equity;[74] nor will a perfect equitable title prevail against a naked legal title.[75] There are, however, decisions contrary to the principal rule,[76] or which are at least exceptions thereto or qualifications thereof.[77]

nett *v.* Gray, 92 Hun (N. Y.) 86, 36 N. Y. Suppl. 372. Where there is an executory contract for sale of land, which does not purport to convey any legal possessory interest in or upon the land, even though it implies a permission to enter and make improvements. Buell *v.* Irwin, 24 Mich. 145. Where a subsequent purchaser from the vendor has not both a legal and equitable title or right of possession. Willis *v.* Wozencraft, 22 Cal. 607. Where plaintiff is a mortgagee (Malloy *v.* Malloy, 35 Nebr. 224, 52 N. W. 1097) or has a mortgage interest only (Sahler *v.* Signer, 37 Barb. (N. Y.) 329). Where there is a trust deed by a mortgagee, who takes only a mere lien which can be converted into the legal title only by extinguishing the equity of redemption. Slaughter *v.* Bernards, 97 Wis. 184, 72 N. W. 977. Where plaintiff relies upon a merely equitable title, and does not seek possession as incidental to a specific performance, or other equitable relief, and defendant is not the party bound to convey to plaintiff. Peck *v.* Newton, 46 Barb. (N. Y.) 173.

Where devisees take equitable estates only in their respective shares, and even though they are grandchildren of the testator, they have no such legal estate as can pass by judgment and sale on execution, purchasers under judgment against one of the grandchildren cannot maintain ejectment against him. Brewster *v.* Striker, 2 N. Y. 19.

Where plaintiff bases his right to recover purely upon the legal title he cannot recover upon an equitable title. Garrett *v.* Belmont Land Co., 94 Tenn. 459, 29 S. W. 726.

74. *California.*— Felger *v.* Coward, 35 Cal. 650; Brown *v.* Winter, 14 Cal. 31.

Kentucky.— Cobb *v.* Stewart, 4 Metc. 255, 83 Am. Dec. 465.

Michigan.— Janison *v.* Rankin, 57 Mich. 49, 23 N. W. 482.

Mississippi.— Thompson *v.* Wheatley, 5 Sm. & M. 499.

New Jersey.— Den *v.* Newark India Rubber Co., 24 N. J. L. 467.

See 17 Cent. Dig. tit. "Ejectment," § 56.

Fraud and fraudulent transfer.— The deed or title should not be based upon fraud (Knox *v.* McFarren, 4 Colo. 586; Bouton *v.* Orr, 51 Iowa 473, 1 N. W. 704; Watts *v.* Witt, 39 S. C. 356, 17 S. E. 822. See Meeker *v.* Dalton, 75 Cal. 154, 16 Pac. 764); nor can ejectment be maintained against a purchaser on the ground of fraudulent transfer without showing that he was a party thereto (Brown *v.* Dean, 52 Mich. 267, 17 N. W. 837). But it is also decided that a fraudulent deed may be set aside in ejectment in a court of law as well as in equity. Cleland *v.* Taylor, 3 Mich. 201. The grantee in a deed executed to defraud the grantor's creditors may maintain ejectment against the grantor. Bush *v.* Rogan, 65 Ga. 320, 38 Am. Rep. 785.

Title founded on fraud, illegality, or mistake see Watkins *v.* Nugen, 118 Ga. 372, 45 S. E. 262 (deed void because based on promise to do illegal acts); Feret *v.* Hill, 15 C. B. 207, 2 C. L. R. 1366, 18 Jur. 1014, 23 L. J. C. P. 185, 2 Wkly. Rep. 493, 80 E. C. L. 207; Beaufort *v.* Neeld, 12 Cl. & F. 248, 9 Jur. 813, 8 Eng. Reprint 1399; Hughes *v.* Lumley, 3 C. L. R. 241, 4 E. & B. 274, 1 Jur. N. S. 422, 24 L. J. Q. B. 57, 3 Wkly. Rep. 109, 82 E. C. L. 274; Dusenbury *v.* Palmatier, 21 U. C. Q. B. 462; Austin *v.* Taite, 8 Ir. C. L. 35.

Where plaintiff asserts an equitable right the fact that the action is tried on the law instead of the equity side of the court does not deprive plaintiff of his right to relief, even though in ejectment the legal title must be in plaintiff. Stanley *v.* Jones, 27 S. W. 992, 16 Ky. L. Rep. 328.

When another remedy is exclusive see *supra*, II, A, 4, b.

75. Thompson *v.* Wheatley, 5 Sm. & M. (Miss.) 499. See also De Lassus *v.* Winn, 174 Mo. 636, 74 S. W. 635.

That legal title must prevail in ejectment see *supra*, II, C, 1, c.

76. Taylor *v.* Eatman, 92 N. C. 601; Condry *v.* Cheshire, 88 N. C. 375; Murray *v.* Blackledge, 71 N. C. 492; Laughlin *v.* Fariss, 7 Okla. 1, 50 Pac. 254 (under Code Civ. Proc. § 614); Presbyterian Congregation *v.* Johnston, 1 Watts & S. (Pa.) 9 (an action in the nature of ejectment); State *v.* Johnson, 26 Wash. 668, 67 Pac. 401 (under Ballinger Annot. Codes & St. §§ 5500, 5508).

Although by statute an equitable title will support ejectment, an equitable title, of which a purchaser had no notice, will not prevail over a legal title. Sengfelder *v.* Hill, 21 Wash. 371, 384, 58 Pac. 250.

That ejectment lies upon an equitable title, if a paramount one, as against the holder of a legal title see Pope *v.* Nichols, 61 Kan. 230, 59 Pac. 257. See also Dodge *v.* Spiers, 85 Ga. 585, 11 S. E. 610; Riggs *v.* Anderson, 47 Kan. 66, 27 Pac. 112; Simpson *v.* Boring, 16 Kan. 248; Kansas Pac. R. Co. *v.* McBratney, 12 Kan. 9.

The equity must be a perfect one to justify recovery, without conveyance from the holder of a legal title. White *v.* Cook, 73 Ga. 164.

77. Thus it has been held that ejectment lies: Where defendant has no equitable defense, as in case of the assignee of a note secured by mortgage which is in effect a deed of trust merely. Wright *v.* Fort, 126 N. C. 615, 36 S. E. 113. Where the equitable title is coupled with the right of possession (Burt *v.* Bowles, 69 Ind. 1) as against the holder of a naked legal title (Lewis *v.* Hamilton, 26 Colo. 263, 58 Pac. 196). Where a devisee is vested with the equitable title, and the land is to vest in possession after the devisor's decease. Johnson *v.* McCue, 34 Pa. St. 180. Where as against a mere trespasser the

b. Equitable Estoppel. Upon the question of title by equitable estoppel the decisions are not in harmony. Thus it is determined that ejectment may be maintained upon an equitable estoppel,[78] and that if defendant's possession was obtained in such manner that he is estopped to deny plaintiff's title, such estoppel will support ejectment.[79] And where plaintiff traces his title back to a point at which defendant is estopped from denying title he need go no further.[80] Notwithstanding the above decisions, it has been held that plaintiff cannot recover upon facts merely estopping defendant from denying his ownership or title;[81] that he cannot rely upon an estoppel to prevent defendant from disputing his title;[82] and that an estoppel *in pais* can never form the basis of title on which ejectment will lie.[83] It is also decided that where plaintiff cannot recover under the rule as

owner of an equity of redemption has the right of possession. Arrington *v.* Arrington, 114 N. C. 116, 19 S. E. 278. Where prospective incorporators procure a conveyance to them and on the organization of the corporation turn over possession to the company in full payment of subscriptions to their stock, and it is so accepted. McCandless *v.* Inland Acid Co., 115 Ga. 968, 42 S. E. 449. Where a partner takes under deed to firm, whatever may be the precise nature of his interest. Smith *v.* Smith, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186, 549. Where upon exchange of lands, plaintiff has an equity to a title and to have a conveyance of the same. Temples *v.* Temples, 70 Ga. 480. Where the vendor of land has not executed the deed and so is in equity the trustee of the vendee. Reed *v.* Murray, 11 Pa. St. 334. See Hewitt *v.* Huling, 11 Pa. St. 27. Where the vendee's interest in land is purchased by another, who takes possession and becomes the transferee of the purchase-money note, and so becomes the owner of a perfect equity; and also, under the written contract of sale, where a vendee in possession pays the entire purchase-money and becomes entitled to a conveyance. Smith *v.* Spencer, 73 Ala. 299.

It is also intimated, but not expressly decided, that if a trust is raised the beneficiary could recover against a trustee holding the mere naked title. Avery *v.* Dufrees, 9 Ohio 145.

Trustees of a term to satisfy creditors, not having notice of an agreement for a lease before the grant of the term, may maintain an ejectment against the tenant in possession under the agreement. Goodtitle *v.* Way, 1 T. R. 735.

Where a deed was void which formed a link in plaintiff's title, but plaintiff proved that he had a good equitable right to possession, he was permitted to recover. Thorne *v.* Williams, 13 Ont. 577.

78. Suddarth *v.* Robertson, 118 Mo. 286, 24 S. W. 151; Langston *v.* McKinnie, 6 N. C. 67. *Compare* Dubois *v.* Campau, 37 Mich. 248.

Plaintiff's title by estoppel.— Where plaintiff has shown an agreement whereby defendant admits his title, he is not bound to show any further title. Den *v.* Tindall, 20 N. J. L. 214, 40 Am. Dec. 220. And if an actual settler prevents the warrant holder from surveying land, he cannot show that the warrant holder did not settle in due season. Buchanan *v.* Nyer, 3 Yeates (Pa.) 586. Defendants may also be estopped from denying the original title of plaintiff where they claim from him derivatively. Ware *v.* Dewberry, 84 Ala. 568, 4 So. 404. Plaintiffs may also recover as against defendants who only claim the land under a tax deed for taxes assessed on it against plaintiff. Wisconsin Cent. R. Co. *v.* Wisconsin River Land Co., 71 Wis. 94, 36 N. W. 837. That defendant had acknowledged plaintiff's title may be shown. Cunningham *v.* Dean, 33 Miss. 46. So plaintiff may recover against one who enters and holds under him. Jackson *v.* Harder, 4 Johns. (N. Y.) 202, 4 Am. Dec. 262. See Elliott *v.* Dycke, 78 Ala. 150; Anderson *v.* Parker, 6 Cal. 197; Caudle *v.* Long, 132 N. C. 675, 44 S. E. 368; Coleman *v.* Stalnacke, 15 S. D. 242, 88 N. W. 107; McClung *v.* Echols, 5 W. Va. 204.

Railroad company may recover upon estoppel against the landowners or the owners of the reversion. Rutland R. Co. *v.* Chaffee, 71 Vt. 84, 42 Atl. 984, 48 Atl. 699. See also *supra*, II, C, 1, f, (II).

79. Mobley *v.* Griffin, 104 N. C. 112, 10 S. E. 142; Conwell *v.* Mann, 100 N. C. 234, 6 S. E. 782; Reid *v.* Chatham, 75 N. C. 86; Geiger *v.* Kaigler, 15 S. C. 262.

80. Morrison *v.* Wilkerson, 27 Iowa 374.

81. Harrison *v.* Alexander, 135 Ala. 307, 33 So. 543; Winter *v.* White, 70 Md. 305, 17 Atl. 84, holding that the principle of acquiescence and estoppel recognized in equity has no application.

In the federal courts where legal and equitable causes of action cannot be blended, plaintiff can get no support from an equitable estoppel. Stone *v.* Perkins, 85 Fed. 616.

82. Nix *v.* Collins, 65 Ga. 219.

83. Allen *v.* Sales, 56 Mo. 28. See also Suttle *v.* Richmond, etc., R. Co., 76 Va. 284.

So it has been held that plaintiff cannot recover on an estoppel between defendant and his grantor (Bigelow *v.* Finch, 11 Barb. (N. Y.) 498); and that if plaintiff only shows a title derived from the holder of the equitable title, such title does not estop defendant from insisting thereon (Edney *v.* Wilson, 27 N. C. 233). Again the conveyance of a homestead by a bankrupt and his wife, set aside at the suit of an assignee in bankruptcy, works no estoppel in favor of the purchaser from the assignee. McFarland *v.* Goodman, 16 Fed. Cas. No. 8,789, 6 Biss. 111.

to paramount title[84] his action must be defeated, if defendant does not stand in a relation which estops him from denying plaintiff's title.[85]

7. TITLE TO PUBLIC LANDS, ENTRY, CERTIFICATE, SURVEY, OR WARRANT.[86] In the United States courts ejectment cannot be supported on a mere entry made with a register and receiver, but only on the patent, for the certificates of the officers of the land department are no evidence of the legal title.[87] But after a survey has been made and approved, under a statute which confers on the grantee an incipient title, ejectment lies even though the patent has not issued.[88] In certain state courts, however, ejectment lies upon an entry and receipt for the purchase-money,[89] a final receiver's receipt,[90] or a certificate of purchase duly issued by the proper officer;[91] upon a notice of location, and a location on the plat of

84. See *supra*, II, C, 1, c.

85. Alabama Mineral Land Co. *v.* Baker, 119 Ala. 351, 24 So. 706. See also Ball *v.* Lively, 4 Dana (Ky.) 369; Elwood *v.* Lannon, 27 Md. 200; Bertram *v.* Cook, 44 Mich. 396, 6 N. W. 868; Howard *v.* Massengale, 13 Lea (Tenn.) 577.

86. Valid and legal title in public lands see further *supra*, II, C, 1, a, (II).

87. Carter *v.* Ruddy, 166 U. S. 493, 17 S. Ct. 640, 41 L. ed. 1090; Langdon *v.* Sherwood, 124 U. S. 74, 8 S. Ct. 429, 31 L. ed. 344; Hooper *v.* Scheimer, 23 How. (U. S.) 235, 16 L. ed. 452; Fenn *v.* Holme, 21 How. (U. S.) 481, 16 L. ed. 198. *Contra*, Rector *v.* Welch, 1 Mo. 334.

Final certificate without possession is insufficient. American Mortg. Co., etc. *v.* Hopper, 48 Fed. 47.

Where the case is sub judice and the legal title remains in the United States, no patent having issued and no final decree of confirmation having been entered, even though the title be held in trust for those having the equitable right to the lands, the *cestui que trust* cannot sue his trustee in possession holding the legal title and recover in ejectment. Bouldin *v.* Phelps, 30 Fed. 547.

Notwithstanding a state statute to the contrary this rule governs. Langdon *v.* Sherwood, 124 U. S. 74, 8 S. Ct. 429, 31 L. ed. 344; Sweatt *v.* Burton, 42 Fed. 285.

88. Bryan *v.* Forsyth, 19 How. (U. S.) 334, 15 L. ed. 674.

89. Trulock *v.* Taylor, 26 Ark. 54. See also Gaines *v.* Hale, 26 Ark. 168; Hunter *v.* Hemphill, 6 Mo. 106.

Receiver's receipt is sufficient against a fraudulently obtained patent. Knox *v.* Pulliam, 14 La. Ann. 123.

Title to a whole tract under a homestead entry, made according to law, is shown against a mere trespasser in actual possession of all but a few acres, and plaintiff can recover under the California act of March 23, 1874. Whittaker *v.* Pendola, 78 Cal. 296, 20 Pac. 680.

Where an ancestor empowered an agent and died before entry was made and the agent enters in the name of the ancestor, the heir may maintain ejectment. McClairen *v.* Wicker, 8 Ark. 192.

Where land was not granted to a state by congress, a simple entry with the United States register and receiver is an insufficient title. Foster *v.* Evans, 51 Mo. 39.

90. Case *v.* Edgeworth, 87 Ala. 203, 5 So. 783; Hill *v.* Plunkett, 41 Ark. 465; Gaither *v.* Lawson, 31 Ark. 279; Rector *v.* Gaines, 19 Ark. 70; Cloyes *v.* Beebe, 14 Ark. 489; McClung *v.* Penny, 12 Okla. 303, 70 Pac. 404; Orchard *v.* Alexander, 2 Wash. 108, 26 Pac. 196; Pierce *v.* Frace, 2 Wash. 81, 26 Pac. 192, 807.

91. *Alabama.*— Ledbetter *v.* Borland, 128 Ala. 418, 29 So. 579.

Arkansas.— Brummett *v.* Pearle, 36 Ark. 471; Surginer *v.* Paddock, 31 Ark. 528; Rector *v.* Gaines, 19 Ark. 70; Cloyes *v.* Beebe, 14 Ark. 489.

California.— Cucamonga Fruit-Land Co. *v.* Moir, 83 Cal. 101, 22 Pac. 55, 23 Pac. 359.

Louisiana.— Simien *v.* Perrodin, 35 La. Ann. 931.

Mississippi.— Davis *v.* Freeland, 32 Miss. 645; Hester *v.* Kembrough, 12 Sm. & M. 659.

Missouri.— Soulard *v.* Clark, 19 Mo. 570; Cerre *v.* Hook, 6 Mo. 474; Janis *v.* Gurno, 4 Mo. 458.

Wisconsin.— Tobey *v.* Secor, 60 Wis. 310, 19 N. W. 99; Gunderson *v.* Cook, 33 Wis. 551.

See 17 Cent. Dig. tit. "Ejectment," § 42 *et seq.*

Administrator of the purchaser dying in possession of a certificate may maintain ejectment against one to whom the widow has assigned the certificate, although a patent has issued to the assignee. Watson *v.* Prestwood, 79 Ala. 416.

Ejectment lies in the name of the state upon the certificate of purchase from the commissioners under the statutes for the sale of Cherokee lands. State *v.* England, 29 N. C. 153.

Equitable interest is transmissible to devisees, and an equitable title to the land is acquired by the certificate of survey and may be coupled with the presumption of a patent from possession held under a certificate for a great length of time. Carroll *v.* Norwood, 4 Harr. & M. (Md.) 287.

Grantee or assignee of a certificate of entry has a sufficient interest. McLane *v.* Bovee, 35 Wis. 27.

Heir of holder of patent certificate may maintain ejectment. McClairen *v.* Wicker, 8 Ark. 192.

Holder of a receiver's certificate cannot, after entry canceled, maintain ejectment as he has only equitable title, even though there is a code provision making such certificate

survey;[92] upon a warrant without a survey;[93] or upon a warrant and survey,[94] coupled with payment.[95]

8. Title From Common Source — a. Rule. It is sufficient for plaintiff to deraign his title from the grantor under whom both parties claim as a common source; he need not go back of such grantor's title, as it is an underlying general principle that neither party can deny the title under which he claims.[96] This application of the principle of estoppel is limited, however, to inconsistent posi-

proof of title equivalent to a patent, except against actual patentee. Headley *v.* Coffman, 38 Nebr. 68, 56 N. W. 701; Morton *v.* Green, 2 Nebr. 441.

Recovery cannot be had upon a certificate of survey without a patent (Seward *v.* Hicks, 1 Harr. & M. (Md.) 22); a certificate of location of school or lieu land, under the act of April 27, 1863 (True *v.* Thompson, 42 Cal. 293); a duplicate receiver's receipt (Adams *v.* Couch, 1 Okla. 17, 26 Pac. 1009), even though the holder was after contest given the right to enter (Balsz *v.* Liebenow, (Ariz. 1894) 36 Pac. 209); or a receipt for payment to the United States from the receiver at a local land-office (Lynch *v.* Brigham, 49 Cal. 137).

92. Cabanne *v.* Lindell, 12 Mo. 184. But see Carter *v.* Ruddy, 56 Fed. 542, 6 C. C. A. 3.

93. Smay *v.* Smith, 1 Penr. & W. (Pa.) 1.

Warrant holder has only equitable title where consideration has not been paid (Penn *v.* Klyne, 19 Fed. Cas. No. 10,935, 4 Dall. 402, Pet. C. C. 497, 1 Wash. 207); or where there has been no survey or payment (Vanhorn *v.* Chestnut, 28 Fed. Cas. No. 16,856, 2 Wash. 160).

94. Copley *v.* Riddle, 6 Fed. Cas. No. 3,214, 2 Wash. 354; Penn *v.* Klyne, 19 Fed. Cas. No. 10,935, 4 Dall. 402, Pet. C. C. 497, 1 Wash. 207.

Only an equitable interest is given by warrant and survey, but this interest can only be divested by conveyance or adverse possession. The mere possession of the warrant by a third party gives no title to him. Washabaugh *v.* Entriken, 34 Pa. St. 74.

Owner of survey has not legal estate and cannot recover. Dresback *v.* McArthur, 7 Ohio 146.

Warrant holder must show that a survey was regularly or actually made. Dubois *v.* Newman, 7 Fed. Cas. No. 4,108, 4 Wash. 74.

95. Winter *v.* Jones, 10 Ga. 190, 54 Am. Dec. 379; Willink *v.* Miles, 30 Fed. Cas. No. 17,768, Pet. C. C. 429.

96. *Alabama.*— Florence Bldg., etc., Assoc. *v.* Schall, 107 Ala. 531, 18 So. 108; Matkin *v.* Marx, 96 Ala. 501, 11 So. 633; Bishop *v.* Truett, 85 Ala. 376, 5 So. 154; Pendley *v.* Madison, 83 Ala. 484, 3 So. 618; Gantt *v.* Doe, 27 Ala. 582; Pollard *v.* Cocke, 19 Ala. 188.

Arkansas.— Griesler *v.* McKennon, 44 Ark. 517.

California.— Rego *v.* Van Pelt, 65 Cal. 254, 3 Pac. 867; Spect *v.* Gregg, 51 Cal. 198; Whitman *v.* Steiger, 46 Cal. 256; Irwin *v.* Towne, 42 Cal. 326; Ellis *v.* Jeans, 7 Cal. 409.

District of Columbia.— Reid *v.* Anderson, 13 App. Cas. 30; Beale *v.* Brown, 6 Mackey 574; Anderson *v.* Smith, 2 Mackey 275.

Florida.— Doyle *v.* Wade, 23 Fla. 90, 1 So. 516, 11 Am. St. Rep. 334.

Georgia.— Scott *v.* Singer, 54 Ga. 689; Hightower *v.* Williams, 38 Ga. 597; Miller *v.* Surls, 19 Ga. 331, 65 Am. Dec. 592; Wood *v.* McGuire, 17 Ga. 303.

Illinois.— Pollock *v.* Maison, 41 Ill. 516; Holbrook *v.* Brenner, 31 Ill. 501; McClure *v.* Engelhardt, 17 Ill. 47; Doe *v.* Johnson, 3 Ill. 522.

Indiana.— McWhorter *v.* Heltzel, 124 Ind. 129, 24 N. E. 743; Nitche *v.* Earle, 117 Ind. 270, 19 N. E. 749; Boyce *v.* Graham, 91 Ind. 420; Wilson *v.* Peelle, 78 Ind. 384; Pierson *v.* Doe, 2 Ind. 123.

Iowa.— Morrison *v.* Wilkerson, 27 Iowa 374; Conger *v.* Converse, 9 Iowa 554.

Kentucky.— Luen *v.* Wilson, 85 Ky. 503, 3 S. W. 911, 9 Ky. L. Rep. 83; Barnett *v.* Mimick, 17 S. W. 334, 13 Ky. L. Rep. 503; McClain *v.* Gregg, 2 A. K. Marsh. 454; Gay *v.* Moffitt, 2 Bibb 506, 5 Am. Dec. 633; Alsop *v.* Weir, 7 Ky. L. Rep. 365.

Louisiana.—Clemens *v.* Meyer, 44 La. Ann. 390, 10 So. 797; Girault *v.* Zuntz, 15 La. Ann. 684; Cotton *v.* Stacker, 5 La. Ann. 677; Bedford *v.* Urquhart, 8 La. 234, 38 Am. Dec. 137.

Maryland.— Jay *v.* Michael, 82 Md. 1, 33 Atl. 322; Ahern *v.* White, 39 Md. 409; Elwood *v.* Lannon, 27 Md. 200.

Michigan.— Drake *v.* Happ, 92 Mich. 580, 52 N. W. 1023; Eames *v.* McGregor, 43 Mich. 313, 5 N. W. 408; Cronin *v.* Gore, 38 Mich. 381; Johnstone *v.* Scott, 11 Mich. 232.

Minnesota.— Thompson *v.* Ellenz, 58 Minn. 301, 59 N. W. 1023; Horning *v.* Sweet, 27 Minn. 277, 6 N. W. 782.

Mississippi.— Gillum *v.* Case, 67 Miss. 588, 7 So. 551; McCready *v.* Lansdale, 58 Miss. 877; Morgan *v.* Hazlehurst Lodge, 53 Miss. 665; Griffin *v.* Sheffield, 38 Miss. 359, 77 Am. Dec. 646; Smith *v.* Doe, 26 Miss. 291.

Missouri.—Finch *v.* Ullmann, 105 Mo. 255, 16 S. W. 863, 24 Am. St. Rep. 383; Ebersole *v.* Rankin, 102 Mo. 488, 15 S. W. 422; Smith *v.* Lindsey, 89 Mo. 76, 1 S. W. 88; Charles *v.* Patch, 87 Mo. 450; Miller *v.* Hardin, 64 Mo. 545; Butcher *v.* Rogers, 60 Mo. 138; Holland *v.* Adair, 55 Mo. 40; Union Bank *v.* Manard, 51 Mo. 548; Fugate *v.* Pierce, 49 Mo. 441; Fellows *v.* Wise, 49 Mo. 350; Brown *v.* Brown, 45 Mo. 412; Merchant's Bank *v.* Harrison, 39 Mo. 433, 93 Am. Dec. 285; Chouquette *v.* Barada, 33 Mo. 249; St. Louis *v.* Wiggins Ferry Co., 15 Mo. App. 227.

Nebraska.— McCarthy *v.* Birmingham, (1902) 89 N. W. 1003; Carson *v.* Dundas, 39

tions in the same suit, and does not extend to different suits, unless the second suit grows out of a judgment in the first.[97]

b. Scope of Rule. The general rule extends to heirs and privies of parties where they if living would have been estopped.[98] It also includes cases where plaintiff swears that both parties claim title through a common source;[99] where defendant distinctly admits in his answer that he claims through a certain grantor;[1] where defendant is the common source;[2] where the title is derived only from the adverse party;[3] where both parties claim by descent as well as by deed;[4] where plaintiffs claim by deed through heirs of decedent and defendants

Nebr. 503, 58 N. W. 141; Barton *v.* Erickson, 14 Nebr. 164, 15 N. W. 206.

New York.—Zahm *v.* Dopp, 19 N. Y. Suppl. 863; Jackson *v.* Hinman, 10 Johns. 292.

North Carolina.— Ferebee *v.* Hinton, 102 N. C. 99, 8 S. E. 922; Christenburg *v.* King, 85 N. C. 229; Whissenhunt *v.* Jones, 78 N. C. 361; Brown *v.* Smith, 53 N. C. 331; Feimster *v.* McRorie, 46 N. C. 547; Johnson *v.* Watts, 46 N. C. 228; Gilliam *v.* Bird, 30 N. C. 280, 49 Am. Dec. 379; Love *v.* Gates, 20 N. C. 498; Ives *v.* Sawyer, 20 N. C. 179; Murphy *v.* Barnett, 6 N. C. 251.

Oregon.— Dolph *v.* Barney, 5 Oreg. 191.

Pennsylvania.— Clark *v.* Trindle, 52 Pa. St. 492; Turner *v.* Reynolds, 23 Pa. St. 199; Patton *v.* Goldsborough, 9 Serg. & R. 47; Riddle *v.* Murphy, 7 Serg. & R. 230; Thompson *v.* Graham, 9 Phila. 53.

South Carolina.— Cave *v.* Anderson, 50 S. C. 293, 27 S. E. 693; Johnson *v.* Cobb, 29 S. C. 372, 7 S. E. 601; Rhett *v.* Jenkins, 25 S. C. 453; Izlar *v.* Haitley, 24 S. C. 382; Smythe *v.* Tolbert, 22 S. C. 133; Pyles *v.* Reeve, 4 Rich. 555. But see Burnett *v.* Crawford, 50 S. C. 161, 27 S. E. 645.

South Dakota.— Horswill *v.* Farnham, (1902) 92 N. W. 1082.

Tennessee.— Carver *v.* Maxwell, 110 Tenn. 75, 71 S. W. 752; Hyder *v.* Butler, 103 Tenn. 289, 52 S. W. 876; Moss *v.* Union Bank, 7 Baxt. 216; Kerbough *v.* Vance, 6 Baxt. 110; Wortham *v.* Cherry, 3 Head 468; Royston *v.* Wear, 3 Head 8; Smith *v.* Turner, (Ch. App. 1898) 48 S. W. 396; Bleidorn *v.* Oakdale Iron, etc., T. Co., (Ch. App. 1896) 43 S. W. 360.

Texas.— Paschal *v.* Acklin, 27 Tex. 173.

Vermont.— Ames *v.* Beckley, 48 Vt. 395; Brooks *v.* Chaplain, 3 Vt. 281, 23 Am. Dec. 209; Bush *v.* Whitney, 1 D. Chipm. 369; Brown *v.* Bean, 1 D. Chipm. 176.

Virginia.— Bolling *v.* Teel, 76 Va. 487.

West Virginia.— Carrell *v.* Mitchell, 37 W. Va. 130, 16 S. E. 453; Low *v.* Settle, 32 W. Va. 600, 9 S. E. 922; Laidley *v.* Central Land Co., 30 W. Va. 505, 4 S. E. 705.

Wisconsin.— Du Pont *v.* Davis, 30 Wis. 170; Orton *v.* Noonan, 19 Wis. 350; Sexton *v.* Rhames, 13 Wis. 99.

Wyoming.— Hecht *v.* Boughton, 2 Wyo. 385.

United States.— Robertson *v.* Pickrell, 109 U. S. 608, 3 S. Ct. 407, 27 L. ed. 1049; Union Consol. Silver Min. Co. *v.* Taylor, 100 U. S. 37, 25 L. ed. 541; Gaines *v.* New Orleans, 6 Wall. 642, 18 L. ed. 950; Mickey *v.* Stratton, 17 Fed. Cas. No. 9,530, 5 Sawy. 475.

See 17 Cent. Dig. tit. "Ejectment," § 59.

That mesne grantor of plaintiff had a legal title from the common grantor cannot be assumed in instruction. Atkinson *v.* Smith, (Va. 1896) 24 S. E. 901.

Plaintiff need only prove that the title under which his adversary claims has, with reference to the original grantor, an intermediate common source with his own. Anderson *v.* Reid, 10 App. Cas. (D. C.) 426.

Where a corporation is the common source of title plaintiff need not show that the corporation was lawfully organized. Ryan *v.* Martin, 91 N. C. 464.

97. Comstock *v.* Eastwood, 108 Mo. 41, 18 S. W. 39.

98. Royston *v.* Wear, 3 Head (Tenn.) 8.

99. Brown *v.* Schintz, 203 Ill. 136, 67 N. E. 767; Burns *v.* Edwards, 163 Ill. 494, 45 N. E. 113, unless defendant denies under oath that he claims title under such source, or swears that he claims title under some other source. See also Lake Erie, etc., R. Co. *v.* Whitman, 155 Ill. 514, 40 N. E. 1014, 46 Am. St. Rep. 355, 28 L. R. A. 612; Chicago, etc., R. Co. *v.* Hardt, 138 Ill. 120, 27 N. E. 910; Cairo, etc., R. Co. *v.* Parrott, 92 Ill. 194; Hartshorn *v.* Dawson, 79 Ill. 108.

1. McDonald *v.* Hannah, 59 Fed. 977, 8 C. C. A. 426 [*reversing* 51 Fed. 73]. See also Johnstone *v.* Scott, 11 Mich. 232; Brown *v.* Brown, 45 Mo. 412; Du Pont *v.* Davis, 30 Wis. 170.

Plaintiff does not waive his right in such case by attempting to prove title in the common source, as such matter is immaterial. McDonald *v.* Hannah, 59 Fed. 977, 8 C. C. A. 426 [*reversing* 51 Fed. 73].

2. Byers *v.* Rodabaugh, 17 Iowa 53.

Defendant who sold to the lessor of plaintiff cannot show title out of himself at time of making deed. Den *v.* Winans, 14 N. J. L. 1.

Title derived by plaintiff from defendant estops the latter from setting up an outstanding title in a third party, both holding under a common source. Mathews *v.* Lecompte, 24 Mo. 545.

3. Coleman *v.* McCormick, 37 Minn. 179, 33 N. W. 556.

4. Myrick *v.* Wells, 52 Miss. 149.

Where one takes by descent as co-heir and tenant in common, he cannot show in ejectment by his co-heir that his ancestor had no title. Jackson *v.* Streeter, 5 Cow. (N. Y.) 529.

through deed from the widow;[5] where the remainder-man and the life-tenant both derive title from the same source;[6] where both parties claim under the same act;[7] where deeds under which defendant claims reserve plaintiff's land and recognize his title;[8] where defendant has a conveyance from the common grantor who was in possession at the time of conveyance;[9] where plaintiff fails to connect himself with an outstanding title, and defendant claiming under the same lessor is estopped from setting up an outstanding title;[10] where both parties claim under the same patent, but defendant's title is that of quasi-tenant to plaintiff;[11] where defendant holds as tenant under the judgment debtor, plaintiff's title being under a sheriff's deed;[12] where both parties claim under a sheriff's sale and plaintiff establishes the judgment debtor's title in himself;[13] where both parties claim under a sale of unseated land for taxes;[14] where both parties derive title under the United States town-site law;[15] and where, in ejectment for dower, defendant has entered into possession under a conveyance from a grantee of the husband.[16] A conveyance from a common ancestor will also be binding, although fraud is alleged, but is unproven.[17] Again if all the title is traced into a common source, through a direct deed from such source and a deed from him through another, it is immaterial whether the latter deed be void or not.[18]

c. Limitations or Qualifications of, or Exceptions to, Rule — (i) *In General.* The general rule does not apply, where there is no outstanding title superior to that of him who is the common source;[19] where the grantor's deed does not purport to convey the entire title;[20] where both parties claim under the same patent, and the title of neither is connected therewith;[21] where by plaintiff's showing he has not the legal title by reason of an encumbrance;[22] where plaintiff's chain of title from the common source is defective;[23] where defendant's deed from the common grantor is void;[24] where a quitclaim deed stands alone, for such deed does not show that the grantee had no prior title.[25] An exception has also been made where defendant can show that plaintiff's ancestor claimed under a different title than that set forth by plaintiff.[26]

5. Sell *v.* McAnaw, 138 Mo. 267, 39 S. W. 779.

6. Smith *v.* Bradley, 11 S. W. 370, 10 Ky. L. Rep. 1029.

7. Monette's Succession, 26 La. Ann. 26, as neither can contest its validity.

8. Greenwich Second M. E. Church *v.* Humphrey, 142 N. Y. 137, 36 N. E. 812 [*affirming* 21 N. Y. Suppl. 89].

9. Van den Brooks *v.* Correon, 48 Mich. 283, 12 N. W. 206.

10. Seabury *v.* Doe, 22 Ala. 207, 58 Am. Dec. 254.

11. Clarke *v.* Slack, 6 J. J. Marsh. (Ky.) 482.

12. Jackson *v.* Jones, 9 Cow. (N. Y.) 182.

13. Nor need plaintiff in such case prove the nature or quality of such debtor's title. Huntington *v.* Pritchard, 11 Sm. & M. (Miss.) 327.

14. Stewart *v.* Shoenfelt, 13 Serg. & R. (Pa.) 360.

15. Tucker *v.* Whittlesey, 74 Wis. 74, 41 N. W. 535, 42 N. W. 101.

16. Bowne *v.* Potter, 17 Wend. (N. Y.) 164.

17. Beasley *v.* Rowley, (Tenn. Ch. App. 1898) 52 S. W. 322. See Barnett *v.* Mimick, 17 S. W. 334, 13 Ky. L. Rep. 503.

18. Prescott *v.* Jones, 29 Ga. 58.

19. New England Mortg. Security Co. *v.* Clayton, 119 Ala. 361, 24 So. 362.

Where evidence of title is forced out of the claimant and is not before the court with his consent, and it does not appear that the title was derived solely from the source so evidenced or that other and better title will not be relied on, the rule does not apply. McConnell *v.* Rhodes, 14 Ga. 313.

20. Campau *v.* Campau, 37 Mich. 245, or even where it leaves it uncertain without the aid of other testimony what interest was conveyed.

21. Ratcliff *v.* Bellfonte Iron Works Co., 87 Ky. 559, 10 S. W. 365, 10 Ky. L. Rep. 643, the question thereby becoming one of superior possessory right.

22. Smith *v.* Doe, 26 Miss. 291.

23. Christenburg *v.* King, 85 N. C. 229. *Compare* Lyons *v.* Holmes, 19 S. C. 406.

24. McDougald *v.* McLean, 60 N. C. 120.

But where defendant's deed was not delivered he cannot show that the alleged common grantor conveyed the land to another before he conveyed either to him or to plaintiff. Thomas *v.* Kelly, 46 N. C. 375.

Where defendant's equitable title has not been consummated by a deed and plaintiff has a legal title, it has been held that although claiming from a common source the general rule does not apply. Levi *v.* Gardner, 53 S. C. 24, 30 S. E. 617.

25. North Chillicothe *v.* Burr, 185 Ill. 322, 57 N. E. 32. See also Henry *v.* Reichert, 22 Hun (N. Y.) 394.

26. Miller *v.* Wilson, 2 Yeates (Pa.) 294.

(II) *Superior Title* — (A) *When Not Precluded by Rule.* The general rule does not preclude showing a superior title;[27] that one party has acquired another and better title from some other person;[28] or that plaintiff has parted with his title.[29] Again defendant may justify his possession by showing that he holds under another deed, thereby destroying the proof of title from a common source.[30]

(B) *Limitation of Inquiry.* If both parties trace title to a common source the inquiry is limited to which has the elder and better title;[31] and the elder or better grant or title will prevail;[32] but this does not mean a naked possession only without color of title for a short time prior to acquiring a claim under the common title.[33]

D. Right of Plaintiff to Possession.[34] As a basis of the right to recover it is essential that plaintiff have a right of present[35] or immediate[36] pos-

27. Burns *v.* Goff, 79 Tex. 236, 14 S. W. 1009.

As against written title defendant's possession will be superior when for twenty years coupled with title from a common source. Shea *v.* Burchell, 27 Nova Scotia 235.

28. Johnson *v.* Watts, 46 N. C. 228; Copeland *v.* Sauls, 46 N. C. 70.

Buying in outstanding title.—It is decided that either party may improve his title, as against the other, by buying in an outstanding title paramount to that of the prior owner; but it will not benefit him unless it is a subsisting and available title. If, however, one enters under another's title he cannot procure from another source an adverse and better title and set it up in opposition to that under which he obtained possession and to the prejudice of his vendor. Wade *v.* Thompson, 52 Miss. 367. *Compare* Bowne *v.* Potter, 17 Wend. (N. Y.) 164.

29. Moss *v.* Union Bank, 7 Baxt. (Tenn.) 216.

30. Hughes *v.* Wilkinson, 28 Miss. 600. But see Dycus *v.* Hart, 2 Tex. Civ. App. 354, 21 S. W. 299.

31. Wade *v.* Thompson, 52 Miss. 367; Bonds *v.* Smith, 106 N. C. 553, 11 S. E. 322. See also Hall *v.* Lance, 25 Ill. 277.

Before defendant can impeach a common source he must establish that he has acquired a superior title. Sell *v.* McAnaw, 138 Mo. 267, 39 S. W. 779.

Older title of plaintiff, coupled with due registration and the common source, entitles him to recover, unless defendant, not being under estoppel, shows another and different title. Anderson *v.* Reid, 10 App. Cas. (D. C.) 426.

Plaintiff must sustain his claim to a common source or show a paramount superior title. North Chillicothe *v.* Burr, 185 Ill. 322, 57 N. E. 32.

32. *California.*—Touchard *v.* Crow, 20 Cal. 150, 81 Am. Dec. 108.

Louisiana.— Weil *v.* Zodiag, 34 La. Ann. 982.

Michigan.— Drake *v.* Happ, 92 Mich. 580, 52 N. W. 1023.

Mississippi.— Slack *v.* Swaim, (1891) 8 So. 545; Griffin *v.* Sheffield, 38 Miss. 359, 77 Am. Dec. 646.

New York.— Risley *v.* Rice, 40 Hun 585; Wood *v.* Livingston, 11 Johns. 36.

North Carolina.— Christenbury *v.* King, 85 N. C. 229; Gilliam *v.* Bird, 30 N. C. 280, 49 Am. Dec. 379.

Wisconsin.— Schwallback *v.* Chicago, etc., R. Co., 69 Wis. 292, 34 N. W. 128, 2 Am. St. Rep. 740.

See 17 Cent. Dig. tit. "Ejectment," § 60; and *supra*, II, C, 1, c; II, C, 4, a, (I).

Senior patent prevails. Simpson *v.* Kilpatrick, 148 Mo. 507, 50 S. W. 435; Cunningham *v.* Snow, 82 Mo. 587.

Title derived under a prior lien is *prima facie* superior to a title from a common source purporting to be derived under a junior lien, although a judicial sale under the latter may have preceded that under the former. Littlefield *v.* Nichols, 42 Cal. 372.

Where grants from the state overlap plaintiff's older grant and entry prevails over defendant's grant without entry. Nolen *v.* Wilson, 5 Sneed (Tenn.) 332.

33. Brooks *v.* Chaplin, 3 Vt. 281, 23 Am. Dec. 289.

34. Title or right at time of action brought or at trial see *supra*, II, C, 2, 3.

35. Baro *v.* Fennell, 24 Fla. 378, 5 So. 9; Batterton *v.* Yoakum, 17 Ill. 288; Heffner *v.* Betz, 32 Pa. St. 376; Russell *v.* Allmond, 92 Va. 484, 23 S. E. 895.

State must have a present right of possession, and where it has demised lands to another and has not been reinvested with the right of possession such other party cannot recover in ejectment. State *v.* Cincinnati Tin, etc., Co., 66 Ohio St. 182, 64 N. E. 68.

36. *Alabama.*— Slaughter *v.* McBride, 69 Ala. 510; Olive *v.* Adams, 50 Ala. 373.

Maryland.—Lannay *v.* Wilson, 30 Md. 536.

Montana.— Herbert *v.* King, 1 Mont. 475.

Ohio.— State *v.* Cincinnati Tin, etc., Co., 21 Ohio Cir. Ct. 218, 11 Ohio Cir. Dec. 587.

Vermont.— Cheney *v.* Cheney, 26 Vt. 606, rule applied to all of several plaintiffs.

See 17 Cent. Dig. tit. "Ejectment," § 63.

Right to immediate possession would always support the action of ejectment and it will yet. Tennessee, etc., R. Co. *v.* East Alabama R. Co., 75 Ala. 516, 51 Am. Rep. 475.

Tennessee code requires the right to immediate possession in plaintiff. Hubbard *v.* Godfrey, 100 Tenn. 150, 47 S. W. 81.

While the homestead act conveys no title, but merely a protection from sale whilst occupied, nevertheless the children and heirs

session,[37] notwithstanding he may have the legal title in himself.[38] A right of possession, however, follows title,[39] or may be based upon what is necessary to the contemplated use of land granted.[40] It has been decided, however, that a right of possession will be determined only on the record title or title by limitation.[41]

E. Ouster of Plaintiff and Possession by Defendant — 1. Nature, Essentials, and Scope — a. In General. Although ejectment lies where there is an actual, tortious eviction,[42] yet it is not necessary to constitute an ouster that the act should be accompanied with force, for the sufficiency of an ouster may be based upon the circumstances.[43] It may, however, be stated that there is a sufficient ouster: Where there is an unlawful interference with the owner's enjoyment of his estate by an unlawful or wrongful entry,[44] with full notice of his

have such an estate, coupled with their right to immediate possession, as entitles them to sue for a recovery in ejectment. Booth *v.* Goodwin, 29 Ark. 633.

37. *Alabama.*— Williams *v.* Hartshorn, 30 Ala. 211.

California.— Willis *v.* Wozencraft, 22 Cal. 607.

Maryland.— Mitchell *v.* Mitchell, 1 Md. 44; Wilson *v.* Inloes, 11 Gill & J. 351.

New York.— McLeans *v.* Macdonald, 2 Edm. Sel. Cas. 393.

United States.—Smith *v.* McCann, 24 How. 398, 16 L. ed. 714.

See 17 Cent. Dig. tit. "Ejectment," § 63.

Against a right of entry reserved ejectment will not lie. Narehood *v.* Wilhelm, 69 Pa. St. 64.

Although possession is taken with plaintiff's consent, under an agreement that plaintiff is to have the right of possession and defendant continues in possession without plaintiff's consent, the latter is entitled to possession after the expiration of the period of consent. Kopper *v.* Fulton, 71 Vt. 211, 44 Atl. 92.

Entry of plaintiff by fraud does not affect his right of possession where he had a right of entry. Depuy *v.* Williams, 26 Cal. 309.

Lease is deemed a real possessory title for all purposes of the action, even though it is founded on fiction. Robinson *v.* Campbell, 3 Wheat. (U. S.) 212, 4 L. ed. 372.

One entitled to possession may maintain ejectment against another, although he has a legal title. Doe *v.* Crosby, 7 U. C. Q. B. 202.

Right of possession is sufficient where defendant admits his possession. Arents *v.* Long Island R. Co., 89 Hun (N. Y.) 126, 34 N. Y. Suppl. 1085.

The statute requires right to recover possession (Bay County *v.* Bradley, 39 Mich. 163, 33 Am. Rep. 367), and a party having such statutory right may bring ejectment (Curtis *v.* Herrick, 14 Cal. 117, 73 Am. Dec. 632).

38. Clark *v.* Davis, 60 S. W. 396, 22 Ky. L. Rep. 1231; Richardson *v.* Baltimore, etc., R. Co., 89 Md. 126, 42 Atl. 938; Hammond *v.* Inloes, 4 Md. 138; Wells *v.* Steckelberg, 52 Nebr. 597, 72 N. W. 865, 66 Am. St. Rep. 529; Perryman *v.* Callison, 1 Overt. (Tenn.) 515. And see Rowe *v.* Beckett, 30 Ind. 154, 95 Am. Dec. 676.

39. Willoby *v.* Raiden, 113 Ga. 85, 38 S. E. 314.

Against naked possession or intruder.— A right of possession, being an incident to legal title, is sufficient against one having naked possession (Hogans *v.* Carruth, 19 Fla. 84), or an intruder (Hull *v.* Campbell, 56 Pa. St. 154), or one who has neither claim or color of title, and has admitted title in plaintiff's grantor (Sykes *v.* Hayes, 23 Fed. Cas. No. 13,709, 5 Biss. 529).

Party having better title is entitled to possession. Gay *v.* Moffitt, 2 Bibb (Ky.) 506, 5 Am. Dec. 633.

40. Southern Pac. Co. *v.* Burr, 86 Cal. 279, 24 Pac. 1032. See also Southern Pac. Co. *v.* Meyer, (Cal. 1890) 24 Pac. 1033.

41. McAnaw *v.* Clark, 167 Mo. 443, 67 S. W. 249.

Perfect possessory title in vendor without paper title in him is sufficient. Hamilton *v.* Hamilton, 29 S. W. 876, 16 Ky. L. Rep. 793.

42. Adams *v.* Tiernan, 5 Dana (Ky.) 394.

43. Corbin *v.* Cannon, 31 Miss. 570. See also 3 Blackstone Comm. 167–170, 198, 2 Blackstone Comm. 196.

An ouster is a wrongful dispossession or exclusion from real property of a party who is entitled to the possession, and involves a question of intent. But actual intent implies active knowledge, and there can be no wrongful dispossession or wrongful exclusion, no adverse intent and adverse holding, where one is in the enjoyment of that which he honestly supposes to be his, and has no knowledge that any person has or claims to have a right to participate in the possession of it. Newell *v.* Woodruff, 30 Conn. 492.

Although, in order to constitute an actual disseizin, there must be a tortious entry and expulsion, still there are certain acts which are capable of being made a disseizin by election. Such acts do not, however, constitute a disseizin until the party makes them so. Jackson *v.* Rogers, 1 Johns. Cas. (N. Y.) 33.

Taking a conveyance from a hostile source constitutes an ouster by tenant. Clark *v.* Crego, 47 Barb. (N. Y.) 599.

Whether the intrusion of a foundation wall may be treated as a disseizin or trespass see Rahn *v.* Milwaukee Electric R., etc., Co., 103 Wis. 467, 79 N. W. 747.

Continuous possession of plaintiff to time of ouster or disturbance see *supra*, II, C, 4, a, (II), (B), (3), (4).

44. Dyer *v.* Krackauer, 14 Mo. App. 39; Bradstreet *v.* Huntington, 5 Pet. (U. S.) 402, 8 L. ed. 170.

rights;[45] where an entry is peaceable and without force, but is equivalent to a forcible entry;[46] or where there is an entry and a claim of possession adverse to the true owner;[47] and, although mere words are insufficient, a notice not to trespass may operate to give construction to defendant's acts upon the land, and so aid in determining whether or not there has been an ouster.[48] Again possession is sufficient as a basis of ejectment: Where there is a refusal of possession even for a temporary period;[49] where defendant's possession is unlawful, even though he has a right in the nature of an easement;[50] where there is a denial of plaintiff's title or an assertion of title by defendant in possession, and acts are done in furtherance of such claim;[51] where adjoining tracts owned in severalty are inclosed around their exterior boundaries;[52] and where there is a subjection of the land to the actual dominion of defendant,[53] or an exercise of acts of ownership and control to the exclusion of plaintiff,[54] as distinguished from a single

Damming water back on plaintiff's land is not a taking of the bed and banks of the stream. Burke *v.* Carlinville Water Co., 176 Ill. 555, 52 N. E. 266.

Entry by a stranger is not tortious when made on the estate of a deceased tenant in common with the consent of the administrator. Carpentier *v.* Small, 35 Cal. 346.

When feoffment and fine with proclamation are an absolute disseizin of coparceners and not a disseizin at election see Doe *v.* Pett, 11 A. & E. 842, 4 P. & D. 278, 39 E. C. L. 446.

45. Sweetland *v.* Hill, 9 Cal. 556.

46. Tidwell *v.* Chiricahua Cattle Co., (Ariz. 1898) 53 Pac. 192.

Entry under a levy on an undivided moiety, against the owner of an estate for life in one third of land and of a term for years in the other two thirds, and claiming to hold a moiety of the land, amounts to an ouster of an assignee of the estate for life and for years. Chapman *v.* Gray, 15 Mass. 439.

Mere entry does not amount to disseizin unless accompanied with expulsion from the freehold. Doe *v.* Thompson, 5 Cow. (N. Y.) 371.

Statute includes wrongful entry or rightful entry and wrongful detention. McCann *v.* Rathbone, 8 R. I. 297.

Where one is rightfully in possession by entry under a bond for a deed he cannot be disturbed by a grantee of his vendor under a deed given while the former vendee was in possession. Sands *v.* Kagey, 150 Ill. 109, 36 N. E. 956.

47. Bell *v.* Foxen, 42 Fed. 755.

48. Dikeman *v.* Taylor, 24 Conn. 219.

49. Smith *v.* Revels, 79 Hun (N. Y.) 213, 29 N. Y. Suppl. 658, refusal here being by a contractor during the process of construction of a building.

50. Ocean Grove Camp-Meeting Assoc. *v.* Berthall, 63 N. J. L. 310, 43 Atl. 887 [*reversing* 62 N. J. L. 88, 40 Atl. 779].

Easements and plaintiff's title see *supra*, II, C, 1, f.

51. **Rule applies:** Where defendant occupies and cultivates the land and never recognizes any right in plaintiff. Hendricks *v.* Rasson, 49 Mich. 83, 13 N. W. 367. Where defendant in possession expressly denies the title of plaintiff and his cotenants claiming under another title and refuses possession and continues to rely upon such title. Dodge *v.* Page, 49 Vt. 137. Where a widow in possession asserts title as donee to the exclusion of the heirs. Kellogg *v.* Gilfillan, (Pa. 1887) 10 Atl. 888. Where a purchaser at a guardian's sale is in possession claiming title under the guardian's deed. Wilkinson *v.* Filby, 24 Wis. 441. Where one under claim of title commits acts of trespass. Chilson *v.* Buttolph, 12 Vt. 231. Where defendant is in possession under chain of title from lessor's ancestor. Register *v.* Rowell, 48 N. C. 312. Where defendant claimed to have a deed and assumed to lease the premises and to collect the rents and retain them, at least it tends to show an ouster. Durkee *v.* Felton, 54 Wis. 405, 11 N. W. 588.

But where the acts done show no claim of title or interest in the land itself there is no sufficient ouster. Cowenhoven *v.* Brooklyn, 38 Barb. (N. Y.) 9.

Even though defendant does not claim ownership and offers to remove improvements, yet if he retains possession unlawfully ejectment lies. Comfort *v.* Ballingal, 134 Mo. 281, 35 S. W. 609.

Mere act of owner of personal chattels in leaving them upon another's land does not constitute a ground for ejectment, where the owner does not demand the removal of such chattels. Bedell *v.* Arnold, 15 N. Y. App. Div. 576, 44 N. Y. Suppl. 541.

Recording of tax deed is sufficient claim of title, unless defendant disclaims interest before suit and takes the necessary steps to disaffirm the apparent title of record. Hoyt *v.* Southard, 58 Mich. 432, 25 N. W. 385.

52. Reay *v.* Butler, 95 Cal. 206, 30 Pac. 208.

53. Quicksilver Min. Co. *v.* Hicks, 20 Fed. Cas. No. 11,508, 4 Sawy. 688.

Where defendant has lawful possession and dominion over the premises there can be no recovery. Binghamton Opera-House Co. *v.* Binghamton, 88 Hun (N. Y.) 620, 34 N. Y. Suppl. 421.

54. Gruell *v.* Spooner, 71 Cal. 493, 12 Pac. 511; Redfield *v.* Utica, etc., R. Co., 25 Barb. (N. Y.) 54. See also Quicksilver Min. Co. *v.* Hicks, 20 Fed. Cas. No. 11,508, 4 Sawy. 688.

act,[55] or occasional acts of intrusion, such as the mere act of cutting timber on land and hauling it off.[56]

b. Continuance of Possession. Whether or not defendant's possession continues after he leaves the land must be determined by his acts at the time of his departure, the appearance of the land thereafter, and also his claims and intentions.[57]

c. Possession of Part.[58] Although defendant is in actual possession of less than is declared for it has been held that plaintiff may recover the whole;[59] but it has also been decided that recovery must be limited to that part possessed or occupied by defendant.[60] Again ejectment lies where plaintiff's lessor and defendant occupy different parts of the same tract claiming adversely.[61]

2. Necessity — a. Of Ouster, Dispossession, Disseizin, or Wrongful Entry. It is a general rule that ejectment can be maintained only by one out of possession.[62] Primarily therefore it must ordinarily be shown that defendant keeps plaintiff out of the possession unlawfully;[63] or that there is an ouster, disseizin,[64] dispossession,[65] actual trespass,[66] or tortious entry,[67] as well as a wrongful possession.[68]

Where there are no acts of ownership and control or any inclosure ejectment does not lie. Harrington *v.* Port Huron, 86 Mich. 46, 48 N. W. 641, 13 L. R. A. 664.

Possession means an exclusion of every other person except by permission, as well as that it is physically possible to use and occupy it by one's self. Syracuse Gas-Light Co. *v.* Rome, etc., R. Co., 11 N. Y. Civ. Proc. 239 [*modified* in 51 Hun 119, 5 N. Y. Suppl. 459].

Exclusion, except upon condition, is sufficient. Mahon *v.* San Rafael Turnpike R. Co., 49 Cal. 269.

55. Jackson *v.* Pike, 9 Cow. (N. Y.) 69.

56. Ozark Land Co. *v.* Leonard, 20 Fed. 881.

But occasional entries and acts may be a sufficient possession when coupled with a claim of right and a refusal to deliver possession on demand. Roach *v.* Heffernan, 65 Vt. 485, 27 Atl. 71.

57. Myers *v.* McMillan, 4 Dana (Ky.) 485. See also Burke *v.* Hammond, 76 Pa. St. 172. *Compare supra*, II, C, 4, a, (II), (B), (3).

58. See *supra*, II, C, 4, d.

59. White *v.* St. Guirons, Minor (Ala.) 331, 12 Am. Dec. 56; Coleman *v.* Henderson, 3 Ill. 251.

If defendant claims title to the entire tract, without disclaiming as to part, it is immaterial that he was in actual possession of only a part. Colorado Cent. R. Co. *v.* Smith, 5 Colo. 160.

Constructive possession.— A conveyance of land adjacent to other land of which one is in actual possession will give a constructive actual possession of the part so conveyed, where there is no adversary in possession, which will warrant ejectment therefor against such possessor. Griffith *v.* Dicken, 2 B. Mon. (Ky.) 20.

Where title is claimed under a confirmation of a grant, defendant must have possession of some part of the land within the decree of confirmation. Brown *v.* Brackett, 45 Cal. 167.

60. Tripp *v.* Fausett, 94 Ga. 330, 21 S. E. 572; Kelly *v.* Hare, 1 Humphr. (Tenn.) 163.

Where entry is made upon public lands without making claim under the possessory or preëmption laws the possession will not be extended beyond that portion of the premises actually occupied. Garrison *v.* Sampson, 15 Cal. 93.

61. Dobbins *v.* Stephens, 18 N. C. 5.

62. Brown *v.* King, 107 N. C. 313, 12 S. E. 137; Corley *v.* Pentz, 76 Pa. St. 57; Kribbs *v.* Downing, 25 Pa. St. 399, Buchanan *v.* Streper, 12 Phila. (Pa.) 529; Smith *v.* Wingard, 3 Wash. Terr. 291, 13 Pac. 717; Peters *v.* Reichenbach, 114 Wis. 209, 90 N. W. 184; Carmichael *v.* Argard, 52 Wis. 607, 9 N. W. 470.

Although defendant claims adversely ejectment does not lie by one in possession. Steinman *v.* Vicars, 99 Va. 595, 39 S. E. 227.

63. Lotz *v.* Briggs, 50 Ind. 346.

64. *California.*— Watson *v.* Zimmerman, 6 Cal. 46; Payne *v.* Treadwell, 5 Cal. 310.

New York.— Smith *v.* Burtis, 6 Johns. 197, 5 Am. Dec. 218.

Pennsylvania.— Lykens *v.* Whelan, 15 Pa. St. 483; Buchanan *v.* Streper, 12 Phila. 529.

South Carolina.— Rollins *v.* Brown, 37 S. C. 345, 16 S. E. 44.

Vermont.— Chamberlin *v.* Donahue, 41 Vt. 306; Cooley *v.* Penfield, 1 Vt. 244.

See 17 Cent. Dig. tit. "Ejectment," § 65 *et seq.*

Actual ouster is necessary in ejectment by one tenant in common against another. Prince *v.* Heylin, 1 Atk. 493, 26 Eng. Reprint 312; Doe *v.* Cuff, 1 Campb. 173. See also Doe *v.* Phillips, 3 B. & Ad. 753, 1 L. J. K. B. 187, 23 E. C. L. 330.

Denial of plaintiff's right of possession is equivalent of actual ouster under Oreg. Code Civ. Proc. § 313. Goldsmith *v.* Smith, 21 Fed. 611.

65. Cooper *v.* Smith, 9 Serg. & R. (Pa.) 26, 11 Am. Dec. 658.

66. Anderson *v.* Lynch, 37 S. C. 575, 16 S. E. 773 [*overruling* Binda *v.* Benbow, 9 Rich. (S. C.) 15].

67. Smith *v.* Burtis, 6 Johns. (N. Y.) 197, 5 Am. Dec. 218.

68. Chamberlin *v.* Donahue, 41 Vt. 306.

b. Of Possession, Occupancy, or Claim of Title, and Time Thereof. Ejectment only lies against a defendant in possession or occupancy,[69] at the time when the action was commenced;[70] and an abandonment[71] thereafter does not defeat the action.[72] It is decided, however, that an exception exists where defendant is admitted to defend the possession of another.[73] It is also determined that actual or personal possession[74] or an actual occupancy or residence are unnecessary;[75]

69. *California.*—Garner *v.* Marshall, 9 Cal. 268.

Illinois.— See Reed *v.* Tyler, 56 Ill. 288.

Kentucky.— McDowell *v.* King, 4 Dana 67; Pope *v.* Pendergrast, 1 A. K. Marsh. 122. And see Withers *v.* Payne, 12 B. Mon. 343; Madison *v.* Owens, Litt. Sel. Cas. 281.

Missouri.— See La Riviere *v.* La Riviere, 97 Mo. 80, 10 S. W. 840; Charter Oak L. Ins. Co. *v.* Cummings, 13 Mo. App. 76.

New York.— Ellicott *v.* Mosier, 7 N. Y. 201; Schuyler *v.* Marsh, 37 Barb. 350; People *v.* New York, 28 Barb. 240; Champlain, etc., R. Co. *v.* Valentine, 19 Barb. 484; Lucas *v.* Johnson, 8 Barb. 244; Jackson *v.* Ives, 9 Cow. 661. And see Child *v.* Chappell, 9 N. Y. 246; Redfield *v.* Utica, etc., R. Co., 25 Barb. 54; Van Horne *v.* Everson, 13 Barb. 526.

North Carolina.— Doggett *v.* Hardin, 132 N. C. 690, 44 S. E. 369; Mordecai *v.* Oliver, 10 N. C. 479; Albertson *v.* Reding, 6 N. C. 283. And see Davis *v.* Morris, 132 N. C. 435, 43 S. E. 950.

Pennsylvania.— McIntire *v.* Wing, 113 Pa. St. 67, 4 Atl. 197. And see Cooper *v.* Smith, 9 Serg. & R. 26, 11 Am. Dec. 658.

Rhode Island.— Grundy *v.* Hadfield, 16 R. I. 579, 18 Atl. 186.

Washington.— See Smith *v.* Wingard, 3 Wash. Terr. 291, 13 Pac. 717.

Wisconsin.— See Carmichael *v.* Argard, 52 Wis. 607, 9 N. W. 470.

United States.— Ozark Land Co. *v.* Leonard, 20 Fed. 881.

See 17 Cent. Dig. tit. "Ejectment," § 65 *et seq.*

When ejectment lies against one out of possession see *infra*, II, F.

Judgment against non-resident proprietor is void. Charter Oak L. Ins. Co. *v.* Cummings, 13 Mo. App. 76.

Occupation or possession by husband or wife and effect and sufficiency thereof see Gordon *v.* Sizer, 39 Miss. 805; Danihee *v.* Hyatt, 81 Hun (N. Y.) 238, 30 N. Y. Suppl. 707 [*affirmed* in 151 N. Y. 493, 45 N. E. 939]; Zeigler *v.* Shomo, 78 Pa. St. 357.

70. *Alabama.*— Betz *v.* Mullin, 62 Ala. 365.

California.— Partridge *v.* Shepard, (1886) 12 Pac. 351; Dillon *v.* Center, 68 Cal. 561, 10 Pac. 176; Shaeffer *v.* Matzen, 59 Cal. 652; Brown *v.* Brackett, 45 Cal. 167; Buhne *v.* Corbett, 43 Cal. 264; Owen *v.* Morton, 24 Cal. 373; Owen *v.* Fowler, 24 Cal. 192.

Florida.— Jones *v.* Lofton, 16 Fla. 189.

Georgia.— Scisson *v.* McLaws, 12 Ga. 166.

Indiana.— Williamson *v.* Crawford, 7 Blackf. 12.

Kentucky.— Moss *v.* Scott, 2 Dana 271; Garnett *v.* Garnett, 7 T. B. Mon. 545.

Mississippi.— Wallis *v.* Smith, 2 Sm. & M. 220; Newman *v.* Foster, 3 How. 383, 34 Am. Dec. 98.

North Carolina.— Ward *v.* Parks, 72 N. C. 452; Atwell *v.* McLure, 49 N. C. 371; Flanniken *v.* Lee, 23 N. C. 293.

Vermont.— Skinner *v.* McDaniel, 4 Vt. 418; Cooley *v.* Penfield, 1 Vt. 244.

West Virginia.— Southgate *v.* Walker, 2 W. Va. 427.

United States.— Walton *v.* Wild Goose Min., etc., Co., 123 Fed. 209, 60 C. C. A. 155.

See 17 Cent. Dig. tit. "Ejectment," § 65 *et seq.*

Exact time of alleged ouster is not material, where there is no claim for or recovery of damages. Collier *v.* Corbett, 15 Cal. 183. See also Walton *v.* Wild Goose Min., etc., Co., 123 Fed. 209, 60 C. C. A. 155.

If possession is such as to be deemed continuous from a time prior to beginning the suit until down to the time of trial, it is sufficient where there is no disclaimer. Doe *v.* Roe, 30 Ga. 553.

Time of service of writ is to be treated as commencement of an action. McDaniels *v.* Reed, 17 Vt. 674.

Where the title is in the wife at the commencement of suit she is an actual occupant. Martin *v.* Rector, 101 N. Y. 77, 4 N. E. 183, 3 How. Pr. N. S. (N. Y.) 361 [*affirming* 30 Hun 138].

71. See Harper *v.* Lowndes, 15 U. C. Q. B. 430.

If party is out of possession by his own act of abandonment before suit is commenced, recovery is precluded, even though he had theretofore refused possession. Allen *v.* Dunlap, 42 Barb. (N. Y.) 585.

Trespass and possession must be continued down to time the action is brought. Anderson *v.* Lynch, 37 S. C. 575, 16 S. E. 773 [*overruling* Binda *v.* Benbow, 9 Rich (S. C.) 15].

72. Archibald *v.* New York Cent., etc., R. Co., 1 N. Y. App. Div. 251, 37 N. Y. Suppl. 336.

Defendant's quitting possession after service of the writ does not affect plaintiff's right to proceed to judgment. Zeigler *v.* Fisher, 3 Pa. St. 365.

73. Garnett *v.* Garnett, 7 T. B. Mon. (Ky.) 545.

74. Quicksilver Min. Co. *v.* Hicks, 20 Fed. Cas. No. 11,508, 4 Sawy. 688. See also Bell *v.* Foxen, 42 Fed. 755.

Actual as distinguished from constructive possession is unnecessary. Crane *v.* Ghirardelli, 45 Cal. 235.

75. Kunze *v.* Evans, 129 Mo. 1, 31 S. W. 114; Phillips *v.* Phillips, 107 Mo. 360, 17 S. W. 974.

and a claim of title may in certain cases be sufficient, although defendant is not in possession.[76]

3. Acts of Tenant, Agent, Servant, and Public or State Officer, or Guardian. Possession of a tenant is that of his landlord;[77] although it is determined that defendant's personal acts may constitute a sufficient possession, notwithstanding a tenant is in actual possession claiming the land as his own, plaintiff having no notice of the latter fact.[78] An ouster may also be committed by an agent[79] or servant;[80] and if there is no trespass by defendant in person, it must have been committed by his agent or tenant, where the statute so requires.[81] Again an officer or state agent in custody of property, and one who under his employment guards and cares for it, have a possession which is a basis of ejectment.[82] Ejectment cannot, however, be maintained against minors on the wrongful taking of possession by their guardian.[83]

4. Where There Are Several Defendants. An ouster committed, and possession thereby acquired, by one person with the knowledge and consent of another, for their joint benefit, are the acts and possession of both.[84] If, however, one procures himself to be made a party defendant he need not be shown to be in possession;[85] but it is also decided that possession of some part of the premises by a co-defendant is necessary, even though he has not entered a disclaimer.[86] Again in ejectment against two the possession of one alone justifies a judgment against him.[87]

5. Defendant Precluded From Denying Ouster. Defendant, it seems, may be precluded by his acts or admissions from denying an ouster.[88]

76. Converse *v.* Dunn, 166 Ill. 25, 46 N. E. 747; Whiteley *v.* Whiteley, 110 Mich. 556, 68 N. W. 241; Banyer *v.* Empie, 5 Hill (N. Y.) 48; Becker *v.* Howard, 47 How. Pr. (N. Y.) 423; Smith *v.* Lee, 1 Coldw. (Tenn.) 549.

Statute giving action against tax-title claimant, whether in actual possession or not, does not apply where such claimant is out of possession and another is in actual possession. Callahan *v.* Davis, 90 Mo. 78, 2 S. W. 216.

Claim of title to unoccupied lands see *infra*, II, F.

77. Smith *v.* Walker, 10 Sm. & M. (Miss.) 584; Jackson *v.* Harrow, 11 Johns. (N. Y.) 434. See Oliver *v.* Williams, 25 Ga. 217; Phillips *v.* Phillips, 107 Mo. 360, 17 S. W. 974; Den *v.* Snowhill, 13 N. J. L. 23, 22 Am. Dec. 496.

If the landlord has constructive possession ejectment cannot be maintained against him alone. Grundy *v.* Hadfield, 16 R. I. 579, 18 Atl. 186.

Peaceable entry under a mortgagee after default constitutes a tenancy making such possession that of the mortgagee. Hennesy *v.* Farrell, 20 Wis. 42.

Where title under lease passes under execution sale the former owner is no longer in possession. Gowan *v.* Bensel, 53 Minn. 46, 54 N. W. 934.

78. Stewart *v.* Cass, 16 Vt. 663, 42 Am. Dec. 534.

79. Munson *v.* Munson, 30 Conn. 425.

Acts of the husband as agent of the wife, done on land which the wife might be presumed to own, are not proof of ouster in an action against the husband and wife to recover an undivided part of the land. Yager *v.* Larsen, 22 Wis. 184.

80. Riecke *v.* Westenhoff, 10 Mo. App. 358.

81. Anderson *v.* Lynch, 37 S. C. 575, 16 S. E. 773, where, however, the acts of the agent were held insufficient.

But where there is no claim of title by the alleged principal or by the alleged agent in the former's behalf, and the latter does not represent himself as agent, an act of dispossession by him is his individual act. Danihee *v.* Hyatt, 68 Hun (N. Y.) 255, 22 N. Y. Suppl. 995.

82. Tindal *v.* Wesley, 167 U. S. 204, 17 S. Ct. 770, 42 L. ed. 137. But see Buhne *v.* Corbett, 43 Cal. 264, an employee of the United States.

Action against state controller of wild, vacant, and forest lands see Meigs *v.* Roberts, 162 N. Y. 371, 56 N. E. 838, 76 Am. St. Rep. 322 [*reversing* 42 N. Y. App. Div. 290, 59 N. Y. Suppl. 215].

83. Spitts *v.* Wells, 18 Mo. 468.

84. Treat *v.* Reilly, 35 Cal. 129.

85. Warren *v.* Carter, 92 Mo. 288, 5 S. W. 42; Gorham *v.* Brenon, 13 N. C. 174.

Recovery may be had against both husband and wife, even though the latter alone was in possession, living apart from her husband, and was made co-defendant as *feme sole* at her request, the question of coverture not being raised until after judgment. Von Schrader *v.* Taylor, 7 Mo. App. 361.

86. McCanna *v.* Johnston, 19 Pa. St. 434.

87. Gordon *v.* Sizer, 39 Miss. 805.

Where one defendant is the landlord of the other defendant, who has actually entered, ejectment will not lie against him. Champlain, etc., R. Co. *v.* Valentine, 19 Barb. (N. Y.) 484.

88. Southern Cotton Oil Co. *v.* Henshaw, 89 Ala. 448, 7 So. 760; Kirkland *v.* Trott, 66 Ala. 417.

F. Claim of Title or Acts of Ownership of Unoccupied Lands — 1. In General. Ejectment will only lie against one out of possession, claiming title, when the lands are unoccupied and his claim of title or of interest is accompanied with acts of ownership, such as inclosure, cultivation, and the like.[89] The oldest and best title will prevail where lands are uninclosed and unimproved,[90] or are wild or unoccupied,[91] and not in the actual possession[92] of either party.[93]

2. Sufficiency of Claim or Acts. As against a person claiming land, although not in occupation thereof, ejectment may be brought where he has made entries and surveys of any part thereof;[94] or where with his claim he exercises acts of ownership such as inclosure, cultivation, and the like,[95] or the payment of taxes.[96] But the claim of title must be a serious and intentional one and not an idle declaration of ownership;[97] and the title or interest claimed must be one which if valid would give a possessory right.[98] The action lies against one recording a deed[99] or a tax deed of wild and unoccupied lands;[1] or against one who owns the record title, although he has subsequently conveyed it, but the conveyance is not recorded.[2]

G. Notice to Quit or Demand For Possession. Notice to quit or demand for possession is necessary, and as a rule is only necessary, where the relation of landlord and tenant exists,[3] or where there is a privity or connection of title

89. Garner *v.* Marshall, 9 Cal. 268. See Converse *v.* Dunn, 166 Ill. 25, 46 N. E. 747; Whiteley *v.* Whiteley, 110 Mich. 556, 68 N. W. 241.

Necessity of defendant's actual possession see *supra*, II, E.

90. King *v.* Hunt, 13 S. W. 214, 11 Ky. L. Rep. 802.

91. Becker *v.* Howard, 47 How. Pr. (N. Y.) 423.

92. Deming *v.* Gainey, 95 N. C. 528; McDaniels *v.* Reed, 17 Vt. 674.

93. Renneker *v.* Warren, 17 S. C. 139.

94. Harvey *v.* Tyler, 2 Wall. (U. S.) 328, 17 L. ed. 871.

95. Garner *v.* Marshall, 9 Cal. 268.

Jurisdiction of county commissioners over a public road is not title or interest sufficient in the road to constitute a basis of ejectment against them. Pueblo Light, etc., Co. *v.* Prowers County, 5 Colo. App. 129, 38 Pac. 112.

96. Winthrop *v.* Grimes, Wright (Ohio) 330.

97. Lucas *v.* Johnson, 8 Barb. (N. Y.) 244.

98. The action will not lie therefore against one having only an apparent lien without color of possessory right. Pier *v.* Fond du Lac, 38 Wis. 470.

99. McDaniels *v.* Reed, 17 Vt. 674; Hill *v.* Kricke, 11 Wis. 442.

1. Cornell University *v.* Mead, 80 Wis. 387, 49 N. W. 815; Hewitt *v.* Butterfield, 52 Wis. 384, 9 N. W. 15.

Rule applies: Where the real owner has notice of the claim (Anderson *v.* Courtright, 47 Mich. 161, 10 N. W. 183); where defendant has refused on request to release such claim, the land being wholly unimproved, unfenced, and unoccupied (Heinmiller *v.* Hatheway, 60 Mich. 391, 27 N. W. 558); or where the recorded deed appears to be the end of a direct chain of title and no person is in actual occupancy (Goodman *v.* Nester, 64 Mich. 662, 31 N. W. 575), or against one who claims under a tax deed paid for, procured, and recorded by the latter, and the land is wild and unoccupied (Tillotson *v.* Webber, 96 Mich. 144, 55 N. W. 837).

Constructive possession by the holder of a tax-title of land not in the actual possession of any one is not sufficient to maintain an action against them when the land is occupied in part under an unexpired term of a lease of the whole given before the tax-title. Callahan *v.* Davis, 103 Mo. 444, 15 S. W. 433.

The Missouri revenue act of 1872 refers only to the collector's tax deed authorized thereby, and does not apply to a sheriff's deed given on the sale of lands for delinquent taxes, under the revenue act of 1877. Vastine *v.* Laclede Land, etc., Co., 135 Mo. 145, 36 S. W. 374.

Where defendant disclaims title and before action is commenced conveys a recorded tax-title held by him to another, who neglected to record his deed until a *lis pendens* was filed in the ejectment suit, the owner cannot recover. Webster *v.* Killen, 99 Wis. 525, 75 N. W. 88.

2. Boardman *v.* Saunders, 126 Mich. 293, 85 N. W. 737. *Contra*, as to principle involved, see Webster *v.* Pierce, 108 Wis. 407, 83 N. W. 938, a case of a tax deed.

3. *Illinois.*— Schoonmaker *v.* Doolittle, 118 Ill. 605, 8 N. E. 839; Murphy *v.* Williamson, 85 Ill. 149.

Indiana.— McCaslin *v.* State, 99 Ind. 428; Eberwine *v.* Cook, 74 Ind. 377.

Kentucky.— Lewis' Heirs *v.* Ringo, 3 A. K. Marsh. 247; Barlow *v.* Bell, 4 Bibb 106.

New Jersey.— Den *v.* Wade, 20 N. J. L. 291.

New York.— Jackson *v.* French, 3 Wend. 337, 20 Am. Dec. 699; Jackson *v.* Fuller, 4 Johns. 215; Jackson *v.* Deyo, 3 Johns. 422.

North Carolina.— Eaton *v.* George, 48 N. C. 385.

Pennsylvania.— Logan *v.* Quigley, (1887) 11 Atl. 92.

between the parties.[4] Within this rule, or as qualifications of or exceptions thereto, such notice or demand is required where defendant has so entered and holds possession that he cannot be treated as a trespasser;[5] where one holds under license from the crown,[6] under an executory contract for purchase,[7] under a contract of purchase from an infant,[8] under a sublease,[9] or under an agreement, with relation to a division line and occupation, which amounts to a license to occupy until revoked.[10] But notice or demand is unnecessary where defendant has repudiated or otherwise terminated the prior relationship, and has asserted a hostile possession or claim;[11] where he holds without title, after termination of his rightful

United States.— Doe *v.* Johnston, 7 Fed. Cas. No. 3,958, 2 McLean 323.

See 17 Cent. Dig. tit. "Ejectment," § 76.

Form of notice to quit see Adams Ejectm. 347 *et seq.*

Tenant at will is entitled to demand of possession (Zilch *v.* Young, 184 Ill. 333, 56 N. E. 318); but there is no sufficient tenancy at will to necessitate notice when not acquired by consent of the person interested (Sherrid *v.* Southwick, 43 Mich. 515, 5 N. W. 1027).

Where the lessor of plaintiff and her husband agreed for an exchange of defendant's lands for the wife's lands, and he entered and remained in possession until the husband's death, he was decided never to have been a tenant of the lessor in any sense and so not entitled to notice to quit. Thackray *v.* Cheeseman, 18 N. J. L. 1.

Sufficiency of notice or demand when any is necessary see the following cases:

Connecticut.— Townsend Sav. Bank *v.* Todd, 47 Conn. 190.

Indiana.— Clouse *v.* Elliott, 71 Ind. 302.

Maryland.— Gwynn *v.* Jones, 2 Gill & J. 173.

New York.— Clark *v.* Crego, 47 Barb. 599.

Ohio.— Spencer *v.* Marckel, 2 Ohio 263.

See 17 Cent. Dig. tit. "Ejectment," § 80.

4. Petty *v.* Doe, 13 Ala. 568; Harland *v.* Eastman, 119 Ill. 22, 8 N. E. 810; Schoonmaker *v.* Doolittle, 118 Ill. 605, 8 N. E. 839.

5. Van Campen *v.* Depue, 11 N. J. L. 409. As where he is lawfully in possession (McNally *v.* Connolly, (Cal. 1885) 9 Pac. 169), under a contract right (Taylor *v.* McCrackin, 2 Blackf. (Ind.) 260), or has entered or holds by permission or acquiescence (Schoonmaker *v.* Doolittle, 118 Ill. 605, 8 N. E. 839; Harrison *v.* Hord, 12 B. Mon. (Ky.) 471; Chamberlin *v.* Donahue, 41 Vt. 306. See Doe *v.* Clifford, 2 C. & K. 448, 61 E. C. L. 448).

Actual intent with which a tenant in common holds should be tested by a formal demand to be let into the enjoyment of the right claimed. Newell *v.* Woodruff, 30 Conn. 492.

Permission after adverse entry to continue in possession, even though there is a disclaimer at the trial of holding adversely, does not create the relation of landlord and tenant so as to entitle defendant to notice. Jackson *v.* Tyler, 2 Johns. (N. Y.) 444.

Where possession by assent has been long continued the holding thereof may not be wrongful until demand for possession. Holston *v.* Needles, 115 Ill. 461, 5 N. E. 530.

6. Doe *v.* Friesman, 5 U. C. Q. B. O. S. 661.

7. Prentice *v.* Wilson, 14 Ill. 91; Stackhouse *v.* Doe, 5 Blackf. (Ind.) 570; Bedford *v.* Thomas, 6 B. Mon. (Ky.) 332; Lundy *v.* Dovey, 7 U. C. C. P. 38. But *compare* Jackson *v.* Kingsley, 17 Johns. (N. Y.) 158; Robinson *v.* Smith, 17 U. C. Q. B. 218; Stringham *v.* Ammerman, 14 U. C. Q. B. 548; Robertson *v.* Slattery, 10 U. C. Q. B. 498; Doe *v.* Crouch, 5 U. C. Q. B. 453; Doe *v.* Trotter, 1 U. C. Q. B. 310; Doe *v.* McGillveray, 6 U. C. Q. B. O. S. 294.

Such possession is a quasi-tenancy at will. Dennis *v.* Warder, 3 B. Mon. (Ky.) 173; Venable *v.* McDonald, 4 Dana (Ky.) 336. See Lundy *v.* Dovey, 7 U. C. C. P. 38. But *compare* Chilton *v.* Niblett, 3 Humphr. (Tenn.) 404; Doe *v.* Garner, 1 U. C. Q. B. 39, holding that such purchaser is a tenant at will, but a notice to quit or a demand for possession is unnecessary.

Person entering under a parol agreement to make a conveyance is not entitled to notice to quit, although there must be a demand for possession or a refusal to deliver. Carson *v.* Baker, 15 N. C. 220, 25 Am. Dec. 706.

Purchase of land on execution sale against the vendor is a termination of the contract of purchase, under which parties in possession hold, so that the purchaser under such sale need not give notice to quit, a demand of possession being sufficient. Van Valkenbergh *v.* Rahway Bank, 23 N. J. L. 583.

8. Clawson *v.* Doe, 5 Blackf. (Ind.) 300; Bool *v.* Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285.

9. Foust *v.* Trice, 53 N. C. 490.

10. Bishop *v.* Babcock, 22 Vt. 295 (at least a reasonable notice to commence suit should be given, even though the relation of landlord and tenant is not created and the full notice is not required); Campbell *v.* Bateman, 2 Aik. (Vt.) 177 (such case differs from one where the division line is uncertain and unknown).

11. *Alabama.*— Alexander *v.* Wheeler, 69 Ala. 332.

California.— Connolly *v.* Hingley, 82 Cal. 642, 23 Pac. 273.

Indiana.— Eberwine *v.* Cook, 74 Ind. 377.

Kentucky.—Isaacs *v.* Gearheart, 12 B. Mon. 231.

Vermont.— Catlin *v.* Washburn, 3 Vt. 25.

See 17 Cent. Dig. tit. "Ejectment," § 76 *et seq.*

Where the relation of landlord and tenant has ceased by non-payment of rent for years

or permissive possession;[12] where he is a tenant at sufferance only,[13] a mere occupant by license,[14] or a mortgagor in possession or his grantee;[15] where he denies or disclaims plaintiff's title, interest, or right of possession,[16] and holds adversely or independently, in hostility to plaintiff, and under a claim of right in himself,[17] or of ownership of the fee,[18] or by a claim of title which is defective;[19] where he holds under a void deed,[20] or a void sale;[21] where by indenture plaintiff acquired a life-estate and defendant a right to occupy under conditional covenants which are broken;[22] where a vendor continues in possession of land after conveying it;[23] where plaintiffs claim a life-estate under a will and defendant does not hold under them and denies their title;[24] where ejectment is founded upon a deed of trust and condition broken;[25] where the heir of a deceased partner sues the surviving partner;[26] where defendant is a mere servant or bailiff in possession;[27] where the object of a statute as to unappropriated lands is to provide a remedy for speedy

notice is unnecessary. Crowther *v.* Lloyd, 31 N. J. L. 395.

12. Rule applies where life-estate determines. Seaton *v.* Davis, 1 Thomps. & C. (N. Y.) 91; Nims *v.* Sabine, 44 How. Pr. (N. Y.) 252.

Death of landlord terminates tenancy at sufferance or at will, and possession thereafter is wrongful against heirs, and no notice to quit or demand for possession is necessary. Joy *v.* McKay, 70 Cal. 445, 11 Pac. 763.

Set-off to a creditor on execution is sufficient notice to a debtor that his title has ceased. Downing *v.* Sullivan, 64 Conn. 1, 29 Atl. 130.

13. Barlow *v.* Bell, 4 Bibb (Ky.) 106; Howard *v.* Carpenter, 22 Md. 10; Young *v.* Perry, 61 N. C. 549; Tisdale *v.* Tisdale, 10 U. C. C. P. 106.

Lessee or assignee of a tenant at will is a disseizor, and the same rule applies to him as to a tenant at sufferance. Reckhow *v.* Schanck, 43 N. Y. 448. See Jackson *v.* Rogers, 1 Johns. Cas. (N. Y.) 33.

Tenant at sufferance, who is turned out of possession without any demand of possession, cannot maintain ejectment but may maintain trespass. Doe *v.* Murrell, 8 C. & P. 134, 34 E. C. L. 651.

14. Young *v.* Perry, 61 N. C. 549.

15. Den *v.* Wade, 20 N. J. L. 291.

At common law a mortgagor in possession was a tenant at sufferance merely, and so not entitled to notice; and under the Vermont statute the same tenancy exists after condition broken. Ford *v.* Steele, 54 Vt. 562.

In an action between a mortgagor and a mortgagee there is a privity of contract as well as of estate and the mortgagor is entitled to notice to quit. Jackson *v.* Laughead, 2 Johns. (N. Y.) 75 [*explained* in Jackson *v.* Fuller, 4 Johns. (N. Y.) 215].

16. *California.*— Webb *v.* Winter, (1901) 65 Pac. 1028; McCarthy *v.* Brown, 113 Cal. 15, 45 Pac. 14.

Illinois.— Chicago, etc., R. Co. *v.* Smith, 78 Ill. 96.

Kentucky.— Bedford *v.* Thomas, 6 B. Mon. 332.

New York.— Jackson *v.* French, 3 Wend. 337, 20 Am. Dec. 699; Jackson *v.* Wheeler, 6 Johns. 272.

United States.— Woodward *v.* Brown, 13 Pet. 1, 10 L. ed. 31.

See 17 Cent. Dig. tit. "Ejectment," § 76 *et seq.*

Although a disclaimer of tenancy dispenses with notice, yet if made after date of the demise and no notice is shown or other determination of the tenancy plaintiff is properly nonsuited. Jackson *v.* Wheeler, 6 Johns. (N. Y.) 272.

Defense by landlord amounts to disclaimer of tenancy. Whissenhunt *v.* Jones, 78 N. C. 361; Foust *v.* Trice, 53 N. C. 490. See Jones *v.* Perdue, 1 Blackf. (Ind.) 351.

Tenant who has attorned to stranger is not entitled to notice. Steinhauser *v.* Kuhn, 50 Mich. 367, 15 N. W. 513.

17. Harland *v.* Eastman, 119 Ill. 22, 8 N. E. 810; Schoonmaker *v.* Doolittle, 118 Ill. 605, 8 N. E. 839; McClane *v.* White, 5 Minn. 178; Jackson *v.* Chase, 2 Johns. (N. Y.) 84.

Setting up an adverse possession for a period sufficient to constitute a bar is inconsistent with a tenancy at will and precludes a right to insist upon notice to quit. Williams *v.* Cash, 27 Ga. 507, 73 Am. Dec. 739.

18. McGinnis *v.* Fernandes, 126 Ill. 228, 19 N. E. 44; Jackson *v.* Deyo, 3 Johns. (N. Y.) 422; Stockwell *v.* Robinson, 1 Pa. St. 477. See also Clark *v.* Crego, 47 Barb. (N. Y.) 599.

19. Clapp *v.* Beardsley, 1 Vt. 151.

20. Covington *v.* McNickle, 18 B. Mon. (Ky.) 262.

21. Chilton *v.* Niblett, 3 Humphr. (Tenn.) 404.

22. Olcott *v.* Dunklee, 16 Vt. 478.

23. Doe *v.* Dafoe, 4 U. C. Q. B. 484.

24. Scouler *v.* Scouler, 19 U. C. Q. B. 106.

25. Brown *v.* Schintz, 203 Ill. 136, 67 N. E. 767.

Cestui que trust is clearly entitled to possession and need make no demand as against his trustee. Caldwell *v.* Lowden, 3 Brewst. (Pa.) 63.

26. Doe *v.* McLeod, 8 U. C. Q. B. 344.

27. Jackson *v.* Sample, 1 Johns. Cas. (N. Y.) 232.

removal of occupants without notice;[28] where a tenant of a devisee for life is ousted by the remainder-man;[29] or subject to certain exceptions[30] where defendant's entry or possession was wrongful at its inception or has become so,[31] or he has put himself in the attitude of a trespasser[32] or mere intruder;[33] or where he has forfeited[34] or waived his right to notice or demand.[35]

H. Successive Actions.[36] A person may in some cases maintain an action of ejectment after he has discontinued a prior action commenced by him,[37] or after a verdict has been rendered against him in a former action.[38] And a prior recovery does not preclude defendant from subsequently setting up evidence of title and recovering the land, the former recovery being of the possession without prejudice to the right.[39] And after a judgment has been obtained by him for part of a tract of land plaintiff may maintain a new action against the same parties for the whole.[40] But where a second action is to try the same title as a former action between the same parties, although to different property, the proceeding may be stayed until the costs of the former proceeding, in which plaintiff was defeated, have been paid by him.[41]

I. Joinder of Causes of Action and Consolidation.[42] One action may be maintained by a plaintiff for several distinct tracts, claimed under different titles, where he has been unlawfully ejected from all by the same defendant.[43] And an

28. Candee *v.* Hayward, 37 N. Y. 653, 5 Transcr. App. (N. Y.) 194 [*affirming* 34 Barb. 349].

29. Doe *v.* Murrell, 8 C. & P. 134, 34 E. C. L. 651.

30. **As in certain statutory cases** where there has been a wrongful ouster and detention from the public domain by one having no better title. New Mexico, etc., R. Co. *v.* Crouch, 4 N. M. 141, 13 Pac. 201.

31. Holsten *v.* Needles, 115 Ill. 461, 5 N. E. 530; Murphy *v.* Williamson, 85 Ill. 149; Jackson *v.* Robinson, 4 Wend. (N. Y.) 436.

32. Fears *v.* Merrill, 9 Ark. 559, 50 Am. Dec. 226; Meeker *v.* Doe, 7 Blackf. (Ind.) 169.

33. Lewis *v.* Ringo, 3 A. K. Marsh. (Ky.) 247; Spencer *v.* Marckel, 2 Ohio 263.

Heir who enters on the death of the tenant for life is an intruder and not entitled to notice. Worthington *v.* Etcheson, 30 Fed. Cas. No. 18,053, 5 Cranch C. C. 303.

34. Prentice *v.* Wilson, 14 Ill. 91.

35. Hargrove *v.* Cherokee Nation, (Indian Terr. 1902) 69 S. W. 823; Protestant Episcopal Soc. *v.* Flanders, 9 Abb. Pr. N. S. (N. Y.) 82; Youst *v.* Martin, 3 Serg. & R. (Pa.) 423. *Compare* Jackson *v.* Stafford, 2 Cow. (N. Y.) 547, where there was no waiver.

When a minor gives a bond to convey, and he or his heir afterward brings ejectment against the assignee of the obligee, defendant is entitled to a demand of possession. But where defendant went to the heir and offered to pay him the money due on the bond, and to take a deed from him as heir, it was held that by such conduct he had waived his right to a demand. Doe *v.* Vancott, 5 U. C. Q. B. O. S. 486.

36. **Conclusiveness of judgment in ejectment** see JUDGMENTS.

Operation and effect of judgment see *infra*, VIII, E, 4.

37. Burt *v.* Mapes, 1 Hill (N. Y.) 649.

Plaintiff who has taken a nonsuit may maintain a second action to recover a part of the same property. Wood *v.* Nortman, 85 Mo. 298.

38. Long *v.* Orrell, 35 N. C. 123; Wintermute *v.* Montgomery, 11 Ohio St. 442.

39. Jackson *v.* Dieffendorf, 3 Johns. (N. Y.) 269.

A judgment against a defendant and agreement by him to turn over to plaintiff his claim for rent against the tenants in satisfaction of the money part of the judgment will not estop him from maintaining ejectment against plaintiff for the same land, there being no surrender of possession in consideration of forbearance to enforce payment of rents. Prior *v.* Lambeth, 78 Mo. 538.

Mere prior possession without evidence of right of possession is not sufficient to sustain an action by defendant after ouster by plaintiff. Johnson *v.* Lancaster, 5 Ga. 39; Jackson *v.* Rightmyre, 16 Johns. (N. Y.) 314; Dresback *v.* McArthur, 7 Ohio 146.

Possession subsequently acquired by defendant by fraud or deceit and held by force will not avail him. Griffeth *v.* Dobson, 3 Penr. & W. (Pa.) 228.

40. Rambler *v.* Tryon, 7 Serg. & R. (Pa.) 90, 10 Am. Dec. 444. See also Kinter *v.* Jenks, 43 Pa. St. 445.

41. Stewart *v.* Hilton, 27 Misc. (N. Y.) 239, 58 N. Y. Suppl. 415. See Keene *v.* Angel, 6 T. R. 740.

42. **Consolidation** generally see CONSOLIDATION AND SEVERANCE OF ACTIONS, 8 Cyc. 589.

Joinder generally see JOINDER AND SPLITTING OF ACTIONS.

43. Williamson *v.* Snowhill, 13 N. J. L. 23, 22 Am. Dec. 496. See also Boles *v.* Cohen, 15 Cal. 150; Weeks *v.* McPhail, 128 N. C. 134, 38 S. E. 292.

But where defendants claim different parcels severally under distinct titles, and not jointly, and do not sustain the relation of

action to recover land may by statute in some states be joined with an action to recover the value of the use.[44] Again it has been determined that a consolidation of several actions of ejectment may be ordered by the court;[45] that a claim for injunction may be joined with a claim for possession;[46] and that a claim for the recovery of land may be joined with an action for the recovery or delivery up of a deed relating to the land or the recovery of personal estate comprised in the same instrument,[47] with a claim for the administration of an estate,[48] or with a claim for a receiver.[49] Leave of court may be necessary in some cases to permit a joinder of causes of action.[50]

J. Persons by Whom Action May Be Maintained.[51] An action may be maintained by a petitioner in insolvency to recover possession of a homestead;[52] by a board of trustees of school lands having authority to lease the same;[53] or by a turnpike company for encroachment on a highway.[54] And one suing in his individual capacity may recover on a patent issued to him in his representative capacity.[55] And it is decided that a committee of the person and estate of one who under an inquest of lunacy has been found incapable of suing cannot bring an action.[56]

K. Persons Against Whom Action May Be Brought.[57] The action should be brought against the person in possession of the land;[58] or if there be no actual

landlord and tenant, it has been decided that a joint action cannot be maintained against them for the premises and mesne profits. Wood *v.* McGuire, 17 Ga. 303. *Compare* Cunningham *v.* Bradley, 26 Ga. 238.

44. Langsdale *v.* Woollen, 120 Ind. 16, 21 N. E. 659; Armstrong *v.* Hinds, 8 Minn. 254.

A claim for damages to other property than that sued for cannot be joined. Furlong *v.* Cooney, 72 Cal. 322, 14 Pac. 12; Holmes *v.* Williams, 16 Minn. 164.

Claims which cannot be joined.— A claim for the recovery of real estate, which has been sold under a decree of a court of equity, cannot be joined in the same action with a claim against the clerk and master for the purchase-money. Brown *v.* Coble, 76 N. C. 391.

45. Hendrickson *v.* Hendrickson, 15 N. J. L. 102; Smith *v.* Fen, 9 N. J. L. 335. See also 8 Cyc. 596 note 22, 597 note 25, 613 note 55. But see Hardin *v.* Kirk, 49 Ill. 153, 95 Am. Dec. 581, holding that under the ejectment act persons who have brought separate actions cannot be required to consolidate without their consent.

After issue joined a consolidation will not be directed. Reid *v.* Dodson, 1 Overt. (Tenn.) 396.

In Louisiana it was decided that petitory and possessory actions cannot be cumulated except by consent of the parties. Stamand *v.* Long, 25 La. Ann. 164.

46. Kendrick *v.* Roberts, 46 L. T. Rep. N. S. 59, 30 Wkly. Rep. 365, holding that such a joinder may be made without leave of court.

47. Cook *v.* Enchmarch, 2 Ch. D. 111, 45 L. J. Ch. 504, 24 Wkly. Rep. 293.

48. Kitching *v.* Kitching, 24 Wkly. Rep. 901.

49. Allen *v.* Kennet, 24 Wkly. Rep. 845.

50. Whetstone *v.* Dewis, 1 Ch. D. 99, 45 L. J. Ch. 49, 3 L. T. Rep. N. S. 501, 24 Wkly. Rep. 93. See Compton *v.* Preston, 21 Ch. D. 138, 51 L. J. Ch. 680, 47 L. T. Rep. N. S. 122, 30 Wkly. Rep. 563 (holding that the provision of r. 2 of ord. xvii that no causes of action except those specified in that rule shall unless by leave of court be joined with an action for the recovery of land, applies to a counter-claim as well as to an original action); *In re* Pilcher, 11 Ch. D. 905, 48 L. J. Ch. 587, 40 L. T. Rep. N. S. 832, 27 Wkly. Rep. 789 (holding that there having been a joinder of actions without leave the court would refuse to continue the action in that form, although defendants had appeared). *Compare* Wilmott *v.* Freehold House Property Co., 51 L. T. Rep. N. S. 552.

The time of making application for leave to join has been held to be before the writ is issued. *In re* Pilcher, 11 Ch. D. 905, 48 L. J. Ch. 587, 40 L. T. Rep. N. S. 832, 27 Wkly. Rep. 789.

51. **Parties plaintiff** see *infra*, IV, C, 2. See also 10 Cyc. 1339; 2 Cyc. 109.

52. Moore *v.* Morrow, 28 Cal. 551.

53. Windham *v.* Chisholm, 35 Miss. 531.

54. Chambersburgh *v.* Manko, 39 N. J. L. 496.

55. Burling *v.* Thompkins, 77 Cal. 257, 19 Pac. 429.

But an assignee of a certificate of the sale of lands by the United States direct tax commissioners cannot maintain an action in his own name. Billings *v.* McDermott, 15 Fla. 60.

56. Petrie *v.* Shoemaker, 24 Wend. (N. Y.) 85.

57. **Parties defendant** see *infra*, IV, C, 3.

58. Dutton *v.* Warschauer, 21 Cal. 609, 82 Am. Dec. 765; Klink *v.* Cohen, 13 Cal. 623; Garner *v.* Marshall, 9 Cal. 268; Lockwood *v.* Drake, 1 Mich. 14; Lucas *v.* Johnson, 8 Barb. (N. Y.) 244; Hyde *v.* Folger, 12 Fed. Cas. No. 6,971, 4 McLean 255. See *supra*, II, E. But see *supra*, II, F.

A church edifice is to be deemed in the actual occupancy of the corporation, and the action should be against the corporation.

occupant of the land against one exercising acts of ownership over the premises in litigation.[59]

L. Compelling Bringing of Action. In Pennsylvania it has been provided by statute[60] that a claimant in possession of property sold by a sheriff might rule a purchaser to bring ejectment within a certain period, and in default of his so doing might obtain a judgment which would be a bar to further proceedings on his part.[61] These acts have been construed as derogatory of the common law.[62] And it has been decided that the claimant should proceed to judgment in order to bar ejectment by the purchaser subsequent to a specified period.[63]

III. DEFENSES.[64]

A. In General. The action of ejectment proceeds for the possession of the premises, claiming that they have been unlawfully entered and unjustly withheld,

Lucas *v.* Johnson, 8 Barb. (N. Y.) 244. *Compare* Chiniquy *v.* Chicago Catholic Bishop, 41 Ill. 148.

Ejectment does not lie against a landlord alone if he has constructive possession as such. Grundy *v.* Hadfield, 16 R. I. 579, 18 Atl. 186.

Ejectment lies against a tenant after he disclaims the tenure and claims the fee in his own right (Walden *v.* Bodley, 14 Pet. (U. S.) 156, 10 L. ed. 398); against a tenant in possession (Mansur *v.* Streight, 103 Ind. 358, 3 N. E. 112), who has never paid rent (Steinfeld *v.* Ross, (Ariz. 1898) 53 Pac. 494; Pappe *v.* Trout, 3 Okla. 260, 41 Pac. 397; Hamill *v.* Jalonick, 3 Okla. 223, 41 Pac. 139), but claims adversely (Steinfeld *v.* Ross, (Ariz. 1898) 53 Pac. 494).

The lessor may also recover possession of the demised premises upon forfeiture, where there is a conditional stipulation or covenant providing for forfeiture of the tenant's estate (Avery *v.* Kansas City, etc., Co., 113 Mo. 561, 21 S. W. 90), even though there is no reservation of a right of entry (Horton *v.* New York Cent., etc., R. Co., 12 Abb. N. Cas. (N. Y.) 30 [*affirmed* in 102 N. Y. 697, and *disapproving* Van Rensselaer *v.* Jewett, 2 N. Y. 141, which is *distinguished* from Kenege *v.* Elliot, 9 Watts (Pa.) 258]).

An occupant of a town lot may recover against his tenant, where the legal title remains in the government. Shy *v.* Brockhause, 7 Okla. 35, 54 Pac. 306.

Recovery may also be had against a lessee of a mortgagor under a lease subsequent thereto, by a purchaser at a foreclosure sale. Allen *v.* Chapman, 168 Mass. 442, 47 N. E. 124.

The mortgagee may maintain his action against any one in possession of the mortgaged premises. Keith *v.* Swan, 11 Mass. 216. But an action against the person with whose support devised land is charged, by one who claims title by sheriff's deed under a sale upon foreclosure of a mortgage executed to him by the devisee, cannot be maintained. Castor *v.* Jones, 107 Ind. 283, 6 N. E. 823.

Where one occupies the position of a mortgagee in possession ejectment will not lie against him. Wing *v.* Field, 35 Hun (N. Y.) 617. See St. John *v.* Bumpstead, 17 Barb. (N. Y.) 100.

Where land is in the possession of an employee the action should be against the employer. Hawkins *v.* Reichert, 28 Cal. 534. *Compare* Doe *v.* Stradling, 2 Stark. 187, 3 E. C. L. 370, holding that plaintiff is entitled to recover, although defendant in possession is the servant of another.

59. Syracuse Gas Light Co. *v.* Rome, etc., R. Co., 11 N. Y. Civ. Proc. 239.

Where one claims the right to occupy submerged land for the cultivation of oysters, ejectment may be maintained against him. Lowndes *v.* Huntington, 153 U. S. 1, 14 S. Ct. 758, 38 L. ed. 615.

60. Pa. Pub. Laws (1893), p. 131; Pa. Pub. Laws (1885), p. 152.

61. Kennedy's Petition, 19 Pa. Super. Ct. 482; Finch's Petition, 2 Pa. Co. Ct. 322; McCutcheon *v.* McDowell, 20 Wkly. Notes Cas. (Pa.) 502; Letchford *v.* Dewees, 14 Phila. (Pa.) 108; Smith *v.* Clearwater, 3 C. Pl. (Pa.) 34.

After ouster by defendant the latter cannot be compelled to bring ejectment but the one ousted may. Light *v.* Zeller, 2 Pa. Co. Ct. 367.

The one actually in possession must make the petition and not his agent or attorney. Farmer's, etc., Mfg. Co. *v.* Goldstine, 4 Pa. Co. Ct. 428.

Where the respondent disputes the possession of the petitioner, the former will not be compelled to bring ejectment, but will relegate the petitioner to his action at law to try title. Farmers', etc., Mfg. Co. *v.* Goldstine, 4 Pa. Co. Ct. 428.

62. Sunma *v.* Retteg, 16 Pa. Co. Ct. 511.

63. Litchford *v.* Dewees, 14 Phila. (Pa.) 108.

64. **Abatement** of action as a defense see ABATEMENT AND REVIVAL.

Accord and satisfaction see 1 Cyc. 310, note 25.

Adverse possession as a defense see ADVERSE POSSESSION.

As showing that adverse possession not only bars the remedy of the holder of the paper title but extinguishes his title and vests title in fee in the adverse occupant see ADVERSE POSSESSION, 1 Cyc. 1135 *et seq.*

and facts which go to disprove these make a legal defense.[65] Possession which has been acquired by force or fraud against the will or consent of the owner and without color or lawful authority is no bar to an action by such owner.[66] Nor is it any defense that defendant is the wife of one of plaintiffs.[67]

B. Title in Defendant. A recovery by plaintiff in ejectment may be defeated by defendant showing title in himself,[68] and it has been decided that

As showing that adverse possession will bar ejectment see ADVERSE POSSESSION, 1 Cyc. 1137 *et seq.*

Defense to action or claim for damages or mesne profits see *infra*, IX, F.

Easement as defense see *supra*, II, C, 1, g.

Pleading defenses see *infra*, V, B.

Questions triable see *supra*, II, A, 3.

65. St. Louis, etc., R. Co. *v.* Karnes, 101 Ill. 402; Stow *v.* Russell, 36 Ill. 18.

A claimed purchase of interest of the owner by plaintiff at a sheriff's sale may be controverted by either the judgment debtor or any other person who is at liberty to show that the interest of the judgment debtor was not the subject of sale on execution. Bigelow *v.* Finch, 11 Barb. (N. Y.) 498.

A covenant of warranty in a deed which is without words of inheritance may operate by way of estoppel and bar ejectment against the grantee by a subsequent lessee of the grantor with notice of the deed. Shaw *v.* Galbraith, 7 Pa. St. 111.

Defendant in ejectment cannot defeat recovery by showing that there has been an intervening period between the bringing of the suit and the final trial, during which plaintiff has been divested of his title even by his own act (Edgerton *v.* Clark, 20 Vt. 264), that the land was temporarily unenclosed where defendant had full notice of plaintiff's claim (Sweetland *v.* Hill, 9 Cal. 556), that plaintiff had offered to lease to defendant at a nominal sum the land occupied by him (Southern Pac. Co. *v.* Burr, 86 Cal. 279, 24 Pac. 1032), or that the delay of the trustees, plaintiffs in ejectment, in executing their trust had been sufficient to divest their title to the lands, where defendant shows no claim whatever to the premises (Augustus *v.* Graves, 9 Barb. (N. Y.) 595), or by showing suit by plaintiff on a note given to him by one who had contracted to purchase the land, there being no connection between such third party and defendant (Gladfelder *v.* Hale, 62 Ill. 72), or by the fact that the land in dispute is inaccessible at the time of trial or judgment so that the sheriff cannot deliver possession (Woodhull *v.* Rosenthal, 61 N. Y. 382); by the possibility of an adverse right arising (Finch *v.* Rhodes, 49 Mich. 33, 12 N. W. 899); or by the fact that one defendant was acting as agent for the other defendant, where possession is wrongfully withheld by both (Wells *v.* Atkinson, 24 Minn. 161).

Defendant having no interest in the premises either at the time of action or of trial, but only in the interval, cannot contest plaintiff's *prima facie* title. Hodges *v.* Parker, Brayt. (Vt.) 52.

In an action by a purchaser at an execution sale of realty subject to a mortgage defendant may protect his occupation by showing that his mortgagee had taken possession of the premises before the suit was commenced and that he remained in possession as a tenant at will to the latter. Wilcox *v.* Wilbur, 15 R. I. 434, 8 Atl. 78.

In ejectment against one not a proprietor in a town the legality of a proprietary division of the town cannot be disputed. Wells *v.* Brewster, 1 D. Chipm. (Vt.) 147.

In ejectment for partnership lands by heirs of the deceased partner against a company formed by the survivor and the deceased's widow and administrator to take the assets, pay the firm debts, and continue the business, it is a good defense that the firm debts are not paid. Weld *v.* Johnson Mfg. Co., 86 Wis. 552, 57 N. W. 374. *Compare* Burgess *v.* Rice, 74 Cal. 690, 16 Pac. 496.

Possession by the grantor as agent of the true owner may be shown in defense to an action of ejectment against the former by his grantee in a quitclaim deed. Franklin *v.* Dorland, 28 Cal. 175, 87 Am. Dec. 111.

That taxes have not been paid on land is available only in cases in the federal courts under a statute allowing defendant in ejectment to put such fact in issue. Blight *v.* Atwell, 7 T. B. Mon. (Ky.) 234.

The appointment of defendant as administrator of decedent's estate cannot be set up in defense to an action by an heir against a person holding as purchaser of the interest of another heir and of decedent's widow, where no interest but defendant's is to be served by such administration and that interest is limited to the defeating of plaintiff in the suit. Dodge *v.* Page, 50 Vt. 39.

The authority of one, acting as agent for plaintiff, to put another in possession of land as plaintiff's tenant, cannot be questioned by defendant, it never having been questioned by the principal. U. S. *v.* Sliney, 21 Fed. 894.

The lease in ejectment being a fictitious proceeding and the lessors being the real plaintiffs and the lessee, although a natural person, not being considered as really interested in the result, the proceedings should not be allowed to prejudice the parties. Warner *v.* Hardy, 6 Md. 525.

Where a deed was executed to plaintiff's lessor by defendant for the land in controversy, to which *femes coverts* were parties, but which was not regularly proved as to them, defendant cannot deny the right of plaintiff to recover. Matthews *v.* Matthews, 24 N. C. 217.

66. Howell *v.* Leavitt, 95 N. Y. 617.

67. Doe *v.* Daly, 8 Q. B. 934, 10 Jur. 691, 15 L. J. Q. B. 295, 55 E. C. L. 934.

68. *Alabama.*— Anderson *v.* Melear, 56 Ala. 621; Russell *v.* Irwin, 38 Ala. 44.

this is so although he acquired the same subsequent to the commencement of the

California.— Keane *v.* Cannovan, 21 Cal. 291, 82 Am. Dec. 738; Potter *v.* Knowles, 5 Cal. 87.

Georgia.— See Roe *v.* Johnson, 30 Ga. 611.

Illinois.— See Wilson *v.* South Park Com'rs, 70 Ill. 46.

Kentucky.— Tucker *v.* Phillips, 2 Metc. 416.

Maryland.— Hall *v.* Gittings, 2 Harr. & J. 112.

Michigan.— See Hemmingway *v.* Drew, 47 Mich. 554, 11 N. W. 382.

Mississippi.— See Lum *v.* Reed, 53 Miss. 73.

Missouri.— See Prior *v.* Scott, 87 Mo. 303; Fellows *v.* Wise, 49 Mo. 350.

New York.— See Smith *v.* Gage, 41 Barb. 60; Moores *v.* Townshend, 54 N. Y. Super. Ct. 245.

Pennsylvania.— Moncure *v.* Hanson, 15 Pa. St. 385; Gilliland *v.* Hanna, Add. 251. And see Prutzman *v.* Ferree, 10 Watts 143.

Canada.— Doe *v.* Ault, 2 U. C. Q. B. 31.

See 17 Cent. Dig. tit. "Ejectment," §§ 81, 82.

A defense to ejectment may be made upon proof of a homestead right (Thornton *v.* Boyden, 31 Ill. 200; Smith *v.* Miller, 31 Ill. 157; Connor *v.* Nichols, 31 Ill. 148), of a right of dower (Den *v.* Dodd, 6 N. J. L. 367. See State *v.* Moore, 61 Mo. 276; Jones *v.* Manly, 58 Mo. 559), or of a *bona fide* entry from the United States (Waller *v.* Von Phul, 14 Mo. 84), or by a receipt from the receiver of the local land-office acknowledging full payment by defendant for lands in controversy (Bates *v.* Herron, 35 Ala. 117. See Simmons *v.* Wagner, 101 U. S. 260, 25 L. ed. 910), by right of preëmption, although such right has not been proved in the land-office and a certificate thereof obtained (Allison *v.* Hunter, 9 Mo. 749), by the record of a guardian's sale in an action by those deraigning title under the record, where the court ordering the sale had jurisdiction (Fitzgibbon *v.* Lake, 29 Ill. 165, 81 Am. Dec. 302), by prior possession under a claim of fee, where plaintiff rests his claim on possession alone (Norfleet *v.* Russell, 64 Mo. 176), or by a lease from the city which it is shown had possession prior to plaintiff, although there is a defect in the lease, where the latter claims only by virtue of an entry and of possession prior to defendant's entry (Carleton *v.* Darcy, 90 N. Y. 566 [*reversing* 46 N. Y. Super. Ct. 484]).

An executor's title may be pleaded by a defendant claiming under an invalid executor's deed, where plaintiff's right of action is based on mere prior possession. Gregory *v.* Haynes, 13 Cal. 591.

Where a patent has issued to defeat plaintiff in ejectment, relying on an elder patent, it should appear that the prior survey varies from the first entry, and what the variance is. Rays *v.* Woods, 2 B. Mon. (Ky.) 217.

Where a vendor conveys to another in violation of his contract with a vendee in possession, the latter is absolved and may deny the title he entered under and purchase and defend under any other claim. Logan *v.* Steele, 7 T. B. Mon. (Ky.) 101.

Sufficiency of title is not shown by a bond for the conveyance of land (Mississippi Agricultural Bank *v.* Rice, 4 How. (U. S.) 225, 11 L. ed. 949. But see Kirby *v.* Wabash, etc., R. Co., 109 Ill. 412), by the purchase of land at a sale on execution if the time for redemption has not expired (McMinn *v.* O'Connor, 27 Cal. 238), by a lease executed by one not authorized to act for the owner (Roosevelt *v.* Hungate, 110 Ill. 595), by a claim founded on fraud (Pekin Min., etc., Co. *v.* Kennedy, 81 Cal. 356, 22 Pac. 679. And see Birge *v.* Nock, 34 Conn. 156), by a forged deed (Redden *v.* Tefft, 48 Kan. 302, 29 Pac. 157), by an invalid deed (Bosworth *v.* Farenholz, 3 Iowa 84), by a tax-title derived from the state which accrued and was perfected after a void probate sale of a decedent's land, where an action is brought by the heirs (Rule *v.* Broach, 58 Miss. 552), by a parol lease of which plaintiff had no knowledge (Burr *v.* Spencer, 26 Conn. 159, 68 Am. Dec. 379), by a satisfied mortgage, although paid off by defendant (Jackson *v.* Cris, 11 Johns. (N. Y.) 437), by a descent cast on the parties in possession (Holt *v.* Hemphills, 3 Ohio 232), or by a deed of an undesignated part of a lot (Miller *v.* Smith, 33 Pa. St. 386).

A grantee who took possession under a void deed may maintain ejectment against one subsequently taking possession under a valid deed from the same grantor, where such deed was offered and admitted in evidence merely as color of title, and there was no evidence of ten years' adverse possession by defendant. Branch *v.* Smith, 114 Ala. 463, 21 So. 423.

In ejectment by a purchaser at a sheriff's sale against defendant in execution, the latter while still in possession cannot defend on the ground that he himself has a better title. Lyerly *v.* Wheeler, 33 N. C. 288, 53 Am. Dec. 414.

The execution of a conveyance to defendant by a third person, unaccompanied by proof of possession or title in such person, is held no evidence of title in defendant. Lake *v.* Hancock, 38 Fla. 53, 20 So. 811, 56 Am. St. Rep. 159.

Title held insufficient in particular cases see the following cases:

Alabama.— Cruise *v.* Riddle, 21 Ala. 791.

California.— Keane *v.* Cannovan, 21 Cal. 291, 82 Am. Dec. 738.

Georgia.— Riley *v.* Southwestern, etc., R. Co., 63 Ga. 325.

Illinois.— Voris *v.* Thomas, 12 Ill. 442.

Indiana.— Goss *v.* Meadors, 78 Ind. 528.

Kansas.— Rickershauser *v.* McMahan, 39 Kan. 288, 18 Pac. 217.

Kentucky.— Shelby *v.* McWilliams, 4 T. B. Mon. 139; Louisville, etc., R. Co. *v.* Rudd, 30 S. W. 604, 17 Ky. L. Rep. 92.

action.[69] And a title acquired by a person under whom defendant claims subsequent to his coming into possession may be available to protect the latter.[70] Title under which defendants in possession claim may always be shown, although it may not be the better one.[71] And the word "title," it has been held, does not necessarily mean a written title, but means any such right as is good in law to resist the title of plaintiff.[72] An action of ejectment is not barred by the fact that defendant owns an interest in the land, since plaintiff may be entitled to be let into possession as cotenant.[73]

C. Want of Title in Plaintiff.[74] The weakness of plaintiff's title is declared to be a good defense in an action against one in possession peaceably, although without color of title.[75] Title by possession must prevail until plaintiff establishes evidence of superior right to the possession.[76] But the rule that plaintiff must recover on the strength of his own title cannot be invoked in favor of a defendant who fraudulently induced plaintiff to purchase a weak title, as the doctrine of estoppel applies in such case.[77]

D. Want of Actual Seizin. Want of actual seizin in a person through whom plaintiff claims is, it has been determined, no ground of nonsuit, if he had a seizin by deed, where the objection is not founded on a descent cast.[78]

E. Abandonment of Possession.[79] Where both parties' claims rest on a possessory title alone, abandonment of possession by plaintiff may be a defense.[80]

F. Want of Possession or Ouster by Defendant.[81] Defendant may show that he is not the actual occupant of the premises,[82] or that he was not in posses-

Maine.— Stevens *v.* Bragdon, 45 Me. 31.
Michigan.—Morse *v.* Hewett, 28 Mich. 481.
Mississippi.— Hanna *v.* Renfro, 32 Miss. 125.
Missouri.— Sims *v.* Gray, 66 Mo. 613.
Nevada.— Sankey *v.* Noyes, 1 Nev. 68.
North Carolina.— Roan Mountain Steel, etc., Co. *v.* Edwards, 110 N. C. 353, 14 S. E. 861; Terrell *v.* Terrell, 69 N. C. 56.
See 17 Cent. Dig. tit. "Ejectment," § 82.

69. *Alabama.*— Pollard *v.* Hanrick, 74 Ala. 334; Doe *v.* Collins, 7 Ala. 480.
California.— Roper *v.* McFadden, 48 Cal. 346; Tustin *v.* Faught, 23 Cal. 237; Moore *v.* Tice, 22 Cal. 513.
Colorado.— Duggan *v.* McCullough, 27 Colo. 43, 59 Pac. 743.
Connecticut.— Munsel *v.* Sanford, 1 Root 257.
Illinois.— Anderson *v.* Gray, 134 Ill. 550, 25 N. E. 843, 23 Am. St. Rep. 696; Hardin *v.* Forsythe, 99 Ill. 312.
Mississippi.— Robinson *v.* Parker, 3 Sm. & M. 114, 41 Am. Dec. 614.
New York.— Jackson *v.* Demont, 9 Johns. 55, 6 Am. Dec. 259.
Tennessee.—William *v.* Henderson, 1 Overt. 265; Carter *v.* Porrot, 1 Overt. 237.
Vermont.— Tucker *v.* Keeler, 4 Vt. 161.
See 17 Cent. Dig. tit. "Ejectment," § 83. But see Hubbard *v.* Bardstown, 2 J. J. Marsh. (Ky.) 81; Gritchell *v.* Kreidler, 12 Mo. App. 497 [*affirmed* in 84 Mo. 472].

70. Jackson *v.* Given, 8 Johns. (N. Y.) 137, 5 Am. Dec. 328.

71. Grant *v.* Levan, 4 Pa. St. 393.

72. Philadelphia, etc., Land Co. *v.* Earl, 3 Walk. (Pa.) 350.

73. Vanderbilt *v.* Brown, 128 N. C. 498, 39 S. E. 36.

74. Title of plaintiff necessary to support ejectment see *supra*, II, C.

75. Lore *v.* Hill, 3 Harr. (Del.) 530; Hockett *v.* Alston, 110 Fed. 910, 49 C. C. A. 180. And see Stephens *v.* Moore, 116 Ala. 397, 22 So. 542; Doe *v.* Clayton, 81 Ala. 391, 2 So. 24; McAllister *v.* Williams, 1 Overt. (Tenn.) 107.

A conveyance by the ancestor, under whom plaintiff claims, may be set up as showing that plaintiff inherited nothing therein. Hagenbuck *v.* McClaskey, 81 Ind. 577.

A purchaser of lands from Indians in violation of law, although no title is conveyed, may maintain his possession against one having no right to the land. Bedel *v.* Loomis, 11 N. H. 9.

As against an invalid tax deed to plaintiff actual possession of defendant under a claim of title will prevail. Maxwell *v.* Paine, 53 Mich. 30, 18 N. W. 546.

76. Hockett *v.* Alston, 110 Fed. 910, 49 C. C. A. 180.

77. Lane *v.* Reynard, 2 Serg. & R. (Pa.) 65.

78. McGregor *v.* Comstock, 16 Barb. (N. Y.) 427.

79. **Plaintiff's abandonment** of possession see *supra*, II, C, 4, a, (II), (B), (3).

80. Onderdonk *v.* Lord, Lalor (N. Y.) 129.

Abandonment by plaintiff's grantor before conveyance to plaintiff who relies on his grantor's possession may be shown by a defendant in possession and thus defeat plaintiff's claim. Bird *v.* Lisbros, 9 Cal. 1, 70 Am. Dec. 617.

81. **Necessity of ouster and possession** by defendant see *supra*, II, E.

82. Porter *v.* McGrath, 41 N. Y. Super. Ct. 84. And see Wallace *v.* Acre, 5 Ont. Pr. 142.

But one who has erected improvements on and rented the land cannot defend on the ground that he asserted no right to the land, but that his acts and control were limited

sion of the premises at the time of the service of the writ and has not been since.[83]

G. Possession Under License or Easement. It is a good defense that defendant holds possession of the land under a license from plaintiff.[84] But it has been decided that a right in the nature of an easement in the land will not operate as a bar.[85]

H. Title or Right of Possession of Third Person[86] **— 1. Right to Show Outstanding Title — a. General Rule.** One who is in possession under color of title or right may avail himself of an outstanding title as a defense,[87] although he does not connect himself therewith.[88]

to the improvements. Ghost *v.* Shurman, 4 Colo. App. 88, 34 Pac. 733.

83. Helfenstein *v.* Leonard, 50 Pa. St. 461.

Surrender of possession by a tenant may be shown in an action against him. Sowles *v.* Carr, 70 Vt. 630, 41 Atl. 581.

Defendant is not estopped from saying he was not in possession when the action was commenced by the fact that he was seen in possession by plaintiff's agent and claimed to be in possession. Pope *v.* Dalton, 31 Cal. 218.

84. Sullivant *v.* Franklin County Com'rs, 3 Ohio 89; Hummel *v.* Wurster, 2 Lanc. L. Rev. 246.

85. Lott *v.* Payne, 82 Miss. 218, 33 So. 948; Asbury Park *v.* Hawxhurst, 67 N. J. L. 582, 52 Atl. 694. But see Kurkel *v.* Haley, 47 How. Pr. (N. Y.) 75. And see *supra*, II, C, 1, f, g.

86. Plaintiff showing title in third person see *supra*, II, C, 1, d.

87. *Alabama.*— Price *v.* Cooper, 123 Ala. 392, 26 So. 238; Stephenson *v.* Reeves, 92 Ala. 582, 8 So. 695; Snedecor *v.* Freeman, 71 Ala. 140; Eakin *v.* Brewer, 60 Ala. 579; Anderson *v.* Melear, 56 Ala. 621; Ellison *v.* Mobile, 53 Ala. 558; King *v.* Stevens, 18 Ala. 475.

California.— Gregory *v.* Haynes, 13 Cal. 591; Potter *v.* Knowles, 5 Cal. 87.

Colorado.— Dyke *v.* Whyte, 17 Colo. 296, 29 Pac. 128.

Florida.— Hogans *v.* Carruth, 18 Fla. 587.

Georgia.— Jones *v.* Sullivan, 33 Ga. 486; Brumbalo *v.* Baxter, 33 Ga. 81; Brooking *v.* Dearmond, 27 Ga. 58; Jones *v.* Scoggins, 11 Ga. 119.

Illinois.— Boyer *v.* Thornburg, 115 Ill. 540, 4 N. E. 253; Masterson *v.* Cheek, 23 Ill. 72.

Indiana.— Galbreath *v.* Doe, 8 Blackf. 366; Connelly *v.* Doe, 8 Blackf. 320; Doe *v.* West, 1 Blackf. 133.

Kentucky.— Price *v.* Evans, 4 B. Mon. 386; Sowder *v.* McMillan, 4 Dana 456; Fowke *v.* Darnall, 5 Litt. 316; Coleman *v.* Talbot, 2 Bibb 129, 4 Am. Dec. 687.

Louisiana.—Font *v.* McConnell, 46 La. Ann. 215, 14 So. 522.

Maryland.— Hall *v.* Gittings, 2 Harr. & J. 112.

Michigan.— Lee *v.* Clary, 38 Mich. 223.

Mississippi.—Nixon *v.* Porter, 38 Miss. 401.

Missouri.— Kelley *v.* Kurz, 118 Mo. 414, 24 S. W. 171; Gurno *v.* Janis, 6 Mo. 330. See also Mulherin *v.* Simpson, 124 Mo. 610, 28 S. W. 86.

New York.— Brewster *v.* Striker, 1 E. D. Smith 321; Adair *v.* Lott, 3 Hill 182. See also Gallupville Reformed Church *v.* Schoolcraft, 5 Lans. 206.

North Carolina.— Clegg *v.* Fields, 52 N. C. 37, 75 Am. Dec. 450; Love *v.* Gates, 20 N. C. 498.

Ohio.— Fowler *v.* Whiteman, 2 Ohio St. 270; Perkins *v.* Dibble, 10 Ohio 433, 36 Am. Dec. 97.

Oregon.—Moore *v.* Willamette Transp., etc., Co., 7 Oreg. 355.

Pennsylvania.— Bear Valley Coal Co. *v.* Dewart, 95 Pa. St. 72; Burford *v.* McCue, 53 Pa. St. 427; Gilliland *v.* Hanna, Add. 251.

South Carolina.— Wagener *v.* Parrott, 51 S. C. 489, 29 S. E. 240, 64 Am. St. Rep. 695; Giles *v.* Pratt, 2 Hill 439; Weaver *v.* Ingram, 1 Nott & M. 207.

Tennessee.— Woods *v.* Bonner, 89 Tenn. 411, 18 S. W. 67; Coal Creek Min., etc., Co. *v.* Ross, 12 Lea 1; Miller *v.* Holt, 1 Overt. 308.

Vermont.— Tucker *v.* Keeler, 4 Vt. 161.

Virginia.— Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347; Atkins *v.* Lewis, 14 Gratt. 30.

Wisconsin.— Gardiner *v.* Tisdale, 2 Wis. 153, 60 Am. Dec. 407.

Wyoming.— Lee *v.* Cook, 2 Wyo. 312.

United States.— Henderson *v.* Wanamaker, 79 Fed. 736, 25 C. C. A. 181.

Canada.— See Doe *v.* McColgan, 12 N. Brunsw. 542.

See 17 Cent. Dig. tit. "Ejectment," § 100.

Defendant must show that the boundary of the stranger's title includes the land in controversy or the defense fails. Pearson *v.* Baker, 4 Dana (Ky.) 321.

The rightfulness of the exclusive possession of a tenant in common as against his cotenants cannot be questioned by a stranger to the title. Simmons *v.* Spratt, 26 Fla. 449, 8 So. 123, 9 L. R. A. 343.

Where right to a New Madrid location is involved defendant under the Missouri statute of 1839 regulating the practice relating to New Madrid locations cannot merely impeach the title of his adversary, but must assert the better title. Mitchell *v.* Tuckers, 10 Mo. 260.

In Kansas the rule is the contrary of that stated in the text. Thomas *v.* Rauer, 62 Kan. 568, 64 Pac. 80; Duffey *v.* Rafferty, 15 Kan. 9.

88. *Alabama.*— Guilmartin *v.* Wood, 76 Ala. 204.

California.— Trenouth *v.* Gordon, 63 Cal. 379; Cranmer *v.* Porter, 41 Cal. 462; Simson *v.* Eckstein, 22 Cal. 580; Welch *v.* Sullivan, 8 Cal. 165.

b. Exceptions to Rule — (I) *Acknowledgment of Plaintiff's Title.*[89] The defense of an outstanding title in a third person is not ordinarily available, where defendant has entered into possession under plaintiff and has acknowledged his title;[90] but if before acceptance of either possession or title defendant disavows both and takes possession under what he considers a better title he may defend under it.[91] And where a third person is made a party to an action by the vendor against the vendee holding under bond, who has made default in payment of purchase-money, a deed offered by such third person tending to show title out of plaintiff and to explain his possession is admissible.[92]

(II) *Title From Common Source.*[93] As a general rule where plaintiff and defendant both claim title from a common source defendant cannot show a better title than plaintiff's in a third person with which title he does not connect himself.[94] The reason assigned why defendant may not protect himself by appealing

District of Columbia.— Reeves v. Low, 8 App. Cas. (D. C.) 105.

Georgia.— Jenkins v. Southern R. Co., 109 Ga. 35, 34 S. E. 355; Jones v. Sullivan, 33 Ga. 486.

Illinois.— Cobb v. Lavalle, 89 Ill. 331, 31 Am. Rep. 91; Rupert v. Mark, 15 Ill. 540.

New York.— Bloom v. Burdick, 1 Hill 130, 37 Am. Dec. 299; Swart v. Service, 21 Wend. 36, 34 Am. Dec. 211.

North Carolina.— Thomas v. Hunsucker, 108 N. C. 720, 13 S. E. 221; Clegg v. Fields, 52 N. C. 37, 75 Am. Dec. 450.

Vermont.— Townsend v. Downer, 32 Vt. 183. *Compare* Stacy v. Bostwick, 48 Vt. 192.

United States.— West v. East Coast Cedar Co., 113 Fed. 737, 51 C. C. A. 411.

See 17 Cent. Dig. tit. "Ejectment," § 100.

Compare Blight v. Atwell, 7 T. B. Mon. (Ky.) 264.

Title in receiver.— A defendant cannot set up that there is an outstanding right to the possession of the premises in a receiver appointed to foreclose a mortgage executed by plaintiff's grantor to a third person, where he does not in any way connect himself with the mortgage or with the receivership. Glos v. Patterson, 195 Ill. 530, 63 N. E. 272.

That a deed under which plaintiff claims was in fact a mortgage may be shown by a defendant, although he does not connect himself with the title of the one executing the mortgage. Swart v. Service, 21 Wend. (N.Y.) 36, 34 Am. Dec. 211.

89. See *supra*, II, C, 6, b.

90. *Alabama.*—Guilmartin v. Wood, 76 Ala. 204; Tennessee, etc., R. Co. v. East Alabama, etc., R. Co., 75 Ala. 516, 51 Am. Rep. 475; Seabury v. Doe, 22 Ala. 207, 58 Am. Dec. 254.

Delaware.— Cooch v. Gerry, 3 Harr. 280.

Illinois.— Doe v. Cochran, 2 Ill. 209.

Kansas.— O'Brien v. Wetherell, 14 Kan. 616.

Kentucky.— Fowler v. Cravens, 3 J. J. Marsh. 428, 20 Am. Dec. 153; Hamilton v. Taylor, Litt. Sel. Cas. 444.

Mississippi.—Walker v. Williams, 30 Miss. 165.

Missouri.— Mathews v. Lecompte, 24 Mo. 545.

New York.— Schauber v. Jackson, 2 Wend. 13 [*reversing* 7 Cow. 187]; Jackson v. Ayers, 14 Johns. 224; Jackson v. Stewart, 6 Johns. 34; Utica Bank v. Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189.

Ohio.— Hart v. Johnson, 6 Ohio 87.

See 17 Cent. Dig. tit. "Ejectment," § 100; and *supra*, II, C, 6, b.

91. Nerhooth v. Althouse, 8 Watts (Pa.) 427, 34 Am. Dec. 480.

92. McAlpin v. Lee, 57 Ga. 281.

93. **Plaintiff relying on title from common source** see *supra*, II, C, 8.

94. *Alabama.*— Donehoo v. Johnson, 120 Ala. 438, 24 So. 888; Matkin v. Marx, 96 Ala. 501, 11 So. 633; Stephenson v. Reeves, 92 Ala. 582, 8 So. 695; Pendley v. Madison, 83 Ala. 484, 3 So. 618; Gantt v. Doe, 27 Ala. 582.

Georgia.— Greenfield v. McIntyre, 112 Ga. 691, 38 S. E. 44; Scott v. Singer, 54 Ga. 689.

Kentucky.— McClain v. Gregg, 2 A. K. Marsh. (Ky.) 454.

Mississippi.— McCready v. Lansdale, 58 Miss. 877; Miller v. Ingram, 56 Miss. 510; Griffin v. Sheffield, 38 Miss. 359, 77 Am. Dec. 646.

Missouri.— Union Bank v. Manard, 51 Mo. 548; Landes v. Perkins, 12 Mo. 238.

North Carolina.— Bernhardt v. Brown, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725; Asbury v. Fair, 111 N. C. 251, 16 S. E. 467; Bonds v. Smith, 106 N. C. 553, 11 S. E. 322; Brown v. Smith, 53 N. C. 331; Love v. Gates, 20 N. C. 498.

United States.— See Plaster v. Rigney, 97 Fed. 12, 38 C. C. A. 25.

See 15 Cent. Dig. tit. "Eminent Domain," § 103.

A title with which defendant connects himself may be shown. Wolfe v. Doe, 13 Sm. & M. (Miss.) 103, 51 Am. Dec. 147; Ray v. Gardner, 82 N. C. 146. And see Reid v. Anderson, 13 App. Cas. (D. C.) 30.

In ejectment on a mortgage a mortgagor cannot set up an outstanding title. Burhans v. Vanness, 10 N. J. L. 102.

Exceptions to this rule.— Nevertheless the superior title meant is one older than the common source or title under which both claim as the foundation of their title, and the rule does not prevent a defendant from availing himself of an outstanding title with a third person with which he had no connection, where it had accrued subsequently to the time of his recognition of the title of the

to an outstanding title in a third person with which he has no connection is that he has acknowledged the title of the common source, and for that reason is precluded from questioning its validity "at the time of his taking under it."[95]

(III) *DEFENDANT A MERE TRESPASSER.* A defendant who is a mere trespasser or intruder cannot set up title in a third person to defeat a recovery;[96] for where a person intrudes without claim of right, upon the actual possession of another, there is reason in compelling him to restore the possession before he be permitted to show title in a third person.[97]

(IV) *OTHER EXCEPTIONS.* A judgment debtor in possession cannot show an outstanding title in another to defeat an action against him by a purchaser at a sheriff's sale.[98] So where defendant does not disclaim but makes full defense, being in possession, he cannot defend on the ground that he has parted with title

common source. McCready *v.* Landsdale, 58 Miss. 877. Nor does the rule prevent defendant from showing that before plaintiff had got his conveyance (which was a sheriff's deed), such prior grantee had conveyed to him, although without consideration, and that he had conveyed to a third person for a full and valuable consideration, who had no notice of the rights of plaintiff. Newlin *v.* Osborne, 47 N. C. 163. So the rule is not violated by showing that the legal title had passed from a common mortgagor before plaintiff's mortgage was executed. New England Mortg. Security Co. *v.* Clayton, 119 Ala. 361, 24 So. 362. And when both plaintiff and defendant in ejectment derive their title from the state, but under grants of different dates, it is competent for defendant to show title out of plaintiff by establishing a prior valid grant from the state to another party, although he fail in an effort to connect himself with such elder title. Tolson *v.* Mainor, 85 N. C. 235.

95. McCready *v.* Landsdale, 58 Miss. 877.

96. *Alabama.*— Lucy *v.* Tennessee, etc., R. Co., 92 Ala. 246, 8 So. 806; Guilmartin *v.* Wood, 76 Ala. 204; Childress *v.* Calloway, 76 Ala. 128.

California.— Southmayd *v.* Henley, 45 Cal. 101; Ryan *v.* Tomlinson, 39 Cal. 639; Hubbard *v.* Barry, 21 Cal. 321; Winans *v.* Christy, 4 Cal. 70, 60 Am. Dec. 597.

District of Columbia.— Bradshaw *v.* Ashley, 14 App. Cas. (D. C.) 485.

Florida.— Seymour *v.* Creswell, 18 Fla. 29.

Georgia.— Jones *v.* Scoggins, 11 Ga. 119.

Illinois.— Casey *v.* Kimmel, 181 Ill. 154, 54 N. E. 905; Sullivan *v.* Eddy, 164 Ill. 391, 45 N. E. 837; Anderson *v.* Gray, 134 Ill. 550, 25 N. E. 843, 23 Am. St. Rep. 696; Hulick *v.* Scovil, 9 Ill. 159.

Iowa.— Williams *v.* Swetland, 10 Iowa 51.

Kentucky.— Adams *v.* Tiernan, 5 Dana 394; Stembridge *v.* Britschu, 20 S. W. 278, 14 Ky. L. Rep. 408.

Michigan.— Cook *v.* Bertram, 86 Mich. 356, 49 N. W. 42.

Missouri.— Strain *v.* Murphy, 49 Mo. 337.

New York.— Jackson *v.* Rowland, 6 Wend. 666, 22 Am. Dec. 557; Jackson *v.* Schauber, 7 Cow. 187; Jackson *v.* Harder, 4 Johns. 202, 4 Am. Dec. 262.

Pennsylvania.— Christy *v.* Brien, 14 Pa. St. 248; Hunt *v.* Crawford, 3 Penr. & W. (Pa.) 426. See Brolaskey *v.* McClain, 61 Pa. St. 146; McHenry *v.* McCall, 10 Watts (Pa.) 456.

United States.— Christy *v.* Henley, 14 How. 297, 14 L. ed. 428; Christy *v.* Young, 14 How. 296, 14 L. ed. 428; Christy *v.* Scott, 14 How. 282, 14 L. ed. 422.

See 17 Cent. Dig. tit. "Ejectment," § 100.

The rule does not apply in a case of that constructive possession which the law implies as following title; and a defendant entering, declaring that he takes the lands as a mere possession, acknowledging his ignorance of the owner, and expressing a desire to discover him, for the purpose of purchasing, is not precluded from showing the title out of the lessors of plaintiff, notwithstanding he may be unable to trace it to himself. Schauber *v.* Jackson, 2 Wend. (N. Y.) 13. So it is held not to apply where the purpose is to show the want of all title or right of possession in plaintiff. Mallett *v.* Uncle Sam Gold, etc., Min. Co., 1 Nev. 188, 90 Am. Dec. 484.

97. Schauber *v.* Jackson, 2 Wend. (N. Y.) 13.

98. *Alabama.*— Avent *v.* Read, 2 Port. 480, 27 Am. Dec. 663.

California.— McDonald *v.* Badger, 23 Cal. 393, 83 Am. Dec. 123; Redman *v.* Bellamy, 4 Cal. 247.

Indiana.— Turner *v.* Madison First Nat. Bank, 78 Ind. 19; Joyce *v.* Madison First Nat. Bank, 62 Ind. 188; Sherry *v.* Den, 8 Blackf. 542; Hobson *v.* Doe, 4 Blackf. 487.

Missouri.— Boyd *v.* Jones, 49 Mo. 202; Laughlin *v.* Stone, 5 Mo. 43; Gritchell *v.* Kreidler, 12 Mo. App. 497.

New York.— Dickinson *v.* Smith, 25 Barb. 102.

North Carolina.— Leach *v.* Jones, 86 N. C. 404; Wade *v.* Sanders, 70 N. C. 277; Judge *v.* Houston, 34 N. C. 108.

Pennsylvania.— Arnold *v.* Gorr, 1 Rawle 223; Wetherill *v.* Curry, 2 Phila. 98.

See 17 Cent. Dig. tit. "Ejectment," § 100.

Defendant in execution may on ejectment show that he never had such title as was the subject of sale on legal process. Cook *v.* Webb, 18 Ala. 810; Falkinburge *v.* Camp, 3 N. J. L. 798. But see Thomas *v.* Orrell, 27 N. C. 569, 44 Am. Dec. 58.

If he abandons the land after the sale and subsequently returns to it, an outstanding title will be a good defense, provided he shows that he has taken possession and holds

before suit;[99] and in ejectment by a mortgagee after maturity of the mortgage and default in payment, the mortgagor cannot defeat recovery by setting up that plaintiff had rented the premises, and was therefore not entitled to possession, where defendant's possession was hostile to that of the lessee.[1] Nor will a deed by a mortgagor to a stranger after a suit for foreclosure avail anything against the mortgagee.[2] It has also been held that, although a conveyance be made to the wrong person through mistake, the title passes, and it will not avail defendant in ejectment to show that the title was made to a person different from the one intended to be the grantee.[3]

2. CHARACTER OF OUTSTANDING TITLE THAT MAY BE SET UP — a. In General. An outstanding title sufficient to defeat an action of ejectment must be one which is a present, subsisting, operative, legal title.[4] And furthermore the title must be

under that title. Hayes v. Bernard, 38 Ill. 297.

If execution conferred no power to make the sale defendant is not estopped to show an outstanding title. Peebles v. Pate, 90 N. C. 348.

In ejectment by a purchaser under a fieri facias against a third person in possession under the debtor, without title or collusively, an outstanding title cannot be set up. Jackson v. Bush, 10 Johns. (N. Y.) 223.

Where defendant paid the purchase-money and title was taken in the son's name a sheriff's vendee cannot maintain ejectment against the latter. You v. Flinn, 34 Ala. 409.

99. Wilson v. Braden, 48 W. Va. 196, 36 S. E. 367.

1. Stanley v. Johnson, 113 Ala. 344, 21 So. 823.

2. Addison v. Crow, 5 Dana (Ky.) 271.

3. Thomas v. See, 8 B. Mon. (Ky.) 5.

4. *Alabama.*— Bernstein v. Humes, 71 Ala. 260.

California.—Robinson v. Thornton, (1893) 31 Pac. 936.

District of Columbia.— Kirk v. Parkhill, 1 MacArthur 28.

Georgia.— Salter v. Williams, 10 Ga. 186.

Illinois.— Clayton v. Feig, 179 Ill. 534, 54 N. E. 149.

Michigan.— Bennett v. Horr, 47 Mich. 221, 10 N. W. 347.

Missouri.— Hardwick v. Jones, 65 Mo. 54; Woods v. Hilderbrand, 46 Mo. 284, 2 Am. Rep. 513; McDonald v. Schneider, 27 Mo. 405; Norcum v. D'Œnch, 17 Mo. 98.

New York.— Becker v. Howard, 47 How. Pr. 423; Jackson v. Todd, 6 Johns. 257; Jackson v. Hudson, 3 Johns. 375, 3 Am. Dec. 500.

Pennsylvania.— Hunter v. Cochran, 3 Pa. St. 105.

Tennessee.— Peck v. Carmichael, 9 Yerg. 325.

Texas.— Shields v. Hunt, 45 Tex. 424.

Virginia.— Reusens v. Lawson, 91 Va. 226, 21 S. E. 347.

West Virginia.— Maxwell v. Cunningham, 50 W. Va. 298, 40 S. E. 499; Parkersburg Industrial Co. v. Schultz, 48 W. Va. 470, 27 S. E. 255; Wilson v. Braden, 48 W. Va. 196, 36 S. E. 367; Jarrett v. Stevens, 36 W. Va. 445, 15 S. E. 177.

United States.— Greenleaf v. Birth, 6 Pet. 302, 8 L. ed, 406; Rigney v. Plaster, 88 Fed. 686; Foster v. Joice, 9 Fed. Cas. No. 4,974, 3 Wash. 498.

See 17 Cent. Dig. tit. "Ejectment," §§ 101, 102.

For titles which may be set up see the following cases:

Alabama.— Clements v. Pearce, 63 Ala. 284.

California.—Gregory v. Haynes, 13 Cal. 591.

Illinois.— Cobb v. Lavalle, 89 Ill. 331, 31 Am. Rep. 91; Batterton v. Yonkum, 17 Ill. 288.

Kentucky.— Chiles v. Cask, 1 A. K. Marsh. 582.

Missouri.— Schanewerk v. Hoberecht, 117 Mo. 221, 22 S. W. 949, 38 Am. St. Rep. 631.

New York.— Pell v. Ulmar, 18 N. Y. 139.

Pennsylvania.— Putnam v. Tyler, 117 Pa. St. 570, 12 Atl. 43; Wonder v. Phelps, 109 Pa. St. 172, 1 Atl. 171; Watson v. Gilday, 1 Serg. & R. 337.

England.— Johnson v. White, 40 U. C. Q. B. 309. And see Clark v. Arden, 16 C. B. 227, 13 C. L. R. 781, 1 Jur. N. S. 710, 24 L. J. C. P. 163, 3 Wkly. Rep. 444, 81 E. C. L. 227.

See 17 Cent. Dig. tit. "Ejectment," §§ 101, 102.

For titles which may not be set up see the following cases:

California.— Gray v. Dixon, 74 Cal. 508, 16 Pac. 305.

Illinois.— Holbrook v. Debo, 99 Ill. 372.

Michigan.— Buell v. Irwin, 24 Mich. 145.

Missouri.— Lanier v. McIntosh, 117 Mo. 508, 23 S. W. 787, 38 Am. St. Rep. 676; Hammond v. Coleman, 4 Mo. App. 307.

New York.— Gray v. Croquet, 4 Abb. Pr. N. S. 113; Becker v. Holdridge, 47 How. Pr. 429; Jackson v. Garnsey, 16 Johns. 189.

Ohio.—Lloyd v. Giddings, 7 Ohio, Pt. II, 50.

Pennsylvania.— Sheik v. McElroy, 20 Pa. St. 25.

Virginia.— Holloran v. Meisel, 87 Va. 398, 13 S. E. 33.

See 17 Cent. Dig. tit. "Ejectment," §§ 101, 102.

An owner of land who allows it to be sold and deeded for taxes and then purchases the tax-title and causes it to be conveyed to a third person for his benefit cannot set up such title against a purchaser at a sale on execution against him, after the tax deed was executed. Swift v. Agnes, 33 Wis. 228.

valid[5] and capable of enforcement by the party holding it,[6] and the burden is on defendant to show this fact. It is not for plaintiff to disprove its validity.[7]

b. Equitable Title.[8] So as already shown the outstanding title must be a legal one, and an equitable right or title in a third person cannot be set up as a defense.[9]

c. Title Barred by Limitations or Otherwise Lost. An outstanding title barred by the statute of limitations is no defense,[10] and neither is an outstanding title which has been abandoned or otherwise lost.[11]

d. Conveyance Pending Action. The right of plaintiff to recover in ejectment will not be defeated by a conveyance by him of the title of the premises in controversy during the pendency of the action.[12] Nor is this rule affected by a

Where an estate has been sequestered from a life-tenant neither he who holds adversely to the sequestrator nor his subsequent vendee nor those claiming under him can set up the title of the sequestrator against the owner of the life-estate. Banks *v.* Ammon, 27 Pa. St. 172.

5. Harney *v.* Morton, 36 Miss. 411; Wilson *v.* Braden, 48 W. Va. 196, 36 S. E. 367. And see Rule *v.* Broach, 58 Miss. 552.

A deed fraudulent on its face cannot be used to defeat recovery. Forsythe *v.* Hardin, 62 Ill. 206.

That the deed of their ancestor was in fraud of creditors cannot be set up by the heirs at law. Cushwa *v.* Cushwa, 5 Md. 44.

6. *Illinois.*— Clayton *v.* Feig, 179 Ill. 534, 54 N. E. 149.

Maryland.— Georges Creek Coal, etc., Co. *v.* Detmold, 1 Md. 225.

Mississippi.— Freeman *v.* Cunningham, 57 Miss. 67.

Missouri.— McDonald *v.* Schneider, 27 Mo. 405.

Pennsylvania.— Wray *v.* Miller, 20 Pa. St. 111.

West Virginia.— Maxwell *v.* Cunningham, 50 W. Va. 298, 40 S. E. 499; Wilson *v.* Braden, 48 W. Va. 196, 36 S. E. 367; Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255.

United States.— Rigney *v.* Plaster, 88 Fed. 686; Foster *v.* Joice, 9 Fed. Cas. No. 4,974, 3 Wash. 498.

7. Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255.

8. **Equitable title in plaintiff** see *supra*, II, C, 6.

9. *California.*— Pioche *v.* Paul, 22 Cal. 105.

Indiana.— East *v.* Peden, 108 Ind. 92, 8 N. E. 722.

Missouri.—Aurora Bank *v.* Linzee, 166 Mo. 496, 65 S. W. 735.

New York.— Cagger *v.* Lansing, 64 N. Y. 417. But see Safford *v.* Hynds, 39 Barb. 625.

Pennsylvania.— Heath *v.* Knap, 1 Pa. St. 482. But see Huston *v.* Wickerham, 8 Watts 519.

Tennessee.— Campbell *v.* Campbell, 3 Head 325.

See 17 Cent. Dig. tit. "Ejectment," § 106.

10. *Kentucky.*— Griffith *v.* Dicken, 4 Dana 561.

Mississippi.— Griffin *v.* Sheffield, 38 Miss. 359, 77 Am. Dec. 646.

Missouri.— Totten *v.* James, 55 Mo. 494.

Tennessee.— Humble *v.* Spears, 8 Baxt. 156; Dickinson *v.* Collins, 1 Swan 516.

West Virginia.—Wilson *v.* Braden, (1900) 36 S. E. 367.

United States.— Rigney *v.* Plaster, 88 Fed. 686; Henderson *v.* Wanamaker, 79 Fed. 736, 25 C. C. A. 181.

See 17 Cent. Dig. tit. "Ejectment," § 102.

11. Peck *v.* Carmichael, 9 Yerg. (Tenn.) 325; Wilson *v.* Braden, 48 W. Va. 196, 36 S. E. 367.

12. *Alabama.*—Davis *v.* Curry, 85 Ala. 133, 4 So. 734. And see Brunson *v.* Morgan, 86 Ala. 318, 5 So. 495. *Compare* Etowah Min. Co. *v.* Henderson, (1900) 29 So. 7.

California.—Clink *v.* Thurston, 47 Cal. 21; Barstow *v.* Newman, 34 Cal. 90.

Georgia.— Suwannee Turpentine Co. *v.* Baxter, 109 Ga. 597, 35 S. E. 142.

Illinois.— Johnson *v.* Shinkle, 50 Ill. 137; Mills *v.* Graves, 44 Ill. 50.

Indiana.—Steeple *v.* Downing, 60 Ind. 478.

Kentucky.— Chiles *v.* Conley, 9 Dana 385; Bonta *v.* Clay, 5 Litt. 129; Jackson *v.* Jeffries, 1 A. K. Marsh. 88; Smith *v.* Price, 13 S. W. 428, 11 Ky. L. Rep. 895.

Missouri.— Smith *v.* Phelps, 74 Mo. 598.

New York.— Livingston *v.* Proseus, 2 Hill 526; Jackson *v.* Leggett, 7 Wend. 377.

Ohio.— McChesney *v.* Wainwright, 5 Ohio 452; Dawson *v.* Porter, 2 Ohio 304.

Pennsylvania.— Hoover *v.* Gonzalus, 11 Serg. & R. 314.

West Virginia.—Beckwith *v.* Thompson, 18 W. Va. 103.

See 17 Cent. Dig. tit. "Ejectment," § 104.

Contra.— Cresap *v.* Hutson, 9 Gill (Md.) 269.

The reason on which the rule is based is that the conveyance being made pending an adverse holding is as to defendant absolutely void and the same as if no conveyance had been made. It confers no rights against him and he can claim no benefits nor defenses under it. Davis *v.* Curry, 85 Ala. 133, 4 So. 734; Johnson *v.* Cook, 73 Ala. 537; Steeple *v.* Downing, 60 Ind. 478; Livingston *v.* Proseus, 2 Hill (N. Y.) 526. The purchaser acquires no title which will maintain an action in his own name against the adverse holder, and if suit could not be maintained in the name of the vendor no one could assert rights resting on his title no matter how complete it might be. Davis *v.* Curry, 85 Ala. 133, 4 So. 734.

statute providing that if the right of plaintiff to the possession of the premises expires after commencement of suit and before trial, the verdict shall be returned according to the fact and judgment entered only for damages and costs. This statute is construed as not applying where plaintiff transfers title pending suit.[13]

e. **Mortgage or Other Encumbrance.** So a defendant in ejectment cannot set up an outstanding mortgage in the hands of a third person to defeat the title of the mortgagor or his heirs.[14] And this rule is not affected by the fact that the mortgage was in the form of an absolute conveyance with a separate defeasance back.[15] The better and prevailing doctrine is that the mortgage is a mere security as to third persons, and as to them the mortgagor has such a title as will support ejectment.[16] So a deed of trust given to secure the payment of money cannot be set up in ejectment as an outstanding title.[17] And an agreement between a tenant in possession and plaintiff that if plaintiff recovers against the tenant's lessor a lease shall be executed by plaintiff in the same terms as that subsisting before will not bar an action by plaintiff which joins the tenant as defendant, he not having passed the title to defendant.[18] It has also been held that a release by one of two lessors of plaintiff does not bar a recovery, such release affecting only the *quantum* of interest.[19] But recovery may be barred by showing that plaintiff has become a voluntary bankrupt.[20]

The action may be continued in plaintiff's name under the California practice act unless the grantee applies to be substituted as plaintiff. Camarillo *v.* Fenlon, 49 Cal. 202. And see Moss *v.* Shear, 30 Cal. 467.

There may be a recovery which will inure to the benefit of the grantee. Johnson *v.* Shinkle, 50 Ill. 137; Mills *v.* Graves, 44 Ill. 50.

The rule stated in the text does not apply where the conveyance is made to defendant himself. Torrance *v.* Betsy, 30 Miss. 129.

13. Smith *v.* Phelps, 74 Mo. 598.

14. *Alabama.*— Dunton *v.* Keel, 95 Ala. 159, 10 So. 333; Cotton *v.* Carlisle, 85 Ala. 175, 4 So. 670, 7 Am. St. Rep. 29; Allen *v.* Kellam, 69 Ala. 442; Denby *v.* Mellgrew, 58 Ala. 147.

Connecticut.— Burr *v.* Spencer, 26 Conn. 159, 68 Am. Dec. 379; Porter *v.* Seeley, 13 Conn. 564.

Illinois.— Emory *v.* Keighan, 88 Ill. 482; Hall *v.* Lance, 25 Ill. 277.

Indiana.— Johnson *v.* Cornett, 29 Ind. 59.

Missouri.— Moreau *v.* Detchmendy, 41 Mo. 431.

New Jersey.— Dimon *v.* Dimon, 10 N. J. L. 156.

New York.— Raynor *v.* Wilson, 6 Hill 469; Jackson *v.* Parkhurst, 4 Wend. 369; Jackson *v.* Pratt, 10 Johns. 381; Collins *v.* Torry, 7 Johns. 278, 5 Am. Dec. 273.

Ohio.— Perkins *v.* Dibble, 10 Ohio 433, 36 Am. Dec. 97; Phelps *v.* Butler, 2 Ohio 224.

Pennsylvania.—Stafford *v.* Wheeler, 93 Pa. St. 462.

Rhode Island.— Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64, 75 Am. Dec. 681.

Canada.— McDonald *v.* Murphy, 20 U. C. Q. B. 355; Sidey *v.* Hardcastle, 11 U. C. Q. B. 162; Doe *v.* Johnson, 4 U. C. Q. B. 508.

See 17 Cent. Dig. tit. "Ejectment," § 104.

Exceptions to rule.— A mortgage after forfeiture has been held to constitute a good outstanding title. Howard *v.* Thornton, 50 Mo. 291; Meyer *v.* Campbell, 12 Mo. 603. And see Smith *v.* Vincent, 15 Conn. 1, 38 Am. Dec. 59. *Compare* Hall *v.* Lance, 25 Ill. 277. And a presumption of an outstanding title sufficient to bar ejectment by the mortgagor or his heirs is raised where the mortgage is of more than twenty years' standing, on which no interest has been paid and under which there has been no entry to foreclose. Schauber *v.* Jackson, 2 Wend. (N. Y.) 13 [*reversing* 7 Cow. 187]. *Compare* Moreau *v.* Detchemendy, 41 Mo. 431.

A purchaser under a void foreclosure sale holds under color of title and may set up a forfeited mortgage against all but the mortgagee and those claiming under him under a valid foreclosure sale. Jackson *v.* Magruder, 51 Mo. 55.

15. Gibson *v.* Seymour, 3 Vt. 565.

16. *Alabama.*— Allen *v.* Kellam, 69 Ala. 442; Denby *v.* Mellgrew, 58 Ala. 147.

Illinois.— Emory *v.* Keighan, 88 Ill. 482.

Missouri.— Woods *v.* Hilderbrand, 46 Mo. 284, 2 Am. Rep. 513.

New Jersey.— Dimon *v.* Dimon, 10 N. J. L. 156.

New York.— Jackson *v.* Pratt, 10 Johns. 381.

See 17 Cent. Dig. tit. "Ejectment," § 104.

The mortgagee in possession himself after forfeiture might set up his own title against the mortgagor, but as against all the world besides the mortgagor is the owner, and his title cannot be defeated by showing that the property is pledged to a third person for the payment of a debt. Woods *v.* Hilderbrand, 46 Mo. 284, 2 Am. Rep. 513.

17. Bobb *v.* Graham, 15 Mo. App. 289. And see Smith *v.* Sullivan, 20 App. Cas. (D. C.) 553; Hoover *v.* Gonzalus, 11 Serg. & R. (Pa.) 314.

18. Carrington *v.* Otis, 4 Gratt. (Va.) 235.

19. Jackson *v.* McClaskey, 2 Wend. (N. Y.) 541.

20. Clements *v.* Taylor, 65 Ala. 363. See Varden *v.* Todd, 1 MacArthur (D. C.) 602.

f. Miscellaneous. The fact that the legal title is held by plaintiff in trust for a third person will not avail defendant.[21] Neither can recovery be defeated by showing an adverse grant, in a stranger, of the same date as plaintiff's,[22] nor by the fact that a third person might defeat plaintiff's title by a plea of disability, such disability being of a personal character.[23] And where plaintiff relies on a prior possession of public lands, defendant cannot show that a third person has an older and better claim to the land than that of plaintiff.[24]

I. Equitable Defenses — 1. Right to Make. An equitable defense is not available at common law to defeat an action of ejectment.[25] But in those juris-

21. Brolaskey *v.* McClain, 61 Pa. St. 146. See also Townsend *v.* Roy, 9 Phila. (Pa.) 120.

22. Bowman *v.* Bartlett, 4 Bibb (Ky.) 520.

23. Watson *v.* Kelty, 16 N. J. L. 517.

24. Piercy *v.* Sabin, 10 Cal. 22, 70 Am. Dec. 692.

25. *Alabama.*— McLeod *v.* Bishop, 110 Ala. 640, 20 So. 130; Hooper *v.* Columbus, etc., R. Co., 78 Ala. 213; Tutwiler *v.* Mumford, 73 Ala. 308; McPherson *v.* Walters, 16 Ala. 714, 50 Am. Dec. 200; Cawsey *v.* Driver, 13 Ala. 818.

Arkansas.— Rowland *v.* McGuire, 67 Ark. 320, 55 S. W. 16.

California.— Lowe *v.* Alexander, 15 Cal. 296.

District of Columbia.—Rathbone *v.* Hamilton, 4 App. Cas. 475.

Illinois.— Hayden *v.* McCloskey, 161 Ill. 351, 43 N. E. 1091; Kirkpatrick *v.* Clark, 132 Ill. 342, 24 N. E. 71, 22 Am. St. Rep. 531, 8 L. R. A. 511; Escherick *v.* Traver, 65 Ill. 379; Chiniquy *v.* Catholic Bishop, 41 Ill. 148; Mills *v.* Graves, 38 Ill. 455, 87 Am. Dec. 314; Reece *v.* Allen, 10 Ill. 236, 48 Am. Dec. 336.

Indiana.— Smith *v.* Allen, 1 Blackf. 22.

Iowa.—Abbott *v.* Chase, 13 Iowa 453; Page *v.* Cole, 6 Iowa 153.

Kentucky.— Stinebaugh *v.* Wisdom, 13 B. Mon. 467; Gilpin *v.* Davis, 2 Bibb 416, 5 Am. Dec. 622.

Maryland.— Matthews *v.* Ward, 10 Gill & J. 443.

Michigan.— Paldi *v.* Paldi, 95 Mich. 410, 54 N. W. 903; Geiges *v.* Greiner, 68 Mich. 153, 36 N. W. 48; McKay *v.* Williams, 67 Mich. 547, 35 N. W. 159, 11 Am. St. Rep. 597; Yale *v.* Stevenson, 58 Mich. 537, 25 N. W. 488; Harrett *v.* Kinney, 44 Mich. 457, 7 N. W. 63; Buell *v.* Irwin, 24 Mich. 145.

Mississippi.— Graham *v.* Warren, (1902) 33 So. 71; Morgan *v.* Blewitt, 72 Miss. 903, 17 So. 601; Bonner *v.* Lessley, 61 Miss. 392; Lockhart *v.* Camfield, 48 Miss. 470.

New York.— Cochran *v.* Webb, 4 Sandf. 653; Sinclair *v.* Jackson, 8 Cow. 543; Jackson *v.* Van Slyck, 8 Johns. 487; Jackson *v.* Pierce, 2 Johns. 221; Jackson *v.* Sisson, 2 Johns. Cas. 321.

North Carolina.— Wilson *v.* Wilson, 117 N. C. 351, 23 S. E. 272; Hinton *v.* Pritchard, 102 N. C. 94, 8 S. E. 887; Davis *v.* Atkinson, 63 N. C. 210; Dunstan *v.* Southwick, 6 N. C. 59.

Ohio.— Spencer *v.* Marckel, 2 Ohio 263; Carey *v.* Richards, 2 Ohio Dec. (Reprint) 630, 4 West. L. Month. 251.

Tennessee.— Langford *v.* Love, 3 Sneed 308; Crutsinger *v.* Catron, 10 Humphr. 24.

Virginia.— Carrington *v.* Goddin, 13 Gratt. 587; Gibson *v.* Jones, 5 Leigh 370; Taylor *v.* King, 6 Munf. 358, 8 Am. Dec. 746.

Washington.— Ward *v.* Huggins, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285.

Wisconsin.— Parkison *v.* Bracken, 1 Pinn. 174, 39 Am. Dec. 296.

United States.— Singleton *v.* Touchard, 1 Black 342, 17 L. ed. 50; Hickey *v.* Stewart, 3 How. 750, 11 L. ed. 814; Newman *v.* Jackson, 12 Wheat. 570, 6 L. ed. 732; Robinson *v.* Campbell, 3 Wheat. 212, 4 L. ed. 372; Highland Boy Gold Min. Co. *v.* Strickley, 116 Fed. 852, 54 C. C. A. 186; Ryan *v.* Staples, 76 Fed. 721, 23 C. C. A. 541; Davis *v.* Davis, 72 Fed. 81, 18 C. C. A. 438; Young *v.* Mahoning County, 51 Fed. 585; Winchester *v.* Aiken, 31 Fed. 393. See also Burnes *v.* Scott, 117 U. S. 582, 6 S. Ct. 865, 29 L. ed. 991.

See 17 Cent. Dig. tit. "Ejectment," § 107.

The remedy of defendant who can fix an equitable charge on the property is to submit to judgment and resort to chancery to enjoin its execution until his charge is satisfied. Jeffery *v.* Hursh, 42 Mich. 563, 4 N. W. 303; Bonner *v.* Lessley, 61 Miss. 392; Young *v.* Dunn, 10 Fed. 717, 4 Woods 331.

A patent from the United States or a state cannot be attacked by the holder of an equitable title. Romain *v.* Lewis, 39 Mich. 233; Boyce *v.* Danz, 29 Mich. 146; Clark *v.* Hall, 19 Mich. 356; Bernard *v.* Bougard, Harr. (Mich.) 130.

An equitable interest may be shown where unconnected with plaintiff's claim of title and where it is not the assertion of an equitable against the legal title and plaintiff is shown to have no title. Shaw *v.* Hill, 83 Mich. 322, 47 N. W. 247, 21 Am. St. Rep. 607.

An exception to the rule has been held to exist in the case of a resulting trust, in which case the estate of a *cestui que trust* may set up to bar recovery by a person having the legal estate. Brown *v.* Doe, 7 How. (Miss.) 181; Jackson *v.* Leggett, 7 Wend. (N. Y.) 377. See also Jackson *v.* Matsdorf, 11 Johns. (N. Y.) 91, 6 Am. Dec. 355; Stith *v.* Lookabill, 76 N. C. 465; Wylie *v.* Mansley, 132 Pa. St. 65, 18 Atl. 1092; Smith *v.* Tome, 68 Pa. St. 158. But see Moore *v.* Spellman, 5 Den. (N. Y.) 225. An exception also is recognized where the equitable estate of defendant is of such a character that he would be entitled in a court of equity to have a transfer of the legal title; in this case he

dictions where there has been a blending of legal and equitable remedies, and in others where there is express statutory authority therefor, a defendant may defeat the action upon equitable principles, and if upon these principles plaintiff ought not to be put in possession of the premises he cannot recover in the action.[26]

2. Requisites of Defense. Where a defense equitable in its nature may be set up it has been decided that it is to be viewed in the same manner as to substance as if the same facts had been made the basis of a petition in chancery for affirmative relief.[27] And such a defense should be distinctly pleaded and averred,[28] and in order that it may prevail the equity should be superior to that of plaintiff.[29] The equity presented must be such that it may be ripened by the decree into a legal title, or such as would estop plaintiff from prosecuting the action in ejectment.[30] Again it is not permissible for a defendant to bring

may defend in an action at law brought by the holder of the legal title. Bonner *v.* Lessley, 61 Miss. 392; Land *v.* Keirn, 52 Miss. 341; Lockhart *v.* Camfield, 48 Miss. 470.

26. *Arkansas.*— Stirman *v.* Cravens, 29 Ark. 548; Newsome *v.* Williams, 27 Ark. 632; Trulock *v.* Taylor, 26 Ark. 54.

California.— Hyde *v.* Mangan, 88 Cal. 319, 26 Pac. 180; McCauley *v.* Fulton, 44 Cal. 355; Love *v.* Watkins, 40 Cal. 547, 6 Am. Rep. 624; Estrada *v.* Murphy, 19 Cal. 248; Morrison *v.* Wilson, 13 Cal. 494, 73 Am. Dec. 593.

Dakota.— Suessenbach *v.* Deadwood First Nat. Bank, 5 Dak. 477, 41 N. W. 662.

Florida.— Walls *v.* Endel, 20 Fla. 86.

Georgia.— Hamilton *v.* Williford, 90 Ga. 210, 15 S. E. 753; Robinson *v.* Alexander, 65 Ga. 406; Morgan *v.* Marshall, 62 Ga. 401; Elder *v.* Allison, 45 Ga. 13.

Iowa.— Byers *v.* Rodebaugh, 17 Iowa 53; Rosierz *v.* Van Dam, 16 Iowa 175.

Kansas.— Goodman *v.* Nichols, 44 Kan. 22, 23 Pac. 957; Frazier *v.* Jeakins, 9 Kan. App. 850, 62 Pac. 354.

Kentucky.— Morton *v.* Dickson, 90 Ky. 572, 14 S. W. 905, 12 Ky. L. Rep. 547; Petty *v.* Malier, 15 B. Mon. 591.

Minnesota.—Williams *v.* Murphy, 21 Minn. 534; McClane *v.* White, 5 Minn. 178.

Missouri.— Butler *v.* Carpenter, 163 Mo. 597, 63 S. W. 823; McCollum *v.* Boughton, 132 Mo. 601, 30 S. W. 1028, 33 S. W. 476, 34 S. W. 480, 35 L. R. A. 480; Walters *v.* Sent, 115 Mo. 524, 22 S. W. 511; Seiberling *v.* Tipton, 113 Mo. 373, 21 S. W. 4; Gooch *v.* Botts, 110 Mo. 419, 20 S. W. 192; Clyburn *v.* McLaughlin, 106 Mo. 521, 17 S. W. 692, 27 Am. St. Rep. 369; Estes *v.* Fry, 94 Mo. 266, 6 S. W. 660; Hayden *v.* Stewart, 27 Mo. 286.

Montana.— Reece *v.* Roush, 2 Mont. 586. And see Mayer *v.* Carothers, 14 Mont. 274, 36 Pac. 182.

Nebraska.—Pinkham *v.* Pinkham, 61 Nebr. 336, 85 N. W. 285; Wanser *v.* Lucas, 44 Nebr. 759, 62 N. W. 1108; Ford *v.* Steele, 31 Nebr. 521, 48 N. W. 271; Stalnaker *v.* Morrison, 6 Nebr. 363.

Nevada.— South End Min. Co. *v.* Tinney, 22 Nev. 19, 35 Pac. 89; Brady *v.* Husby, 21 Nev. 453, 33 Pac. 801.

New York.— Mandeville *v.* Reynolds, 68 N. Y. 528; Lamont *v.* Cheshire, 65 N. Y. 30; Chase *v.* Peck, 21 N. Y. 581; Bartlett *v.* Judd, 21 N. Y. 200, 78 Am. Dec. 131; Pope *v.* Cole, 64 Barb. 406; Cockhill *v.* Landers, 44 Barb. 218; Foot *v.* Sprague, 12 How. Pr. 355.

North Carolina.— McAdoo *v.* Callum, 86 N. C. 419; Ten Broeck *v.* Orchard, 74 N. C. 409.

Oregon.— Spaur *v.* McBee, 19 Oreg 76, 23 Pac. 818.

Pennsylvania.—McFadden *v.* Drake, 79 Pa. St. 473; Greenlee *v.* Greenlee, 22 Pa. St. 225; Bishop *v.* Reed, 3 Watts & S. 261.

South Dakota.— Catholican Hot Springs Co. *v.* Ferguson, 8 S. D. 534, 67 N. W. 615; Goldberg *v.* Kidd, 5 S. D. 169, 58 N. W. 574.

Texas.— Neill *v.* Keese, 5 Tex. 23, 51 Am. Dec. 746.

Utah.— Duke *v.* Griffith, 9 Utah 469, 35 Pac. 512; Steele *v.* Boley, 7 Utah 64, 24 Pac. 755; Kahn *v.* Old Telegraph Min. Co., 2 Utah 174.

Wisconsin.— Weld *v.* Johnson Mfg. Co., 86 Wis. 549, 57 N. W. 378; Prentiss *v.* Brewer, 17 Wis. 635, 86 Am. Dec. 730; Fisher *v.* Moolick, 13 Wis. 321.

United States.— Bohall *v.* Dilla, 114 U. S. 47, 5 S. Ct. 782, 29 L. ed. 61; Quinby *v.* Conlan, 104 U. S. 420, 26 L. ed. 800; O'Brien *v.* Perry, 1 Black 132, 17 L. ed. 114 [*affirming* 28 Mo. 500]. *Compare* Davis *v.* Davis, 72 Fed. 81, 18 C. C. A. 438.

See 17 Cent. Dig. tit. "Ejectment," § 107.

If an equitable defense is not sustained where both legal and equitable defenses are set up the court should so announce and try the issues at law. McNear *v.* Williamsburg, 166 Mo. 358, 66 S. W. 160.

27. Penny *v.* Cook, 19 Iowa 538. *Compare* Williams *v.* Peters, 72 Md. 584, 20 Atl. 175, where it is held that under a code or statutory provision allowing a defendant to plead such equitable defenses as would entitle him to relief in a court of equity against the judgment if recovered, unless the facts pleaded are such that a court of equity would enjoin the execution of the judgment they cannot be set up as an equitable defense at law.

28. McCauley *v.* Fulton, 44 Cal. 355; Lestrade *v.* Barth, 19 Cal. 660; Estrada *v.* Murphy, 19 Cal. 248.

29. Blazier *v.* Johnson, 11 Nebr. 404, 9 N. W. 543.

30. Blum *v.* Robertson, 24 Cal. 127; Lestrade *v.* Barth, 19 Cal. 660. So it is

forward two inconsistent, equitable defenses for the court to choose between the two.[31]

3. What Equitable Defenses Available — a. In General. The equitable defense that a deed was intended as and understood to be a mortgage is not available in an action of ejectment,[32] except where it is allowable by statute or code.[33] And although an equitable defense may be set up, yet a defendant cannot avail himself of a right which he has raised before in a bill for specific performance and as to which he suffered an adverse judgment.[34] Where, however, it is provided by statute that a defendant in ejectment may set forth by answer as many defenses as he may have, in ejectment he may set up the equitable defense of contribution.[35]

b. Contract For Purchase. Although the rule that equitable defenses are not available at law is held to preclude a defendant from setting up as a defense a contract for purchase coupled with possession,[36] yet under the practice in many jurisdictions he may in an action by his vendor or a purchaser from the latter with notice show such possession under a contract of purchase, and it is sufficient to defeat a recovery where no default in performance on his part is shown,[37]

declared that equities in defense should be strong, clear, and decisive, and such as would entitle to a conveyance on a bill filed. Williams *v.* Murphy, 21 Minn. 534; McClane *v.* White, 5 Minn. 178. And see Johnson *v.* Bowlware, 149 Mo. 451, 51 S. W. 109.

31. Cox *v.* Cox, 26 Pa. St. 375, 67 Am. Dec. 432.

32. Finlon *v.* Clark, 118 Ill. 32, 7 N. E. 475; Gates *v.* Sutherland, 76 Mich. 231, 42 N. W. 1112; Jeffery *v.* Hursh, 42 Mich. 563, 4 N. W. 303.

33. Walls *v.* Endel, 20 Fla. 86.

No defense in equity is shown by an answer to a petition in ejectment which only sets forth that the deed was intended as a mortgage, and which does not ask to reform the deed or to redeem the land. Sutton *v.* Mason, 38 Mo. 120.

34. Sparks *v.* Walton, 4 Phila. (Pa.) 93.

35. McCollum *v.* Boughton, 132 Mo. 601, 30 S. W. 1028, 33 S. W. 476, 34 S. W. 480, 35 L. R. A. 480.

36. Doe *v.* Haskins, 15 Ala. 619, 50 Am. Dec. 154; Rench *v.* Doe, 2 Blackf. (Ind.) 309; Harrett *v.* Kinney, 44 Mich. 457, 7 N. W. 63; Butner *v.* Chaffin, 61 N. C. 497. And see Doe *v.* Burton, 16 Q. B. 807, 15 Jur. 990, 71 E. C. L. 807.

Where plaintiff is not wrongfully kept out of possession and defendant is in possession rightfully under a contract for purchase, and such contract has been fully performed by him, ejectment cannot be sustained. Turpin *v.* Baltimore, etc., R. Co., 105 Ill. 11.

37. *California.*— Hyde *v.* Mangan, 88 Cal. 319, 26 Pac. 180; Arguello *v.* Bours, 67 Cal. 447, 8 Pac. 49; De Rutte *v.* Muldrow, 16 Cal. 505.

Illinois.— Waggoner *v.* Wabash R. Co., 185 Ill. 154, 56 N. E. 1050.

Indiana.— Adler *v.* Sewall, 29 Ind. 598.

Iowa.— Warren *v.* Crew, 22 Iowa 315.

Mississippi.— Bolton *v.* Roebuck, 77 Miss. 710, 27 So. 630.

New York.— Clythe *v.* La Fontain, 51 Barb. 186.

See 17 Cent. Dig. tit. "Ejectment," § 112.

Defendant should show a mutuality of contract (Billings *v.* Sanderson, 8 Mont. 201, 19 Pac. 307); a performance by him or readiness to perform and if he has failed to perform a waiver of his default or an equitable excuse for it (Hill *v.* Still, 19 Tex. 76); and that an action by him for specific performance of the contract would result in his obtaining the deed (Dyke *v.* Spargur, 143 N. Y. 651, 38 N. E. 269; Lawrence *v.* Ball, 14 N. Y. 477).

A bond for conveyance by one of several commissioners to make partition without report to or confirmation by the court as required by law does not prevent plaintiff from asserting the title derived from the heir who had given the bond, as no color of title is shown by such bond. Vanderbilt *v.* Brown, 128 N. C. 498, 39 S. E. 36.

Defendant may set up an assigned contract of sale in himself. Turner *v.* Rives, 75 Ga. 606.

In an action by an heir of an estate a defense setting up a claim under a contract of purchase with the ancestor is sufficient. Harris *v.* Vinyard, 42 Mo. 568.

In ejectment by a preëmptor, based on the patent issued to him, an executory contract to convey the land, entered into by him before making proof and payment as a preëmptor, cannot be set up by defendant. Huston *v.* Walker, 47 Cal. 484.

Possession under such a contract does not become wrongful by failure to perform a condition which if valid only the owner or his heirs could enforce and not plaintiff, his grantee, and performance of which, although made before the action was brought, was never demanded. Waggoner *v.* Wabash R. Co., 185 Ill. 154, 56 N. E. 1050.

Possession under a lease and option to purchase is a good defense. Tyson *v.* Neill, (Ida. 1902) 70 Pac. 790.

Right of possession is held a legal right where a purchaser has taken possession under a contract that such possession shall continue so long as he complies with the contract, and there has been a full compli-

although the contract be an oral one, provided there has been part performance,[38] and the contract is not void under the statute of frauds.[39] So possession under an executed contract is a good defense,[40] except in those jurisdictions where it is decided that the legal title must prevail.[41] Default, however, in payment of the purchase-price, in accordance with the terms of the contract where it is not excused will it is held preclude a defendant from setting up possession under a contract for purchase.[42]

c. Liens. A claim by defendant that he is the equitable owner of the property will not prevent a recovery, where the proof consists merely of the fact that he has a lien against the property.[43] The possession may be awarded to the rightful claimant, and the lien still be allowed to stand.[44]

d. Fraud or Invalidity of Plaintiff's Title — (i) *In General.* In many jurisdictions it is a good defense to an action of ejectment that the deed under which plaintiff claims is for any reason void, most of the cases going on the theory that this constitutes a legal defense, while others, although considering the defense an equitable one, were decided in jurisdictions where such a defense might be set up in actions of ejectment.[45] Fraud which relates to the execution

ance by him. Schoolfield *v.* Rhodes, 82 Fed. 153, 27 C. C. A. 95.

The insolvency of the obligor in a bond for title is no defense to the action even though he has not paid his vendor for the land, and has himself no title — only a bond for titles. These facts may be ground for rescission, but they are no reason for keeping the land and the purchase-money too. Hill *v.* Winn, 60 Ga. 337.

38. Young *v.* Montgomery, 28 Mo. 604 (holding that possession alone is part performance); Ford *v.* Steele, 31 Nebr. 521, 48 N. W. 271; Dodge *v.* Wellman, 1 Abb. Dec. (N. Y.) 512, 43 How. Pr. (N. Y.) 427; Kenyon *v.* Youlen, 53 Hun (N. Y.) 591, 6 N. Y. Suppl. 784. And see Swon *v.* Stevens, 143 Mo. 384, 45 S. W. 270.

Possession and the making of valuable and lasting improvements by defendant in good faith under a parol contract of purchase may be shown. Arguello *v.* Edinger, 10 Cal. 150; Vanduzer *v.* Christian, 30 Ga. 336; Chandler *v.* Neil, 46 Kan. 67, 26 Pac. 470; Holcomb *v.* Dowell, 15 Kan. 378; Bigler *v.* Baker, 40 Nebr. 325, 58 N. W. 1026, 24 L. R. A. 255.

39. McClane *v.* White, 5 Minn. 178; Evans *v.* Lee, 12 Nev. 393.

40. *California.*— Talbert *v.* Singleton, 42 Cal. 390; Love *v.* Watkins, 40 Cal. 547, 6 Am. Rep. 624.

Kansas.— South-Side Town Min., etc., Co. *v.* Rhodes, 33 Kan. 229, 6 Pac. 278.

Kentucky.— Cornellison *v.* Cornellison, 1 Bush 149.

Missouri.— Tibeau *v.* Tibeau, 19 Mo. 78, 59 Am. Dec. 329.

New York.— Traphagen *v.* Traphagen, 40 Barb. 537; Thurman *v.* Anderson, 30 Barb. 621.

Ohio.— Barton *v.* Morris, 15 Ohio 408.

South Carolina. — Geiger *v.* Kaigler, 15 S. C. 262.

Virginia. — Jennings *v.* Gravely, 92 Va. 377, 23 S. E. 763.

The statute of limitations does not bar this equitable defense. Gerdes *v.* Moody, 41 Cal. 335.

41. Morgan *v.* Casey, 73 Ala. 222; Brewton *v.* Watson, 67 Ala. 121; Collins *v.* Doe, 33 Ala. 91; Fleming *v.* Carter, 70 Ill. 286; Coleman *v.* Casey, 1 A. K. Marsh. (Ky.) 440.

Oreg. Code, § 316, providing that one may plead "any license or right to the possession" of real property as a defense has been construed as not allowing a defendant to set up mere equitable rights such as possession under an executed contract of purchase. Newby *v.* Rowland, 11 Oreg. 133, 1 Pac. 708.

42. Howard *v.* Hewitt, 139 Cal. 614, 73 Pac. 414; Haile *v.* Smith, 128 Cal. 415, 60 Pac. 1032; Connolly *v.* Hingley, 82 Cal. 642, 23 Pac. 273; Hoffman *v.* Remnant, 72 Cal. 1, 12 Pac. 804; Thorne *v.* Hammond, 46 Cal. 530; Williams *v.* Murphy, 21 Minn. 534; Walker *v.* Arnold, 71 Vt. 263, 44 Atl. 351. But see Morton *v.* Dickson, 90 Ky. 572, 14 S. W. 905, 12 Ky. L. Rep. 547; Coolbaugh *v.* Roemer, 32 Minn. 445, 21 N. W. 472.

Failure to perform contract of exchange.— One who has obtained possession under a contract for exchange of land and is unable by his own act to give possession to the other party or execute the contract cannot avail himself of such contract in defense. French *v.* Seely, 7 Watts (Pa.) 231, 32 Am. Dec. 758.

43. Schierloh *v.* Schierloh, 72 Hun (N. Y.) 150, 25 N. Y. Suppl. 676. And see Montour *v.* Purdy, 11 Minn. 384, 88 Am. Dec. 88; Todhunter *v.* Armstrong, (Cal. 1898) 53 Pac. 446.

Lien for taxes.— It has, however, been held that a title under a judgment enforcing a lien for taxes will prevail over one derived from a foreclosure of a prior deed of trust, on the ground that a lien on land for taxes is superior to one created by a prior deed of trust executed by the owner. Cowell *v.* Gray, 85 Mo. 169; Gitchell *v.* Kreidler, 84 Mo. 472.

44. Montour *v.* Purdy, 11 Minn. 384, 88 Am. Dec. 88.

45. *California.*—Fulton *v.* Hanlow, 20 Cal. 450; Hart *v.* Burnett, 15 Cal. 530.

of the deed under which plaintiff claims,[46] as if it be misread to the party or his signature obtained to an instrument which he did not intend to sign,[47] may be set up as a defense in ejectment, both in jurisdictions where equitable defenses are allowed and in jurisdictions where they are not allowed; but in jurisdictions where equitable defenses are not available fraud which goes merely to the consideration of the deed and not to its execution cannot be set up as a defense in ejectment, consideration not being a subject of inquiry in a court of law.[48] Nor in such jurisdictions is it competent to show that there was an irregularity in an assignment of a contract of purchase under which plaintiff obtained his legal title;[49] that the claim of plaintiff has never been listed for taxation;[50] or the breach of an agreement between the lessor of plaintiff who became the purchaser of the title of a mortgagor in possession of land, under a judgment and execution, and defendant, to postpone the sale under execution for a certain time.[51] Again a defendant cannot set up an agreement by plaintiff in an action to recover land to convey part of it to his attorneys when recovered in compensation for services.[52] And a grantor and his heirs are bound by a deed by the former, and an heir at law of a grantor who conveyed without a consideration cannot set up such conveyance in bar of ejectment by the grantee.[53]

(II) *Patents and Grants.* Where a patent under which plaintiff claims is absolutely void this fact may be shown as a defense in an action of ejectment,[54]

Colorado.— Cheney v. Crandell, 28 Colo. 383, 65 Pac. 56.

Georgia.— Sugart v. Mays, 54 Ga. 554.

Indiana.— Sherry v. Nick of the Woods, 1 Ind. 575.

Missouri.— Comings v. Leedy, 114 Mo. 454, 21 S. W. 804; Funkhouser v. Mallen, 62 Mo. 555.

New York.— Stebbins v. Kay, 123 N. Y. 31, 25 N. E. 207; Schulz v. Albany, 27 Misc. 51, 57 N. Y. Suppl. 963.

United States.— De Guire v. St. Joseph Lead Co., 38 Fed. 65.

See 17 Cent. Dig. tit. "Ejectment," § 109.

Instances.— Thus it may be shown as a defense that the sale under which plaintiff's claim is void for want of authority in the sheriff to make it (Funkhouser v. Mallen, 62 Mo. 555); or because the premises were sold for non-payment of an illegal assessment (Stebbins v. Kay, 123 N. Y. 31, 25 N. E. 207; Schulz v. Albany, 27 Misc. (N. Y.) 51, 57 N. Y. Suppl. 963); or were not subject to seizure and sale under execution (Fulton v. Hanlow, 20 Cal. 450; Hart v. Burnett, 15 Cal. 530); so defendant may show that the deed under which plaintiff claims was void because at the time it was made defendant was in possession of the land claiming adversely to plaintiff's grantor (Hughes v. Hughes, 35 N. Y. Suppl. 679); or that it was void as being in fraud of creditors (Knox v. McFarran, 4 Colo. 586; Jackson v. Myers, 11 Wend. (N. Y.) 533; Jackson v. Burgott, 10 Johns. (N. Y.) 457, 6 Am. Dec. 349; De Guire v. St. Joseph, 38 Fed. 65); or because the grantor was *non compos mentis* (Elder v. Schumacher, 18 Colo. 433, 33 Pac. 175; Van Dusen v. Sweet, 51 N. Y. 378; Farley v. Parker, 6 Oreg. 105, 25 Am. Rep. 504; Dexter v. Hall, 15 Wall. (U. S.) 9, 21 L. ed. 73); or was insane (Den v. Moore, 5 N. J. L. 470).

A mere trespasser cannot defend by attacking plaintiff's title. Wimberly v. Hurst, 33 Ill. 166, 83 Am. Dec. 295; Zeringue v. Williams, 15 La. Ann. 76; Matthewson v. Spencer, 2 Head (Tenn.) 424.

A stranger to the title cannot question the validity of plaintiff's title where the parties to the conveyance have acquiesced therein. Christy v. Brien, 14 Pa. St. 248; Phelps v. Parks, 4 Vt. 488; Davison v. Moore, 2 Am. L. Reg. 183. See also Deering v. Reilly, 167 N. Y. 184, 60 N. E. 447.

46. Escherick v. Traver, 65 Ill. 379; Lively v. Ball, 8 Dana (Ky.) 312; Shackelford v. Purket, 1 A. K. Marsh. (Ky.) 425; Thomas v. Thomas, 1 Litt. (Ky.) 62, 13 Am. Dec. 220; Taylor v. King, 6 Munf. (Va.) 358, 8 Am. Dec. 746. See also Reece v. Allen, 10 Ill. 236, 48 Am. Dec. 326; Talbot v. Callaway, Hard. (Ky.) 35. *Compare* Paldi v. Paldi, 95 Mich. 410, 54 N. W. 903; Harrett v. Kinney, 44 Mich. 457, 7 N. W. 63, which decisions hold that such defense is equitable and not available in ejectment.

47. Escherick v. Traver, 65 Ill. 379; Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 716; Taylor v. King, 6 Munf. (Va.) 358, 8 Am. Dec. 746.

48. Wells v. Caywood, 3 Colo. 487 (equitable defenses are now available); Union Brewing Co. v. Meier, 163 Ill. 424, 45 N. E. 264; Escherich v. Traver, 65 Ill. 379; Dyer v. Day, 61 Ill. 336; Taylor v. King, 6 Munf. (Va.) 358, 8 Am. Dec. 746; Osterhout v. Shoemaker, 3 Hill (N. Y.) 513 (equitable defenses are now available); Jackson v. Hills, 8 Cow. (N. Y.) 290.

49. Sawyer v. Cox, 63 Ill. 130.

50. Barbour v. Nelson, 1 Litt. (Ky.) 59.

51. Jackson v. Davis, 18 Johns. (N. Y.) 7.

52. Gage v. Downey, 79 Cal. 140, 21 Pac. 527, 855.

53. Jackson v. Garnsey, 16 Johns. (N. Y.) 189.

54. *Alabama.*— Crommelin v. Minter, 9 Ala. 594.

California.— Carr v. Quigley, 57 Cal. 394.

unless defendant is a mere trespasser.[55] If, however, the grant is not absolutely void it cannot be attacked by defendant in ejectment,[56] and where a grant or patent for land or legislative confirmation of titles to land has been given by the sovereignty or legislative authority only having the right to make it, without any provision having been made in the patent or by the law to inquire into its fairness between the grantor and the grantee, or between the third parties and the grantee, the question of fraud as between the grantor and the grantee cannot be raised by a third party, as this is a question exclusively between the sovereignty making the grant and the grantee.[57] Again a decree in a former action between the parties directing a conveyance to plaintiff and which necessarily adjudicated that all requirements of an act had been fully complied with by plaintiff or his predecessors will preclude a defendant from claiming that the deed executed in pursuance of said decree was void because plaintiff had not complied with some of the requirements of such act.[58]

e. Equitable Estoppel. Any conduct which estops one *in pais* to assert title or right of possession to the land is a good defense to ejectment.[59] And this rule has been affirmed in the federal courts, it being declared that even at law such a

Georgia.— Winter *v.* Jones, 10 Ga. 190, 54 Am. Dec. 379.

Illinois.— Rogers *v.* Brent, 10 Ill. 573, 50 Am. Dec. 422; Jamison *v.* Doe, 4 Ill. 113, 36 Am. Dec. 534.

North Carolina.— Strother *v.* Cathey, 5 N. C. 162, 3 Am. Dec. 683; University Trustees *v.* Sawyer, 3 N. C. 98.

Virginia.— Hambleton *v.* Wells, 4 Call 213.

United States.— Doolan *v.* Carr, 125 U. S. 618, 8 S. Ct. 1228, 31 L. ed. 844; Reynolds *v.* Iron Silver Min. Co., 116 U. S. 687, 6 S. Ct. 601, 29 L. ed. 774; St. Louis Smelting, etc., Co. *v.* Kemp, 104 U. S. 636, 26 L. ed. 875; Sherman *v.* Buick, 93 U. S. 209, 23 L. ed. 849; Polk *v.* Wendal, 9 Cranch (U. S.) 87, 3 L. ed. 665; Doe *v.* Winn, 11 Wheat. (U. S.) 379, 382, 6 L. ed. 500; Smythe *v.* New Orleans Canal, etc., Co., 93 Fed. 899; Lake Superior Ship-Canal, etc., Co. *v.* Cunningham, 44 Fed. 819; Patterson *v.* Tatum, 18 Fed. Cas. No. 10,830, 3 Sawy. 164.

See 17 Cent. Dig. tit. "Ejectment," § 109.

A defendant may show want of authority of the officers to issue the patent or grant (Jamison *v.* Beaubien, 4 Ill. 113, 36 Am. Dec. 534; Crutchfield *v.* Hammock, 4 Humphr. (Tenn.) 203; Doolan *v.* Carr, 125 U. S. 618, 8 S. Ct. 1228, 31 L. ed. 844; Reynolds *v.* Iron Silver Min. Co., 116 U. S. 687, 6 S. Ct. 601, 29 L. ed. 774. And see Goldberg *v.* Kidd, 5 S. D. 169, 58 N. W. 574); the cancellation of a certificate under which plaintiff claims on the ground that it was illegally issued (Hays *v.* Parker, 2 Wash. Terr. 198, 3 Pac. 901); the death of the patentee before the patent was issued (Blankenpickler *v.* Anderson, 16 Gratt. (Va.) 59); that the land in question was accepted from the grant (McLaughlin *v.* Heid, 63 Cal. 208); and that the person claiming as patentee, although of the same name, was not the patentee intended by the grant (Jackson *v.* Goes, 13 Johns. (N. Y.) 518, 7 Am. Dec. 399).

55. *Alabama.*— Crommelin *v.* Minter, 9 Ala. 594.

California.— Phillips *v.* Carter, 135 Cal. 604, 67 Pac. 1031, 87 Am. St. Rep. 152.

Missouri.— Boyce *v.* Papin, 11 Mo. 16; Macklot *v.* Dubreuil, 9 Mo. 477, 43 Am. Dec. 550.

Ohio.— Holt *v.* Hemphill, 3 Ohio 232.

United States.— Haws *v.* Victoria Copper Min. Co., 160 U. S. 303, 16 S. Ct. 282, 40 L. ed. 436; Boyreau *v.* Campbell, 3 Fed. Cas. No. 1,760, 1 McAll. 119.

See 17 Cent. Dig. tit. "Ejectment," § 109.

A defendant not connecting himself with the title of the sovereignty cannot attack the patent or grant. Schieffery *v.* Tapia, 68 Cal. 184, 8 Pac. 878; Rhodes *v.* Craig, 21 Cal. 419; Crane *v.* Reeder, 25 Mich. 303; Fellows *v.* Pedrick, 8 Fed. Cas. No. 4,724, 4 Wash. 477.

56. Winter *v.* Jones, 10 Ga. 190, 54 Am. Dec. 379; Lovinggood *v.* Burgess, 44 N. C. 407. And see Witherington *v.* McDonald, 1 Hen. & M. (Va.) 306, 3 Am. Dec. 603; Doe *v.* Winn, 11 Wheat. (U. S.) 379, 6 L. ed. 500.

57. Field *v.* Seabury, 19 How. (U. S.) 323, 333, 15 L. ed. 650, 655.

A defendant claiming under a tax deed cannot, where plaintiff asserts title under a railroad land grant, attack the regularity of the proceedings by which the government's title was divested, as the validity of the tax deed depends on the government having parted with the title. Tillotson *v.* Webber, 96 Mich. 144, 55 N. W. 837.

A grant by duly authorized commissioners cannot be impeached for fraud, mistake, or irregularity in the proceedings before the commissioners. Lovinggood *v.* Burgess, 44 N. C. 407.

The selection of land as swamp land, having been confirmed by the secretary of the interior and a patent having issued therefor from the state to plaintiff's county, defendant cannot defeat the title by showing that the land was not in fact swamp land. Jasper County *v.* Wadlow, 82 Mo. 172.

58. Forbes *v.* Reilly, 57 Cal. 302.

59. *Connecticut.*— Crandall *v.* Gallup, 12 Conn. 365.

ground is recognized as a valid reason for denying the right of possession to one against whom it may justly be urged.[60] There are, however, some jurisdictions in which the rule is denied on the ground that the question is one of legal title and that an equitable estoppel is no defense.[61]

f. Mistake. In an action at law a defendant cannot set up in defense circumstances which in equity might entitle him to a reformation of the description in the deed under which plaintiff claims.[62] In those jurisdictions, however, where equitable defenses are available in ejectment, defendant may in some cases show that by mistake there is an error in the deed under which either plaintiff or defendant claims as to the description and amount of property conveyed thereby.[63] But where in a conveyance of all right, title, and interest of plaintiff there has been no fraud, misrepresentation, or mistake rendering the title either better or worse, and by the conveyance defendant is to be considered as taking the risk of a paramount title, it has been decided that in ejectment against him a misde-

Florida.— Hagan *v.* Ellis, 39 Fla. 463, 22 So. 727, 63 Am. St. Rep. 167; Coogler *v.* Rogers, 25 Fla. 853, 7 So. 391; Levy *v.* Cox, 22 Fla. 546.

Indiana.— Wilson *v.* Carrico, 155 Ind. 570, 58 N. E. 847.

Kentucky.— Hart *v.* Baylor, Hard. 597.

Louisiana.— Willett *v.* Andrews, 106 La. 319, 30 So. 883; Randolph *v.* Laysard, 36 La. Ann. 402.

Missouri.— Shea *v.* Shea, 154 Mo. 599, 55 S. W. 869, 77 Am. St. Rep. 779; Clyburn *v.* McLaughlin, 106 Mo. 521, 17 S. W. 692, 27 Am. St. Rep. 369.

Nebraska.—Stratton *v.* Omaha, etc., R. Co., 37 Nebr. 477, 55 N. W. 1058; Gillespie *v.* Sawyer, 15 Nebr. 536, 19 N. W. 449.

New York.— Corning *v.* Troy Iron, etc., Factory, 44 N. Y. 577; Corkhill *v.* Landers, 44 Barb. 218.

Pennsylvania.— French *v.* Seely, 7 Watts 231, 32 Am. Dec. 758; Lane *v.* Reynard, 2 Serg. & R. 65.

Utah.— Duke *v.* Griffith, 9 Utah 469, 35 Pac. 512; Poynter *v.* Chipman, 8 Utah 442, 32 Pac. 690; Kahn *v.* Old Telegraph Min. Co., 2 Utah 174.

Wisconsin.— Mariner *v.* Milwaukee, etc., R. Co., 26 Wis. 84.

See 17 Cent. Dig. tit. "Ejectment," § 114.

One having no title or right of possession is not in a position to invoke the doctrine of equitable estoppel against plaintiff. Cooper *v.* Newton, 68 Ark. 150, 56 S. W. 867.

What does not amount to estoppel.—Where defendant does not rely on deed from the owner, but claims only under a tax-title and no fraud, misrepresentation, or concealment by the owner is shown, plaintiff, a grantee of the owner, is not estopped from asserting title to the land. Allen *v.* Fitzgerald, 23 Utah 597, 65 Pac. 592. And see Bartlett *v.* Kauder, 97 Mo. 356, 11 S. W. 67. For other instances see Dutertre *v.* Shallenberger, 21 Nev. 507, 34 Pac. 449; Chamberlain *v.* Taylor, 92 N. Y. 348, 12 Abb. N. Cas. (N. Y.) 473; Johnson *v.* Farlow, 35 N. C. 84.

60. Kirk *v.* Hamilton, 102 U. S. 68, 26 L. ed. 79; Dickerson *v.* Colgrove, 100 U. S. 578, 25 L. ed. 618; National Nickel Co. *v.* Nevada Nickel Syndicate, 112 Fed. 44, 50 C. C. A. 113; Berry *v.* Seawall, 65 Fed. 742, 13 C. C. A. 101. But see Wythe *v.* Smith, 30 Fed. Cas. No. 18,122, 4 Sawy. 17.

61. Vankirk Land, etc., Co. *v.* Green, 132 Ala. 348, 31 So. 484; Williams *v.* Armstrong, 130 Ala. 389, 30 So. 553; McLeod *v.* Bishop, 110 Ala. 640, 20 So. 130; Simmons *v.* Simmons, 78 Ala. 365; Hooper *v.* Columbus, etc., R. Co., 78 Ala. 213; Standifer *v.* Swann, 78 Ala. 88; Wakefield *v.* Van Tassell, 202 Ill. 41, 66 N. E. 830, 95 Am. St. Rep. 207; Grubbs *v.* Boon, 201 Ill. 98, 66 N. E. 390; Linnertz *v.* Dorway, 175 Ill. 508, 51 N. E. 809, 67 Am. St. Rep. 232; Hayden *v.* McCloskey, 161 Ill. 351, 43 N. E. 1091; Winslow *v.* Cooper, 104 Ill. 235; Mills *v.* Graves, 38 Ill. 455, 87 Am. Dec. 314; Haney *v.* Breeden, 100 Va. 781, 42 S. E. 916.

62. Prentice *v.* Stearns, 113 U. S. 435, 5 S. Ct. 547, 28 L. ed. 1059.

63. Nichols *v.* Shearon, 49 Ark. 75, 4 S. W. 167; Walker *v.* Brem, 67 Cal. 599, 8 Pac. 320 (deed from plaintiff to defendant); Collins *v.* Rogers, 63 Mo. 515 (deed from plaintiff to defendant); Glacken *v.* Brown, 39 Hun (N. Y.) 294 (deeds to plaintiff and defendant from third person at request of defendant entitled to conveyance); Chaflin *v.* Gantz, 17 Misc. (N. Y.) 425, 39 N. Y. Suppl. 712 (deeds to plaintiff and defendant who had purchased at auction sale). And see Perrior *v.* Peck, 167 N. Y. 582, 60 N. E. 1118 [*affirming* 39 N. Y. App. Div. 390, 57 N. Y. Suppl. 377]; Leek *v.* Cowley, 10 Serg. & R. (Pa.) 176.

A defendant is not entitled to the benefit of the correction of a mistake in the description against him without allowing plaintiff a similar benefit, if there be also a mistake to his disadvantage. Hoppough *v.* Struble, 60 N. Y. 430.

A defendant cannot set up a mutual mistake between him and his grantee in an action by one claiming under a warranty deed from such grantees, as such a defense is in effect a claim to have the former deed reformed, and equity could not decree reformation of that deed in an action to which the grantees were not parties. Hicks *v.* Sheppard, 4 Lans. (N. Y.) 335.

One who has purchased land at a sheriff's sale and taken possession of the wrong tract, under a mistake as to its locality and identity, will not be precluded, upon discovery of

scription of the tract was no defense.[64] And where by mistake a defendant has directed the redemption of a different tract of land from a tax-sale from that he intended, such fact is no defense to ejectment by a vendee of the purchaser of the tract not redeemed, although plaintiff had knowledge that defendant claimed to have redeemed the latter tract.[65]

J. Set-Off and Counter-Claim.[66] The doctrine of set-off cannot be applied to an action of ejectment.[67] Nor in ejectment by the grantor's heirs can defendant assert a right to the restitution of the price of the land paid by him to the grantor who was laboring under a legal incapacity.[68] In some jurisdictions, however, a defendant may avail himself of a counter-claim in defense,[69] and the general rules relating to counter-claims apply in actions of ejectment.[70]

K. Limitations and Laches.[71] The action may be barred by the statute of limitations[72] or by reason of laches.[73]

L. Several Defenses. A defendant may rely on several distinct defenses,[74]

his mistake, from asserting title to that which he did purchase. Hiester *v.* Laird, 1 Watts & S. (Pa.) 245.

64. Miles *v.* Williamson, 24 Pa. St. 135.

65. Hollinger *v.* Devling, 105 Pa. St. 417.

66. Pleading set-off and counter-claim see *infra*, V, B, 8.

Set-off and counter-claim generally see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

67. McKinnon *v.* Lessley, 89 Ala. 625, 8 So. 9; Nutwell *v.* Tongue, 22 Md. 419.

In an action of ejectment by the mortgagee defendant cannot show a set-off against the consideration of the mortgage. McKinnon *v.* Lessley, 89 Ala. 625, 8 So. 9.

68. Wall *v.* Hill, 1 B. Mon. (Ky.) 290, 36 Am. Dec. 578.

69. Bodenhamer *v.* Welch, 89 N. C. 78. And see Arnold *v.* Smith, 80 Ind. 417; Pritchard *v.* Pritchard, 17 Ont. 50; Goring *v.* Cameron, 10 Ont. Pr. 496.

70. Curtiss *v.* Livingston, 36 Minn. 312, 30 N. W. 814; Reed *v.* Newton, 22 Minn. 541; Dale *v.* Hunneman, 12 Nebr. 221, 10 N. W. 711; Moore *v.* Smead, 89 Wis. 558, 62 N. W. 426; Cornelius *v.* Kessel, 58 Wis. 237, 16 N. W. 550; Lombard *v.* Cowham, 34 Wis. 486.

If facts constitute a legal defense a counter-claim based thereon cannot be maintained. Appleton Mfg. Co. *v.* Fox River Paper Co., 111 Wis. 465, 87 N. W. 453; Brown *v.* Cohn, 88 Wis. 627, 60 N. W. 826.

71. Laches generally see EQUITY.

Statute of limitations generally see LIMITATIONS OF ACTIONS.

72. *California.*— Billings *v.* Harvey, 6 Cal. 381.

Kentucky.— Smith *v.* Nowell, 2 Litt. 165.

Ohio.— Archer *v.* Brockschmidt, 5 Ohio S. & C. Pl. Dec. 348, 5 Ohio N. P. 349.

Pennsylvania.— Herron *v.* Fetterman, 3 Walk. 103.

Virginia.— Virginia Min., etc., Co. *v.* Hoover, 82 Va. 449, 4 S. E. 689.

Wisconsin.— Whitney *v.* Marshall, 17 Wis. 174.

United States.— Fussell *v.* Hughes, 8 Fed. 384; Penn *v.* Ingham, 19 Fed. Cas. No. 10,933, 3 Wash. 90.

See 17 Cent. Dig. tit. "Ejectment," § 131; and, generally, ADVERSE POSSESSION.

Ala. Code (1867), § 546, does not apply to the statutory action of ejectment against one claiming by adverse possession under a certificate of purchase at a tax-sale. Jones *v.* Williams, 108 Ala. 282, 19 So. 317.

An action may be commenced and dismissed under Ga. Code, § 2932, and recommenced in certain cases within six months, and the renewed case stand on the same footing as to limitations with the original. White *v.* Moss, 92 Ga. 244, 18 S. E. 13; Cox *v.* Berry, 13 Ga. 306.

In Michigan there has been held to be no limitation upon the action. Harrison *v.* Spencer, 90 Mich. 586, 51 N. W. 642.

In a joint action one plaintiff cannot recover if his co-plaintiff is barred by limitations. Davis *v.* Coblens, 12 App. Cas. (D. C.) 51.

The service of notice is treated as the commencement of the action in the determination of questions as to the statute of limitations. Pindell *v.* Maydwell, 7 B. Mon. (Ky.) 314.

Upon the issuance of the patent by the United States the statute of limitations commences to run against the holder of the certificate of purchase. Redfield *v.* Parks, 132 U. S. 239, 10 S. Ct. 83, 33 L. ed. 327.

73. Hatcher *v.* Hall, 77 Va. 573. And see Whitney *v.* Wright, 15 Wend. (N. Y.) 171; Moore *v.* Jackson, 4 Wend. (N. Y.) 58.

Where an action is not barred by limitations the doctrine of laches does not apply where plaintiff does not ask for equitable relief, but only seeks to enforce a plain legal title in a court of law. So held in McFarlane *v.* Grober, 70 Ark. 371, 69 S. W. 56. See Craig *v.* Conover, 72 S. W. 2, 24 Ky. L. Rep. 1682.

74. Yocum *v.* Morice, 4 Phila. (Pa.) 106.

Several distinct titles may be shown by a defendant who claims that he is the owner of the premises in dispute. Kahn *v.* Old Tel. Min. Co., 2 Utah 174.

Under plea of general issue all matters of law and fact are admissible in defense. Johnson *v.* Boardman, 6 Allen (Mass.) 28; Ransom *v.* Anderson, 9 S. C. 438. And see Barco *v.* Fennell, 24 Fla. 378, 5 So. 9.

Where plaintiff in ejectment claims on separate grounds of original title and as having parted with possession pursuant to a lease to defendant, it is competent for defendant to

provided they are not inconsistent,[75] and if one of them is not established on the trial he is not thereby precluded from the benefits of any other defense he may have set up in his answer.[76] Again where both parties claim from the same grantor, nothing more appearing, the title in the common grantor will be taken as admitted. This, however, will not estop defendant from showing that plaintiff had no title, although he cannot claim part of the lands under and part against the same title.[77]

M. Separate Defense of Several Defendants. Where one defendant shows color of title and a seven years' possession, distinct from the possession of the others, his defense is not available to the others.[78]

IV. JURISDICTION, VENUE, PARTIES, PROCESS, AND INCIDENTAL PROCEEDINGS.

A. Jurisdiction.[79] The question as to what court has jurisdiction of an action of ejectment must be determined by reference to the constitutional or statutory provisions creating the courts and conferring jurisdiction upon them.[80]

B. Venue.[81] The venue of the action is determined by the situation of the premises[82] and not by the residence of the parties.[83]

C. Parties[84] — **1. In General.** A person does not become a party of record by the fact that he is interested in the result of the action and employs counsel

defend on both grounds. Miller *v.* McBrier, 14 Serg. & R. (Pa.) 382.

Where title by actual settlement is claimed by defendant it is held no objection to his claim that he has purchased of a third person another title by warrant and survey. Turner *v.* Waterson, 4 Watts & S. (Pa.) 171.

75. Blum *v.* Robertson, 24 Cal. 127.

The statute of limitations is not inconsistent with an equitable defense. Irwin *v.* Cooper, 92 Pa. St. 298.

76. Ransom *v.* Anderson, 9 S. C. 438. And see Moreland *v.* Marion County, 17 Fed. Cas. No. 9,794, construing Oreg. Civ. Code, § 316.

77. Cummings *v.* Powell, 97 Mo. 524, 10 S. W. 819. See also Holland *v.* Adair, 55 Mo. 40.

Where a tenant in common brings ejectment against his cotenant for an undivided interest in certain lands claimed to be derived from a common grantor, and defendant relies solely on adverse possession and the statute of limitations, he cannot object that plaintiff's title papers are improperly acknowledged or recorded. Long *v.* Stapp, 49 Mo. 506.

78. McKay *v.* Glover, 52 N. C. 41. But see Doe *v.* Litherland, 4 A. & E. 784, 6 L. J. K. B. 267, 6 N. & M. 313, 31 E. C. L. 345.

79. **Jurisdiction** generally see COURTS.

80. *Alabama.*— Gager *v.* Doe, 29 Ala. 341, the county court of the county in which the land lies has jurisdiction.

Kentucky.— Hord *v.* Walker, 5 Litt. 22, 15 Am. Dec. 39, the circuit court has no jurisdiction where lands lie in another county.

Louisiana.—State *v.* Judge Second City Ct., 33 La. Ann. 419, city courts of New Orleans have no jurisdiction.

Michigan.— Wattles *v.* Warren, 8 Mich. 77, the county courts as they existed in 1848 had jurisdiction.

Mississippi.— Illinois Cent. R. Co. *v.* Le Blanc, 74 Miss. 650, 21 So. 760, the circuit court has jurisdiction.

New York.— Jones *v.* Reilly, 68 N. Y. App. Div. 116, 74 N. Y. Suppl. 243, supreme court has jurisdiction.

Pennsylvania.— Church *v.* Ruland, 64 Pa. St. 432, court of common pleas has jurisdiction.

Rhode Island.— Champlin *v.* Horton, 12 R. I. 123, special courts of common pleas have no jurisdiction.

United States.— Carroll *v.* Price, 81 Fed. 137, district court of the district of Alaska has jurisdiction of an action between claimants to either uplands or tide lands.

See 17 Cent. Dig. tit. "Ejectment," § 129; and, generally, COURTS.

Defendant may show that the value of the premises is in excess of the court's jurisdiction. Logiodice *v.* Gannon, 60 Conn. 81, 21 Atl. 100.

When an action in the circuit court to recover land situated in another county is joined with an action for rents, issue, and profits of the land, that part of the judgment rendered for the value of the rents is within the jurisdiction of the courts. Healy *v.* Humphrey, 81 Fed. 990, 27 C. C. A. 39.

81. **Venue** generally see VENUE.

82. Doll *v.* Feller, 16 Cal. 432; Barnes *v.* Underwood, 54 Ga. 87; Gorham *v.* Jones, 11 Humphr. (Tenn.) 353.

It must be brought in the county where the land lies. Draper *v.* Kirkland, 1 Head (Tenn.) 260.

Where a single tract is divided by a county line the superior court of either county has jurisdiction. Barnes *v.* Underwood, 54 Ga. 87.

83. Doll *v.* Feller, 16 Cal. 432.

84. **Parties** generally see PARTIES.

In New York under the code the action for the recovery of the possession of real property stands on the same footing in respect to parties with all other actions. Hubbell *v.* Lerch, 62 Barb. 295 [*affirmed* in 58 N. Y. 237].

to attend to it.[85] But where the action is entered for the use of a person such person is substantially a party.[86] And where an equitable defense is set up there should be the same parties to the action as would be required to a bill in equity seeking the same relief.[87]

2. PARTIES PLAINTIFF[88] — a. Necessary Parties. It is not necessary that all the tenants in common should unite in the action,[89] although if they do not all join each must maintain a separate action to recover his share.[90] So all coheirs need not join;[91] nor need a husband and wife;[92] nor is it necessary to make the heirs of the lessor parties on the death of the lessor pending the action;[93] but it has been held that joint reversioners should all join,[94] and that where the descent of land is broken and the estate vested in executors with power to sell, leaving to legatees but an interest in the proceeds, ejectment will not lie without the coöperation of all in interest in case of a refusal of the executors to execute the power.[95]

b. Proper Parties. The one holding the legal title is a proper plaintiff,[96] although only the trustee of an express trust.[97] So a tenant by curtesy of an undivided half interest in land may properly bring an action therefor.[98] And an executor is a proper plaintiff where the will contemplates his taking possession of decedent's lands in order to execute a trust.[99] Again where it is provided by code that the action shall be in the name of the real party in interest a lessee may bring an action for possession in his own name.[1]

c. Joinder. Tenants in common may join in an action for their common estate,[2] and it is not error to join the heirs with the executor in an action to recover decedent's land.[3] So persons having an interest in the subject-matter of

85. Davis *v.* Higgins, 91 N. C. 382, although there is a published notice requiring him to plead.

86. Hammond *v.* Ridgeley, 5 Harr. & J. (Md.) 245, 9 Am. Dec. 522.

87. Lestrade *v.* Barth, 19 Cal. 660.

88. **Persons by whom** ejectment maintainable see *supra*, II, J.

89. Deering *v.* Riley, 38 N. Y. App. Div. 164, 56 N. Y. Suppl. 704; Kellogg *v.* Kellogg, 6 Barb. (N. Y.) 116.

90. Hasbrouck *v.* Bunce, 62 N. Y. 475.

91. Larne *v.* Slack, 4 Bibb (Ky.) 358; Dowd *v.* Gilchrist, 46 N. C. 353. *Compare* Brent *v.* Long, 99 Ky. 245, 35 S. W. 640, 18 Ky. L. Rep. 137.

92. Jackson *v.* Leek, 19 Wend. (N. Y.) 339.

After a decree of divorce ordering the community property to be divided equally between husband and wife, both of whom died thereafter, the latter intestate, a grantee of the wife, may maintain ejectment against an intruder on the common land without joining as co-plaintiff the executor of the husband. McLeran *v.* Benton, 31 Cal. 29.

93. McLennan *v.* McLeod, 70 N. C. 364.

94. Cook *v.* St. Paul's Church, 5 Hun (N. Y.) 293.

95. Silverthorn *v.* McKinster, 12 Pa. St. 67.

96. Boardman *v.* Beckwith, 18 Iowa 292.

A corporation which has become vested with the legal title to land is the proper plaintiff, and not as trustees, who are the grantees named. Van Deuzen *v.* Ft. Edward Presb. Congregation, 4 Abb. Dec. (N. Y.) 465, 3 Keyes (N. Y.) 550, 3 Transcr. App. (N. Y.) 39.

97. Boardman *v.* Beckwith, 18 Iowa 292.

The eldest male heir of a deceased trustee is the property party to sue. Doe *v.* Lank, 4 Houst. (Del.) 648.

98. Moore *v.* Ivers, 83 Mo. 29.

99. McAlpine *v.* Daniel, 101 N. C. 550, 8 S. E. 215.

1. Tarpey *v.* Deseret Salt Co., 5 Utah 205, 14 Pac. 338, notwithstanding there is a recital in the lease that any action to recover possession shall be in the name of the lessor.

One who has no interest in the premises except as mortgagee to secure payment for his professional services and advancements in the litigation should not be joined with plaintiff. Mohr *v.* Porter, 55 Wis. 149, 12 N. W. 374.

2. Hillhouse *v.* Mix, 1 Root (Conn.) 246, 1 Am. Dec. 41; Lambert *v.* Harvey, 100 Ill. 338; Mattis *v.* Boggs, 19 Nebr. 698, 28 N. W. 325; Wilkinson *v.* Fleming, 2 Ohio 301. And see Bradley *v.* Ferry, 20 U. C. Q. B. 563. But *compare* Wathen *v.* English, 1 Mo. 746; Dube *v.* Smith, 1 Mo. 313.

An executor and those who are tenants in common with him may join. Touchard *v.* Keyes, 21 Cal. 202.

If, however, one plaintiff cannot recover there can be no recovery by the others. Davis *v.* Coblens, 174 U. S. 719, 19 S. Ct. 832, 43 L. ed. 1147.

3. McAlpine *v.* Daniel, 101 N. C. 550, 8 S. E. 215.

Trustee and cestuis que trustent.— It is no ground for the abatement of an action that the trustee of an express trust, who holds the legal title, has joined with him as plaintiffs *cestuis que trustent* who are minors. Snell *v.* Harrison, 131 Mo. 495, 32 S. W. 37, 52 Am. St. Rep. 642.

an action and in obtaining the relief demanded may be joined as plaintiffs.[4] Several persons may join, although they hold separate lots under distinct titles.[5] The joinder by a purchaser at a sale under a trust deed of the trustee under such deed as plaintiff will not affect the recovery by the former, where it is provided by statute that a plaintiff may recover, although a co-plaintiff fail to prove any interest in the premises.[6] But persons who claim by title hostile to each other cannot unite.[7] Nor should a person join with him others who have no title or interest in the premises.[8] And an heir[9] whose estate is saved by his disability cannot recover on a joint demise with others whose claim is barred by the statute, but he must recover on a separate demise.[10]

d. Suing in Name of Another. To authorize a plaintiff in ejectment to sue in another's name some connection between his title and that of the person in whose name he sues should be shown.[11] The vendee of land being privy in estate with the vendor may sue in the vendor's name,[12] and should do so when at the time of the conveyance the land is held adversely by a third party.[13] So an action by a beneficial owner may be brought in the name of a nominal warrantee, although without the knowledge and consent of the latter.[14]

e. Lessor of Plaintiff. As a general rule a person ought not to be made a lessor in an action of ejectment who has no subsisting title.[15] It is not enough that it may be a question on the trial whether the legal title is not in him.[16] Nevertheless under special circumstances the court will permit the demise to be retained;[17] but the necessity of it must be clearly shown.[18] If the use of the lessor's name be necessary to an assertion of plaintiff's rights,[19] and plaintiff shows a *bona fide* subsisting claim of the premises and that there is a connection between

4. James *v.* Smith, (Indian Terr. 1900) 58 S. W. 714. See also Wall *v.* Fairley, 73 N. C. 464.

Persons who have no joint or common claim to land, but only separate claims, may be joined as plaintiffs in one count as well as named severally in others, although it is not necessary that they be named jointly. Ocheltree *v.* McClung, 7 W. Va. 232.

5. Cunningham *v.* Bradley, 26 Ga. 238. *Compare* People *v.* New York, 10 Abb. Pr. (N. Y.) 111 [*reversing* 8 Abb. Pr. 7].

6. Davis *v.* Hess, 103 Mo. 31, 15 S. W. 324.

7. Hubbell *v.* Lerch, 58 N. Y. 237. See also St. John *v.* Croel, 10 How. Pr. (N. Y.) 253.

A widow should not join with the heirs in an action for the lands of the deceased. Pringle *v.* Gaw, 5 Serg. & R. (Pa.) 536; Dwyer *v.* Wright, 14 Pa. Co. Ct. 406. *Compare* Magee *v.* Alba, 9 Fla. 382.

8. Adams *v.* Turner, 7 Ohio, Pt. II, 136.

To sustain a recovery all should have title. Morris *v.* Wheat, 8 App. Cas. (D. C.) 379; Medlock *v.* Merritt, 102 Ga. 212, 29 S. E. 185.

9. **Where on the death of the owner one of his heirs** being in possession denied possession to the other heirs it was held that each of them was entitled to be let in. Butler *v.* Butler, 133 Ala. 377, 32 So. 579.

10. Moore *v.* Armstrong, 10 Ohio 11, 36 Am. Dec. 63.

11. Shanks *v.* White, 36 Ga. 432; Jones *v.* Sullivan, 33 Ga. 486; Adams *v.* McDonald, 29 Ga. 571; Couch *v.* Turner, 17 Ga. 489.

12. Hassell *v.* Walker, 50 N. C. 270; Posten *v.* Henry, 34 N. C. 339. And see Ely *v.* Ballantine, 7 Wend. (N. Y.) 470.

A purchaser of land sold and conveyed by a sheriff, under execution against the estate of a decedent to his heirs descended, cannot use their names without their consent in an action to recover the land. Frizzle *v.* Veach, 1 Dana (Ky.) 211.

13. Coogler *v.* Rogers, 25 Fla. 853, 7 So. 391; Thompson *v.* Richards, 19 Ga. 594; Hasbrouck *v.* Bunce, 62 N. Y. 475 [*affirming* 3 Thomps. & C. 309]; Crowley *v.* Murphy, 11 Misc. (N. Y.) 579, 32 N. Y. Suppl. 806; Justice *v.* Eddings, 75 N. C. 581. And see Hegar *v.* De Groat, 3 N. D. 354, 56 N. W. 150.

14. Ross *v.* Barker, 5 Watts (Pa.) 391; Campbell *v.* Galbreath, 1 Watts (Pa.) 70.

15. McConnel *v.* Johnson, 3 Ill. 522; Jared *v.* Goodtitle, 1 Blackf. (Ind.) 29; Jackson *v.* Paul, 2 Cow. (N. Y.) 502; Jackson *v.* Sclover, 10 Johns. (N. Y.) 368; Jackson *v.* Richmond, 4 Johns. (N. Y.) 483.

Valid and legal title of plaintiff see *supra*, II, C, 1, a.

If any person who may have once had a title is to be lessor, the burden of deducing title from him is taken from plaintiff and thrown on the tenant which would be unreasonable. Jackson *v.* Richmond, 4 Johns. (N. Y.) 483.

16. Jackson *v.* Paul, 2 Cow. (N. Y.) 502; Jackson *v.* Richmond, 4 Johns. (N. Y.) 483.

17. Jackson *v.* Sclover, 10 Johns. (N. Y.) 368. And see Kelley *v.* Jackson, 14 Fed. Cas. No. 7,659, 2 Paine 440.

18. McConnel *v.* Johnson, 3 Ill. 522; Jackson *v.* Richmond, 4 Johns. (N. Y.) 483.

19. Fain *v.* Garthright, 5 Ga. 6.

his title and that of the party upon whose demise he seeks to recover,[20] the name of the lessor may be used even without his consent,[21] if sufficient guarantee against loss or damage is given him.[22] It is no ground to dismiss the action that the lessor is insane,[23] or that the lessor, a female, has married since the demise.[24]

3. PARTIES DEFENDANT[25] — a. Actual Occupants — (i) *IN GENERAL.* Where the premises are occupied the person in the actual occupation or possession of the premises is in all cases a necessary party,[26] and he is the only necessary party in the absence of statutes requiring others having an interest in the controversy to be joined,[27] as a judgment against him binds all persons who are in privity with him.[28] Furthermore in the absence of statute providing otherwise the actual occupant is the only party who may be sued in ejectment, and no other person is a proper party defendant;[29] but as will be subsequently shown this rule has in

20. Keeter *v.* Smith, 32 Ga. 445, 79 Am. Dec. 303.

21. Shanks *v.* White, 36 Ga. 432; Kinsey *v.* Sensbough, 17 Ga. 540; English *v.* Register, 7 Ga. 387. But see Greer *v.* Smith, 7 Yerg. (Tenn.) 487.

22. Shanks *v.* White, 36 Ga. 432; Fain *v.* Garthright, 5 Ga. 6.

Presumption as to assent.— Where there are several demises laid in the complaint, the lessor in each is presumed to assent to the action. Stringfellow *v.* Tennessee, etc., R. Co., (Ala. 1898) 22 So. 997.

23. Gilleland *v.* Martin, 10 Fed. Cas. No. 5,433, 3 McLean 490.

If the sole lessor of plaintiff is dead it is decided in Georgia that there can be no recovery. Head *v.* Driver, 79 Ga. 179, 3 S. E. 621.

24. Gregory *v.* Ford, 5 B. Mon. (Ky.) 471.

25. **Persons against whom** ejectment maintainable see *supra*, II, K.

26. *California.*— Dutton *v.* Warschauer, 21 Cal. 609, 82 Am. Dec. 765; Garner *v.* Marshall, 9 Cal. 268.

Kentucky.— Wharton *v.* Clay, 4 Bibb 167.

Louisiana.— Millaudon *v.* Ranney, 18 La. Ann. 196.

Michigan.— Farrand *v.* Kavanaugh, (1903) 93 N. W. 1083; Hoyt *v.* Southard, 58 Mich. 432, 25 N. W. 385; Sayles *v.* Curtis, 45 Mich. 279, 7 N. W. 909.

Mississippi.— Wallis *v.* Smith, 2 Sm. & M. 220.

Missouri.— Shaw *v.* Tracy, 95 Mo. 531, 8 S. W. 434; Charter Oak L. Ins. Co. *v.* Cummings, 90 Mo. 267, 2 S. W. 397; Clarkson *v.* Stanchfield, 57 Mo. 573; Bledsoe *v.* Simms, 53 Mo. 305.

New York.— Finnegan *v.* Carraher, 47 N. Y. 493 [*affirming* 61 Barb. 252]; Lucas *v.* Johnson, 8 Barb. 244; People *v.* Ambrecht, 11 Abb. Pr. 97; Taylor *v.* Crane, 15 How. Pr. 358; Waldorph *v.* Bortle, 4 How. Pr. 358; Shaver *v.* De Graw, 12 Wend. 558.

Rhode Island.— Grundy *v.* Hadfield, 16 R. I. 579, 18 Atl. 186.

Canada.— Bannerman *v.* Dewson, 17 U. C. C. P. 257.

See 17 Cent. Dig. tit. "Ejectment," § 138.

Where a wife living apart from her husband is in possession of land, under such circumstances as preclude the presumption of her being agent of her husband, she must be made a defendant in ejectment for the land. The person in possession must be made defendant. Woodward *v.* Cummings, 6 Ont. Pr. 110.

Limitation of rule.— Where by statute the landlord may be joined as a defendant if plaintiff brings the action against the landlord alone without joining the tenant, the landlord, by omitting to plead the non-joinder waives the defect, and as he is a proper party the action must be tried upon the question of plaintiff's title and right to possession, although a recovery of the land cannot be enforced as against the tenant's occupancy (Clason *v.* Baldwin, 129 N. Y. 183, 29 N. E. 226); so if the landlord admits that he is in possession when it is demanded of him, and refuses to surrender the premises, he may be sued alone without joining a tenant from month to month, to whom he has rented his property (Napa *v.* Howland, 87 Cal. 84, 25 Pac. 247).

27. *Arkansas.*—Theurer *v.* Brogan, 41 Ark. 88; Simms *v.* Richardson, 32 Ark. 304.

California.— Dimick *v.* Deringer, 32 Cal. 488.

Illinois.— Chicago, etc., R. Co. *v.* Clapp, 201 Ill. 418, 66 N. E. 223; Hanson *v.* Armstrong, 22 Ill. 442.

Missouri.— Sutton *v.* Casseleggi, 77 Mo. 397.

New York.— Schuyler *v.* Marsh, 37 Barb. 350; People *v.* New York, 28 Barb. 240.

Washington.— Raymond *v.* Morrison, 9 Wash. 156, 37 Pac. 318.

28. Chicago, etc., R. Co. *v.* Clapp, 201 Ill. 418, 66 N. E. 223; Hansom *v.* Armstrong, 22 Ill. 442.

29. *Alabama.*— Morris *v.* Beebe, 54 Ala. 300.

California.— Dimick *v.* Deringer, 32 Cal. 488; Keane *v.* Cannovan, 21 Cal. 291, 82 Am. Dec. 738.

Kentucky.— McDowell *v.* King, 4 Dana 67; Wharton *v.* Clay, 4 Bibb 167.

New York.— Schuyler *v.* Marsh, 37 Barb. 350; People *v.* New York, 28 Barb. 240; Jackson *v.* Ives, 9 Cow. 661.

United States.— West *v.* Talman, 29 Fed. Cas. No. 17,426, 4 Wash. 200.

See 17 Cent. Dig. tit. "Ejectment," § 138; and Adams Ejectm. 255; Tyler Ejectm. 411.

many jurisdictions been either modified or entirely abrogated by statutory provisions.[30]

(II) *Where There Are Several Occupants.* Where there are several persons holding possession of the premises jointly they may be joined as defendants,[31] and it has been held that they must all be joined as defendants in order to conclude them by the judgments,[32] unless some of the occupants are so in privity with one or more co-defendants that the judgment against such co-defendant will be conclusive upon him.[33] So it is very generally held that several defendants in possession, although holding distinct and separate parts of the premises under distinct and separate titles, may be joined and they may defend separately, each for the part in his possession.[34] Nevertheless the non-joinder of one who occupies a distinct portion of the premises will not cause the action to fail. The only effect will be to limit the recovery by excluding that portion.[35]

30. See *infra*, IV, C, 3, b, *et seq.*

31. Pearce *v.* Ferris, 10 N. Y. 280; Pearce *v.* Colden, 8 Barb. (N. Y.) 522; Rank *v.* Levinus, 50 N. Y. Super. Ct. 159; Warner *v.* Pate, 5 Vt. 166; Reddish *v.* Smith, 10 Wash. 178, 38 Pac. 1003, 45 Am. St. Rep. 781.

An improper joinder of one not in possession with those who are will not defeat recovery against the latter, under R. I. Pub. St. c. 204, § 34; c. 217, § 9. Grundy *v.* Hadfield, 16 R. I. 579, 18 Atl. 186.

A purchaser at sheriff's sale of a defendant's interest, who after ejectment brought has obtained possession, may be made a co-defendant. Murray *v.* Galbraith, 2 Binn. (Pa.) 59.

Receivers who have been put in possession of a railroad are proper if not necessary parties to an action of ejectment against the railroad company. San Antonio, etc., R. Co. *v.* Ruby, 80 Tex. 172, 15 S. W. 1040.

32. Tarkington *v.* Link, 27 Nebr. 826, 44 N. W. 35; Haddy *v.* Tobias, 85 Mich. 326, 48 N. W. 499; Hodson *v.* Van Fossen, 26 Mich. 68.

A wife in actual possession and the only active defendant in the cause, her husband who claims title being insane, is a necessary party. Bensieck *v.* Cook, 110 Mo. 173, 19 S. W. 642, 33 Am. St. Rep. 422.

Where husband and wife occupy together as a homestead premises claimed to belong to either of them, the occupancy is joint and they must be joined as defendants in an action of ejectment. Kalkes *v.* Storms, 93 Mich. 480, 53 N. W. 622; Gibbs *v.* O'Neil, 85 Mich. 633, 48 N. W. 696; Haddy *v.* Tobias, 85 Mich. 326, 48 N. W. 499; Sessions *v.* Sherwood, 78 Mich. 234, 44 N. W. 263; Cleaver *v.* Bigelow, 61 Mich. 47, 27 N. W. 851; Hodson *v.* Van Fossen, 26 Mich. 68. And see Bunce *v.* Bidwell, 43 Mich. 542, 5 N. W. 1023. But *compare* Connecticut Mut. L. Ins. Co. *v.* Jones, 8 Fed. 303, 1 McCrary 388, which seems to maintain the contrary doctrine.

Where a wife remains in possession after a decree of foreclosure against her and her husband, and claims title in her own right, she should be made defendant in ejectment on the title obtained by such decree. Sayles *v.* Curtis, 45 Mich. 279, 7 N. W. 909.

Where a grantor becomes a tenant by sufferance of the grantee by remaining in possession both may be joined as defendants. Patch *v.* Keeler, 27 Vt. 252.

Under a statute of Pennsylvania persons in possession, although not named in the writ, must be joined as defendants. Marshall *v.* Forest Oil Co., 198 Pa. St. 83, 47 Atl. 927.

33. Tarkington *v.* Link, 27 Nebr. 826, 44 N. W. 35.

34. *Michigan.*— Hendricks *v.* Rasson, 42 Mich. 104, 3 N. W. 281.

New York.— Jackson *v.* Andrews, 7 Wend. 152, 22 Am. Dec. 574; Jackson *v.* Wood, 5 Johns. 278.

North Carolina.— Needham *v.* Branson, 27 N. C. 426, 44 Am. Dec. 45; Love *v.* Wilbourn, 27 N. C. 344.

Pennsylvania.—Wilson *v.* Guthrie, 2 Grant 111; White *v.* Pickering, 12 Serg. & R. 435.

South Carolina.— Lewis *v.* Hinson, 64 S. C. 571, 43 S. E. 15.

Vermont.— Marshall *v.* Wood, 5 Vt. 250; Rood *v.* Willard, Brayt. 67.

Virginia.— Stuart *v.* Coalter, 4 Rand. 74, 15 Am. Dec. 731; Camden *v.* Haskill, 3 Rand. 462.

Washington.— Murray *v.* Briggs, 29 Wash. 245, 69 Pac. 765.

See 17 Cent. Dig. tit. "Ejectment," § 140.

See also Abney *v.* Barnet, 1 A. K. Marsh. (Ky.) 107; Jones *v.* Hartley, 3 Whart. (Pa.) 178, in which cases it was held that where defendants sued jointly, although having separate and distinct titles, united in pleading, they cannot raise the objection that they were not sued separately. *Contra*, Becker *v.* Stroeher, 167 Mo. 306, 66 S. W. 1083 (holding that where the property in suit is held by defendants in separate and distinct lots they cannot be joined); *Ex p.* Girard, 10 Fed. Cas. No. 5,457, 3 Wall. Jr. 263 (holding that the court will not permit plaintiff by joining defendants claiming by distinct and separate titles to injuriously affect the rights of either, but may compel plaintiff to discontinue his action).

All occupants need not be made defendants under a code provision that if the land is occupied "the occupant" must be made defendant. Hennessey *v.* Paulsen, 147 N. Y. 255, 41 N. E. 516 [*affirming* 12 Misc. 384, 33 N. Y. Suppl. 638].

35. Hendricks *v.* Rasson, 42 Mich. 104, 3 N. W. 281.

b. The Landlord. Ejectment cannot be maintained against the landlord alone, when he is out of possession,[36] and in the absence of statute requiring him to be made a defendant he is not a necessary party.[37] So he is not even a proper party unless there is some statutory provision permitting or requiring him to be made a party.[38] In some jurisdictions, however, the statutes in terms authorize the joinder of the landlord with the tenant as a defendant,[39] and he may also be properly joined as a defendant under statutes providing that any person may be made a defendant who has or claims an interest in the controversy adverse to plaintiff.[40]

c. Persons Out of Possession Claiming Title. Where the premises are not actually occupied, the action may be brought against one claiming title thereto or some interest therein.[41]

d. Other Persons Having Interests Adverse to Plaintiff. The codes usually provide that any person having an interest adverse to plaintiff may be joined as defendant, and some of them further provide that in actions to recover real estate any person claiming title or right of possession may be made a defendant.[42] As regards necessary parties it has been held in one jurisdiction where the code practice is adopted that where an equitable defense is set up all persons interested

36. Shaw *v.* Tracy, 95 Mo. 531, 8 S. W. 434; Charter Oak L. Ins. Co. *v.* Cummings, 90 Mo. 267, 2 S. W. 397; Callahan *v.* Davis, 90 Mo. 78, 2 S. W. 216; Grundy *v.* Hadfield, 16 R. I. 579, 18 Atl. 186. And see Banks *v.* Speer, 117 Ala. 264, 23 So. 64.

37. Dimick *v.* Deringer, 32 Cal. 488; Sutton *v.* Casseleggi, 77 Mo. 397; Pulen *v.* Reynolds, 22 How. Pr. (N. Y.) 353.

38. Morris *v.* Beebe, 54 Ala. 300; Pulen *v.* Reynolds, 22 How. Pr. (N. Y.) 353. And see cases cited *infra*, note 39.

Limitations of rule.— Where a landlord knowingly and purposely takes upon himself the burden of supporting his tenant's possession and states that he is the one to whom plaintiff may look for redress, he thereby adopts the defense and cannot be permitted to insist that he is an improper party to the action. His act in defending the possession makes him a joint tort feasor. Abeel *v.* Van Gelder, 36 N. Y. 513, 2 Transcr. App. (N. Y.) 99.

39. Jackson *v.* Allen, 30 Ark. 110; Moore *v.* Moore, (Cal. 1893) 34 Pac. 90; Oakland Gas Light Co. *v.* Dameron, 67 Cal. 663, 8 Pac. 595; Baxter *v.* Carroll, (N. J. Ch. 1898) 41 Atl. 407; Harkey *v.* Houston, 65 N. C. 137.

Under Ala. Code (1896), § 1534, the landlord must be made a party defendant on the tenant's motion. The tenant is not, however, under this provision entitled to have his landlord made a sole party defendant. McClendon *v.* Equitable Mortg. Co., 122 Ala. 384, 25 So. 30.

Under the Oregon statute providing that a defendant in actual possession may plead that he is in possession only as tenant of another, naming him and his place of residence, and if the landlord does not apply to be made defendant, he shall be made defendant if plaintiff requires it, one of five cotenants holding possession of the whole tract holds four fifths as tenant only, and the other cotenants may be joined as co-defendants. McTown *v.* Hannah, 3 Oreg. 302.

Under the Vermont statute it is provided that the action shall be brought as well against the landlord as against the tenant, but even under this statute the action will not abate for non-joinder of the landlord **in a case in which the tenancy is by parol and** is unknown to plaintiff. Paris *v.* Bartlett, 19 Vt. 639; Brush *v.* Cook, Brayt. (Vt.) 89.

40. More *v.* Deyoe, 22 Hun (N. Y.) 208.

41. Lucas *v.* Johnson, 8 Barb. (N. Y.) 244; Edwards *v.* Farmers' F. Ins., etc., Co., 21 Wend. (N. Y.) 467; Burchard *v.* Roberts, 70 Wis. 111, 35 N. W. 286, 5 Am. St. Rep. 148.

The action can only be brought against one not in possession when the premises are not actually occupied. Garner *v.* Marshall, 9 Cal. 268. And it has been held that the claim must be accompanied by the exercise of acts of ownership, such as inclosure, cultivation, and the like. Garner *v.* Marshall, 9 Cal. 268. See also *supra*, II, K.

42. See code provisions of the several states.

Under these provisions any person claiming an interest in the controversy is of course a proper party defendant in ejectment. Waldorph *v.* Bortle, 4 How. Pr. (N. Y.) 358; Hargrove *v.* Cherokee Nation, (Indian Terr. 1902) 69 S. W. 823. And one who is jointly in possession of lands of an Indian nation with claimants to citizenship in that nation may properly be joined as a defendant, although not a claimant to citizenship himself. Hargrove *v.* Cherokee Nation, (Indian Terr. 1902) 69 S. W. 823, independently of any statutory provision, he could be joined. See *supra*, IV, 3, a, (II).

In Illinois, although not a code state, a statute authorizes plaintiff to join with the occupant, all persons claiming any title or interest in the premises, although not in privity with the occupant. South Park Com'rs *v.* Gavin, 139 Ill. 280, 28 N. E. 826.

The landlord, although neither a necessary nor proper party at common law, may under

in such equitable defense should be made parties,[43] but in another this has been denied in a case where affirmative relief was not asked.[44] It has also been held that a third person whose title defendant sets up as a defense is not a necessary party,[45] and that in an action by a purchaser claiming under a deed executed after the grantor had attained his majority, against a grantee under a deed executed prior to the grantor's majority, the grantor is not a necessary party to the suit.[46]

e. Persons Without Interest in Suit — (I) *In General.* Persons who are strangers to the title and who have no interest in the result of the suit cannot be joined as defendants.[47]

(II) *Servants.* According to the weight of authority persons in possession of land merely as servants or employees of the party claiming title adversely are not occupants of the land or tenants in possession of the land within the meaning of the ejectment law, and an action in ejectment cannot be maintained against them.[48]

f. Election Between Defendants. A plaintiff may elect to sue one or more defendants,[49] and in some cases is even required by code or statute to make such an election.[50]

4. Intervenors — a. In General. One seeking to be let in as defendant should show a privity of interest between himself and the occupant, and that his title is consistent and connected with the possession of the latter.[51] The right of the

these provisions be joined as a defendant. See *supra*, IV, C, 3, b.

43. Ten Broeck *v.* Orchard, 74 N. C. 409.

44. Seiberling *v.* Tipton, 113 Mo. 373, 21 S. W. 4.

Administrator with power to sell land.— An administrator of a defendant in ejectment does not acquire such an interest by virtue of a general power in the will to sell real estate as to make him a necessary party on a revival of the suit. Estes *v.* Nell, 140 Mo. 639, 41 S. W. 940.

45. Rauer *v.* Thomas, 60 Kan. 71, 55 Pac. 285.

46. Moore *v.* Baker, 92 Ky. 518, 18 S. W. 363, 13 Ky. L. Rep. 724.

47. Long *v.* Louisville, etc., R. Co., 89 Ky. 544, 13 S. W. 3, 14 S. W. 78, 11 Ky. L. Rep. 955; Longdon *v.* Clouse, (Pa. 1885) 1 Atl. 600.

One who "has some pretended claim to said land" is not properly joined, there being no further allegation as to the right or interest of such person. Liggett *v.* Lozier, 133 Ind. 451, 32 N. E. 712.

48. Polack *v.* Mansfield, 44 Cal. 36, 13 Am. Rep. 51; Hawkins *v.* Reichert, 28 Cal. 534; Chiniquy *v.* Catholic Bishop, 41 Ill. 148. See also Doe *v.* Staunton, 2 B. & Ald. 371, 1 Chit. 8, 18 E. C. L. 76. But *compare* Shaver *v.* McGraw, 12 Wend. (N. Y.) 558.

The rule is subject to some limitations.— It necessarily presupposes that the employer may be sued and that the wrongs of which plaintiff complains may be redressed by resort to an action against the employer as being the real party committing the ouster. Accordingly where an employer for any reason is not amenable to an action the servant becomes necessarily the proper party defendant, since he is the only party who can be subjected to suit at all (Polack *v.* Mansfield, 44 Cal. 36, 13 Am. Rep. 151), and where one who is served with the declaration in ejectment assents to the character of tenant in possession and appears and pleads, this will be sufficient to authorize a finding that he was a tenant in possession, notwithstanding there is some evidence that he was in the situation only of a servant and managed the business of the real owner (Doe *v.* Staunton, 2 B. & Ald. 371, 1 Chit. 118, 18 E. C. L. 76).

Children of the principal defendant, an aged and infirm woman, who live upon the premises and work the land and take care of her may be joined as defendants. Church *v.* Shultes, 4 N. Y. App. Div. 378, 38 N. Y. Suppl. 842.

49. Winans *v.* Christy, 4 Cal. 70, 60 Am. Dec. 597; Fosgate *v.* Herkimer Mfg., etc., Co., 9 Barb. (N. Y.) 287.

50. As where there are several claiming under different sources of title (Campau *v.* Campau, 45 Mich. 367, 8 N. W. 85, construing Mich. Comp. Laws, § 6230, which so provided as not applying where the title, possession, and claim of each of defendants is derived from the same source), or who do not occupy the land jointly (Dillaye *v.* Wilson, 43 Barb. (N. Y.) 261, deciding that 2 N. Y. Rev. St. p. 307, § 29, which so provided was retained in force by Code, § 455).

51. *Arkansas.*— Files *v.* Watt, 28 Ark. 151.

California.—Reay *v.* Butler, (1885) 7 Pac. 669; Porter *v.* Garissino, 51 Cal. 559.

Florida.— State *v.* Call, 39 Fla. 165, 22 So. 266.

Indiana.— Sherry *v.* Denn, 8 Blackf. 542.

Indian Territory.— Donohoo *v.* Howard, (1902) 69 S. W. 927.

Kentucky.— Troublesome *v.* Estill, 1 Bibb 128.

Maryland.— Minke *v.* McNamee, 30 Md. 294, 96 Am. Dec. 577.

New Jersey.— Layton *v.* Shupe, 13 N. J. L. 66; Dickinson *v.* Lanning, 11 N. J. L. 185.

New York.— Campbell *v.* Rockwell, 62

applicant to be admitted should be determined before proceeding to trial.[52] Where facts sufficient to entitle a third party to intervene are not stated in his petition and without making the objection plaintiff and such third person stipulate that the claim of the intervener shall be determined upon the legal effect of facts agreed upon, the objection cannot be afterward raised by plaintiff that the case is not one in which an intervention can be had or that the pleadings are insufficient for such purpose.[53] And where new parties are necessary for the determination of the issues raised by a cross complaint they may be admitted.[54] Where a person intervenes after issues raised by the answer of defendant and by stipulation such answer is considered as the answer of the former, he must by evidence connect himself with the title of the original defendant before he can introduce evidence as to the issues.[55]

b. The Landlord. A landlord may on his own motion be admitted as a defendant, the right to do so being conferred by statutory provision in many jurisdictions.[56]

N. Y. App. Div. 266, 70 N. Y. Suppl. 1101; Jackson *v.* Flint, 2 Cow. 594; Jackson *v.* McEvoy, 1 Cai. 151.

North Carolina.— Ashville Div. No. 15 S. of T. *v.* Aston, 92 N. C. 588. And see Wainwright *v.* Massenburg, 129 N. C. 46, 39 S. E. 725.

Pennsylvania.— Cope *v.* Brotzman, 1 C. Pl. 19; Pennsylvania Canal Co. *v.* Central Iron Works, 7 Phila. 662.

See 17 Cent. Dig. tit. "Ejectment," § 145.

Who may be allowed to defend.— A purchaser of defendant's title at sheriff's sale may be allowed to defend, where he relies on defendant's title and does not deny his possession (McFadden *v.* Wallace, 38 Cal. 51. And see Keathly *v.* Branch, 84 N. C. 202); as may also a lessee from such a purchaser (Bell *v.* Caldwell, 107 Pa. St. 46); one in possession for several years as a purchaser may be admitted in place of the casual ejector (Water *v.* Harrison, 4 Bibb (Ky.) 87); heirs, in an action against the widow in possession in the mansion-house until her dower is allotted (Porter *v.* Robinson, 3 A. K. Marsh. (Ky.) 253, 13 Am. Dec. 153); a common grantor, who is liable on his warranty (Browning *v.* Chrisman, 30 Mo. 353); a mortgagee (Sand *v.* Church, 32 N. Y. App. Div. 139, 52 N. Y. Suppl. 854; Jackson *v.* Stiles, 11 Johns. (N. Y.) 407; Security Bldg., etc., Assoc. *v.* Ambrose, 6 Pa. Dist. 197. But see Stafford *v.* Wheeler, 93 Pa. St. 462); a third party claiming to be joint owner with defendant (Lytle *v.* Burgin, 82 N. C. 301); a wife, who asserts that the money was furnished by her for the purchase of the land, the husband taking title in his own name (Taylor *v.* Apple, 90 N. C. 343); tenants before judgment against the casual ejector (Bowie *v.* Roe, 1 Ohio Dec. (Reprint) 167, 3 West. L. J. 81); a survivor of several tenants in common in an action against his grantee by the original grantee in a deed by all the tenants in common with a reservation of a life-estate (Kennedy *v.* Johnson, 69 N. C. 249); or a wife in an action by the purchaser at an execution sale to dispossess a husband of his wife's land (Cecil *v.* Smith, 81 N. C. 285). But one asserting a paramount title to both plaintiff and defendant cannot intervene. Porter *v.* Garrisino, 51 Cal. 559; Colgrove *v.* Koonce, 76 N. C. 363. Nor can a third person intervene to get the court to quiet his title as against plaintiff to another tract of land not in dispute between plaintiff and defendant. Rosecrans *v.* Ellsworth, 52 Cal. 509. Nor can the grantee to whom the property is conveyed by defendant during the pendency of the action intervene (Loos *v.* Caldwell, 2 Miles (Pa.) 390. And see Merrill *v.* Martin, (Indian Terr. 1901) 64 S. W. 539), or one who has permitted his agent to defend for him after the latter has been admitted and confessed judgment (Bonta *v.* Clay, 5 Litt. (Ky.) 129). And where land has been illegally leased by a city to defendant, the city cannot intervene unless the relation of landlord and tenant is shown to exist between it and defendant. Carleton *v.* Darcy, 46 N. Y. Super. Ct. 484.

An affidavit to sustain a motion to let in third parties need not be accompanied by an exhibit of their title. Stribling *v.* Prettyman, 57 Ill. 371.

If affidavit is not by person seeking to be admitted, or by his agent or attorney, such fact is sufficient for overruling motion to admit based thereon. Sherry *v.* Denn, 8 Blackf. (Ind.) 542.

An intervener is presumed to adopt the plea and defend the title of his co-defendant, where he offers no new plea nor evidence of title in himself. Gorham *v.* Brenon, 13 N. C. 174.

The record should show consent rule entered by order of court, Battaile *v.* Hall, 24 Miss. 246.

52. Keathly *v.* Branch, 84 N. C. 202.

53. Donner *v.* Palmer, 51 Cal. 629.

54. Eureka *v.* Gates, 120 Cal. 54, 52 Pac. 125.

55. Baldwin *v.* Bornheimer, 48 Cal. 433.

56. *Alabama.*— Morris *v.* Beebe, 54 Ala. 200; Doe *v.* McKinney, 5 Ala. 719.

Arkansas.— Jackson *v.* Allen, 30 Ark. 110.

California.— Reay *v.* Butler, 69 Cal. 572, 11 Pac. 463.

Kentucky.—Buford *v.* Gaines, 6 J. J. Marsh. 34; McCleland *v.* Doe, 3 Bibb 266.

Missouri.— Hill *v.* Atterbury, 88 Mo. 114; Sutton *v.* Casseleggi, 77 Mo. 397.

New Jersey.— Den *v.* Smith, 16 N. J. L.

And he may defend in the name of the tenant.[57] He cannot, however, substitute his own name as defendant in place of the person sued without the consent of plaintiff,[58] unless it be first shown that the tenant refuses or has neglected to appear,[59] or unless he is expressly authorized by statute to do so.[60] When the landlord is admitted to defend, his right to conduct the proceedings extends to the final disposition of the case.[61] When he defends in the tenant's place, he can make only such defenses as the tenant himself might make.[62]

5. SUBSTITUTION OF PARTIES. New parties plaintiff may upon the death of a plaintiff be substituted, where they succeed to the latter's title.[63] And it has been held that on the death of a defendant his heirs and administrators should be

438; Baxter *v.* Carroll, (Ch. 1898) 41 Atl. 407.

New York.— Godfrey *v.* Townsend, 8 How. Pr. 398; Jackson *v.* Stiles, 1 Wend. 316; Jackson *v.* Stiles, 1 Cow. 134.

Pennsylvania.— McClay *v.* Benedict, 1 Rawle 424.

Virginia.— Hanks *v.* Price, 32 Gratt. 107; Mitchell *v.* Baratta, 17 Gratt. 445.

See 17 Cent. Dig. tit. "Ejectment," § 144.

A landlord is entitled as a matter of right to be let in to defend on compliance with the requisites of 15 & 16 Vict. c. 76, § 172. Butler *v.* Meredith, 11 Exch. 85, 1 Jur. N. S. 451, 24 L. J. Exch. 239, 3 Wkly. Rep. 443. *Compare* Croft *v.* Lumley, 4 E. & B. 608, 1 Jur. N. S. 424, 24 L. J. Q. B. 78, 3 Wkly. Rep. 234, 82 E. C. L. 608.

If a prima facie case of possession by the applicant or his tenant is shown by the affidavit on an application to be allowed to appear and defend it is sufficient. Croft *v.* Lumley, 4 E. & B. 608, 1 Jur. N. S. 424, 24 L. J. Q. B. 78, 3 Wkly. Rep. 234, 82 E. C. L. 608.

The relation of landlord and tenant should be shown to entitle one to be admitted to defend as landlord. Jackson *v.* Stiles, 6 Cow. (N. Y.) 594. And see Bryant *v.* Kinlaw, 90 N. C. 337. It need not, however, appear that rent is paid. Saltonstall *v.* White, Col. Cas. (N. Y.) 87; Wisner *v.* Wilcocks, Col. Cas. (N. Y.) 62.

Who may defend as landlord.— The assignee of a mortgage may be let in to so defend (Jackson *v.* Babcock, 17 Johns. (N. Y.) 112), but not a landlord, who subsequent to the lease parted with all his interest in the premises (Jackson *v.* Stiles, 5 Cow. (N. Y.) 447).

A person may be admitted to defend, as constructive landlord, although not a landlord in the strict sense of the term. Vancleve *v.* Green, 20 N. J. L. 171.

One acquiring his title subsequent to the commencement of an action, and who claims to be the landlord of plaintiff, cannot as a matter of right be made a party. Ralston *v.* Doe, 36 Ga. 611. And see Brown *v.* O'Brien, 4 Pa. L. J. 501, 3 Pa. L. J. Rep. 115.

A vendor of defendant is not entitled to be substituted as landlord. Linderman *v.* Berg, 12 Pa. St. 301.

That a landlord was admitted to defend is sufficiently shown by a copy of the rule of court certified by the clerk. Jackson *v.* Harrow, 11 Johns. (N. Y.) 434.

A landlord is not entitled to notice of trial who does not make himself a party to the record. Clayton *v.* Alshouse, 2 Dall. (Pa.) 150, 1 L. ed. 327.

If the relation of landlord and tenant does not clearly exist there should be a summons or rule *nisi* before a person claiming as landlord can be allowed to defend an action of ejectment in that character. Doe *v.* Fen, 6 N. Brunsw. 633.

57. Dimick *v.* Deringer, 32 Cal. 488; Thompson *v.* Schuyler, 7 Ill. 271; Payn *v.* Parks, 1 How. Pr. (N. Y.) 94.

58. Merritt *v.* Thompson, 13 Ill. 716; Jackson *v.* Stiles, 1 Cow. (N. Y.) 134; Emlen *v.* Hoops, 3 Serg. & R. (Pa.) 130; Beardsley *v.* Torrey, 2 Fed. Cas. No. 1,190, 4 Wash. 286. *Compare* Thompson *v.* Ives, 11 Ala. 239, holding that the admission of the landlord to defend instead of the tenant was not reversible error.

59. Jackson *v.* Stiles, 1 Cow. (N. Y.) 134. And see Godfrey *v.* Townsend, 8 How. Pr. (N. Y.) 398; Jackson *v.* Stiles, 6 Cow. (N. Y.) 589; Rittenhouse *v.* Fetters, 9 Wkly. Notes Cas. (Pa.) 221.

60. State *v.* Orwig, 34 Iowa 112; Millauden *v.* Ranney, 18 La. Ann. 196.

Necessity for answer by tenant.— Under the Oregon statute the landlord has no right to be substituted as defendant in place of the tenant until the latter files his answer stating that he is in possession only as the tenant of another, naming him and his place of residence. Fitch *v.* Cornell, 9 Fed. Cas. No. 4,834, 1 Sawy. 156.

The appearance and substitution of the landlord should be entered of record. Dutton *v.* Warschauer, 21 Cal. 609, 82 Am. Dec. 765.

61. Dutton *v.* Warschauer, 21 Cal. 609, 82 Am. Dec. 765.

62. Crockett *v.* Lashbrook, 5 T. B. Mon. (Ky.) 530, 17 Am. Dec. 98; Whissenhunt *v.* Jones, 80 N. C. 348; Sinclair *v.* Worthy, 60 N. C. 114, 80 Am. Dec. 357; Tatham *v.* Jones, 1 Phila. (Pa.) 214. But see Maddrey *v.* Long, 86 N. C. 383.

63. Hamilton *v.* Homer, 46 Miss. 378; St. John *v.* Croel, 10 How. Pr. (N. Y.) 253; James *v.* Bennett, 10 Wend. (N. Y.) 540, may be substituted by scire facias, in such case and not by motion.

A purchaser of plaintiff's title at execution sale is not a legal representative within the meaning of a statute providing for the substitution of such a person on the death of a plaintiff in ejectment. Hamilton *v.* Homer,

cited by name to appear and defend.[64] So where one of several plaintiffs has acquired the right since the commencement of the suit to all the land demanded he may have his name substituted for the other plaintiffs,[65] or one of several defendants who has acquired plaintiff's interest may likewise be substituted.[66] So one to whom plaintiff has conveyed his interest pending the action and who has been substituted succeeds to all the rights which the original plaintiff would have had.[67] The issues are not changed by a substitution, but the title to be tried is the title of the original plaintiff on which the substituted plaintiff must rely.[68] Where, however, there has been laches on the part of a plaintiff, the court may refuse to allow him to substitute a new defendant.[69] Where an action is brought to recover lands held adversely by defendant the complaint if brought in the name of the grantee cannot be amended by adding as parties plaintiff the grantors in deed under which plaintiff claims title.[70] And in an action of ejectment by a landlord against a tenant one who claims adversely to plaintiff cannot be substituted as a co-defendant.[71]

D. Process[72] — **1. In General.** A recovery will not extend to the possession of a tenant who was not served with process.[73] The service of process upon defendant in the county in which he resides and which is not the county in which the land lies has been decided to be good,[74] as has also service by publication.[75] And a third person may be deputized by the sheriff to serve the summons,[76] service being held sufficient by giving to each defendant a true and attested copy thereof and making known its contents.[77] New process is not necessarily required when leave is given to amend a declaration.[78] But where the præcipe and writ describe the land erroneously and defendants file a disclaimer, they are entitled to notice of application to amend the record for the purpose of correcting the description.[79]

2. Declaration and Notice as Process. There must be a service of the notice required by statute,[80] and of a copy of the declaration,[81] which has been held

46 Miss. 378. *Compare* Karns *v.* Tanner, 74 Pa. St. 339.

On the death of a tenant in tail the children and next heir in tail may be substituted. Shoemaker *v.* Huffnagle, 4 Watts & S. (Pa.) 437.

Residuary devisee may be substituted. Robb *v.* Simpson, 2 Wkly. Notes Cas. (Pa.) 68.

64. Trask *v.* Trask, 78 Me. 103, 3 Atl. 37.

65. Alden *v.* Grove, 18 Pa. St. 377.

66. Bullion Min. Co. *v.* Crœsus Gold, etc., Min. Co., 2 Nev. 168, 90 Am. Dec. 526.

67. Dillon *v.* Dougherty, 2 Grant (Pa.) 99.

68. Barrett *v.* Birge, 50 Cal. 655. *Compare* Richards *v.* Smith, 98 N. C. 509, 4 S. E. 625.

69. Hook *v.* Hook, 15 Phila. (Pa.) 631.

70. Reese *v.* Reaves, 131 Ala. 195, 31 So. 447.

71. Boyer *v.* Smith, 5 Watts (Pa.) 55. But see Bellas *v.* Houtz, 8 Watts (Pa.) 373.

72. Process generally see Process.

73. Pleak *v.* Chambers, 5 Dana (Ky.) 60. But see Cooper *v.* Hughes, 39 N. J. L. 445, holding that under the ejectment act service upon the tenant in possession was not necessary.

Service on a tenant whose lease has expired is good, where the tenant is still in possession. Losee *v.* McFarland, 86 Pa. St. 33.

74. Dunn *v.* Dyson, 22 Ga. 572.

75. Morgan *v.* Burnett, 18 Ohio 535; Newman *v.* Cincinnati, 18 Ohio 323. But see Staffan *v.* Zeust, 10 App. Cas. (D. C.) 260, construing D. C. Rev. St. § 787.

76. Stellmacher *v.* Kloepping, 36 N. J. L. 176.

77. Erskine *v.* Adams, 9 Pa. Dist. 444, 24 Pa. Co. Ct. 382.

78. Holmes *v.* Grabeel, 81 Fed. 145.

79. Duff *v.* Patterson, 173 Pa. St. 153, 33 Atl. 1026.

80. O'Donnell *v.* Howes, 27 Ill. 510; Lytle *v.* Fenn, 15 Fed. Cas. No. 8,651, 3 McLean 411.

Notice in ejectment is in the nature of process and cannot be aided by any statement of the person serving the declaration or by defendants appearing and excepting, unless they also enter into the common rule. Craig *v.* Clarke, 3 A. K. Marsh. (Ky.) 252.

The notice should be read or its contents explained to the person to whom it is delivered, or such person should be informed of the intent and meaning of the service. Auten *v.* Fen, 10 N. J. L. 237.

The notice should name the tenants. Lytle *v.* Fenn, 15 Fed. Cas. No. 8,651, 3 McLean 411.

81. *Illinois.*— O'Donnell *v.* Howes, 27 Ill. 510.

Kentucky.— Wharton *v.* Clay, 4 Bibb 167.

Maryland.— Spurrier *v.* Yieldhall, 2 Harr. & M. 173.

North Carolina.— Bledsoe *v.* Wilson, 13 N. C. 314.

sufficient to bring defendant into court without any other notice of the institution of the suit.[82]

3. **Affidavit of Service.** An affidavit of service was necessary at common law,[83] and has in some cases been required by statute,[84] while in other jurisdictions it need not be made.[85] The affidavit may be filed *nunc pro tunc*.[86] And where it has been filed it may be shown to be untrue.[87]

E. Estrepement. Writs of estrepement are means of preserving property in litigation from spoil or injury until the rights to it can be settled, and it has been declared that statutes authorizing such writs are only declaratory of the common-law authority of the courts and were passed because this power was not exercised as fully as it should have been.[88] Such a writ is not granted as of course, but will be granted on motion supported on affidavit,[89] and may be dissolved with or without terms or on giving bond.[90]

Tennessee.— Collins *v.* Legg, 1 Lea 120; Cravins *v.* Armour, 6 Yerg. 467.

United States.— West *v.* Talman, 29 Fed. Cas. No. 17,426, 4 Wash. 200.

See 17 Cent. Dig. tit. "Ejectment," § 148.

Sufficiency of service see the following cases:

Illinois.— Bletch *v.* Johnson, 35 Ill. 542.

Kentucky.— Clay *v.* Woods, 1 A. K. Marsh. 152.

New York.— Livingston *v.* Hicks, 1 How. Pr. 224; Evans *v.* Moran, 12 Wend. 180; Jackson *v.* Stiles, 1 Cow. 222.

United States.— Kibbe *v.* Benson, 17 Wall. 624, 21 L. ed. 741; Campbell *v.* Harper, 4 Fed. Cas. No. 2,360, 3 Wash. 356.

England.— Clinton *v.* Wales, 2 Jur. N. S. 1096, 5 Wkly. Rep. 113; Fothergill *v.* White, 14 L. T. Rep. N. S. 768; Doe *v.* Roe, 11 M. & W. 77.

Canada.— Doe *v.* Roe, 6 N. Brunsw. 585; Doe *v.* Roe, 4 N. Brunsw. 169; Doe *v.* Fen, 3 N. Brunsw. 458; Doe *v.* Roe, 2 N. Brunsw. 526; Doe *v.* Roe, 3 U. C. Q. B. 127; Doe *v.* Roe, 5 U. C. Q. B. O. S. 483; Doe *v.* Roe, Taylor (U. C.) 350.

See 17 Cent. Dig. tit. "Ejectment," § 148.

Service of a declaration upon the secretary of a railroad company has been held good, under 8 & 9 Vict. c. 16, § 135, in ejectment against the company. Doe *v.* Roe, 16 L. J. Exch. 273, 16 M. & W. 98.

That service was made by the lessor of plaintiff is not ground for setting aside a judgment by default. Auten *v.* Fen, 10 N. J. L. 237.

Where all the defendants reside in the same house a delivery of one copy of the declaration has been held sufficient. Campbell *v.* Harper, 4 Fed. Cas. No. 2,360, 3 Wash. 356.

Where the declaration is served on the wife of defendant on the premises a rule to appear and plead may be ordered. Jackson *v.* Salisbury, 3 Wend. (N. Y.) 430.

A declaration is not process so that it may be filed in vacation time, under an act declaring that every court of record shall always be open for the issuing and return of process (Knapp *v.* Pults, 3 How. Pr. (N. Y.) 53, construing Judiciary Act, § 57); nor is it process within the meaning of a statute requiring process to be made returnable within the first two weeks of the term (Borst *v.* Griffin, 5 Wend. (N. Y.) 84).

The copy served need not contain a filemark nor have indorsed on it the date of service. Hunt *v.* O'Neill, 44 N. J. L. 564.

The declaration and notice should be noticed on the record at the term it is returnable. Stair *v.* Pickett, 3 A. K. Marsh. (Ky.) 551. And see Fry *v.* Smith, 2 Dana (Ky.) 38.

The return of service should show when service was made. Bletch *v.* Johnson, 35 Ill. 542.

There may be a waiver by defendant of irregularities in connection with service. Buckner *v.* Pope, 1 B. Mon. (Ky.) 163. And see Fuller *v.* Wadsworth, 24 N. C. 263, 38 Am. Dec. 692.

82. Cruise *v.* Riddle, 21 Ala. 791; Breeding *v.* Taylor, 6 B. Mon. (Ky.) 62.

83. Williams *v.* Doe, 1 Sm. & M. (Miss.) 559; Moyers *v.* Brown, 10 Humphr. (Tenn.) 77.

Forms of affidavit see Adams Ejectm. 487, etc.

For sufficiency of affidavit see Doe *v.* Roe, 6 M. & G. 273, 6 Scott N. R. 961, 46 E. C. L. 273; Doe *v.* Roe, 4 N. Brunsw. 360; Doe *v.* Roe, 5 U. C. Q. B. 319.

84. O'Donnell *v.* Howes, 27 Ill. 510; Bolard *v.* Mason, 66 Pa. St. 138.

A sheriff's return is not sufficient where the statute requires an affidavit that the declaration and notice to appear and plead have been served. O'Donnell *v.* Howes, 27 Ill. 510.

Sufficiency of affidavit see Ely *v.* Fen, 12 N. J. L. 321; Auten *v.* Fen, 10 N. J. L. 237.

85. Williams *v.* Doe, 1 Sm. & M. (Miss.) 559.

An affidavit has been held unnecessary in a federal court, where the service is made by an officer of the court. Campbell *v.* Harper, 4 Fed. Cas. No. 2,360, 3 Wash. 356.

The sheriff's return of declaration has been held sufficient in Tennessee. Moyers *v.* Brown, 10 Humphr. (Tenn.) 77.

86. Stellmacher *v.* Kloepping, 36 N. J. L. 176.

87. Stewart *v.* Camden, etc., R. Co., 33 N. J. L. 115.

88. Byrne *v.* Boyle, 37 Pa. St. 260.

89. Higgins *v.* Roe, 3 Harr. (Del.) 49.

90. Byrne *v.* Boyle, 37 Pa. St. 260.

F. Injunction[91] or Order to Stay Waste.[92] In some jurisdictions a plaintiff may obtain an injunction or order to stay waste during the pendency of the action.[93]

G. Surveys. Rules to lay down pretensions require notice to the other party[94] or his attorney.[95] This requires notice of the running of all lines material to the dispute, whether the main lines or lines of illustration, if they are laid down on the plots.[96] The duty of the surveyor[97] in such a case is to plot such natural or other objects as are necessary to be proved or referred to at the trial in locating the lines.[98] Again a defendant who claims under the same survey as plaintiff cannot object to such survey.[99] And where a deposition contains a reference to lines run and surveys made, and there is annexed thereto a draft which does not embrace all these lines and surveys, but only those of the tract in dispute, it is sufficient if defendant is present to cross-examine and does not ask for any other or further draft.[1] A return of a survey is *prima facie* evidence of a survey on the ground, and no legitimate inference can be drawn from the fact that the deputy surveyor was not called as a witness to prove the fact.[2] A plaintiff cannot, however, avail himself of a survey not set up in his bill or relied on as confirming his title.[3] And the court should under the Maryland code[4] refuse to issue an order for a resurvey where both parties claim through a common source.[5]

H. Notice of Pendency of Proceedings. A notice of *lis pendens* is unnecessary even as against a purchaser *pendente lite*.[6]

V. PLEADING.[7]

A. Declaration, Complaint, or Petition — 1. Form and Requisites in General — a. Form, Necessity, and Filing.[8] To support a judgment for plaintiff it is

A court of common pleas may dissolve the writ in Pennsylvania and may require bond. Prescott *v.* Adams, 89 Fed. 474, 32 C. C. A. 255, construing the act of May 4, 1852 (Pub. Laws, p. 584, § 2) and the act of March 29, 1822 (7 Smith Laws, p. 520, § 2).

It will not be dissolved except under very special circumstances. Hough *v.* Kulp, 24 Pa. Co. Ct. 563.

Plaintiff may recover directly on the bond where he recovers in the action. Prescott *v.* Adams, 89 Fed. 474, 32 C. C. A. 255.

91. Injunction generally see INJUNCTIONS.

92. Waste generally see WASTE.

93. Natoma Water, etc., Co. *v.* Clarkin, 14 Cal. 544; Bush *v.* Phillips, 3 Wend. (N. Y.) 428; Riemer *v.* Johnke, 37 Wis. 258.

On an ex parte application the order may be granted. People *v.* Alberty, 11 Wend. (N. Y.) 160.

Revocation of the injunction is justified by an abuse of process on the part of plaintiff in the cutting by him of a great quantity of timber for the purpose of removing the same. Haight *v.* Lucia, 36 Wis. 355.

In Indiana unless there is a prayer for a temporary injunction in the complaint it is error to grant one, in the absence of a statutory provision. Miller *v.* Shriner, 86 Ind. 493.

In North Carolina it has been held that an injunction does not lie to restrain defendant from enjoying the fruits of his possession and claim of title, especially where it does not appear that plaintiff will lose the fruits of his recovery if he establishes title. Baldwin *v.* York, 71 N. C. 463.

94. Cann *v.* Thompson, 5 Harr. (Del.) 398; Short *v.* Cummins, 5 Harr. (Del.) 261. And see Brown *v.* Anderson, 90 Ind. 93.

Notice of regular adjournments must be taken by the parties. Cann *v.* Thompson, 5 Harr. (Del.) 398. And see Orr *v.* Hollidays, 9 B. Mon. (Ky.) 59.

Postponement without costs.—Where a survey is necessary it has been decided that the trial should be postponed without costs until it is made. Gourdine *v.* Theus, 2 Brev. (S. C.) 35.

95. Kolb *v.* Jones, 62 S. C. 193, 40 S. E. 168.

96. Short *v.* Cummins, 5 Harr. (Del.) 261, 262.

97. The surveyor and chain carriers should be sworn on the execution of such a rule. Short *v.* Cummins, 5 Harr. (Del.) 261.

98. McNamee *v.* Townsend, 3 Harr. (Del.) 88. *Compare* Stripling *v.* Davis, 28 Ga. 465; Spears *v.* Burton, 31 Miss. 547.

The fact, however, that there is not a proper and official execution of an order of survey will not defeat a recovery by plaintiff where he is otherwise entitled to recover. Campbell *v.* Hughes, 12 W. Va. 183.

99. Powers *v.* McFerran, 2 Serg. & R. (Pa.) 44.

1. Smay *v.* Smith, 1 Penr. & W. (Pa.) 1.

2. McCall *v.* Barnheart, 2 Watts (Pa.) 112. *Compare* Bellas *v.* Levan, 4 Watts (Pa.) 294.

3. Anderson *v.* Gore, 2 Litt. (Ky.) 27.

4. Md. Code, art. 75, § 78.

5. Kelso *v.* Stigar, 75 Md. 376, 24 Atl. 18.

6. Sheridan *v.* Andrews, 49 N. Y. 478 [*reversing* 3 Lans. 129].

7. Pleading generally see PLEADING.

8. For forms of original writ, complaint, declaration, or petition see Adams Ejectm.

essential that a declaration or complaint should be filed.[9] Each paragraph[10] of a declaration should be perfect and complete within itself, and defective allegations in one paragraph cannot be aided by reference to another paragraph,[11] nor can a complaint which fails to state a cause of action be aided by allegations in the answer.[12] Where a petition alleged actual possession in one of several plaintiffs the fact that the petition contained a prayer that the title to the property be decreed in one of the complainants is not a matter to which defendant can properly object or in which he has any interest.[13]

b. Requisites and Sufficiency in General. Whether the action be at common law or under the statute,[14] the complaint should allege that plaintiff was in possession of the premises sued for, with their description, and that defendant entered thereon and unlawfully detains and withholds the same.[15] And a petition alleging that defendant is in possession of the premises and that plaintiff is legally entitled to the same is held sufficient.[16] The allegation that plaintiff is entitled to possession and defendant unlawfully keeps the plaintiff out need not be made in the words of the statute it being sufficient if words of similar import are used.[17]

483 *et seq.*; Martin Civ. Proc. 379 *et seq.*; Stephen Pl. 33; Tidd App. 720; San Francisco *v.* Sullivan, 50 Cal. 603, 605; Hotchkiss *v.* Butler, 18 Conn. 287; Austin *v.* Jones, 47 Kan. 565, 566, 28 Pac. 621; Walter *v.* Lockwood, 23 Barb. (N. Y.) 228; Bryan *v.* Spivey, 106 N. C. 95, 97, 11 S. E. 510; Galliopolis Tp. First Presb. Soc. *v.* Smithers, 12 Ohio St. 248, 249; Boyd *v.* Cowan, 4 Dall. (Pa.) 138, 139, 1 L. ed. 774 [*quoting* Jacob L. Dict.]; McAbee *v.* Harrison, 50 S. C. 39, 27 S. E. 539; Columbia Water Power Co. *v.* Columbia Land, etc., Co., 42 S. C. 488, 490, 20 S. E. 378, 540; Kemble *v.* Herndon, 28 W. Va. 524, 525; Wetmore *v.* Rymer, 169 U. S. 115, 123, 18 S. Ct. 293, 42 L. ed. 682.

9. Wallace *v.* Elder, 5 Serg. & R. (Pa.) 143.

Time of filing.— The declaration should be filed and entered on the records at the term defendant is warned to appear. Sliger *v.* Grants, 7 T. B. Mon. (Ky.) 406.

10. **Although under a statute recovery may be had in an action for two separate and distinct parcels** of land, when the causes of action affect all the parties to the action and do not require separate places of trial, yet when the causes of action are thus united they must be separately stated. Boles *v.* Cohen, 15 Cal. 150.

Where equitable interposition is sought for, the grounds therefor should be stated subsequently to and distinct from those on which the judgment at law is sought. Natoma Water, etc., Co. *v.* Clarkin, 14 Cal. 544.

11. McCarnan *v.* Cochran, 57 Ind. 166.

12. Wisconsin Lakes Ice, etc., Co. *v.* Pike, etc., Lakes Ice Co., 115 Wis. 377, 91 N. W. 988.

13. Hale *v.* Morgan, (Tenn. Ch. App. 1900) 63 S. W. 506.

14. Greer *v.* Mezes, 24 How. (U. S.) 268, 16 L. ed. 661, where it is said that the principles of pleading and practice which have been established by the courts of common law were not changed by the mode of instituting an action of ejectment by petition and summons.

15. Bush *v.* Glover, 47 Ala. 167.

Sufficient complaint.— A complaint which alleges the character of the estate which plaintiff has in the premises, that defendant entered and ousted him, and that the latter withholds the possession thereof (Brown *v.* Martin, 25 Cal. 82; Coryell *v.* Cain, 16 Cal. 567; Boles *v.* Weifenback, 15 Cal. 144; Rhoades *v.* Higbee, 21 Colo. 88, 39 Pac. 1099; McClane *v.* White, 5 Minn. 178; Helena First Nat. Bank *v.* Roberts, 9 Mont. 323, 23 Pac. 718; Billings *v.* Sanderson, 8 Mont. 201, 19 Pac. 307; Richards *v.* Crews, 16 Oreg. 58, 16 Pac. 925; Brady *v.* Kreuger, 8 S. D. 464, 66 N. W. 1083, 59 Am. St. Rep. 771) wrongfully or unlawfully (Garrison *v.* Sampson, 15 Cal. 93; McClane *v.* White, 5 Minn. 178; Richards *v.* Crews, 16 Oreg. 58, 16 Pac. 925; Lewis *v.* St. Paul, etc., R. Co., 5 S. D. 148, 58 N. W. 580) is sufficient. So it may be sufficient where it states the interest which plaintiff has in the premises described and the fact that he is entitled to possession thereof, which defendant withholds (Hihn *v.* Mangenberg, 89 Cal. 268, 26 Pac. 968; Keller *v.* Ruiz de Ocana, 48 Cal. 638; Northern Pac. R. Co. *v.* Lilly, 6 Mont. 65, 9 Pac. 116; Maudlin *v.* Ball, 5 Mont. 96, 1 Pac. 409; McCauley *v.* Gilmer, 2 Mont. 202; Sanders *v.* Leavy, 16 How. Pr. (N. Y.) 308. See Anderson *v.* Proctor Coal Co., 74 S. W. 717, 25 Ky. L. Rep. 130; Leprell *v.* Kleinschmidt, 112 N. Y. 364, 19 N. E. 812) unlawfully or wrongfully (Payne *v.* Treadwell, 16 Cal. 220; Hensley *v.* Breeding, 7 Ky. L. Rep. 604; Merrill *v.* Dearing, 22 Minn. 376; Wells *v.* Masterson, 6 Minn. 566; Garner *v.* Manhattan Bldg. Assoc., 6 Duer (N. Y.) 539; Alvord *v.* Hetsel, 2 How. Pr. N. S. (N. Y.) 88; People *v.* New York, 17 How. Pr. (N. Y.) 56; Ensign *v.* Sherman, 13 How. Pr. (N. Y.) 35; Warner *v.* Nelligar, 12 How. Pr. (N. Y.) 402). In North Carolina such a complaint concluding with a demand for judgment, for possession, for damages for withholding the same, and for costs is sufficient under the code. Johnston *v.* Pate, 83 N. C. 110.

16. Alexander *v.* Campbell, 74 Mo. 142.

17. Swaynie *v.* Vess, 91 Ind. 584; Dunn *v.* Remington, 9 Nebr. 82, 2 N. W. 230.

And it has been decided that it is unnecessary to demand seizin and possession in the conclusion.[18] Nor need plaintiff's deed be set out in the complaint by copy or otherwise.[19] So an allegation that plaintiff is suing for the use of another may be considered as surplusage.[20] Again, although by statute all distinctions between legal and equitable actions may be abolished, yet a party who seeks relief on a merely equitable title against a legal title must in his pleadings, whether he is plaintiff or defendant, set forth such a state of facts as would have entitled him to the relief he seeks under the old form of proceedings.[21] And in an action by one who contracted to sell land and received the purchase-money, the contract being rescinded, repayment or tender of the amount should be alleged in the complaint.[22]

c. Joinder, Misjoinder, and Duplicity.[23] Where causes are joined in a complaint they should be consistent and affect all the parties to the action.[24] A declaration which contains but one count for several distinct parcels of land is not bad for duplicity.[25] In order to make a complaint multifarious the count which is claimed to be improperly joined must set out a good cause of action.[26] And it has been decided that where a declaration contains two counts, one good and the other defective, there may be a recovery on the good count.[27]

2. Description of Property — a. Necessity and Sufficiency of — (i) *In General.* The action being to recover possession of lands the petition, complaint, or declaration should so describe the land[28] sued for that in the event of a recovery the officer executing the writ of possession will know to what land plaintiff is entitled, and thus be enabled to effect the purpose of the action.[29] It was formerly

The word "unlawfully" need not be used under a statute which provides that plaintiff shall state in his complaint "that the defendant unlawfully keeps him out of possession," an equivalent in meaning being sufficient. Smith *v.* Kyler, 74 Ind. 575.

18. Cone *v.* Cone, 1 Day (Conn.) 134. *Compare* Porter *v.* Warner, 1 Root (Conn.) 438.

19. Lash *v.* Perry, 19 Ind. 322.

20. Caldwell *v.* Smith, 77 Ala. 157, under the Alabama code.

21. Maguire *v.* Vice, 20 Mo. 429. *Compare* Guyol *v.* Chouteau, 19 Mo. 546.

Where as an incident to recovery of real estate plaintiff seeks to have an alleged mistake in one of his title papers corrected, a demurrer to the complaint is properly overruled, although the allegations in regard to the mistake are clearly defective and insufficient, as a motion to strike out or to make such allegations more specific is the proper procedure. Smith *v.* Kyler, 74 Ind. 575.

22. Bohall *v.* Diller, 41 Cal. 532.

23. Joinder of causes of action and consolidation see *supra*, II, I.

Joinder of plaintiffs see *supra*, IV, C, 2, c.

Joinder of defendants see *supra*, IV, C, 3, a, (II); IV, C, 3, b; IV, C, 3, e, (I).

24. Porter *v.* International Bridge Co., 45 N. Y. App. Div. 416, 60 N. Y. Suppl. 819.

25. Hotchkiss *v.* Butler, 18 Conn. 287.

26. Hiles *v.* Johnson, 67 Wis. 517, 30 N. W. 721. See also Thames *v.* Jones, 97 N. C. 121, 1 S. E. 692; Welsh *v.* Chicago, etc., R. Co., 34 Wis. 494.

27. Bevans *v.* Taylor, 7 Harr. & J. (Md.) 1. See also Ocheltree *v.* McClung, 7 W. Va. 232.

Surplusage.— Where in ejectment for non-payment of the purchase-price under contract of sale, the complaint states facts constituting a cause of action, it is not demurrable because other facts which give defendant an opportunity to redeem and to avoid the effect of a judgment of restitution by complying with the contract are also stated therein. Kerns *v.* Dean, 77 Cal. 555, 19 Pac. 817.

28. There should be a description of the premises sought to be recovered. Goodwin *v.* Forman, 114 Ala. 489, 21 So. 946; Russell *v.* Fee, 1 Browne (Pa.) 194.

29. *Alabama.*— Griffin *v.* Hall, 111 Ala. 601, 20 So. 485; Tennessee, etc., R. Co. *v.* East Alabama R. Co., 75 Ala. 516, 51 Am. Rep. 475.

Colorado.— Bay State Min., etc., Co. *v.* Jackson, 27 Colo. 139, 60 Pac. 573.

Georgia.— Harwell *v.* Foster, 97 Ga. 264, 22 S. E. 994.

Indiana.— Lenninger *v.* Wenrick, 98 Ind. 596; College Corner, etc., Gravel Road Co. *v.* Moss, 92 Ind. 119; Jolly *v.* Ghering, 40 Ind. 139; Harrison, etc., Turnpike Co. *v.* Roberts, 33 Ind. 246.

Maryland.—Fenwick *v.* Floyd, 1 Harr. & G. 172.

Massachusetts.— Rochester Proprietors *v.* Hammond, Quincy 159.

Michigan.— White *v.* Hapeman, 43 Mich. 267, 5 N. W. 313, 38 Am. Rep. 178.

Missouri.— Livingston County *v.* Morris, 71 Mo. 603.

Montana.— Tracy *v.* Harmon, 17 Mont. 465, 43 Pac. 500.

New York.— Rowland *v.* Miller, 60 N. Y. Super. Ct. 399, 18 N. Y. Suppl. 205, 22 N. Y. Civ. Proc. 25.

Utah.— Darger *v.* Le Sieur, 9 Utah 192, 33 Pac. 701.

necessary to describe the premises with great accuracy, but under later decisions the rule was relaxed and less certainty was required,[30] it being declared sufficient to give a general description,[31] or to describe them with "reasonable certainty,"[32] or "convenient certainty,"[33] or "common certainty,"[34] or so that the land can be identified with the description in the complaint.[35] If the complaint describes the premises without apparent uncertainty it will be sufficient on demurrer, as the court will not indulge in conjecture for the purpose of making doubtful or equivocal that which seems to be definite.[36] Where the premises are otherwise sufficiently described it is not necessary to designate the quantity;[37] nor in such a case will a reference to a record of petition in a public office invalidate the declaration,[38] or a subsequent erroneous addition to the description.[39] And if from the description the court can judicially know that the land is in a certain county the complaint will be good in this regard so as to give the court jurisdiction.[40] Where, however, the action is under the statute and partakes of the nature of a real action and judgment on the merits is conclusive of title between the parties and their heirs and assigns, greater accuracy is required than in the action at common law.[41] Again it is decided that before plaintiff can recover he must prove the identity of the land claimed so far as the exterior boundaries are concerned.[42] And where defendant is in doubt for what property plaintiff means to proceed the latter may be compelled by rule to specify the premises sought to be recovered.[43]

(II) *SUFFICIENT PARTICULAR DESCRIPTIONS.* The premises may be sufficiently described by a particular name by which they are known;[44] by their

Virginia.— Hitchcox *v.* Rawson, 14 Gratt. 526.

West Virginia.— Postlewaite *v.* Wise, 17 W. Va. 1.

Wisconsin.— Orton *v.* Noonan, 18 Wis. 447.

England.— See Doe *v.* Bath, 3 L. J. K. B. 48, 2 N. & M. 440, 28 E. C. L. 580.

See 17 Cent. Dig. tit. "Ejectment," § 158.

30. Barclay *v.* Howell, 6 Pet. (U. S.) 498, 8 L. ed. 477. See Talbot *v.* Wheeler, 4 Day (Conn.) 448.

Mere matter of description need not be averred with the certainty and positiveness required in pleading the material facts constituting the cause of action. May *v.* First Div. St. Paul, etc., R. Co., 26 Minn. 74, 1 N. W. 584.

31. Barclay *v.* Howell, 6 Pet. (U. S.) 498, 8 L. ed. 477. See also Munson *v.* Munson, 30 Conn. 425.

32. Leary *v.* Langsdale, 35 Ind. 74.

33. Smith *v.* Cox, 6 Heisk. (Tenn.) 462.

In determining what is "convenient certainty" as used in a statute requiring such a description the strict rules of the common law should not be applied, but the certainty should be such as in the usual sense of the word is convenient. Kemble *v.* Herndon, 28 W. Va. 524.

34. Barley *v.* Roosa, 13 N. Y. Suppl. 209, 20 N. Y. Civ. Proc. 113.

35. *Colorado.*— Bay State Min., etc., Co. *v.* Jackson, 27 Colo. 139, 60 Pac. 573.

Florida.— Buesing *v.* Forbes, 33 Fla. 495, 15 So. 209.

Indiana.— Indianapolis Mfg., etc., Union *v.* Cleveland, etc., R. Co., 45 Ind. 281.

Kentucky.— Howard *v.* Lock, 22 S. W. 332, 15 Ky. L. Rep. 154.

Missouri.— Newman *v.* Lawless, 6 Mo. 279.

West Virginia.— Clerc *v.* Greer, 49 W. Va. 102, 38 S. E. 485.

United States.— Black *v.* Black, 74 Fed. 978.

See 17 Cent. Dig. tit. "Ejectment," § 158 *et seq.*

36. Railsback *v.* Walke, 81 Ind. 409.

Where uncertainty can only arise upon proof in the absence of proof a description will not be presumed uncertain. Carpentier *v.* Grant, 21 Cal. 140.

37. Griffeth *v.* Dobson, 3 Penr. & W. (Pa.) 228.

38. Bear *v.* Snyder, 11 Wend. (N. Y.) 592.

39. Brake *v.* Stewart, 88 Ind. 422.

40. Wilcox *v.* Moudy, 82 Ind. 219.

Describing land as situate in a certain county without any other local description, has also been held good on a motion in arrest of judgment. Doe *v.* Mew, 7 A. & E. 240, 2 N. & P. 260, W. W. & D. 460, 34 E. C. L. 143.

Where premises were described as being in a certain parish and the evidence showed that there were two parishes of the name given, it was held that this was not a variance. Doe *v.* Harris, 5 M. & S. 326.

Where parishes are united by act of parliament for no other purpose than the maintenance of their poor, it is a misdescription to describe premises as situated in the united parishes when they are actually within one of them. Goodtitle *v.* Lammiman, 2 Campb. 274, 6 Esp. 128.

41. Davis *v.* Judge, 44 Vt. 500.

42. Holly River Coal Co. *v.* Howell, 36 W. Va. 489, 15 S. E. 214. See Stewart *v.* Camden, etc., R. Co., 33 N. J. L. 115.

43. Phillips *v.* Phillips, 21 N. J. L. 436.

44. Hildreth *v.* White, 66 Cal. 549, 6 Pac. 454; Castro *v.* Gill, 5 Cal. 40; Fouke *v.*

boundaries;[45] by number;[46] by the lot and concession;[47] or by sections and townships.[48] Or it may be sufficient to describe the land as a part of a section,[49] of a certain survey,[50] or of a lot or tract,[51] although in such case the description should be such that the part sought to be recovered may be identified.[52] Again a description may be sufficient to identify the premises where they are described by structures, improvements, or other physical characteristics,[53] or by reference to a map[54] or to a document describing the property,[55] or by quantity in connection with other controlling particulars.[56] And the word "tenement" is held sufficiently descriptive of land, the metes and bounds being given.[57]

Kemp, 5 Harr. & J. (Md.) 135; Beard *v.* Federy, 3 Wall. (U. S.) 478, 18 L. ed. 88.

45. *California.*— Hihn *v.* Mangenberg, 89 Cal. 268, 26 Pac. 968.

Connecticut.—Wooster *v.* Butler, 13 Conn. 309.

Indiana.— Brown *v.* Anderson, 90 Ind. 93.

North Carolina.— Brown *v.* Coble, 76 N. C. 391.

Pennsylvania.— Hawn *v.* Norris, 4 Binn. 77.

Wisconsin.— Ayers *v.* Reidel, 84 Wis. 276, 54 N. W. 588.

See 17 Cent. Dig. tit. "Ejectment," § 160.

Compare Budd *v.* Bingham, 18 Barb. (N. Y.) 494; Rowland *v.* Miller, 60 N. Y. Super. Ct. 399, 18 N. Y. Suppl. 205, 22 N. Y. Civ. Proc. 25, holding that under the description in this case possession could not be delivered.

A description which calls for a well ascertained beginning point from whence the land is to be run to a designated monument and then giving the course of every other call in the description is sufficient. Muir *v.* Meredith, 82 Cal. 19, 22 Pac. 1080. See also Sherman *v.* McCarthy, 57 Cal. 507.

A statute providing that the land shall be described by metes and bounds is directory merely, the object being to enable the officer charged with the execution of a judgment for possession to ascertain the locality and extent of the property. Beard *v.* Federy, 3 Wall. (U. S.) 478, 18 L. ed. 88. See also Whitney *v.* Buckman, 19 Cal. 300; Doll *v.* Feller, 16 Cal. 432.

Where there is nothing to control the courses and distances, no monuments being named except at the point of beginning, the line must be run by the needle. Brooks *v.* Tyler, 2 Vt. 348.

46. As where the land is located in a city having a known system of notation regulated by municipal laws, and recognized in the transaction of regular business and acted upon by everyone. Baker *v.* Carrington, 34 Misc. (N. Y.) 54, 68 N. Y. Suppl. 405; Flanigen *v.* Philadelphia, 51 Pa. St. 491.

47. Doe *v.* Pickle, 1 U. C. Q. B. 282.

48. Louis *v.* Giroir, 38 La. Ann. 723.

49. *Alabama.*— Rayburn *v.* Elrod, 43 Ala. 700; Sims *v.* Thompson, 30 Ala. 158.

Florida.— Wade *v.* Doyle, 18 Fla. 630.

Illinois.— Job *v.* Tebbetts, 9 Ill. 143.

Indiana.— Barton *v.* Cridge, 145 Ind. 698, 44 N. E. 541; Sphung *v.* Moore, 120 Ind. 352, 22 N. E. 319.

Mississippi.— Pickett *v.* Doe, 5 Sm. & M. 470, 43 Am. Dec. 523.

Nebraska.— Mills *v.* Traver, 35 Nebr. 292, 53 N. W. 67.

See 17 Cent. Dig. tit. "Ejectment," § 159 *et seq.*

50. Chaffin *v.* Fulkerson, 95 Ky. 277, 24 S. W. 1066, 15 Ky. L. Rep. 635. See also Lane *v.* Queen City Milling Co., (Ark. 1899) 50 S. W. 274.

51. Combs *v.* Combs, 43 S. W. 697, 19 Ky. L. Rep. 1449; Bear *v.* Snyder, 11 Wend. (N. Y.) 592; Speight *v.* Jenkins, 99 N. C. 143, 5 S. E. 385; Johnson *v.* Nevill, 35 N. C. 677. See also Driver *v.* Board of Directors, 70 Ark. 358, 68 S. W. 26; Carter *v.* Chattanooga, (Tenn. Ch. App. 1897) 48 S. W. 117.

52. *Georgia.*— Harwell *v.* Foster, 97 Ga. 264, 22 S. E. 994.

Indiana.— Boyer *v.* Robertson, 149 Ind. 74, 48 N. E. 7; Roberts *v.* Lanam, 92 Ind. 380; Hammond *v.* Stoy, 85 Ind. 457; Jolly *v.* Ghering, 40 Ind. 139; Unversaw *v.* Myers, 37 Ind. 487.

Kentucky.— Smith *v.* Price, (1888) 7 S. W. 918.

Maryland.— Fenwick *v.* Floyd, 1 Harr. & G. 172.

Massachusetts.— Rochester Proprietors *v.* Hammond, Quincy 159.

Michigan.— White *v.* Hapeman, 43 Mich. 267, 5 N. W. 313, 38 Am. Rep. 178.

Mississippi.— Lazar *v.* Caston, 67 Miss. 275, 7 So. 321.

Virginia.— Hitchcox *v.* Rawson, 14 Gratt. 526.

Wisconsin.—Orton *v.* Noonan, 18 Wis. 447.

See 17 Cent. Dig. tit. "Ejectment," § 159 *et seq.*

A petition to recover an undivided interest should aver of what fractional part of the whole that interest consists. Roberts *v.* Haines, 112 Ga. 842, 38 S. E. 109.

53. Cunningham *v.* McCollum, 98 Ind. 38; Cushing *v.* Fenn, 63 Vt. 106, 21 Atl. 272; Carter *v.* Chesapeake, etc., R. Co., 26 W. Va. 644, 53 Am. Rep. 116. *Compare* College Corner, etc., Gravel Road Co. *v.* Moss, 92 Ind. 119.

54. Pierce *v.* Hilton, 102 Cal. 276, 36 Pac. 595.

55. Guy *v.* Barnes, 24 Ind. 345; De Haven *v.* De Haven, 104 Ky. 41, 46 S. W. 215, 47 S. W. 597, 20 Ky. L. Rep. 663; Seeley *v.* Howard, 23 Mich. 11. *Compare* Liggett *v.* Lozier, 133 Ind. 451, 32 N. E. 712.

56. Johnson *v.* Cobb, 29 S. C. 372, 7 S. E. 601. See also Garwood *v.* Hastings, 38 Cal. 216; Lyons *v.* Miller, 4 Serg. & R. (Pa.) 279; Thomas *v.* Culp, 4 Serg. & R. (Pa.) 271.

57. Osborne *v.* Woodson, 2 N. C. 24.

b. Conflicting Descriptions. Where a complaint contains two descriptions of the property, one general and the other particular, and they conflict, the latter will control.[58]

3. Title, Estate, and Possession of Plaintiff — a. Necessity and Sufficiency in General. The declaration should allege title or at least actual possession in plaintiff.[59] And a complaint is held sufficient on demurrer which asserts title based on a deed regular in form, clear in its terms, and apparently founded on a valuable consideration.[60] The complaint need not, however, allege how the title or estate was acquired or derived,[61] or set out the chain of conveyances by which the title is to be proved.[62] It is also decided that the title may be stated in general

58. Inge *v.* Garrett, 38 Ind. 96; Haggin *v.* Lorenz, 15 Mont. 309, 39 Pac. 285; Cushing *v.* Conness, (Nebr. 1903) 95 N. W. 855.

It is immaterial, however, that the premises are described in a mortgage under which plaintiff claims by metes and bounds, while the complaint describes them by land-office numbers, where the evidence shows without conflict that they are the same lands, the two descriptions not being different in substance. Williamson *v.* Mayer, 117 Ala. 253, 23 So. 3.

59. Steinback *v.* Fitzpatrick, 12 Cal. 295; Clay *v.* Sloan, 104 Tenn. 401, 58 S. W. 229. See also Ensign *v.* Sherman, 13 How. Pr. (N. Y.) 35; Bockee *v.* Crosby, 3 Fed. Cas. No. 1,593, 2 Paine 432.

A complaint alleging that plaintiff became possessed of and entitled to the possession of certain public land by virtue of compliance with certain laws in respect thereto is held insufficient in the absence of an allegation of ownership. Schultz *v.* Hadler, 39 Minn. 191, 39 N. W. 97.

An allegation of ownership is held equivalent to an allegation of seizin in fee (Garwood *v.* Hastings, 38 Cal. 216); and such an allegation together with an exhibit by plaintiff of the deeds and evidence of title on which he relies is held a sufficient compliance with a statute requiring plaintiff to set forth the deeds on which he relies and to state facts showing a *prima facie* title in himself (Fagg *v.* Martin, 53 Ark. 449, 14 S. W. 647); but a general allegation of ownership will not aid plaintiffs who have alleged title in themselves specifically, in case the specific allegations do not show title in them (Morgan *v.* Lake Shore, etc., R. Co., 130 Ind. 101, 28 N. E. 548).

An allegation of possession is sufficient allegation of title, possession being *prima facie* evidence of title. Hutchinson *v.* Perley, 4 Cal. 33, 60 Am. Dec. 578. See also Norris *v.* Russell, 5 Cal. 249; Horton *v.* Murden, 117 Ga. 72, 43 S. E. 786.

A tenant for a term of years may allege that he is the owner in an action against his landlord. Parker *v.* Minneapolis, etc., R. Co., 79 Minn. 372, 82 N. W. 673.

Different sources of title may be alleged. Stephenson *v.* Wilson, 50 Wis. 95, 6 N. W. 240.

If complaint by the facts shows title in plaintiff, it is not necessary to state the conclusion that he is the owner. Lovely *v.* Speisshoffer, 85 Ind. 454.

Possession after maturity of title by prescription should be alleged where plaintiff relies on title by adverse possession or prescription. Schoonmaker *v.* Doolittle, 118 Ill. 605, 8 N. E. 839.

Possession is not averred by an allegation that plaintiff assumed and did exercise acts of control over a portion of the land. Brennan *v.* Ford, 46 Cal. 7. See also Smith *v.* Doe, 15 Cal. 100.

Sufficiency of allegation generally see Marshall *v.* Shafter, 32 Cal. 176; People *v.* New York, 10 Abb. Pr. (N. Y.) 111.

Time of seizin or ownership.—Seizin should be alleged, within the time limited for bringing the action. Bockee *v.* Crosby, 3 Fed. Cas. No. 1,593, 2 Paine 432. But it is held that an allegation of ownership in fee in plaintiff on a day named before the commencement of the action is sufficient. Salmon *v.* Symonds, 24 Cal. 260. But see Miller *v.* Hoberg, 22 Minn. 249; Armstrong *v.* Hinds, 8 Minn. 254.

Wis. Rev. St. c. 141, § 4, although it did not require a complaint to set out plaintiff's title, yet did not prohibit special complaints in that form, they being proper where the rights of the parties depend wholly on questions of construction for the court. Lawe *v.* Hyde, 39 Wis. 345.

60. Ewing *v.* Cones, 131 Ind. 600, 30 N. E. 1069; Ewing *v.* Lutz, 131 Ind. 361, 30 N. E. 1069.

61. *Kansas.*— Kansas Pac. R. Co. *v.* McBratney, 12 Kan. 9.

Minnesota.— Curtiss *v.* Livingston, 36 Minn. 380, 31 N. W. 357.

Montana.— Billings *v.* Sanderson, 8 Mont. 201, 19 Pac. 307.

New York.— Overbagh *v.* Oathout, 90 Hun 506, 35 N. Y. Suppl. 962.

Oregon.— Pease *v.* Hannah, 3 Oreg. 301.

See 17 Cent. Dig. tit. "Ejectment," § 165 *et seq.*

62. Coryell *v.* Cain, 16 Cal. 567; Ensign *v.* Sherman, 13 How. Pr. (N. Y.) 35 [*affirmed* in 14 How. Pr. 439].

A statutory provision as to setting forth deeds and other written evidence of title in the complaint is for the benefit of defendant and is waived by him when he answers without objection or permits judgment by default. Merrill *v.* Martin, (Indian Terr. 1901) 64 S. W. 539.

One claiming under a deed subject to prior covenants entered into by the grantor and grantee need not set out such covenants. Lockwood *v.* Mills, 39 Ill. 602.

The effect only of a document need be stated and it need not be set out in the pre-

terms.[63] And although a plaintiff is not required in his complaint to anticipate a defendant's defense,[64] yet if he does so facts such as would show a title sufficiently strong to destroy such defense must be stated.[65]

b. Right to Possession. The complaint should allege that plaintiff is entitled to the possession,[66] or state facts from which his right to possession arises by necessary implication.[67] But where it is provided by statute that the right of possession is presumed to accompany ownership and the possession is presumed subordinate to legal title, such an averment is not necessary.[68] And in an action by a landlord against a tenant at sufferance it is decided that the tenancy and its termination need not be alleged.[69]

c. Nature and Extent of Title or Interest. It is as a general rule necessary to specify in the declaration the nature and extent of the title, estate, or interest which plaintiff claims in the premises.[70] So it has been declared that the decla-

cise words thereof under order xix, rule 21. Darbyshire *v.* Leigh, [1896] 1 Q. B. 554, 65 L. J. Q. B. 360, 74 L. T. Rep. N. S. 241, 44 Wkly. Rep. 452.

The Georgia code provision that an abstract of title shall be annexed to the declaration for the recovery of land and mesne profits does not apply to actions in ejectment brought in the common-law form. Georgia Iron, etc., Co. *v.* Allison, 116 Ga. 444, 42 S. E. 794.

63. But if a plaintiff undertakes to set forth the particular facts on which it rests he must allege all that he could have been called upon to prove under his general averment. Castro *v.* Richardson, 18 Cal. 478. See also Wile *v.* Sweeny, 2 Duv. (Ky.) 161; Strœbe *v.* Fehl, 22 Wis. 337.

Where plaintiff bases his action on title acquired at a tax-sale he should allege and show a substantial compliance with all the requirements of the statute authorizing such sale. Hundley *v.* Taylor, 25 S. W. 887, 15 Ky. L. Rep. 808.

64. Morgan *v.* Lake Shore, etc., R. Co., 130 Ind. 101, 28 N. E. 548. See also Williams *v.* Watson, 44 S. W. 424, 19 Ky. L. Rep. 1798; Duffy *v.* Duffy, 20 Pa. Super. Ct. 25; Parr *v.* Currence, 53 W. Va. 524, 44 S. E. 184.

Plaintiff need not negative breach of a condition subsequent in a conveyance under which he claims. Lewis *v.* Lewis, 74 Conn. 630, 51 Atl. 854, 92 Am. St. Rep. 240.

65. Morgan *v.* Lake Shore, etc., R. Co., 130 Ind. 101, 28 N. E. 548.

66. *Indiana.*— Nutter *v.* Hendricks, 150 Ind. 605, 50 N. E. 748; Simmons *v.* Lindley, 108 Ind. 297, 9 N. E. 360; Mansur *v.* Streight, 103 Ind. 358, 3 N. E. 112; Miller *v.* Shriner, 87 Ind. 141. But see McCaslin *v.* State, 99 Ind. 428.

Minnesota.—Atwater *v.* Spalding, 86 Minn. 101, 90 N. W. 370; Armstrong *v.* Hinds, 8 Minn. 254.

Missouri.— Jamison *v.* Smith, 4 Mo. 202.

Nebraska.— George *v.* McCullough, 48 Nebr. 680, 67 N. W. 758.

New Mexico.— Osborne *v.* U. S., 3 N. M. 213, 5 Pac. 465.

New York.— Moores *v.* Lehman, 52 N. Y. Super. Ct. 283. But see Walter *v.* Lockwood, 23 Barb. 228.

Oregon.— Bingham *v.* Kern, 18 Oreg. 199, 23 Pac. 182.

Wisconsin.— Barclay *v.* Yeomans, 27 Wis. 682.

See 17 Cent. Dig. tit. "Ejectment," § 165.

But see Tutt *v.* Port Royal, etc., R. Co., 28 S. C. 388, 5 S. E. 831.

The time when plaintiff's right to possession accrued was required to be stated in a complaint by statute of New Jersey. Vreeland *v.* Ryerson, 28 N. J. L. 205.

Under Wis. Rev. St. § 3077, plaintiff should allege that he was entitled to possession at the commencement of the action. Ashland M. E. Church *v.* Northern Pac. R. Co., 78 Wis. 131, 47 N. W. 190.

A complaint defective for failure to allege that plaintiff was entitled to possession is held to be cured by a denial in the answer that plaintiff was entitled to possession. Vance *v.* Anderson, 113 Cal. 532, 45 Pac. 816.

A complaint is held sufficient which avers that plaintiff is lawfully entitled to possession (Godwin *v.* Stebbins, 2 Cal. 103. *Compare* Jamison *v.* Smith, 4 Mo. 202), or which avers seizin in fee, such an averment being declared equivalent to an averment of right to immediate possession (Halsey *v.* Gerdes, 17 Abb. N. Cas. (N. Y.) 395 [*disapproving* Moores *v.* Lehman, 52 N. Y. Super. Ct. 283]). See also Parr *v.* Van Horn, 38 Ill. 226; Jenkins *v.* Fahey, 73 N. Y. 355; Wilmington, etc., R. Co. *v.* Garner, 27 S. C. 50, 2 S. E. 634. And *compare* Payne *v.* Treadwell, 5 Cal. 310.

67. Mansur *v.* Streight, 103 Ind. 358, 3 N. E. 112; Carson *v.* Butt, 4 Okla. 133, 46 Pac. 596.

68. Jones *v.* Memmott, 7 Utah 340, 26 Pac. 925.

69. McCarthy *v.* Yale, 39 Cal. 585.

70. *Illinois.*— Rawlings *v.* Bailey, 15 Ill. 178.

Michigan.— Olin *v.* Henderson, 120 Mich. 149, 79 N. W. 178; Goodall *v.* Henkel, 60 Mich. 382, 27 N. W. 556.

New York.— Austin *v.* Schluyter, 7 Hun 275.

Oregon.— Little *v.* Pherson, 35 Oreg. 51, 56 Pac. 807; Johnson *v.* Crookshanks, 21 Oreg. 339, 28 Pac. 78; Thompson *v.* Wolf, 6 Oreg. 308.

ration should set forth the title of plaintiff in terms so explicit that judgment in his favor will determine the character of his estate and not simply his right of possession.[71]

d. Estates of Decedents. Where plaintiff undertakes to set out the particular facts on which his title rests, and one of the links in the chain is a will, it is decided that the admission of the will to probate should be alleged.[72] And an heir of a deceased grantor who seeks to recover the real estate, because of a breach of a condition subsequent contained in the conveyance, should allege that the grantor was seized in fee simple of such real estate at the time of the conveyance.[73] But in an action by an executor, a complaint is not necessarily defective because it does not allege title in the testator.[74] And where a complaint shows that the land was a homestead of decedent and his wife, being set out from the separate property of the former without his consent, and was devised to plaintiff, and that the widow was dead at the time suit was brought, he need not allege that the homestead to which his estate was subject had ceased to exist at the time the action was brought, as it will not be presumed that the homestead was set apart for a longer time than allowed by law.[75]

e. Equitable Title. Where plaintiff alleges that he is the equitable owner, but no facts are set forth in support of the equitable title, it has been decided that the complaint is insufficient.[76]

f. Laying of Demise. The declaration in ejectment should contain the name

Rhode Island.— Gorton *v.* Potter, 16 R. I. 493, 17 Atl. 909.

Virginia.— Roach *v.* Blakey, 89 Va. 767, 17 S. E. 228.

Washington.— Belles *v.* Miller, 10 Wash. 259, 38 Pac. 1050.

Wisconsin.— Haight *v.* Clifford, 42 Wis. 571; Allie *v.* Schmitz, 17 Wis. 169.

See 17 Cent. Dig. tit. "Ejectment," § 166.

Compare Schenck *v.* Kelley, 88 Ind. 444; Atwater *v.* Spalding, 86 Minn. 101, 90 N. W. 370; Senterfeit *v.* Shealy, 66 S. C. 384, 44 S. E. 958; Livingston *v.* Ruff, 65 S. C. 284, 43 S. E. 678; Royston *v.* Wear, 3 Head (Tenn.) 8.

A complaint is sufficient, it has been held, where it alleges that plaintiffs claim an "interest in fee simple as tenants in common" in a certain part of a lot (Wheat *v.* Morris, 21 D. C. 11); that plaintiff is "possessed in fee" of the land (Jarrett *v.* Stevens, 36 W. Va. 445, 15 S. E. 177. See Baker *v.* Carrington, 34 Misc. (N. Y.) 54, 68 N. Y. Suppl. 405); that he has a title in fee, in an action by a vendee, entitled to possession under an executory contract of sale, against a trespasser (Olin *v.* Henderson, 120 Mich. 149, 79 N. W. 178); or that his ownership is by right of prior occupancy and actual possession, where that is in fact the only kind of an estate that it is possible to have in the land claimed (Malony *v.* Adsit, 175 U. S. 281, 20 S. Ct. 115, 44 L. ed. 163).

An averment that plaintiff claims title by purchase is not a sufficient statement of title under a statute requiring the estate or interest of plaintiff to be set forth. Drake *v.* Root, 2 Colo. 685.

Defects in this respect may be waived by taking issue upon the facts as alleged in the complaint by the answer and setting up new matter by way of defense. Johnson *v.* Crookshanks, 21 Oreg. 339, 28 Pac. 78.

To set forth nature and duration of estate as required by Oreg. Civ. Code, § 316, it is sufficient to state succinctly a license or right to the possession claimed, with the necessary facts constituting it. Witherell *v.* Wiberg, 30 Fed. Cas. No. 17,917, 4 Sawy. 232.

71. Dunn *v.* Sullivan, 23 R. I. 605, 51 Atl. 203; Taylor *v.* O'Neil, 15 R. I. 198, 2 Atl. 299.

72. Castro *v.* Richardson, 18 Cal. 478.

73. Clark *v.* Holton, 57 Ind. 564.

Sufficiency of averment of title by an heir see Chavanne *v.* Frizola, 25 La. Ann. 76; St. John *v.* Northrup, 23 Barb. (N. Y.) 25; Masterson *v.* Townshend, 57 N. Y. Super. Ct. 21, 5 N. Y. Suppl. 182.

74. The latter may have had neither title nor right of possession at the time of his death and the executor may have subsequently acquired the same in his representative capacity. Salmon *v.* Wilson, 41 Cal. 595. See also Oury *v.* Duffield, 1 Ariz. 509, 25 Pac. 533, construing Ariz. Comp. Laws, p. 267, § 114, and holding that an administrator need not allege possession or right of possession in his intestate. But see Johnston *v.* McDowell, 37 Tex. 595.

75. Hutchinson *v.* McNally, 85 Cal. 619, 24 Pac. 1071 [*reversing*, (1890) 23 Pac. 132], decided under Cal. Civ. Code, § 1265, providing that a homestead in the separate property of the husband can be set apart to the widow for a limited period, not longer than during her life.

76. Leatherwood *v.* Fulbright, 109 N. C. 683, 14 S. E. 299. See also Thomas *v.* Walker, 115 Ga. 11, 41 S. E. 269. But see Westfelt *v.* Adams, 131 N. C. 379, 42 S. E. 823, holding that where, although the equity is not stated in the complaint, it is of such a character that the court upon the face of the record evidence introduced at the trial

of the lessor of plaintiff.[77] And separate demises from several lessors may be laid.[78] Heirs at law may demise severally.[79] And it is decided that in an action by one as devisee under a will, he may allege a demise in the executor.[80] Again all cotenants need not be joined,[81] although the demise may be laid jointly.[82] Where, however, there is but one count and that is upon the joint demise of two persons, of whom only one has title, it has been decided that the declaration could not be sustained.[83] The lease set out should be one which could have been made at the time the action was commenced.[84] And the day on which the demise is alleged to have been made must be subsequent to that on which the claimant's right of entry accrued.[85] But where by statute the action is not subject to the technical rules at common law, it is sufficient if the declaration allege title in plaintiff without averring a demise.[86]

4. Ouster and Possession of Defendant, Demand, and Notice — a. Ouster and Possession in General. The complaint should allege either an entry and ouster[87] or possession by defendant.[88] And where a complaint alleges that the entry was

would have corrected the defects in an *ex parte* proceeding as a matter of course the action will be sustained. And *compare* Geer v. Geer, 109 N. C. 679, 14 S. E. 297.

77. Taylor v. Gilkerson, 4 Bibb (Ky.) 410.

Warranty of the grantor of a plaintiff does not authorize him to insert a count upon the demise of his grantor, and the latter may have such count stricken out on motion. Ross v. Garrison, 1 Dana (Ky.) 35.

78. Magruder v. Peter, 4 Gill & J. (Md.) 323; Jackson v. Sidney, 12 Johns. (N. Y.) 185.

Counts on the demise of persons who had died before the bringing of the action are properly stricken out. Adderton v. Melchor, 31 N. C. 349.

Where in the first action there are several demises in the declaration it is not necessary that a demise from each of those persons should be laid in the declaration in the second action. Long v. Orrell, 35 N. C. 123.

79. Scott v. Bealle, 1 A. K. Marsh. (Ky.) 69.

80. Croft v. Doe, 125 Ala. 391, 28 So. 84.

81. Carson v. Smart, 34 N. C. 369.

Joint tenants may sever. Doe v. Clement, 7 U. C. Q. B. 549.

82. Barrow v. Naves, 2 Yerg. (Tenn.) 227. But see Steinmetz v. Nixon, 3 Yeates (Pa.) 285.

83. Bryan v. Manning, 51 N. C. 334; Elliott v. Newbold, 51 N. C. 9.

84. McLennan v. McLeod, 70 N. C. 364; Bates v. Tucker, N. Chipm. (Vt.) 69.

A fictitious lease is to be tested by the same rules as if it were actually made and produced. Bray v. McShane, 13 N. J. L. 35.

85. Bray v. McShane, 13 N. J. L. 35; Dickenson v. Jackson, 6 Cow. (N. Y.) 147; Doe v. Hicks, 7 T. R. 433, 727. And see Doe v. Wells, 10 A. & E. 427, 2 P. & D. 396, 8 L. J. Q. B. 265, 37 E. C. L. 237; Doe v. Bluck, 3 Campb. 447, 14 Rev. Rep. 804; Roe v. Hersey, 3 Wils. C. P. 274. But see Obert v. Bordine, 20 N. J. L. 394, holding that the demise may be laid on the day when the right of entry accrued.

After issue has been joined it cannot be objected that the demise was laid before the title of the lessor of plaintiff accrued. Whittington v. Christian, 2 Rand. (Va.) 353.

Construction of particular demises see Armstrong v. Jackson, 1 Blackf. (Ind.) 210, 12 Am. Dec. 225; Burhans v. Vanness, 10 N. J. L. 102; Brown v. Lutterloh, 1 N. C. 425.

Where the lessor of plaintiff claims under a sheriff's sale his title relates back to the date of judgment, and it cannot be said that a demise stated in the declaration to be anterior to the date of the sheriff's deed is therefore laid before the commencement of his title. Doe v. Horn, Smith (Ind.) 242.

86. Brewer v. Beckwith, 35 Miss. 467.

87. Tetherow v. Chambers, 74 Mo. 183; Ensign v. Sherman, 13 How. Pr. (N. Y.) 35.

In Florida it has been held unnecessary under the statute to allege ouster. Gale v. Hines, 17 Fla. 773.

Ouster is sufficiently alleged where complaint avers that "defendants are in possession of said lands and premises and the whole thereof, withhold the possession of the whole thereof from plaintiff, and exclude plaintiff from the same." Rego v. Van Pelt, 65 Cal. 254, 256, 3 Pac. 867.

A complaint against several defendants which alleges that defendant committed the ouster is not on this account defective, it being a mere clerical error which could not have misled defendants. Fay v. McKeever, 59 Cal. 307.

Disseizin should be alleged under the Me. Rev. St. c. 104, § 2, although it is not necessary to use the word "disseized." Roberts v. Niles, 95 Me. 244, 49 Atl. 1043.

88. Tetherow v. Chambers, 74 Mo. 183.

It is not necessary to allege ouster where the complaint alleges possession in defendant, and that plaintiff is legally entitled to the same. Alexander v. Campbell, 74 Mo. 142.

Possession by defendant at the commencement of the action need not be alleged. Herrick v. Graves, 16 Wis. 157.

Possession is sufficiently averred, in the absence of a demurrer, where the complaint alleges the leasing of the premises to defend-

made wilfully, fraudulently, maliciously, and forcibly, these words will not if it is otherwise sufficient detract from its character as a complaint in ejectment.[89]

b. Time of Ouster. The day of the ouster need not be alleged, it being sufficient if laid after the demise.[90]

c. Wrongful Detention. The complaint should state that defendant withholds possession unlawfully[91] or wrongfully,[92] or should contain an equivalent allegation[93] or allege facts showing that his possession is unlawful or wrongful.[94]

d. Demand and Notice. In those cases where demand for possession of the premises or a notice to quit is necessary to be proven it should be alleged.[95]

B. Plea, Answer, and Disclaimer[96] — **1. In General.** The proper plea in ejectment has been held to be "not guilty,"[97] which raises the general issue,[98] under which any available defense may be taken.[99] And by statute it may be sufficient for defendant to deny generally the title alleged in the petition.[1] But

ant; that the lease has expired; and that defendant refused to vacate the premises and "has withheld and still withholds the possession thereof from the plaintiff." McKissick *v.* Ashby, 98 Cal. 422, 33 Pac. 729.

89. Hildreth *v.* White, 66 Cal. 549, 6 Pac. 454.

In an action against a tenant holding over the complaint need not allege that the holding is by force. Wheeler *v.* Reitz, 92 Ind. 379.

90. Woodward *v.* Brown, 13 Pet. (U. S.) 1, 10 L. ed. 31. *Compare* Cole *v.* Segraves, 88 Cal. 103, 25 Pac. 1109; Miller *v.* Shackleford, 4 Dana (Ky.) 264.

Date of ouster is material only on the question of mesne profits. Yount *v.* Howell, 14 Cal. 465. See Collier *v.* Corbett, 15 Cal. 183.

91. Lafayette Second Nat. Bank *v.* Corey, 94 Ind. 457; Levi *v.* Engle, 91 Ind. 330; Vance *v.* Schroyer, 71 Ind. 501; Moores *v.* Lehman, 52 N. Y. Super. Ct. 283. See Weiss *v.* Bethel, 8 Oreg. 522.

Although the premises are not actually occupied a statutory requirement that the complaint aver an unlawful withholding should be complied with. Platto *v.* Jante, 35 Wis. 629. *Compare* Gowan *v.* Bensel, 53 Minn. 46, 54 N. W. 934.

"Unlawfully withholds" possession is held insufficient in South Carolina, plaintiff being required to allege facts showing it to be unlawful. Tompkins *v.* Augusta, etc., R. Co., 33 S. C. 216, 11 S. E. 692; Tutt *v.* Port Royal, etc., R. Co., 28 S. C. 388, 5 S. E. 831.

92. Whipple *v.* McGinn, 18 R. I. 55, 25 Atl. 652.

93. Moores *v.* Lehman, 52 N. Y. Super. Ct. 283.

An equivalent of "unlawfully" is "without right" (Smith *v.* Kyler, 74 Ind. 575); but "unjustly" is not (Osborne *v.* U. S., 3 N. M. 213, 5 Pac. 465).

94. Postlewaite *v.* Wise, 17 W. Va. 1. See Holmes *v.* Williams, 16 Minn. 164.

95. McClane *v.* White, 5 Minn. 178.

Applications of rule.— A petition is insufficient in a summary proceeding brought by an execution purchaser of land to recover possession from defendant or his lessee, where it does not allege a demand or notice to quit. Fitzgerald *v.* Beebe, 7 Ark. 310. And an entry on or claim to the real estate should be alleged in an action by one to recover the land because of an alleged breach of a condition subsequent contained in the conveyance thereof. Clark *v.* Holton, 57 Ind. 564. But where defendant entered under plaintiff, agreeing to pay interest on the purchase-money in place of rent, and that plaintiff could reënter in case of failure to pay, and defendant repudiates the relation and sets up adverse title in himself, plaintiff need not aver demand and notice. Coates *v.* Cleaves, 92 Cal. 427, 28 Pac. 580.

96. **For forms of plea or answer** see Adams Ejectm. 361, 488; King *v.* La Grange, 61 Cal. 221, 227; Chivington *v.* Colorado Springs Co., 9 Colo. 597, 599, 14 Pac. 212; Fengar *v.* Brown, 57 Conn. 60, 61, 17 Atl. 321; Cody *v.* Quarterman, 12 Ga. 386, 392; Hentig *v.* Redden, 35 Kan. 471, 472, 11 Pac. 398; Ray *v.* Bowles, 83 Mo. 166, 167; Bouvier *v.* Stricklett, 40 Nebr. 792, 794, 59 N. W. 550.

97. Kirkland *v.* Thompson, 51 Pa. St. 216; Zeigler *v.* Fisher, 3 Pa. St. 365.

"Not guilty" was made the only plea in Pennsylvania by the act of April 13, 1807. Gallagher *v.* McNutt, 3 Serg. & R. (Pa.) 409.

The words "not guilty" present a plea under W. Va. Code, c. 90, § 13, providing that defendant shall plead that he "is not guilty of unlawfully withholding the premises claimed." Robinson *v.* Dewhurst, 68 Fed. 336, 15 C. C. A. 466.

98. Black *v.* Tricker, 52 Pa. St. 436. *Compare* Schenk *v.* Evoy, 24 Cal. 104.

Under Ill. Rev. St. (1845) p. 206, § 17, the general issue only could be pleaded. Warren *v.* Jacksonville, 15 Ill. 236, 58 Am. Dec. 610.

99. Lomb *v.* Pioneer Sav., etc., Co., 106 Ala. 591, 671, 17 So. 670; Black *v.* Tricker, 52 Pa. St. 436.

1. Wicks *v.* Smith, 18 Kan. 508.

Where seizin in fee and right to immediate possession is alleged in a complaint, an answer denying both seizin and right to possession is held good as a general denial, and to put plaintiff on proof of his title just as the plea of general issue would in the old action of trespass to try title. Ransom *v.* Anderson, 9 S. C. 438.

Where the answer of a tenant denies all the allegations of the petition and puts plaintiff upon proving such title or right to pos-

where a complaint alleges title, right to possession, and wrongful possession by defendant an answer is held fatally defective which does not deny title and right to possession of plaintiff.[2] Defendant should file his plea or answer within the time required by law.[3] Every reasonable intendment is to be indulged in favor of an answer as against an objection thereto first made in the appellate court, and it should be construed broadly and liberally.[4]

2. SPECIAL PLEAS. Where the general issue has been pleaded a special plea of matters which may be shown under the general issue is not allowable,[5] except where the rule has been changed by statute.[6] But a special plea to jurisdiction is proper.[7] And where any matter arises since issue joined which could have been pleaded *puis darrein continuance* it must be so pleaded or it cannot otherwise be given in evidence.[8] A special plea must be clear, definite, and explicit,[9] and is to be construed against the pleader who is presumed to allege the facts in the manner most favorable to himself.[10] So a plea which professes to answer the whole declaration, but which only answers a part, is bad on demurrer.[11] And special pleas which are immaterial may be properly stricken out.[12]

3. EQUITABLE TITLE AND DEFENSES. An equitable defense must be distinctly

session as will enable him to recover, such answer will not be stricken out, although the separate answer of the landlord, a co-defendant, was stricken out as presenting no valid defense. Jones *v.* Jackson, 38 Mo. 444.

2. Rhoades *v.* Higbee, 21 Colo. 88, 39 Pac. 1099.

3. Kelley *v.* Inman, 4 Ill. 28; Cooper *v.* Hughes, 39 N. J. L. 445; Jackson *v.* Woodward, 2 Johns. Cas. (N. Y.) 110.

In some cases, however, power has been vested in the court to extend the time, in its discretion, where good cause is shown for non-compliance. Short *v.* Conlee, 28 Ill. 219. *Compare* Dempsey *v.* Rhodes, 93 N. C. 120.

4. Bendikson *v.* Great Northern R. Co., 80 Minn. 332, 83 N. W. 194, holding that an answer alleging that defendant "took possession of said tract of land as lessee" of the owner and has ever since remained in possession "as such lessee" was, as against an objection first made on appeal, a sufficient allegation that defendant leased the land from the owner and occupied it under such lease.

5. Bruck *v.* Tucker, 42 Cal. 346; Crandall *v.* Lynch, 20 App. Cas. (D. C.) 73; Barbour *v.* Moore, 4 App. Cas. (D. C.) 535; Barco *v.* Fennell, 24 Fla. 378, 5 So. 9; Wade *v.* Doyle, 17 Fla. 522; Roosevelt *v.* Hungate, 110 Ill. 595. See also Cumming *v.* Butler, 6 Ga. 88.

A special plea of non est factum should be struck out where plaintiff relies on a mortgage and defendant pleads the general issue. McClendon *v.* Equitable Mortg. Co., 122 Ala. 384, 25 So. 30.

Special plea of statute of limitations is not allowable. Weiskoph *v.* Dibble, 18 Fla. 24; Dean *v.* Tucker, 58 Miss. 487. But see Chivington *v.* Colorado Springs Co., 9 Colo. 597, 14 Pac. 212, holding that in Colorado the statute of limitations must be specially pleaded or the defense will be considered as waived under the code of that state.

Where by code the only plea is general issue special pleas are to be regarded as mere nullities. Hutto *v.* Thornton, 44 Miss. 166. See also Johnston *v.* Griswold, 8 W. Va. 240; Fraser *v.* Weller, 9 Fed. Cas. No. 5,064, 6 McLean 11.

Where plaintiff has taken issue on special pleas and the defense set up therein has been proved, defendant is entitled to a general affirmative charge in his favor, although such pleas tendered an immaterial issue, and although the statute provides that the only plea shall be "not guilty." Richardson *v.* Stephens, 114 Ala. 238, 21 So. 949.

6. Thornburn *v.* Doscher, 32 Fed. 810, 13 Sawy. 60, holding that under Oreg. Code, § 316, the defense of ownership by defendant or another must be specially pleaded. See also Chivington *v.* Colorado Springs Co., 9 Colo. 597, 14 Pac. 212.

7. Barbour *v.* Moore, 4 App. Cas. (D. C.) 535.

8. Jackson *v.* Rich, 7 Johns. (N. Y.) 194. But *compare* Price *v.* Sanderson, 18 N. J. L. 426, holding that a plea *puis darrein continuance* that the lessor of plaintiff had entered upon the possession of defendant is not a good plea either in bar or abatement.

9. Lomb *v.* Pioneer Sav., etc., Co., 106 Ala. 591, 671, 17 So. 670.

10. Patrick *v.* Hutchason, 91 Ala. 320, 8 So. 821.

Plea of adverse possession in third party and license from him.— A special plea which sets up that the *locus* is in the actual adverse possession of a third person under a claim of title and that defendant has license from him, if only intended to deny the possession of plaintiff, is held bad on demurrer as only amounting to the general issue already pleaded, and if intended as a plea of license under the true owner is bad as denying plaintiff's possession and not alleging title in the third person. Alexander *v.* Eastland, 37 Miss. 554.

11. Kennedy *v.* Holman, 19 Ala. 734; Anderson *v.* Fisk, 36 Cal. 625; Dickerson *v.* Hendryx, 88 Ill. 66.

12. Kirton *v.* Bull, 168 Mo. 622, 68 S. W. 927.

pleaded,[13] the equities being fully and completely alleged in the answer[14] so as to warrant the court in granting a decree which will stop further prosecution of the action.[15] An answer setting up an equitable defense in an action of ejectment should contain in substance the elements of a bill in equity.[16] Again a defendant cannot set up facts as an equitable plea in bar which make such a legal defense as he could show under the general issue pleaded by him.[17]

4. Want of Title or Right of Possession in Plaintiff. The answer should be such as to apprise the adverse party of the defense intended to be relied on.[18] Defendant may by his answer controvert plaintiff's allegation of title in express words or set out the existence of facts which if true show that plaintiff has no title.[19] But a defendant who pleads title by adverse possession need not set forth

13. McCauley *v.* Fulton, 44 Cal. 355; Cadiz *v.* Majors, 33 Cal. 288; Lestrade *v.* Barth, 19 Cal. 660; Estrada *v.* Murphy, 19 Cal. 248.

14. Freeman *v.* Brewster, 70 Minn. 203, 72 N. W. 1068.

The facts should be fully stated. Arguello *v.* Bours, 67 Cal. 447, 8 Pac. 49; Tormey *v.* True, 45 Cal. 105; Shartzer *v.* Mountain Lake Park Assoc., 86 Md. 335, 37 Atl. 786; Travellers' Ins. Co. *v.* Walker, 77 Minn. 438, 80 N. W. 618; Freeman *v.* Brewster, 70 Minn. 203, 72 N. W. 1068.

In arriving at the meaning of an answer, however, it is decided that the inquiry is not to be confined to the definite allegations made, but if as a whole the pleading or the inferences reasonably flowing from the facts set forth show a defense, it will be sufficient. Sample *v.* Lyons, 59 N. Y. App. Div. 456, 69 N. Y. Suppl. 378.

15. Blum *v.* Robertson, 24 Cal. 127; Downer *v.* Smith, 24 Cal. 114.

16. Kentfield *v.* Hayes, 57 Cal. 409; Davis *v.* Davis, 26 Cal. 23, 85 Am. Dec. 157; Downer *v.* Smith, 24 Cal. 114; Carman *v.* Johnson, 20 Mo. 108, 61 Am. Dec. 593. *Compare* Weld *v.* Johnson Mfg. Co., 86 Wis. 549, 57 N. W. 378; Dobbs *v.* Kellogg, 53 Wis. 448, 10 N. W. 623.

Failure to ask for affirmative relief.— Where defendant sets up in his answer that the deed under which plaintiff claims was only a mortgage and that the debt has been fully paid, but does not ask for affirmative relief, it is held that he is not entitled to proceed with the trial of the question whether the deed was a mortgage, on the ground of an equitable defense. Smith *v.* Smith, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186, 549.

The case is converted into a suit in equity where the answer admits the legal cause of action and sets up matters of an equitable character in avoidance. Dunn *v.* McCoy, 150 Mo. 548, 52 S. W. 21; Lewis *v.* Rhodes, 150 Mo. 498, 52 S. W. 11; Swon *v.* Stevens, 143 Mo. 384, 45 S. W. 270.

Whether a case within the equity jurisdiction of the court is set forth by the answer must be determined by the answer itself. Bodley *v.* Ferguson, 30 Cal. 511. See also Meeker *v.* Dalton, 75 Cal. 154, 16 Pac. 764.

He who asks equity must do equity, and where a defendant in his answer tenders the consideration paid for a conveyance by him to plaintiff and seeks to have the conveyance set aside, if he withdraws such tender, on plaintiff's acceptance of his offer, so much of the answer as sets up an equitable defense may be properly struck out. Andola *v.* Picott, 5 Ida. 27, 46 Pac. 928.

17. Johnson *v.* Drew, 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172. See also Michael *v.* Joy, 91 Md. 75, 46 Atl. 385; Thummel *v.* Holden, 149 Mo. 677, 51 S. W. 404.

Non-delivery of deed is a defense at law. McNear *v.* Williamson, 166 Mo. 358, 66 S. W. 160.

18. Dutch Flat Water Co. *v.* Mooney, 12 Cal. 534.

Documentary evidence of title is in some cases required to be filed with answer. Beard *v.* Wilson, 52 Ark. 290, 12 S. W. 567. See also Spaulding *v.* Baldwin, 31 Ind. 376.

The nature and duration of an estate or interest claimed by defendant in the premises is sufficiently stated by the plea that defendant is the owner of a perpetual right of way over such premises. Lewis *v.* Oregon Cent. R. Co., 15 Fed. Cas. No. 8,329.

Where title to a part of the premises is set up by defendant, he must specify the part he claims in order to apprise his adversary of it so that he may bring proofs understandingly. Anderson *v.* Fisk, 36 Cal. 625; Slaughter *v.* Detiney, 10 Ind. 103. See also Bailey *v.* McConnell, 14 S. W. 337, 12 Ky. L. Rep. 473; Pease *v.* Hannah, 3 Oreg. 301.

19. By omitting to put the title in issue by a distinct and specific denial, he takes upon himself the burden of stating facts in his answer, which taken to be true are sufficient of themselves to show that plaintiff has no title. Corwin *v.* Corwin, 9 Barb. (N. Y.) 219. *Compare* McTarnahan *v.* Pike, 91 Cal. 540, 27 Pac. 784; Over *v.* Shannon, 75 Ind. 352; Kilbourne *v.* Lockman, 8 Iowa 380; Ford *v.* Sampson, 30 Barb. (N. Y.) 183; Terrell *v.* Wheeler, 13 N. Y. Civ. Proc. 178.

A defendant claiming title under a tax deed should plead the statute of limitations in order to protect the deed from impeachment for defects and irregularities in the tax proceedings. Morgan *v.* Bishop, 56 Wis. 284, 14 N. W. 369. Such statute is sufficiently pleaded by stating the facts showing defendant to be within its protection. Whitney *v.* Marshall, 17 Wis. 174.

An answer alleging forfeiture by non-compliance with mining rules should set out

the nature and character of such possession.[20] Nor is it necessary, where the answer alleges that the deed under which plaintiff claims is void, to also allege that plaintiff had notice of defendant's title.[21] And averments in a complaint as to ownership of plaintiff's grantors are held to be immaterial and it is not necessary to deny them.[22] So where the answer denies title in plaintiff, further allegations of particulars in which such title is defective may be properly struck out as surplusage.[23]

5. Matters in Abatement.[24] Pleas in abatement in ejectment have been declared to be rare, but nevertheless pleadable whenever right so requires.[25]

6. Disclaimer. Although it has been declared that disclaimer is unknown in[26] or is not properly a plea in ejectment,[27] yet as a general rule a defendant has been allowed to file one.[28] A disclaimer of a part of the lands demanded should

such rules. Dutch Flat Water Co. *v.* Mooney, 12 Cal. 534.

A plea alleging that plaintiff claims under a tax rule and setting up several special defenses attacking the tax proceedings should allege that plaintiff's title is based solely on such proceedings. Caines *v.* Katz, 95 Mo. 333, 7 S. W. 18.

A plea denying seizin or possession by plaintiffs, or those under whom they claim within seven years prior to the commencement of the action, is held bad for want of an allegation of adverse possession in defendant during said time. Wade *v.* Doyle, 17 Fla. 522.

A statement of matters which might be evidence in support of title in defendant is not a proper plea of such title under Oreg. Code, § 316. Wythe *v.* Myers, 30 Fed. Cas. No. 18,119, 3 Sawy. 595; Moreland *v.* Marion County, 17 Fed. Cas. No. 9,794; Hall *v.* Austin, 11 Fed. Cas. No. 5,925, Deady 104. See also Fitch *v.* Cornell, 9 Fed. Cas. No. 4,834, 1 Sawy. 156, holding that defendant should not, under Oreg. Code, §§ 226, 227, requiring defendant to state the nature and duration of the estate he claims, state the evidence of it.

Want of title in plaintiff is a legal defense in Wisconsin and well pleaded by a general denial in the answer. Fowler *v.* Scott, 64 Wis. 509, 25 N. W. 716.

20. Bartlett *v.* Secor, 56 Wis. 520, 14 N. W. 714.

21. Funkhauser *v.* Mallen, 62 Mo. 555.

22. Morgan *v.* Tillottson, 73 Cal. 520, 15 Pac. 88. But see Sharp *v.* Dangney, 33 Cal. 505.

23. Nelson *v.* O'Brien, 139 Cal. 628, 73 Pac. 469.

Where defendant does not allege that he is a creditor of plaintiff it is proper to strike out averments therein of acts of the latter alleged to be fraudulent as against his creditors. Moore *v.* Ivers, 83 Mo. 29.

24. **Matters in abatement** generally see Abatement and Revival, 1 Cyc. 10.

25. Rouche *v.* Williamson, 25 N. C. 141, 149 [*citing* Doe *v.* Roe, 10 East 523; Denn *v.* Fenn, 8 T. R. 474].

Defendant is not precluded from entering a plea in abatement, although it is provided by statute or code that the plea in ejectment shall be "not guilty." Campbell *v.* Galbreath, 5 Watts (Pa.) 423. See also James River, etc., Co. *v.* Robinson, 16 Gratt. (Va.) 434.

Thus defendant may plead in abatement such matters as marriage or death (McCormic *v.* Leggett, 53 N. C. 425); misnomer (Dixon *v.* Cavenaugh, 1 Overt. (Tenn.) 365. *Compare* Augusta Mfg. Co. *v.* Vertrees, 4 Lea (Tenn.) 75); improper joinder of defendants (Gibbons *v.* Martin, 10 Fed. Cas. No. 5,381, 4 Sawy. 206) or non-joinder of a defendant (Tucker *v.* Starks, Brayt. (Vt.) 191. *Compare* Stapp *v.* Wilkinson, 80 Ala. 47); plaintiff's taking possession (McCormic *v.* Leggett, 53 N. C. 425; Johnson *v.* Swain, 44 N. C. 335); that there is no such person as the alleged plaintiff (Campbell *v.* Galbreath, 5 Watts (Pa.) 423); the omission of the name of the township in the description as filed (Lyons *v.* Miller, 4 Serg. & R. (Pa.) 279); or the pendency of an action of covenant for a breach of a contract to convey in a subsequent action of ejectment to enforce specific performance (Findlay *v.* Keim, 62 Pa. St. 112, holding also that after going to trial on the merits it is too late to make such plea); or in an action against the holders of a tax-title that plaintiff had not filed the affidavit required by law to the effect that he had tendered the purchasers or their representatives the full amount of all taxes and costs and the statutory interest thereon and the full value of all improvements and that the same had been refused. Pope *v.* Macon, 23 Ark. 644.

But defendant cannot plead in abatement facts tending to deny plaintiff's title (Peters *v.* Banta, 120 Ind. 416, 22 N. E. 95) or the disability of the lessor of plaintiff (Rouche *v.* Williamson, 25 N. C. 141).

26. Ellis *v.* Jeans, 26 Cal. 272.

27. Kirkland *v.* Thompson, 51 Pa. St. 216; Zeigler *v.* Fisher, 3 Pa. St. 365.

28. A disclaimer may be filed during the trial. Harris *v.* Tyson, 24 Pa. St. 347, 64 Am. Dec. 661. But see Steinmets *v.* Logan, 3 Watts (Pa.) 160.

After a plea by a defendant which admits possession he cannot subsequently file a disclaimer. Alexander *v.* Wheeler, 69 Ala. 332; Graybeal *v.* Powers, 83 N. C. 561.

No defense should be entered by one who intends to disavow possession. McClennan *v.* McLeod, 75 N. C. 64; Thomas *v.* Orrell, 27 N. C. 569, 44 Am. Dec. 58.

The action cannot be defeated by a dis-

show to what part the disclaimer applies.[29] And a plea which is not technically a disclaimer, but is in the nature of a special plea in bar, should be rejected where the only proper plea is not guilty.[30] A disclaimer will operate as an estoppel by record as to the part of the land disclaimed unless withdrawn or amended by leave of court.[31] Where defendant files an answer disclaiming all right, title, interest, and possession in the premises, judgment should be entered on the pleadings in favor of plaintiff.[32] The fact that a disclaimer of title has been filed by defendant accompanied by a denial of possession does not entitle him to dismissal,[33] although it may relieve him from further costs.[34]

7. SEVERAL OR INCONSISTENT PLEAS.[35] The pleas of not guilty and disclaimer are incompatible and cannot be pleaded as a defense to the recovery of the same land.[36] But in some jurisdictions defendant may set forth as many grounds of defense, legal or equitable, as he may have.[37] And a special denial of possession

claimer of title by plaintiff pending the action, made without consideration or the advice of counsel, and which is subsequently contested by plaintiff. Martin *v.* Walker, 94 Ga. 477, 21 S. E. 223.

The court may permit a defendant to disclaim on condition of permitting plaintiff to take judgment by default for recovery of the premises where the sheriff has returned the summons with an affidavit that defendant was actually in possession and it appears at the hearing that he was not in possession at the time of the issuance of the summons. Stewart *v.* Camden, etc., R. Co., 33 N. J. L. 115.

What amounts to a disclaimer see McCarnan *v.* Cochran, 57 Ind. 166; Carson *v.* Dundas, 39 Nebr. 503, 58 N. W. 141.

29. Christy *v.* Scott, 14 How. (U. S.) 282, 14 L. ed. 422. *Compare* Buxbaum *v.* McCorley, 99 Ala. 537, 13 So. 5; Graybeal *v.* Powers, 83 N. C. 561. And it has been decided that a defendant who does not specify the portion for which he intends to defend, and disclaim as to the balance, cannot complain, although the finding be against him for the whole. Guy *v.* Hanly, 21 Cal. 397. See also Carrington *v.* Goddin, 13 Gratt. (Va.) 587. But see Cowles *v.* Ferguson, 90 N. C. 308.

A defendant wishing to defend as to a part only of the premises and to obtain a proportionate reduction in the damages awarded as mesne profits should specify the portion of the premises for which it was intended to defend and disclaim as to the balance. Guy *v.* Hanly, 21 Cal. 397.

Where defendants are required to admit possession before being permitted to defend, it has been decided that two defendants, survivors of three sued as joint tenants, may disclaim as to a portion of the premises not possessed by them and admitting possession, may defend as to the remaining portion. Payne *v.* Ormond, 44 Ga. 514.

30. Reynolds *v.* Cook, 83 Va. 817, 3 S. E. 710, 5 Am. St. Rep. 317.

31. Greeley *v.* Thomas, 56 Pa. St. 35. See also Burt *v.* Florida Southern R. Co., 43 Fla. 339, 31 So. 265, where it is decided that defendant, who has pleaded not guilty and that he was not in possession and who subsequently withdraws the second plea and after verdict in his favor amends his answer by disclaiming as to the greater part of the land, voluntarily relinquishes by such plea the right to a judgment which will be an estoppel on the question of title as to all the lands sued for and disclaimed by defendant.

32. Kansas, etc., R. Co. *v.* McBratney, 10 Kan. 415. See also McAdams *v.* Lotton, 118 Ind. 1, 20 N. E. 523, under the Indiana statute. But see Noe *v.* Card, 14 Cal. 576, where it is held that a disclaimer of title and possession does not authorize a judgment by confession, for it does not confess possession which is necessary to found a judgment.

33. **Where the disclaimer discloses the owner's name** and residence the action will not be dismissed but plaintiff may cite the real owner. Scott *v.* Bowles, 3 La. Ann. 637.

34. Killen *v.* Compton, 60 Ga. 116. See also 11 Cyc. 82.

Defendant is only relieved from liability for costs in such a case when the claimant's right to recover is defeated by a disclaimer in the pleadings. Cooper *v.* Great Falls Cotton Mills Co., 94 Tenn. 588, 30 S. W. 353.

35. **Several defenses** see *supra*, III, L.

36. Buxbaum *v.* McCorley, 99 Ala. 537, 13 So. 5; Torrey *v.* Forbes, 94 Ala. 135, 10 So. 320; McQueen *v.* Lampley, 74 Ala. 408; Bernstein *v.* Humes, 60 Ala. 582, 31 Am. Rep. 52. *Compare* Scranton *v.* Bosarge, (Miss. 1896) 19 So. 194.

Pleading the general issue waives a disclaimer filed by defendant. Danner *v.* Crew, 137 Ala. 617, 34 So. 822; Alexander *v.* Wheeler, 69 Ala. 332.

37. Penny *v.* Cook, 19 Iowa 538; Goodman *v.* Nichols, 44 Kan. 22, 23 Pac. 957; Ledbetter *v.* Ledbetter, 88 Mo. 60.

Equitable defenses not inconsistent with general denial see Fisher *v.* Stevens, 143 Mo. 181, 44 S. W. 769.

Inconsistent or contradictory defense may be pleaded under Oreg. Civ. Code, § 72 (Hall *v.* Austin, 11 Fed. Cas. No. 5,925, Deady 104); and likewise in North Carolina under Clark Code Civ. Proc. § 245 (3d ed.), provided they are separately stated (McLamb *v.* McPhail, 126 N. C. 218, 35 S. E. 426).

Under the Montana practice it is decided that the defendant may deny *seriatim* the allegations of the complaint showing title in plaintiff and may set forth new matter for

is held not inconsistent with a plea of not guilty.[38] Where the parties raise no objection prior to going to trial on issues made by the pleading they cannot after the verdict object that the answer sets up inconsistent defenses.[39]

8. SET-OFF AND COUNTER-CLAIM.[40] A counter-claim set up by defendant must stand as an independent pleading,[41] and all the facts should be set forth as if it were a petition in an independent action.[42]

C. Cross Complaint and Answer Thereto. Where equities are alleged by a defendant in a cross bill as a defense and a prayer for equitable relief is based thereon the facts should be as fully set forth as it would be necessary to allege them in the stating part of a bill in equity.[43] Defendant cannot set up by way of cross complaint facts which do not constitute a defense to the action, but are intended merely as the foundation for a money judgment.[44] Parties should not be made co-defendants by a cross petition which does not raise any issue in which they are interested.[45]

D. Subsequent Pleadings — 1. REPLY. Where a plaintiff fails to reply to new matter set up by defendant, such as title in the latter, it will be taken as true against the former.[46] If an equitable defense is set up plaintiff may reply equitable matter in rebuttal, although not set up in the complaint.[47] He may also in

the purpose of showing title in himself. Northern Pac. R. Co. *v.* McCormick, 55 Fed. 601.

38. Buesing *v.* Forbes, 33 Fla. 495, 15 So. 209, holding thus under a statute providing that the plea of not guilty shall be held to admit possession of defendant or, in case of an adverse claimant, the adverse claim of defendant, and should defendant wish to deny possession or that he claims adversely it shall be done by special plea. But see Powell *v.* Watson, 66 Miss. 176, 5 So. 513.

A mere statutory suggestion of adverse possession for a certain period made by defendant with a view to ascertaining the allowance for the value of permanent improvements as provided by the code is not a defense or plea to the action which can be stricken out as repugnant to the plea of not guilty. Newsome *v.* Guy, 109 Ala. 305, 19 So. 448.

39. Schaefer *v.* Causey, 8 Mo. App. 142.

40. **Set-off and counter-claim** as a defense see *supra*, III, J; and, generally, RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

41. Rucker *v.* Steelman, 73 Ind. 396, holding that a pleading cannot be both a counter-claim and an answer.

42. Allen *v.* Douglass, 29 Kan. 412. See also Crecelius *v.* Mann, 84 Ind. 147; Rucker *v.* Steelman, 73 Ind. 396; Travelers' Ins. Co. *v.* Walker, 77 Minn. 438, 80 N. W. 618; Freeman *v.* Brewster, 70 Minn. 203, 72 N. W. 1068. It may, however, in some cases be sufficient as against a general demurrer, although it may possibly be open to a motion to make it more definite and certain. Parker *v.* Vinson, 11 S. D. 381, 77 N. W. 1023.

A counter-claim resting on defendant's legal title cannot generally be set up. Lawe *v.* Hyde, 39 Wis. 345.

But a plea of usury or set-off is not authorized by a statute providing that, in an action by a mortgagee against a mortgagor to recover the land conveyed by the mortgage, defendant "may plead payment of the mortgage debt or the performance of the conditions of the mortgage." McKinnon *v.* Lessley, 89 Ala. 625, 8 So. 9.

The title claimed is sufficiently set forth in a counter-claim which alleges that defendant is the owner in fee simple of the real estate. McMannus *v.* Smith, 53 Ind. 211.

43. Arguello *v.* Bours, 67 Cal. 447, 8 Pac. 49.

Affirmative relief should be asked for. Hills *v.* Sherwood, 48 Cal. 386; Dewey *v.* Hoag, 15 Barb. (N. Y.) 365.

A cross complaint should be complete in itself. Meyendorf *v.* Frohner, 3 Mont. 282.

A cross complaint is good on demurrer which shows that the cross complainant owns the land in fee and states that plaintiff asserts title but has none. Collins *v.* McDuffie, 89 Ind. 562.

Where one action for two separate parcels is brought defendant may in one cross complaint seek affirmative relief as to each parcel separately. Eureka *v.* Gates, 120 Cal. 54, 52 Pac. 125.

An allegation in an answer of title in defendant is held but a general denial in an argumentative form and not to constitute a cross complaint requiring a denial of its allegations. Phillips *v.* Shagart, 113 Cal. 552, 45 Pac. 843, 54 Am. St. Rep. 369. *Compare* Nelson *v.* O'Brien, 139 Cal. 628, 73 Pac. 469.

44. Hoffman *v.* Remnant, 72 Cal. 1, 12 Pac. 804.

45. Klinker *v.* Schmidt, 106 Iowa 70, 75 N. W. 672.

Where a cross complaint makes an additional party defendant and the latter answers disclaiming any interest in the premises and shows that it was the property of the original plaintiff by devise it is error to strike out his answer on motion of the original defendant. Montgomery *v.* Gorrell, 51 Ind. 309.

46. Newman *v.* Newton, 14 Fed. 634, 4 McCrary 293, under Colo. Code Civ. Proc. § 250.

47. Hardin *v.* Ray, 94 N. C. 456.

some cases avail himself in the reply of matter in avoidance.[48] It has, however, been decided that matter which amounts only to a denial of plaintiff's title need not be replied to,[49] nor need surplusage matter.[50] But a reply is defective where it is evasive and not responsive to the answer,[51] is a departure,[52] or tenders an immaterial issue.[53]

2. REJOINDER. A rejoinder which is a departure and tenders a traverse on a traverse is bad.[54]

E. Denials and Admissions and Effect Thereof — 1. IN GENERAL. Matters which are alleged in the complaint and which are not denied by the answer of defendant may be regarded as admitted.[55] And plaintiff may rely on admissions in the answer and be relieved from proof of the facts thus admitted.[56] The defense of adverse possession is held to be a denial of plaintiff's title.[57] And a denial in the answer that defendant "derived" title from a common source will, in the absence of a motion for a more specific statement, be treated as a denial of

48. South Park Com'rs *v.* Gavin, 139 Ill. 280, 28 N. E. 826.

To a plea of "liberum tenementum" plaintiff may reply either by traversing the title generally and showing by way of avoidance that the title was destroyed, or he may admit the title and show that it was taken away by adverse possession. Crockett *v.* Lashbrook, 5 T. B. Mon. (Ky.) 530, 17 Am. Dec. 98.

49. Thompson *v.* Thompson, 52 Cal. 154.

50. Kyser *v.* Cannon, 29 Ohio St. 359. See also Raymond *v.* Morrison, 9 Wash. 156, 37 Pac. 318.

51. Swope *v.* Schwartz, 15 S. W. 251, 12 Ky. L. Rep. 853.

52. Morris *v.* Beebe, 54 Ala. 300.

53. Bailey *v.* Selden, 124 Ala. 403, 26 So. 909.

Sufficiency of reply generally see Steeple *v.* Downing, 60 Ind. 478; Kratemayer *v.* Brink, 17 Ind. 509.

54. Price *v.* Sanderson, 18 N. J. L. 426.

55. Stafford *v.* Watson, 41 Ark. 17 (failure to deny allegation as to whom plaintiff claimed under); Langley *v.* Jones, 26 Md. 462 (admission of location of plaintiff's pretensions); Johnson *v.* Pate, 90 N. C. 334 (failure to deny the existence of the record of a judgment under which plaintiff claims).

Admission of title.— Where ownership in plaintiff and ouster by defendant is alleged in the complaint, and the answer admits possession, avers fee in defendant, and deraigns title from an administrator's sale, the answer amounts to an admission of plaintiff's title if the sale was void. Pryor *v.* Madigan, 51 Cal. 178.

An admission of possession of part of the land claimed and that the same is withheld by defendant, coupled with a denial of possession or withholding of the remainder, such admission and denial being preceded by a denial of every obligation "except as hereinafter stated," does not amount to an admission that plaintiffs own such remainder. Stites *v.* Gater, (Cal. 1896) 45 Pac. 185.

An answer alleging that the deed is void under which plaintiff claims, but which fails to allege that he had notice of defendant's title, does not thereby admit that plaintiff is an innocent purchaser for value. Funkhouser *v.* Mallen, 62 Mo. 555.

Plea of not guilty admits that the land described is that covered by the title alleged in the declaration. Tongue *v.* Nutwell, 17 Md. 212, 79 Am. Dec. 649.

Title not being put in issue by direct allegation it should not be held to be put in issue by mere inference through the assertion by defendant of title in himself. Knight *v.* Denman, (Nebr. 1903) 94 N. W. 622.

56. Voltz *v.* Newbert, 17 Ind. 187 (admission of boundaries alleged by plaintiff); Heinz *v.* Cramer, 84 Iowa 497, 51 N. W. 173 (admission of title alleged by plaintiff); Russell *v.* Glasser, 93 Mo. 353, 6 S. W. 362 (admission as to deeds constituting a chain in plaintiff's title).

An answer admitting that defendant claims from a certain grantor may be relied on by plaintiff who need not prove title in such grantor. McDonald *v.* Hannah, 59 Fed. 977, 8 C. C. A. 426.

A plaintiff may rely on admission in answer of title in his grantor prior to the date of his deed without admitting the further allegation therein as to a grant of the same or other lands by the same grantor to defendant. Orton *v.* Noonan, 19 Wis. 350.

If a defendant in pleading his equity unqualifiedly pleads the legal title or right of possession out of himself and in plaintiff, the latter need not offer evidence of his title, especially where he waives damages, rents, and profits. Ledbetter *v.* Ledbetter, 88 Mo. 60.

Where defendant pleads two defenses, however, one a general denial and the other by way of confession and avoidance, any admission contained in the latter plea cannot be resorted to by plaintiff to establish the issue raised by the former. Stanley *v.* Shoolbred, 25 S. C. 181.

57. Clayton *v.* Rose, 87 N. C. 106. *Compare* Knight *v.* Denman, 64 Nebr. 814, 90 N. W. 863.

That defendant claims by adverse possession in his bill of particulars does not admit that plaintiff has a good paper title. Troth *v.* Smith, 68 N. J. L. 36, 52 Atl. 243.

an allegation that he claimed title through a common source.[58] Again where there is a denial in the answer of the title of plaintiff the latter must recover on the strength of his own title.[59]

2. **Possession and Ouster.** The possession of defendant is admitted by the plea of not guilty or general issue,[60] by a general denial,[61] or by an answer which does not deny possession,[62] in which case it is not necessary for plaintiff to prove it.[63] So ouster may be admitted by the pleadings,[64] as where the answer puts in issue plaintiff's title and right of possession but does not deny that defendant is in possession,[65] or by the denial of title of a cotenant.[66] And a landlord who is admitted to defend in an action against his tenant is held to admit his or his tenant's possession.[67] But a denial of entry and ouster also necessarily denies a withholding of possession.[68] And an answer which denies plaintiff's title and avers title in another, and that defendant's title has been divested by a judicial sale, and that the purchaser at such sale has been put in possession, is a denial of possession.[69]

3. **Confession of Lease, Entry, and Ouster — Consent Rule.** The common consent rule[70] admits lease, entry, and ouster,[71] and dispenses with proof of

58. Nicklace *v.* Dickerson, 65 Ark. 422, 46 S. W. 945.

59. Jones *v.* Griffin, 25 Ky. L. Rep. 117, 74 S. W. 713, holding that in such a case it is improper to sustain a demurrer to the answer because the averments therein as to defendant's own title are insufficient.

60. *Alabama.*— Newton *v.* Louisville, etc., R. Co., 110 Ala. 474, 19 So. 19; Bernstein *v.* Humes, 60 Ala. 582, 31 Am. Rep. 52; Philpot *v.* Bingham, 55 Ala. 435.

Florida.— Buesing *v.* Forbes, 33 Fla. 495, 15 So. 209.

Illinois.— Wieland *v.* Kobick, 110 Ill. 16, 51 Am. Rep. 676.

Indiana.— Holman *v.* Elliott, 86 Ind. 231.

Maine.— Coffin *v.* Freeman, 82 Me. 577, 20 Atl. 238.

Maryland.— Wallis *v.* Wilkinson, 73 Md. 128, 20 Atl. 787.

New Jersey.— French *v.* Robb, 67 N. J. L. 260, 51 Atl. 509, 91 Am. St. Rep. 433, 57 L. R. A. 956.

Pennsylvania.— Ulsh *v.* Strode, 13 Pa. St. 433; Hoig *v.* Clark, 22 Pa. Co. Ct. 552.

Tennessee.— James *v.* Brooks, 6 Heisk. 150.

See 17 Cent. Dig. tit. "Ejectment," § 202.

But see Cummings *v.* Butler, 6 Ga. 88; Stevens *v.* Griffith, 3 Vt. 448.

The plea of not guilty is equivalent in its effect to the consent rule. Swann *v.* Kidd, 78 Ala. 173; King *v.* Kent, 29 Ala. 542.

61. A general denial under Wash. Code Proc. § 532, admits that defendant is a trespasser without title. Allen *v.* Higgins, 9 Wash. 446, 37 Pac. 671, 43 Am. St. Rep. 847.

62. Schenk *v.* Evoy, 24 Cal. 104; Burke *v.* Table Mountain Water Co., 12 Cal. 403; Yorks *v.* Mooberg, 84 Minn. 502, 87 N. W. 1115; McCarty *v.* Clark County, 101 Mo. 179, 14 S. W. 51; Tomlinson *v.* Lynch, 32 Mo. 160.

63. McCreery *v.* Everding, 44 Cal. 284; Powell *v.* Oullahan, 14 Cal. 114; Wieland *v.* Kobick, 110 Ill. 16, 51 Am. Rep. 576.

A plea of title by adverse possession admits possession by defendant which plaintiff need not introduce proof of. Tatum *v.* St. Louis, 125 Mo. 647, 28 S. W. 1002.

64. Carpenter *v.* Carpenter, 119 Mich. 167, 77 N. W. 703.

65. Salmon *v.* Wilson, 41 Cal. 595. See also Moore *v.* Moore, (Cal. 1893) 34 Pac. 90; Ketchum *v.* Barber, (Cal. 1886) 12 Pac. 251.

66. Phelan *v.* Smith, 100 Cal. 158, 34 Pac. 667; Spect *v.* Gregg, 51 Cal. 198; Combs *v.* Brown, 29 N. J. L. 36; Aiken *v.* Lyon, 127 N. C. 171, 27 S. E. 199; Gilchrist *v.* Middleton, 107 N. C. 663, 12 S. E. 85.

67. Although if several tracts are embraced in the declaration the admission extends only to that tract the tenant of which was served with process. King *v.* Brittain, 32 N. C. 116.

68. Hawkins *v.* Reichert, 28 Cal. 534.

69. Carson *v.* Dundas, 39 Nebr. 503, 58 N. W. 141.

Sufficiency of denial of possession generally see Weeks *v.* Link, 137 Cal. 502, 70 Pac. 548; Huber *v.* Bletzer, 64 Hun (N. Y.) 638, 19 N. Y. Suppl. 506; Duncan *v.* Hall, 117 N. C. 443, 23 S. E. 362.

Where adverse possession is pleaded and it is stipulated that plaintiff was never in possession, although he is admitted therein to have had title, the stipulation will be construed as referring to actual possession. San Francisco *v.* Fulde, 37 Cal. 349, 99 Am. Dec. 278.

70. **The consent rule** in the English practice has been defined to be a superseded instrument, in which a defendant in an action of ejectment specified for what purpose he intended to defend, and undertook to confess not only the fictitious lease, entry, and ouster, but that he was in possession. Black L. Dict.

Form of consent rule see Adams Ejectm. 359.

71. Hilliard *v.* Doe, 7 Ga. 172.

Possession is admitted. Rawley *v.* Doe, 6 Blackf. (Ind.) 143; Atwell *v.* McLure, 49 N. C. 371. But see Albertson *v.* Reding, 6

them.[72] It also admits that the boundaries of the land are those given by plaintiff.[73] A special consent rule may, however, be entered into in some cases in which only lease and entry is admitted,[74] and ouster must be proved.[75]

F. Demurrer — 1. In General. When a cause of demurrer is assigned the reason or ground of it must also be stated.[76] A demurrer to a pleading may be overruled where the defects should be reached by motion and not by demurrer.[77]

2. To Declaration or Complaint. A demurrer is the proper remedy where the complaint is defective in not stating the nature and quality of the estate;[78] where it contains in addition to the facts in detail on which plaintiff's title rests, a subsequent allegation of ownership which is merely an unwarranted conclusion of law;[79] where it appears on the face of the petition that defendant has acquired a prescriptive title to the land in controversy as against plaintiff;[80] or where it appears by the allegation of the complaint that one of two co-defendants has conveyed his interest to the other.[81] And although an action to recover lands owned by a ward cannot be maintained by the guardian in his own name, yet where the title of the ward is fully set forth in the declaration, the guardian being only a nominal party, the objection should be taken by demurrer.[82]

3. To Plea, Answer, or Disclaimer. A demurrer to an answer admits only so much as goes to make a proper defense, and surplusage or immaterial matter is not admitted.[83] A disclaimer, being a confession of the cause of action and its office being to save costs which accrue after entry of judgment, is not demurrable.[84] The rule that a demurrer reaches back to the first defective pleading applies in the case of a demurrer to a counter-claim.[85]

N. C. 283. And defendant cannot narrow his defense to a possession of a part of the premises. Philadelphia *v.* Clifford, 4 Yeates (Pa.) 272. So where a defendant is substituted by consent he must admit that he was in actual possession. Wise *v.* Wheeler, 28 N. C. 196.

Such confession extends to an entry to complete the title. Holt *v.* Smith, 1 Harr. & M. (Md.) 273.

72. Hilliard *v.* Doe, 7 Ga. 172.

Ouster need not be proved. Armstrong *v.* Timmons, 3 Harr. (Del.) 342; Davis *v.* Whitesides, 1 Bibb (Ky.) 510; Jackson *v.* Denniston, 4 Johns. (N. Y.) 311; Hargrove *v.* Powell, 19 N. C. 97.

Proof of reëntry is not necessary where defendant was a party to the ejectment and entered into such rule. Cooch *v.* Gerry, 3 Harr. (Del.) 423.

Defendant is not precluded by the confession of the leases from showing on the trial that the lessor was dead or a *feme covert* at their date. Coleman *v.* Mabberly, 3 T. B. Mon. (Ky.) 220.

73. Dunn *v.* Games, 8 Fed. Cas. No. 4,176, 1 McLean 321.

74. In ejectment against a cotenant if defendant relies on want of actual ouster he should ask for a special rule to confess lease and entry only. Van Bibber *v.* Frazier, 17 Md. 436; Tongue *v.* Nutwell, 17 Md. 212, 79 Am. Dec. 649.

75. Jackson *v.* Leek, 12 Wend. (N. Y.) 105.

76. Brown *v.* Martin, 25 Cal. 82.

A general demurrer may be properly overruled, although a special demurrer might be sustained. White *v.* Scofield, 84 Ga. 56, 10 S. E. 591.

77. Vance *v.* Schroyer, 82 Ind. 114; Stringfellow *v.* Alderson, 12 Kan. 112.

78. Clark *v.* Crego, 47 Barb. (N. Y.) 599.

Conveyances attached to the complaint as exhibits do not become part of the pleadings, and a court in considering a demurrer to the complaint should look, not at the conveyances, but at the allegations only. Pruett *v.* Ramsey, (Ark. 1890) 14 S. W. 1095; Howell *v.* Rye, 35 Ark. 470; Cairo, etc., R. Co. *v.* Parks, 32 Ark. 131. See also Youn *v.* Pittman, 82 Ga. 637, 9 S. E. 667, holding that an action cannot be dismissed on demurrer to the abstract of title annexed to the declaration.

79. Ely *v.* Azoy, 39 Misc. (N. Y.) 669, 80 N. Y. Suppl. 620.

80. Gunter *v.* Smith, 113 Ga. 18, 38 S. E. 374.

81. Eisner *v.* Eisner, 5 N. Y. App. Div. 117, 38 N. Y. Suppl. 671.

A party is not precluded from pleading over, on overruling his demurrer by a code provision that the judgment for plaintiff on demurrer is that he recover the premises according to the description in the declaration, such provision being held to apply only where defendant fails to make any further defense. Martin *v.* Nance, 3 Head (Tenn.) 649.

82. Kinney *v.* Harrett, 46 Mich. 87, 8 N. W. 708.

83. Meyendorf *v.* Frohner, 3 Mont. 282.

84. McAdams *v.* Lotton, 118 Ind. 1, 20 N. E. 523.

85. Lawe *v.* Hyde, 39 Wis. 345.

4. To Replication. A mere general demurrer to a replication on the ground that it is "insufficient in law" is properly overruled.[86]

G. Amended and Supplemental Pleadings — 1. In General. The question as to the allowance or refusal of an amendment is ordinarily one for the trial court to determine in the exercise of its discretion,[87] and its ruling will not be reversed by the appellate court,[88] unless there appears to have been an abuse of discretion.[89] An amendment is properly not allowed where it is too remote from the original cause of action and the parties thereto to be germane to the controversy set out in the declaration.[90] And where the paragraphs of a petition characterize it as a possessory action defendant cannot by amendment change it into a petitory action.[91]

2. Parties. Although it has been decided that an amendment of a complaint by adding a new demise,[92] by striking out the original plaintiff and substituting another,[93] by which an entire change of parties is effected,[94] or by the addition of a new party plaintiff to the abstract of title, which by statute takes the place of demises, should not be allowed,[95] yet it is generally held that an amendment involving a change or addition of parties is a matter within the discretion of the court.[96] A simple action of ejectment, however, against one person for a certain

86. Tranum *v.* Drum, 112 Ala. 277, 20 So. 419.

87. *Maryland.*— Wallis *v.* Wilkinson, 73 Md. 128, 20 Atl. 787.

North Carolina.— Talbert *v.* Becton, 111 N. C. 543, 16 S. E. 322.

Pennsylvania.— Langdon *v.* Clouse, (1885) 1 Atl. 600.

Wisconsin.— Kennan *v.* Smith, 115 Wis. 463, 91 N. W. 986.

United States.— Wright *v.* Hollingsworth, 1 Pet. 165, 7 L. ed. 96.

See 17 Cent. Dig. tit. "Ejectment," § 205 *et seq.*

In New York it has been held that a plaintiff may amend his declaration as of course. Lounsbury *v.* Ball, 12 Wend. 247.

Amendments are favored which enable a party to prove all the facts necessary to his cause of action or defense. Crosby *v.* Clark, 132 Cal. 1, 63 Pac. 1022; Cal. Code Civ. Proc. § 473.

Declaration stating when plaintiff's right of action accrued may be amended by substitution of a later period. Vreeland *v.* Ryerson, 28 N. J. L. 205.

Cause should be shown by affidavit. Jackson *v.* Smith, 6 Cow. (N. Y.) 39.

Interlining amendment.— Where leave to extend the term in a demise has been given by the court on motion and the amendment is specific, it need not be interlined in the declaration. Walden *v.* Craig, 14 Pet. (U. S.) 147, 10 L. ed. 393.

Where the term laid in the declaration has expired pending the proceedings on an injunction preventing the execution of a writ of habere facias possessionem and the injunction is dissolved it has been decided that the court to which the motion for such writ was made may cause the term to be enlarged. Noland *v.* Seekright, 6 Munf. (Va.) 185.

88. Wright *v.* Hollingsworth, 1 Pet. (U. S.) 165, 7 L. ed. 96.

Where a supplemental answer contains a recital that it was filed by leave of court, and is a part of the judgment-roll brought up on appeal, it will be presumed by the appellate court that there was an order of the trial court allowing it to be filed. Roper *v.* McFadden, 48 Cal. 346.

89. Kirsch *v.* Smith, 64 Cal. 13, 27 Pac. 942. See also Kennan *v.* Smith, 115 Wis. 463, 91 N. W. 986.

90. Hobby *v.* Bunch, 83 Ga. 1, 10 S. E. 113, 20 Am. St. Rep. 301, holding that where a declaration sets out demises severally from two persons it should not be amended by ingrafting upon one of these demises an equitable claim for money in favor of a third person against defendant.

Application to amend refused.— See McIlhargey *v.* McGinnis, 9 Ont. Pr. 157 (refusing to allow plaintiff to amend his statement of claim and ask a foreclosure of the land as mortgagee); Mitchell *v.* Smellie, 20 U. C. C. P. 389 (refusing to allow plaintiff to add a claim for an alleged forfeiture of their lease to defendant under which latter claimed).

91. St. Amand *v.* Long, 25 La. Ann. 164.

92. Dudley *v.* Grayson, 6 T. B. Mon. (Ky.) 259; Currie *v.* Tibbs, 5 T. Mon. (Ky.) 440; May *v.* Hill, 5 Litt. (Ky.) 307; Gale *v.* Babcock, 9 Fed. Cas. No. 5,188, 4 Wash. 199.

Addition of another lessor can only be made by consent. Smith *v.* Steelman, 20 N. J. L. 116.

93. Gresham *v.* Webb, 29 Ga. 320.

94. Dougherty *v.* Powe, 127 Ala. 577, 30 So. 524.

95. Willis *v.* Meadors, 64 Ga. 721.

96. Chapin *v.* Curtenius, 15 Ill. 427 (adding a count making new parties plaintiff); Carson *v.* Smart, 34 N. C. 369 (striking out name of one of the lessors); Kaul *v.* Lawrence, 73 Pa. St. 410 (adding new party plaintiff); Wilkes *v.* Elliot, 29 Fed. Cas. No. 17,660, 5 Cranch C. C. 611 (adding new demise). And see Doe *v.* Clifton, 4 A. & E. 809, 6 L. J. K. B. 274, 31 E. C. L. 356; Doe *v.* Heron, 1 C. L. Ch. (Ont.) 99; Sutcliffe *v.* Wood, 53 L. J. Ch. 970, 50 L. T.

quantity of land cannot be expanded by amendment into an equitable proceeding against a number of persons to decree a lien on a much larger quantity of land, as this would amount to a complete and radical alteration of the whole scope of the action.[97]

3. Date of Demise. The date of the demise may be altered,[98] or extended or enlarged[99] in the discretion of the court,[1] provided it does not injure or impose any hardship on defendant.[2]

4. Description of Property. A mistake in the complaint in the description of the property may be corrected by amendment.[3]

5. Title, Estate, or Interest. An amendment may be made to a declaration to correct a defect therein which consists of a failure to set forth plaintiff's estate

Rep. N. S. 705; Wright *v.* Creighton, 30 U. C. C. P. 5; Henderson *v.* White, 23 U. C. C. P. 78; Bannerman *v.* Dewson, 17 U. C. C. P. 257; Robinson *v.* Bell, 9 U. C. C. P. 21; White *v.* McKay, 43 U. C. Q. B. 226.

An amendment has been allowed which adds as a plaintiff one who is named as a trustee for the original plaintiffs in a deed under which they claim title (Ebersole *v.* Rankin, 102 Mo. 488, 15 S. W. 422); which adds the name of trustees of trust property in ejectment by the mortgagee (Blake *v.* Done, 7 H. & N. 465, 7 Jur. N. S. 1306, 31 L. J. Exch. 100, 5 L. T. Rep. N. S. 429, 10 Wkly. Rep. 175); which adds a separate demise by each lessor of the plaintiff (Den *v.* Ganoe, 16 N. J. L. 439; Den *v.* Seagrave, 16 N. J. L. 357. See Jackson *v.* Kough, 1 Cai. (N. Y.) 251, Col. & C. Cas. (N. Y.) 230); or by which the demise of the lessors who are dead are struck out (Doe *v.* Bohannon, 5 T. B. Mon. (Ky.) 121; Jackson *v.* Reynolds, 1 Cai. (N. Y.) 20. *Compare* Doe *v.* Roe, 8 Jur. 476, 13 L. J. Exch. 304); or which adds the names of parties joined as plaintiffs who are barred by the statute of limitations (McBrayer *v.* Cariker, 64 Ala. 50) or who are not found to be entitled to the land (Waterman *v.* Andrews, 14 R. I. 589), the name of a defendant who disclaimed all interest in the land except as dowress (Weaver *v.* Burgess, 5 Ont. Pr. 307); the name of a defendant not in possession and who claims no right to the land (Hall *v.* Yuill, 2 Ont. Pr. 242. *Compare* Anglo-Canadian Mortg. Co. *v.* Cotter, 8 Ont. Pr. 111; Grogan *v.* Adair, 14 U. C. Q. B. 479); the name of a tenant in possession in an action against a landlord and his tenant (Kerr *v.* Waldie, 4 Ont. Pr. 138); the name of a trustee who has brought action after the trust has ceased (Westcott *v.* Edmunds, 68 Pa. St. 34); or the name of a wife improperly joined as defendant (Mattocks *v.* Stearns, 9 Vt. 326. See Barncord *v.* Kuhn, 36 Pa. St. 383).

An amendment adding new parties where necessary for the purpose of determining the real question in controversy is properly allowable by a judge at *nisi prius* under section 222 of the Common Law Procedure Act. Ogilvie *v.* McRory, 15 U. C. C. P. 557.

An amendment adding a new party plaintiff is improperly allowed where plaintiff has been guilty of laches in making the motion to amend, and because on a new trial to which defendant is entitled as a matter of right a new issue will be presented whether adverse possession, which was the defense on former trials, can be shown as against the new party. Crowley *v.* Murphy, 58 N. Y. Super. Ct. 257, 10 N. Y. Suppl. 698, 19 N. Y. Civ. Proc. 46.

An amendment adding a count on the demise of one alive at the commencement of an action, but who has since died, is improperly allowed. Skipper *v.* Lennon, 44 N. C. 189.

97. Finch *v.* Strickland, 132 N. C. 103, 43 S. E. 552.

98. Miller *v.* Shackleford, 4 Dana (Ky.) 264; Rogers *v.* Barnett, 4 Bibb (Ky.) 480; Anonymous, 8 N. J. L. 366; Denny *v.* Smith, 3 N. J. L. 710; Blackwell *v.* Patton, 7 Cranch (U. S.) 471, 3 L. ed. 408. See also Scott *v.* Creighton, 9 Ont. Pr. 253.

99. Maus *v.* Montgomery, 10 Serg. & R. (Pa.) 192, holding that if the lease laid in the declaration has expired the court should allow an amendment enlarging the term.

1. Craig *v.* McBride, 9 Dana (Ky.) 427; Rogers *v.* Barnett, 4 Bibb (Ky.) 480; Young *v.* Erwin, 2 N. C. 323; Walden *v.* Craig, 9 Wheat. (U. S.) 576, 6 L. ed. 164. *Compare* Cox *v.* Lacey, 3 Litt. (Ky.) 334, holding that an amendment adding a count stating a demise after the commencement of the term ought not to be permitted.

2. Meeker *v.* Doe, 7 Blackf. (Ind.) 169. See also Doe *v.* Fen, 11 N. Brunsw. 328; Doe *v.* Todd, 6 N. Brunsw. 601.

3. *California.*— Heilbron *v.* Heinlen, 72 Cal. 376, 14 Pac. 24.

Georgia.— Polhill *v.* Brown, 84 Ga. 338, 10 S. E. 921.

Maine.— Wyman *v.* Kilgore, 47 Me. 184.

Mississippi.— Cooper *v.* Granberry, 35 Miss. 117.

New Jersey.— Stewart *v.* Camden, etc., R. Co., 33 N. J. L. 115.

New York.— Russell *v.* Conn, 20 N. Y. 81; Olendorf *v.* Cook, 1 Lans. 37.

Pennsylvania.— Leeds *v.* Lockwood, 84 Pa. St. 70; Sample *v.* Robb, 16 Pa. St. 305.

See 17 Cent. Dig. tit. "Ejectment," § 208.

After the evidence is closed such an amendment may be made under Ala. Code, § 2254. Russell *v.* Irwins, 38 Ala. 44.

But a co-defendant who has been substituted as plaintiff cannot be allowed to amend the complaint so as to include other property than that originally sued for and which he claims by himself and under a different

in the land.[4] So he may be allowed, where his disclaimer has been stricken out, to amend his plea of not guilty by stating the extent of his possession;[5] or by amendment to show a claim to less than the quantity of land described,[6] to set up a mistake in a deed under which plaintiff claims,[7] or to show that the property sued for is community property.[8] And an amendment may be allowed claiming the entire tract where the action is against a husband and wife for an undivided moiety;[9] adding an abstract of plaintiff's title;[10] or by inserting a new demise.[11] Again a title acquired pending the action may be set up by amendment[12] or supplemental answer.[13] So an amendment may be allowed denying plaintiff's title to the premises.[14] But it is not error to reject an amended petition which merely seeks to plead the evidence or origin of plaintiff's title.[15] Nor can an amendment be made which introduces a new cause of action and would amount to the bringing of substantially a new suit.[16]

6. Prayer For Relief. An amendment as to the relief sought may in some cases be properly allowed.[17]

7. After Verdict, Judgment, or Nonsuit. A declaration or complaint, it has been held, may in many cases be amended after a verdict[18] or a judgment is rendered,[19]

title. Bullion Min. Co. *v.* Crœsus Gold, etc., Min. Co., 2 Nev. 168, 90 Am. Dec. 526.

4. Ludeman *v.* Hirth, 96 Mich. 17, 55 N. W. 449, 35 Am. St. Rep. 588.

5. Lea *v.* Slatterly, 7 Baxt. (Tenn.) 235.

6. Dougherty *v.* Purdy, 18 Ill. 206. See also Kellogg *v.* Kellogg, 6 Barb. (N. Y.) 116.

Where plaintiff claims an entire fee he may amend alleging an undivided half interest. Retan *v.* Sherwood, 120 Mich. 496, 79 N. W. 692.

7. Ely *v.* Early, 94 N. C. 1.

8. Owen *v.* St. Paul, etc., R. Co., 12 Wash. 313, 41 Pac. 44.

9. Barncord *v.* Kuhn, 36 Pa. St. 383.

10. Camp *v.* Smith, 61 Ga. 449.

Although an abstract may be amended, yet where no excuse is given for not filing a correct abstract at the beginning and plaintiff has been permitted to give in evidence all that could have been given if the abstract as amended had been filed, it is proper not to allow the amendment. Kellogg *v.* Gilfillan, (Pa. 1887) 10 Atl. 888.

11. Nance *v.* Thompson, 1 Sneed (Tenn.) 321. See also Giltner *v.* Carrollton, 7 B. Mon. (Ky.) 680.

An amendment inserting a new demise will not be allowed where the statute of limitations has attached, as it would be equivalent to a new action overreaching the statute. Jackson *v.* Murray, 1 Cow. (N. Y.) 156, 13 Am. Dec. 517.

12. Reily *v.* Lancaster, 39 Cal. 354; McMinn *v.* O'Connor, 27 Cal. 238; Taylor *v.* Gooch, 110 N. C. 387, 15 S. E. 2; Hardy *v.* Johnson, 1 Wall. (U. S.) 371, 17 L. ed. 502.

13. Peterson *v.* Albach, 51 Kan. 150, 32 Pac. 917.

Title so acquired should be set up by supplemental answer in order to be available. Bagley *v.* Ward, 37 Cal. 121, 99 Am. Dec. 256; Moss *v.* Shear, 30 Cal. 467; Johnson *v.* Briscoe, 92 Ind. 367; Kahn *v.* Old Tel. Min. Co., 2 Utah 174.

14. Nys *v.* Biemeret, 44 Wis. 104.

15. Howe *v.* Saddler, 25 S. W. 277, 15 Ky. L. Rep. 765.

16. Robbins *v.* Harris, 96 N. C. 557, 2 S. E. 70.

17. An amendment so as to include special damages may be made to the statutory form of a suit in ejectment. Lippett *v.* Kelley, 46 Vt. 516.

Striking out prayers for equitable relief.— Where there are allegations in a petition which are sufficient to authorize the recovery of the real property as well as allegations authorizing equitable relief, the petition may be amended by striking therefrom the allegations and prayers for the equitable relief. Wood *v.* Bewick Lumber Co, 103 Ga. 235, 29 S. E. 820.

Where under statute legal and equitable causes may be joined a petition may be amended by the addition of a count praying for the cancellation of certain deeds to defendant of the land in controversy. Morrison *v.* Herrington, 120 Mo. 665, 25 S. W. 568.

It is proper to disallow an amendment where in answer to a special demurrer to a petition in which plaintiff relies solely on an equitable title the amendment offered shows that the transaction was not between the vendor of the land and plaintiff but between the vendee and plaintiff. Thomas *v.* Walker, 115 Ga. 11, 41 S. E. 269.

18. *Kentucky.*— Smith *v.* Price, 13 S. W. 428, 11 Ky. L. Rep. 895.

Mississippi.— Metcalfe *v.* McCutchen, 60 Miss. 145.

Missouri.— Acton *v.* Dooley, 16 Mo. App. 441.

New Jersey.— Williamson *v.* Snowhill, 13 N. J. L. 23, 22 Am. Dec. 496.

New York.— Fanning *v.* Farley, 4 Den. 263; Hinman *v.* Booth, 21 Wend. 267.

North Carolina.— Pollock *v.* Kitrell, 4 N. C. 585.

See 17 Cent. Dig. tit. "Ejectment," § 209.

To conform to proof.— Defendant may be allowed to amend his answer after verdict so as to make it conform to the proof. Zeilin *v.* Rogers, 21 Fed. 103.

19. Neidenberger *v.* Campbell, 11 Mo. 359 (amendment of complaint upon giving de-

and amendments have been permitted after a nonsuit at the trial for variance.[20]

8. WHETHER AMENDMENT RELATES BACK. Although an amendment may relate back to the commencement of the action in some instances,[21] yet an amendment of a misdescription cannot be permitted to so relate back as to affect defendants, whose rights have since accrued under the statute of limitations.[22]

9. BILL OF PARTICULARS. A bill of particulars may be obtained in ejectment.[23]

H. Affidavits. The statutory provision that a plaintiff may file an affidavit that he and defendant claim title through a common source[24] applies in an action, which, although in form is an action of ejectment, is in fact an action to ascertain the boundary line.[25] So a statute may require an affidavit of a lessor of plaintiff in order to compel an overholding tenant to give security for costs and damages.[26]

I. Abstracts or Evidence of Title, Description, and Location. Plaintiff pursuing the statutory form of remedy may be required to show title in himself by an abstract annexed to his declaration or complaint.[27] If there is a location on

fendant leave on application to plead); Ryerss *v.* Wheeler, 25 Wend. (N. Y.) 434, 37 Am. Dec. 243 (description of interest of estate claimed so as to conform to interest recovered); Bailey *v.* Fairplay, 6 Binn. (Pa.) 450, 6 Am. Dec. 486 (omission to strike out name of casual ejector and insert that of the real defendant). See also Irish *v.* Scovil, 6 Binn. (Pa.) 55. But see Meadows *v.* Goff, 90 Ky. 540, 14 S. W. 535, 12 Ky. L. Rep. 495; Covington *v.* Page, 11 Ky. L. Rep. 404.

After judgment by default a complaint which fails to describe any land in possession of defendant cannot be amended so as to describe such land, and the default against defendant still holds. Haggin *v.* Lorenz, 15 Mont. 309, 39 Pac. 285.

An amendment to support a judgment after a trial on the merits may be properly allowed. Campbell *v.* Gratz, 6 Binn. (Pa.) 115.

Demise may be extended or enlarged after judgment. Roseberry *v.* Seney, 3 Harr. & J. (Md.) 228; Bronson *v.* Taylor, 14 N. J. L. 81; Ledgerwood *v.* Pickett, 15 Fed. Cas. No. 8,175, 1 McLean 143. But see Coghill *v.* Burriss, 2 Dana (Ky.) 57; Owings *v.* Marshall, 3 Bibb (Ky.) 27; Frazier *v.* Hall, 5 Harr. & J. (Md.) 437.

After reversal of judgment an amendment by defendant may be allowed to enable him to set forth any superior title he may have. Asher *v.* McCarty, 2 Ky. L. Rep. 218. *Compare* Clark *v.* Duke, 59 Miss. 575, holding that after a judgment in favor of a defendant is reversed he may be refused leave to substitute "denial of possession" for his plea of "not guilty."

20. Jackson *v.* Bailey, 5 Cow. (N. Y.) 265; Ryerss *v.* Wheeler, 22 Wend. (N. Y.) 148.

21. An added count in the name of another party between whom and plaintiff there is a privity of estate relates back. Augusta Mfg. Co. *v.* Vertrees, 4 Lea (Tenn.) 75.

An amendment by inserting a new demise may relate back where a new cause of action is not introduced. Nance *v.* Thompson, 1 Sneed (Tenn.) 321. *Compare* Roe *v.* Doe, 30 Ga. 873.

22. Leeds *v.* Lockwood, 84 Pa. St. 70. See also Hills *v.* Ludwig, 46 Ohio St. 373, 24 N. E. 596.

23. Phillips *v.* Phillips, 21 N. J. L. 436; Roberts *v.* Cullen, 16 N. Y. Suppl. 517; Bryan *v.* Spivey, 106 N. C. 95, 11 S. E. 510. But see Roberts *v.* Vornholt, 126 Ind. 511, 26 N. E. 207.

A bill of particulars giving an abstract of title as required under Miss. Code, § 2491, when filed, is an admission of record that the party claims under the chain of title therein referred to. Gillum *v.* Case, 67 Miss. 588, 7 So. 551.

Plaintiff need not give notice to defendant of the documents which it may become necessary for him to use in rebuttal of defendant's case, where the latter demands a bill of particulars under the ejectment act of New Jersey. Miller *v.* Mead, 39 N. J. L. 538.

24. Ill. Rev. St. c. 45, § 25.

Sufficiency of such affidavit see Cairo, etc., R. Co. *v.* Parrott, 92 Ill. 194.

Denial of title through a common source by defendant need not under this statute be made by affidavit. Chicago, etc., R. Co. *v.* Hardt, 138 Ill. 120, 27 N. E. 910.

Plaintiff need not trace title, where no counter affidavit is filed, anterior to the deed to the grantee named in their affidavit as the common source. Stalford *v.* Goldring, 197 Ill. 156, 64 N. E. 395.

25. Clark *v.* Day, 93 Ill. 480.

26. Shannonhouse *v.* Bagley, 48 N. C. 295, where it was held to be sufficient to set forth the expiration of the lease before bringing suit, refusal to surrender by defendant, holding over by him against the will of the affiant, and that defendant claims title to the premises, without stating a more formal demand and refusal before suit brought.

27. Harrington *v.* Gabby, 52 Ga. 537.

A parol contract set up in plaintiff's abstract of title should be set forth with sufficient particularity to take the transaction out of the statute of frauds, and such facts should be averred as will disclose to the adverse party complete information regarding the essential elements of the alleged contract. Melvin *v.* Handley, 3 Lack. Jur. (Pa.) 380.

Where plaintiff in his abstract of title admits the chain of title set up by defendant the necessity of the latter's substantiating his claim by introducing the patent and deeds in evidence is dispensed with. Easton *v.* Randall, 45 Iowa 111.

the plats in the case by either party[28] and there is no counter location by the adverse party such location is admitted.[29]

J. Motions — 1. For Judgment on Pleadings. The general rules relating to motions for judgment on the pleadings[30] are applicable to pleadings in actions of ejectment.

2. To Strike Out. Likewise motions to strike out have been allowed in proper cases.[31] Thus where a plea sets up nothing which is not available under the general issue already pleaded it may be stricken out on motion;[32] and averments in a complaint which are immaterial or matters of evidence may also be so stricken out,[33] as may the names of persons, inserted as lessors, who are dead.[34] So it has

What should be set forth in the abstract of title or as evidence of title is dependent in many states upon special statutes in respect thereto (Carter *v.* Greer, 72 Ga. 897; Barrett *v.* Johnson, 2 Ind. App. 25, 27 N. E. 983; Boardman *v.* Beckwith, 18 Iowa 292); and the practice of the particular state (Gitt *v.* Watson, 18 Mo. 274, holding that under the new practice every link in the chain of title need not be set forth or all the documentary evidence).

The exhibits form no part of the pleadings under the statute in Arkansas. Percifull *v.* Platt, 36 Ark. 456; Surginer *v.* Paddock, 31 Ark. 528.

Where, however, the petition does not refer to any title papers, it has been held erroneous to require the filing of such papers, without good cause shown by affidavit, as it may be that title is altogether possessory and based on no title papers. Ruggles *v.* Moore, 18 B. Mon. (Ky.) 821.

28. **Plaintiff who claims under the title of a defendant in a former ejectment** for the same land brought by one under whom defendant in the present action claims cannot locate the land in any other manner than that in which defendant in the former action located the same on the plats in that action. Ridgely *v.* Ogle, 4 Harr. & M. (Md.) 123.

Where defense is taken on a warrant of resurvey it has been decided that all possessions, whether relied on to prove title, for illustrations, or to disqualify witnesses examined on the survey, must be located on the plats in the cause. Casey *v.* Inloes, 1 Gill (Md.) 430, 39 Am. Dec. 658.

Description of property in complaint see *supra*, V, A, 2.

In an early Pennsylvania case it was decided that a plaintiff is bound to file a description of the land after a plea of not guilty and a rule for trial. Galloway *v.* Saunders, 2 Serg. & R. (Pa.) 405. *Compare* Cahill *v.* Benn, 6 Binn. (Pa.) 99, holding that another description need not be filed where there is a description in the præcipe for a summons.

Where defendant arbitrates the cause a description need not be filed if it appears on the record with reasonable certainty for what land the suit was brought. Santee *v.* Keister, 6 Binn. (Pa.) 36.

29. Shilknecht *v.* Eastburn, 2 Gill & J. (Md.) 114; Hughes *v.* Howard, 3 Harr. & J. (Md.) 9; Jarrett *v.* West, 1 Harr. & J. (Md.) 501. See also Langley *v.* Jones, 26 Md. 462; Wilson *v.* Inloes, 6 Gill (Md.) 121.

If plaintiff makes title to a part only, and there is no controversy about the whole, it is sufficient to locate such part on the plats. Mitchell *v.* Gover, 1 Harr. & J. (Md.) 507.

30. Thus where a plea is in substance to the merits the fact that it bears an erroneous appellation and may be otherwise inartificially drawn does not destroy its substantial character, and it is sufficient to defeat a motion for judgment on the pleadings. Jones *v.* Rowley, 73 Fed. 286. So where a complaint alleges possession by defendant which the answer admits, the fact that plaintiff files a replication controverting an allegation of defendant that he is in possession does not entitle the latter to judgment on the pleadings, as the replication may be disregarded as frivolous. Sankey *v.* Noyes, 1 Nev. 68. And where an answer raises an issue as to some portion of the property, although it may be demurrable for uncertainty, yet a motion for such a judgment will not be granted. Chester *v.* Field, 87 Cal. 422, 25 Pac. 493. Again an entry of judgment on the pleadings, without trial, has been held erroneous, merely because of defects in defendant's title, as plaintiff should establish his title by evidence. Lowe *v.* Harris, 121 N. C. 287, 28 S. E. 535. But where plaintiff alleges seiziu in fee and that defendant is in unlawful and wrongful possession and wrongfully withholds possession from plaintiff, and defendant merely denies that his possession and withholding are wrongful and unlawful and offers no evidence to show such fact, it has been held proper to find for plaintiff. Hihn Co. *v.* Fleckner, 106 Cal. 95, 39 Pac. 214. And *compare* Boaz *v.* Jackson, 105 Ga. 228, 31 S. E. 163.

31. **Motion premature.**— Where, owing to some defect in his chain of title, a plaintiff is unable to recover in his own name and bases his claim upon a demise from a third person, it has been decided that a motion to strike out such demise as unnecessary to enforce plaintiff's claim will be overruled as premature if made before the close of the testimony. Couch *v.* Turner, 17 Ga. 489.

32. Buesing *v.* Forbes, 33 Fla. 495, 15 So. 209; Coffee *v.* Groover, 20 Fla. 64.

Court may on its own motion strike out such a plea. Sheldon *v.* Van Vleck, 106 Ill. 45.

33. Larco *v.* Casaneuava, 30 Cal. 560.

34. Doe *v.* Bohannon, 5 T. B. Mon. (Ky.) 121; Jackson *v.* Bankcraft, 3 Johns. (N. Y.) 259.

been held that the name of a lessor who has no interest in the premises may be stricken out.[35]

VI. ISSUES, PROOF, AND VARIANCE.

A. Issues as to Title, Possession, or Right of Possession. If the title of plaintiff is not controverted it is not put in issue;[36] but the legal title is put in issue by the plea of not guilty.[37] And the right to possession is put in issue where the complaint alleges that plaintiff is entitled to immediate possession by virtue of a lease from a person named and the answer denies such allegations.[38] If defendant's answer puts in issue the possession of the premises,[39] the possession thereof at the time the action was commenced is declared to be a material issue.[40] And the right of a defendant to avail himself of the defense that the deed under which plaintiff claims is void under a statute, as providing that a deed is void if at the time of its delivery the property is in actual possession of an adverse claimant, is waived by a failure to set it up.[41] After issue is joined in an action by school commissioners the title only is in issue, and it is not necessary for them to prove the regularity of the proceeding whereby they were appointed and qualified.[42] Nor is any issue as to the location of the boundary of a town raised, where the complaint describes the land as bounded by such town and the answer simply disclaims title.[43] And denial of immaterial allegations as to time of seizin or ouster raises no issue except where the mesne profits are in question.[44]

Should apply to the court on affidavit to strike out. Coleman *v.* Doe, 3 Ill. 251; Butler *v.* Ditz, Col. & C. (N. Y.) 105; Jackson *v.* Ditz, 1 Johns. Cas. (N. Y.) 392.

35. Jackson *v.* Sclover, 10 Johns. (N. Y.) 368.

36. Ford *v.* Sampson, 30 Barb. (N. Y.) 183. See also Marks *v.* Jones, 71 Minn. 274, 73 N. W. 961.

Recognition of title and claim under parol gift.— Where defendants recognize the title to have been originally in plaintiff and claim the land only by virtue of a parol gift followed by adverse possession, the only issue is whether the right of defendant has become perfect against the otherwise confessed legal title of plaintiff. Davis *v.* Davis, 68 Miss. 478, 10 So. 70.

Where the answer contains a general denial and sets up an equitable defense alleging that plaintiff's title is in trust for defendant and the allegation of the answer as to the manner in which plaintiff obtained title is admitted by the reply which, however, denies the trust, the only issue is that presented by the equitable defense. Schuster *v.* Schuster, 93 Mo. 438, 6 S. W. 259. *Compare* Snyder *v.* Elliott, 171 Mo. 362, 71 S. W. 826.

37. Petty *v.* Mays, 19 Fla. 652.

If defendant pleads not guilty as to the whole tract and enters a disclaimer as to part of the land plaintiff may if he so elects take issue on the plea of disclaimer under Ala. Code, § 2699. Otherwise it is decided that he should take judgment for want of a plea as to the lands disclaimed and join issue on the plea of not guilty as to the balance. Torrey *v.* Forbes, 94 Ala. 135, 10 So. 320.

"Not guilty" puts in issue the title and right of possession to the premises under Md. Code, art. 75, § 69. Wallis *v.* Wilkinson, 73 Md. 128, 20 Atl. 787.

Under the general issue the real contest is declared to be as to which party can show the better title. Clarke *v.* Hilton, 75 Me. 426; Wyman *v.* Brown, 50 Me. 139.

38. Wilkins *v.* Williams, 3 N. Y. Suppl. 897, 15 N. Y. Civ. Proc. 168.

39. **Where issue as to possession of defendant is raised** it devolves on plaintiff to prove possession. St. Louis, etc., R. Co. *v.* Hamilton, 158 Ill. 366, 41 N. E. 777.

Effect of stipulation as to title and possession see Murphy *v.* Reimenschneider, 104 Ill. 520.

40. Pope *v.* Dalton, 31 Cal. 218.

Where the writ contains no retrospective words the only question is whether plaintiff was entitled to possession at the time of the date of the writ. Longhurst *v.* Elworthy, 3 F. & F. 323.

41. Ten Eyck *v.* Whitbeck, 170 N. Y. 564, 62 N. E. 1101 [*affirming* 55 N. Y. App. Div. 165, 66 N. Y. Suppl. 921], decided under N. Y. Laws (1896), c. 547, § 225.

42. Bowers *v.* Tally's Cove School Com'rs, 7 Yerg. (Tenn.) 117.

43. Hill *v.* Forkner, 76 Ind. 115.

44. Kidder *v.* Stevens, 60 Cal. 414.

No issue is raised by immaterial allegations in answer as to title and possession where the first paragraph of the answer is a disclaimer. Kansas Pac. R. Co. *v.* McBratney, 10 Kan. 415.

Surplusage.— Where defendant pleads a general denial under which he may show title in himself an allegation in the answer of such title does not present a new issue but is mere surplusage. Meyendorf *v.* Frohner, 3 Mont. 282. See also Rhodes *v.* Gunn, 35 Ohio St. 387.

Where a complaint alleges title in plaintiff and wrongful withholding of possession by defendant and the answer after a general denial alleges title in defendant, the issue of

Again a defendant cannot set up a title for plaintiff in his answer and plead to it and compel plaintiff to take issue with him on the title thus set up.[45]

B. Action Against Two or More Defendants. In an action against two or more defendants, if they join in pleading the general issue,[46] evidence of title in one of them is a good defense for both.[47] And where a declaration charges several defendants with a joint holding, but it appears from the testimony that their holding is several, the direction of a verdict for plaintiff has been declared erroneous.[48] It is not, however, necessary where notice is served on several persons to show that they entered and held jointly, where they unite in pleading.[49]

C. Notice of Intention to Prove Particular Matters. It is sometimes required that notice of intention to prove particular matters should be duly given before evidence with respect thereto will be admitted.[50]

D. Necessity of Proof of Title, Possession, or Right of Possession — 1. Title in All Co-Plaintiffs. If a joint demise is laid, a joint interest in the lessors should be shown by the evidence.[51] And an allegation of joint title in plaintiffs is not supported by proof of title in some of them,[52] or of title in part of premises in one.[53] So it has been determined that if the proof does not show a joint interest in all who join as plaintiffs the action must fail as to all;[54] by statute, however, in some states a failure to prove title as to some will not prevent a recovery by others who show a good title.[55] And it has been decided that, where the declaration states that the lessors jointly and severally demised, it is sup-

title only is raised and not the defenses of right of way by prescription or by necessity or that an actual highway exists. Burlew *v.* Hunter, 41 N. Y. App. Div. 148, 58 N. Y. Suppl. 453.

45. Gillis *v.* Black, 6 Iowa 439.

46. **But where one appeared and pleaded to issue and the other disclaimed** and objected to the jury being sworn, it has been decided that the cause was not at issue as to both, and that the trial and judgment were erroneous as to both, although the jury found for defendant who disclaimed. Bralton *v.* Mitchell, 5 Watts (Pa.) 69.

47. Tripp *v.* Ide, 3 R. I. 51. *Compare* Jackson *v.* Hazen, 2 Johns. (N. Y.) 438.

48. Townsend *v.* Kreigh, (Mich. 1903) 94 N. W. 732, 97 N. W. 46. See also Evarts *v.* Dunton, Brayt. (Vt.) 70.

49. Moody *v.* Walton, 1 A. K. Marsh. (Ky.) 151.

50. Thus evidence of fraud in the making or procuring of deeds constituting a part of defendant's chain of title is held not admissible in the absence of notice to the latter. Kieth *v.* Catchings, 64 Ga. 773.

Evidence admissible under pleadings as to invalidity of deed under which party claims see *infra*, VI, E, 2, c.

In West Virginia notice of an intention to interpose an equitable defense should be given in writing. Carrell *v.* Mitchell, 37 W. Va. 130, 16 S. E. 453.

Proof of usury.— It has been decided that defendant may, under the general issue, prove usury in order to invalidate plaintiff's title founded on a mortgage without having given notice. Holton *v.* Button, 4 Conn. 437. *Compare* Commonwealth Title Ins., etc., Co. *v.* Dokko, 72 Minn. 229, 75 N. W. 106.

51. Etowah Mfg. Co. *v.* Alford, 78 Ga. 345; Bohanan *v.* Bonn, 32 Ga. 390; Doe *v.* Butler, 3 Wend. (N. Y.) 149; Hoyle *v.* Stowe, 13 N. C. 318. *Compare* Garrard *v.* Reynold, 4 How. (U. S.) 123, 11 L. ed. 903.

52. De Mill *v.* Moffat, 49 Mich. 125, 13 N. W. 387; Gillett *v.* Stanley, 1 Hill (N. Y.) 121; Cheney *v.* Cheney, 26 Vt. 606.

Judgment for all cannot be given on proof of title in some. Tormey *v.* Pierce, 42 Cal. 335; Primm *v.* Walker, 38 Mo. 94.

53. Lynch *v.* Kirby, 36 Mich. 238, holding that Mich. Comp. Laws (1871), § 6231, does not apply, but only contemplates where one or more are found to have possession of the entire premises.

54. Whitlow *v.* Echols, 78 Ala. 206; McGlamory *v.* McCormick, 99 Ga. 148, 24 S. E. 941; Towns *v.* Mathews, 91 Ga. 546, 17 S. E. 955; Murphy *v.* Orr, 32 Ill. 489. *Compare* Armstrong *v.* Morrill, 14 Wall. (U. S.) 120, 20 L. ed. 765, sustaining a judgment for one of three plaintiffs where the finding conformed to two counts and no objection to the form of judgment was made in the court below.

On a joint demise if title is not established in all the lessors there can be no recovery. Smith *v.* Mahan, 7 T. B. Mon. (Ky.) 228; Chiles *v.* Bridges, Litt. Sel. Cas. (Ky.) 420; Lynn *v.* Clark, 3 A. K. Marsh. (Ky.) 378; Taylor *v.* Taylor, 3 A. K. Marsh. (Ky.) 18; Tucker *v.* Vance, 2 A. K. Marsh. (Ky.) 458; Skyle *v.* King, 2 A. K. Marsh. (Ky.) 385; Conn *v.* Manifee, 2 A. K. Marsh. (Ky.) 241; Banner *v.* Carr, 33 N. C. 45. But see Roberts *v.* Pharis, 8 Yerg. (Tenn.) 447. *Compare* Stevenson *v.* Howard, 3 Harr. & J. (Md.) 554; Childers *v.* Bumgarner, 53 N. C. 297.

Where an equitable defense has been filed this rule does not apply. Milner *v.* Vandivere, 86 Ga. 540, 12 S. E. 879.

55. Walton *v.* Follansbee, 131 Ill. 147, 23 N. E. 332; Miller *v.* Early, 64 Mo. 478; Miller *v.* English, 61 Mo. 444; Miller *v.* Bledsoe, 61 Mo. 96.

ported by proving a tenancy in common; there is nothing impracticable in joint and several demises of the same land.[56]

2. SOURCE AND VALIDITY. Where defendant relies on the original title of the proprietary it has been decided that he should show it to be a subsisting title either in the proprietary or in himself claiming under the proprietary.[57] If he sets out his source of title he cannot show title derived from another source than that alleged,[58] without amendment, where the parties have made up the issues and gone to trial,[59] although it is decided that defendant may show title from another source than that alleged in his answer.[60] So a party need only prove one good and paramount title, although he may have different sources of title and plead them all.[61] Plaintiff should prove delivery of the deed to him under which he claims title, and he is not relieved from giving such proof by the fact that it is set out by copy and made a part of the complaint.[62] If he relies on a deed which he claims to have been given him by plaintiff and to be lost, not only the existence of the deed should be proven but also its contents.[63] Again a plaintiff need not deraign title of land levied on and sold to him as defendant's, where the latter admits and proves a good title in himself up to the time of the sale.[64]

3. NATURE AND EXTENT OF TITLE OR INTEREST. There cannot be a recovery by a plaintiff of an estate or interest different from that which he has alleged.[65] So

56. Courtney *v.* Shropshire, 3 Litt. (Ky.) 265. *Compare* Fleeger *v.* Pool, 9 Fed. Cas. No. 4,860, 1 McLean 185 [*affirmed* in 11 Pet. (U. S.) 185, 9 L. ed. 680, 955], holding that proof of a tenancy in common will support a joint demise.

In case of a joint and several demise no recovery can be had on the joint demise if no joint right is proved, but may on the separate demise so far as proved. Riggs *v.* Dooley, 7 B. Mon. (Ky.) 236.

57. Hylton *v.* Brown, 12 Fed. Cas. No. 6,980, 1 Wash. 204.

58. Utassy *v.* Giedinghagen, 132 Mo. 53, 33 S. W. 444; Leland *v.* Bennett, 5 Hill (N. Y.) 286; Brown *v.* Moore, 26 S. C. 160, 2 S. E. 9. See also Lane *v.* Queen City Milling Co., 66 Ark. 646, 50 S. W. 274.

An after-acquired title cannot be recovered on, where not alleged, plaintiff being confined to the title alleged in the declaration. Nowlen *v.* Hall, 128 Mich. 274, 87 N. W. 222.

Proof of a paramount equitable title is held not at variance from a complaint alleging ownership of a legal title. Pope *v.* Nichols, 61 Kan. 230, 59 Pac. 257.

Where plaintiffs allege they are owners by inheritance from their father, it has been held that they may recover upon proof of title by possession. Davis *v.* Leeper, 56 S. W. 712, 22 Ky. L. Rep. 116.

Variance.— A variance between the proof of how defendants claim title and surplusage matter in the answer in respect thereto, by which plaintiff is not misled, is immaterial. Moore *v.* Frazer, 15 Oreg. 635, 16 Pac. 869. And it has been held that a word inserted in the declaration after the name of plaintiff, and which is merely descriptive, is immaterial, and a variance between the proof and such description will not defeat plaintiff's right to recover, as in case of the word "heirs" (Magill *v.* Swearingen, 10 Pa. St. 497), or "administratrix" (Richardson *v.* Biglane, 81 Miss. 676, 33 So. 650). See also Birney *v.* Haim, 2 Litt. (Ky.) 262. So a variance which consists of a misspelling of the name of the ancestor under whom plaintiff claims and which does not affect his identity is immaterial. Jackson *v.* Boneham, 15 Johns. (N. Y.) 226.

59. Mays *v.* Pryce, 95 Mo. 603, 8 S. W. 731. *Compare* Huggins *v.* Watford, 38 S. C. 504, 17 S. E. 363.

60. Keathley *v.* Branch, 88 N. C. 379.

61. Leary *v.* New, 90 Ind. 502. See also St. Louis Public Schools *v.* Risley, 28 Mo. 415, 75 Am. Dec. 131.

62. Burkholder *v.* Casad, 47 Ind. 418.

63. Sais *v.* Sais, 49 Cal. 263.

64. Christian *v.* Mynatt, 11 Lea (Tenn.) 615.

65. Winstanley *v.* Meacham, 58 Ill. 97; Ballance *v.* Rankin, 12 Ill. 420, 54 Am. Dec. 412.

Where a legal title is the basis of a plaintiff's claim to property or its possession, he cannot recover on the strength of an equitable title not alleged.

California.— Seaton *v.* Son, 32 Cal. 481.

Georgia.— Sutton *v.* Aiken, 57 Ga. 416.

Indiana.— Stout *v.* McPheeters, 84 Ind. 585; Groves *v.* Marks, 32 Ind. 319.

Minnesota.— Merrill *v.* Dearing, 47 Minn. 137, 49 N. W. 693.

Utah.— Tarpey *v.* Deseret Salt Co., 5 Utah 205, 14 Pac. 338.

See 17 Cent. Dig. tit. "Ejectment," § 224.

If plaintiff declares on a lease it is held that he cannot recover on proof of title in fee. Norton *v.* Spooner, N. Chipm. (Vt.) 74.

Plaintiffs alleging title under an administrator's sale cannot recover on proof of any other title. Cummins *v.* Denton, 1 Tex. Unrep. Cas. 181.

Where a husband and wife allege that they are well seized and possessed of the demanded premises, the declaration is supported by evidence showing that the wife is

one bringing an action for a whole tract or piece of land cannot recover on proof showing title to an undivided part.[66]

4. Identity or Description of Property. The proof should show that the lands are those described in the complaint[67] and that the land in contest is covered by the deeds relied on.[68] As against a rightful owner one who claims by prescription should show his limits by positive evidence.[69] If land is described as part of a larger tract the proof should show the distinct location of the tract referred to,[70] and what part plaintiff claims.[71] But an immaterial variance between the description in the demise and the plats in the certificate returned in the cause will not be fatal;[72] nor will a slight variance in the name of the property between that given in the complaint and that which is shown by the proof, it being shown to be the same land.[73] Again a plaintiff is entitled to recover, although the proof shows the quantity of land to be slightly in excess of the description of the premises in the consent rule.[74]

seized in her own right and the husband only in her right. Kelsey *v.* Hanmer, 18 Conn. 311.

Where an estate in fee is alleged a recovery cannot be had on proof only of a life-estate. Hunt *v.* Campbell, 83 Ind. 48; Rawson *v.* Taylor, 57 Me. 343; Brittain *v.* Daniels, 94 N. C. 781. But see Casey *v.* Casey, 55 Vt. 518. And an assignee of a mortgage cannot recover under such an allegation. Speer *v.* Hadduck, 31 Ill. 439. But it has been decided that a plaintiff alleging title in fee may show title as a mortgagee in possession by agreement with the mortgagor, as such evidence may establish a title in fee. Chapman *v.* Delaware, etc., R. Co., 3 Lans. (N. Y.) 261. And it has also been held that a plaintiff may show title by possession. Day *v.* Alverson, 9 Wend. (N. Y.) 223. But see Winans *v.* Christy, 4 Cal. 70, 60 Am. Dec. 597.

Where plaintiff alleges an estate for the life of another he cannot, on proof of title in himself by possession and as guardian in socage, recover without amending his declaration to conform to the proof. Holmes *v.* Seely, 17 Wend. (N. Y.) 75.

66. East St. Louis *v.* Hackett, 85 Ill. 382; Winstanley *v.* Meacham, 58 Ill. 97; Martin *v.* Neal, 125 Ind. 547, 25 N. E. 813; Craig *v.* McBride, 9 Dana (Ky.) 427; Dougherty *v.* Linthicum, 8 Dana (Ky.) 194; Cretzer *v.* Thomas, 1 Harr. & J. (Md.) 463. See also McCandless *v.* Inland Acid Co., 115 Ga. 968, 42 S. E. 449; Strean *v.* Lloyd, 128 Ill. 493, 21 N. E. 533.

Where a complaint alleges possession of an undivided part of land, the fact that the proof shows his title to be subject to a previous estate in dower is not a variance. Bear *v.* Snyder, 11 Wend. (N. Y.) 592.

67. *Alabama.*— Dunton *v.* Keel, 95 Ala. 159, 10 So. 333.

Georgia.— Parker *v.* Brown, 39 Ga. 50. And see Peters *v.* West, 70 Ga. 343.

Illinois.— McCormick *v.* Huse, 78 Ill. 363.

Indiana.— Buchanan *v.* Whitham, 36 Ind. 257.

Michigan.— Wilson *v.* Hoffman, 54 Mich. 246, 20 N. W. 37.

Mississippi.— Illinois Cent. R. Co. *v.* Baldwin, 77 Miss. 788, 28 So. 948.

Missouri.— Bricken *v.* Cross, 140 Mo. 166, 41 S. W. 735.

See 17 Cent. Dig. tit. "Ejectment," § 225.

68. Vaughn *v.* Mills, 18 B. Mon. (Ky.) 633; Nixon *v.* Porter, 38 Miss. 401; Menkins *v.* Blumenthal, 19 Mo. 496; Smith *v.* Fite, 92 N. C. 319. See also Bell *v.* Vanzant, 46 Tex. 300.

A deed at variance with the complaint is not admissible. Marx *v.* Threet, 131 Ala. 340, 30 So. 831; Griffin *v.* Hall, 115 Ala. 482, 22 So. 162.

If description in deed is admitted by the answer proof is unnecessary to aid such description. Robinson *v.* Ingram, 126 N. C. 327, 35 S. E. 612.

Where plaintiff claims under a lease the land mentioned in the complaint should be identified with that described in the lease. Guy *v.* Barnes, 24 Ind. 345.

69. Mayfield *v.* Morris, 10 La. 441.

70. Pinkerton *v.* Ledoux, 3 N. M. 252, 5 Pac. 721. See also Morris *v.* Giddens, 101 Ala. 571, 14 So. 406.

In an action for a certain lot in a proprietary division, the declaration containing no other description, a division in fact must be shown by plaintiff. Bown *v.* Bean, 1 D. Chipm. (Vt.) 176. *Compare* Coit *v.* Wells, 2 Vt. 318.

71. Crœsus Min., etc., Co. *v.* Colorado Land, etc., Co., 19 Fed. 78.

Plaintiff claiming under a deed conveying "the balance of a tract of land" should show what that balance is. Taylor *v.* Taylor, 3 A. K. Marsh. (Ky.) 18.

72. Chamberlaine *v.* Crawford, 1 Harr. & M. (Md.) 355.

73. Carroll *v.* Norwood, 4 Harr. & M. (Md.) 287; Mitchell *v.* Gover, 1 Harr. & J. (Md.) 507. See also Smith *v.* Volgamot, 2 Harr. & M. (Md.) 155.

The fact that the description in the complaint is fuller than that in the deed relied on is not a variance where it is consistent therewith. Smith *v.* Willing, 10 Mo. 394. *Compare* Medley *v.* Williams, 7 Gill & J. (Md.) 61.

74. White *v.* Den, 24 N. J. L. 753.

5. Particular Elements or Requisites in Deraignment of Title — a. In General. A plaintiff who fails to show either possession or a continuous chain of title from one in possession cannot recover.[75] Where he makes title as assignee of a lease, the execution of the lease and its assignment should be proved.[76] And it is decided that one deraigning title through a corporation should prove the legal existence of the corporation in an action against one claiming title through another source.[77] If the lands are described as confiscated lands the proof should show that they have been confiscated.[78] And it has been decided that in an action for uncultivated land a plaintiff cannot recover merely because his name is the same as that used in the warrant.[79] And a defendant who relies on adverse possession should show what color or claim of title he relied on and that his possession was unbroken for the full statutory period.[80] But it is not necessary for the grantee of a mortgage to produce the mortgage or the bond to support his title against the mortgagee's tenant or those claiming under him.[81] And a plaintiff claiming under a sale by virtue of a deed of trust need not show a compliance with all the preliminaries showing the authority of the trustee to sell.[82]

b. Property Sold on Execution. In an action by a purchaser at a sheriff's sale proof of the judgment, execution, sale, and sheriff's deed is generally sufficient to authorize a recovery by him,[83] although in some cases it has been declared

75. Hence evidence consisting of a chain of title not reaching back to one in possession is properly stricken out. Start *v.* Clegg, 83 Ind. 78. See also Adams *v.* Baltimore County School Com'rs, (Md. 1890) 20 Atl. 954.

Plaintiff must either show that he derives from some common source or that his grantor was in possession of the premises. Cunningham *v.* Harper, Wright (Ohio) 366. And see Doe *v.* Dupey, 4 J. J. Marsh. (Ky.) 388; Anderson *v.* Turner, 3 A. K. Marsh. (Ky.) 131.

A failure to show a continuous chain of title from the state will not affect the right of plaintiff to recover, where he proves title by adverse possession for the required period. Kepley *v.* Scully, 185 Ill. 52, 57 N. E. 187.

One should show by what means he acquired title from the person last named in a chain title offered in evidence by him. Whitmore *v.* Crawford, 106 Mo. 435, 17 S. W. 640.

One who traces title to the United States through the grantors need not establish possession in them. Steeple *v.* Downing, 60 Ind. 478.

76. Swearingen *v.* Hawkenberry, Wright (Ohio) 111.

77. Sonoma County Water Co. *v.* Lynch, 50 Cal. 503.

Where one claims to derive title from a railroad company to land granted to the company by the acts of congress of July 1, 1862, and July 2, 1864, by which acts certain land on each side of the railroad right of way was excepted, he should show, defendant being in possession, that the land in controversy was not within the exception. Corinne Mill Canal, etc., Co. *v.* Johnson, 7 Utah 327, 26 Pac. 922. See also McGrath *v.* Tallent, 7 Utah 256, 26 Pac. 574.

78. Hardy *v.* Jones, 6 N. C. 52; Hardy *v.* Jones, 4 N. C. 144.

79. It should also appear from the proof that he was the one who procured the warrant, obtained the survey, or paid the purchase-money. Wolf *v.* Goddard, 9 Watts (Pa.) 544.

80. Hall *v.* Hall, 27 W. Va. 468.

81. Smallwood *v.* Bilderback, 16 N. J. L. 497.

82. O'Day *v.* Vansant, 2 Mackey (D. C.) 273.

Plaintiff claiming under a deed executed in pursuance of a sale made by a mortgagee, under a power of sale contained in the mortgage, need not introduce in evidence the note secured by such mortgage. Pardee *v.* Lindley, 31 Ill. 174, 83 Am. Dec. 219.

Where a plaintiff offers in evidence a deed executed by a commissioner in pursuance of a decree entered in a suit for the specific execution of a written contract for the sale of the land so conveyed and also such portions of the record as show authority of the commissioner to make the deed, including the contract, the execution of such contract need not be proved. Waggoner *v.* Wolf, 28 W. Va. 820, 1 S. E. 25.

83. De Vendell *v.* Doe, 27 Ala. 156; Carpenter *v.* Sherfy, 71 Ill. 427; Shipley *v.* Shook, 72 Ind. 511; Mercer *v.* Doe, 6 Ind. 80; Neilson *v.* Neilson, 5 Barb. (N. Y.) 565. But see Morss *v.* Doe, 2 Ind. 65 (holding that it should be shown that the sheriff was authorized to sell); Hundley *v.* Taylor, 25 S. W. 887, 15 Ky. L. Rep. 808 (holding that a substantial compliance with the requirements of the statute authorizing such sale should be shown).

In an action not against execution defendant it has been decided that the decree as well as the execution must be proved and that in order to introduce the decree enough of the pleadings and orders to show that it was pronounced in an action properly instituted between the parties must be shown. Williamson *v.* Bedford, 32 N. C. 198. See Lyerly *v.* Wheeler, 33 N. C. 288, 53 Am. Dec. 414.

Judgment and process under which sale was

that in addition to such proof it should also appear that at the time of the levy and sale defendant was in possession,[84] or had some interest or estate in the premises on which the judgment could operate.[85]

c. **Property Claimed by Descent or Devise.** Where plaintiff claims by descent he cannot recover without showing the extinction of all rights of those entitled to claim before him.[86] He must prove his heirship,[87] and that the ancestor died seized of the premises.[88] So where one claims through the will of a testator proof of title in the latter should be given in order to recover.[89]

6. **Possession or Right of Possession.** Plaintiff should prove a right of entry at the commencement of the suit, where his title is controverted by the general issue;[90] and he should show a right to the possession of the premises at the time laid in the declaration.[91] And it is also essential for plaintiff to prove possession of the premises by defendant or those claiming under him,[92] except where the

made need only be introduced and not the intermediate executions. Kane *v.* Doe, 9 Sm. & M. (Miss.) 387.

Judgment need not be proved by production of the record in the action against defendant in execution. Rutherford *v.* Raburn, 32 N. C. 144.

Recital of assignment of certificate of purchase.— If there is a recital in the sheriff's deed of an assignment of the certificate of purchase and the certificate as introduced in evidence appears not to have been assigned, there can be no recovery in the absence of proof showing an assignment. Carpenter *v.* Sherfy, 71 Ill. 427.

Where names of purchasers at a sheriff's sale are affixed by a third person to a power of attorney to assign the certificate of sale, a plaintiff claiming under a sheriff's deed to the assignee against one not the judgment debtor should show authority in such third person to affix the signature. Claflin *v.* Robinhurst, 40 Wis. 482.

Where one party claims under a sheriff's deed and the other under a prior deed from the execution debtor, it should be shown affirmatively by the former that the judgment lien attached to the land before its sale to the latter. Boatright *v.* Porter, 32 Ga. 130.

84. Yost *v.* Brown, 5 Kulp (Pa.) 111; Pratt *v.* Phillips, 1 Sneed (Tenn.) 543, 60 Am. Dec. 162; Hamilton *v.* Jack, 1 Sneed (Tenn.) 81.

85. Hendon *v.* White, 52 Ala. 597.

86. Elwood *v.* Lannon, 27 Md. 200. See also Hogan *v.* Finley, 52 Ark. 55, 11 S. W. 1035; Rathbone *v.* Hamilton, 4 App. Cas. (D. C.) 475; Taylor *v.* Whiting, 4 T. B. Mon. (Ky.) 364; Kelso *v.* Stiger, 75 Md. 376, 24 Atl. 18; Sprigg *v.* Moale, 28 Md. 497, 92 Am. Dec. 698.

Plaintiff must show that he is the only heir or if not how many there are. Dupon *v.* McLaren, 63 Ga. 470. See also Cook *v.* Sinnamon, 47 Ill. 214.

Where one's title was to accrue on the death of another without issue, under a certain age, he must in an action of ejectment show that both of these events have occurred. Clark *v.* Trinity Church, 5 Watts & S. (Pa.) 266.

87. Morgan *v.* Fox, 4 Bibb (Ky.) 565; Hunt *v.* Payne, 29 Vt. 172, 70 Am. Dec. 402.

88. De Mill *v.* Moffatt, 49 Mich. 125, 13 N. W. 387.

89. Enders *v.* Sternbergh, 52 Barb. (N. Y.) 222.

90. Daniel *v.* Lefevre, 19 Ark. 201. See also Scisson *v.* McLaws, 12 Ga. 166.

If it appears that defendant acquired possession under a written contract between the parties for an exchange of land, there can be no recovery by plaintiff without the production of the contract or evidence of its terms and proof of some breach thereof. Eaton *v.* Freeman, 58 Ga. 129.

Judgment for plaintiff is not sufficiently supported by proof of a decree in partition whereby the land in controversy was set apart to one who conveyed it to plaintiff's testator and of the deed conveying it, in the absence of proof of possession thereunder. Greenleaf *v.* Brooklyn, etc., R. Co., 132 N. Y. 408, 30 N. E. 762 [*reversing* 8 N. Y. Suppl. 30].

Plaintiff, who alleges that he was in possession when ousted, may recover, although it only appears from the proof that he was entitled to possession. Wilson *v.* Owens, 1 Indian Terr. 163, 38 S. W. 976.

91. Holt *v.* Rees, 44 Ill. 30.

Variance.— But it has been decided that a variance between the alleged seizin and the right of possession of plaintiff is immaterial, the latter being previous to the commencement of the action. Stark *v.* Barrett, 15 Cal. 361.

Proof of title in the lessors prior to the date of the demise is essential to a recovery. Wood *v.* Grundy, 3 Harr. & J. (Md.) 13.

92. Daniel *v.* Lefevre, 19 Ark. 201; St. Louis, etc., R. Co. *v.* Hamilton, 158 Ill. 366, 41 N. E. 777; Pickett *v.* Doe, 5 Sm. & M. (Miss.) 470, 43 Am. Dec. 523; Southgate *v.* Walker, 2 W. Va. 427.

Joint possession of defendants must be proved where they appear and plead jointly. Jackson *v.* Hazen, 2 Johns. (N. Y.) 438.

Variance.— Where a complaint alleges possession by defendant claiming in right of his wife the fact that it appears that he was in possession in his own right is an immaterial variance, the court having power to direct that the facts be found according to

rule is varied by statute,[93] or unless defendant by his pleading admits possession.[94] Where by statute plaintiff need not prove demand of possession unless defendant shall deny that demand of possession was made by special plea verified by affidavit, a failure to so plead will be regarded as a waiver of proof of demand.[95] Again to support a plea of prescription interposed as a defense in a petitory action it is decided that defendant must show an actual and continuous possession as owner for the entire term.[96]

E. Evidence Admissible Under the Pleadings — 1. In General. A court will not take notice of any proof concerning which there is not a corresponding allegation.[97] But defendant may introduce proof of all matters of legal defense under the general issue or plea of not guilty,[98] or under the statutory plea which amounts to the general issue.[99]

2. As to Title — a. In General. A plaintiff may under an allegation of seizin introduce proof of any interest in the premises entitling him to possession.[1] If a party claims the premises by two titles, either of which is available, he may

the evidence and to order an amendment of the complaint. Rose *v.* Bell, 38 Barb. (N. Y.) 25.

93. Weigold *v.* Pross, 132 Ind. 87, 31 N. E. 472; Voltz *v.* Newbert, 17 Ind. 187.

If by statute the return of the officer who serves the process is sufficient proof that defendant is in possession proof thereof is not necessary. Harding *v.* Strong, 42 Ill. 148, 89 Am. Dec. 415.

94. McDowell *v.* Love, 30 N. C. 502. See also Crandall *v.* Lynch, 20 App. Cas. (D. C.) 73; Beckwith *v.* Thompson, 18 W. Va. 103.

95. Timmons *v.* Kidwell, 138 Ill. 13, 27 N. E. 756.

96. Davis *v.* Young, 36 La. Ann. 374. *Compare* Kelley *v.* Oldham, 46 S. W. 214, 20 Ky. L. Rep. 370, holding that one who pleads adverse possession for more than fifteen years cannot rely on a possession for less than fifteen years under an executed verbal agreement fixing a division line, where such matter was not pleaded.

97. McLaurin *v.* Cronly, 90 N. C. 50. See also McClane *v.* White, 5 Minn. 178; Hunt *v.* Searcy, 167 Mo. 158, 67 S. W. 206.

Where a plaintiff is substituted for the original plaintiff by an order declaring that all the allegations and denials of the pleadings shall apply to him, and one of such allegations was that plaintiff was entitled to possession at the time the action was brought, a deed from the original plaintiff to the new one pending the action is not admissible, being irrelevant to any issue made by the pleadings. Northern R. Co. *v.* Jordan, 87 Cal. 23, 25 Pac. 273.

But although an estoppel must be generally pleaded to be available as a defense, yet it is decided that the rule does not apply where the parties do not set up the title on which they rely. Tyler *v.* Hall, 106 Mo. 313, 17 S. W. 319, 27 Am. St. Rep. 337. *Compare* Lord *v.* Bigelow, 8 Vt. 445, holding that a party having no opportunity of pleading an estoppel may give it in evidence with the same effect as if pleaded.

98. Bynum *v.* Gold, 106 Ala. 427, 17 So. 667; Coffee *v.* Groover, 20 Fla. 64; Webster *v.* Bebbinger, 70 Ind. 9; Woodruf *v.* Garnor, 20 Ind. 174; Zeigler *v.* Fisher, 3 Pa. St. 365.

Evidence showing coverture may be given. Black *v.* Tricker, 52 Pa. St. 436.

That plaintiffs are alien enemies may be shown under general issue. Jackson *v.* Decker, 11 Johns. (N. Y.) 418.

Qualifications of and exceptions to rule.— Where the general issue is pleaded it has been decided that evidence of non-possession (Bernard *v.* Elder, 50 Miss. 336) or evidence of the death of the lessor of plaintiff (Worthington *v.* Etcheson, 30 Fed. Cas. No. 18,053, 5 Cranch C. C. 302) is not admissible. Nor in an action by pretermitted heirs can they show that they have received advancements and that defendant has made improvements (McCracken *v.* McCracken, 67 Mo. 590); nor where defendant pleads the general issue without disclaiming can he show that he has had no notice to quit, or has a right of dower which has never been assigned, the only inquiry under the statute being which has the better title (Clarke *v.* Hilton, 75 Me. 426).

A former judgment is admissible under plea of not guilty. Brooke *v.* Gregg, 89 Md. 234, 43 Atl. 38. But a defendant cannot attack a former decree in partition between the same parties because of irregularities. Bartley *v.* Bartley, 172 Mo. 208, 72 S. W. 521.

99. Stewart *v.* Camden, etc., R. Co., 33 N. J. L. 115. See also Stout *v.* Hyatt, 13 Kan. 232.

Under a general denial in accordance with a statute such evidence is admissible. Wood *v.* Eckhouse, 79 Ind. 354; Steeple *v.* Downing, 60 Ind. 478; Dale *v.* Frisbie, 59 Ind. 530; Wicks *v.* Smith, 18 Kan. 508; Hurst *v.* Sawyer, 2 Okla. 470, 37 Pac. 817.

Where an action erroneously brought in equity was transferred to the ordinary docket and an amended petition stating a cause of action in ejectment was filed by plaintiff, to which defendant filed an answer, it has been decided that the former may under the general issue raised by the petition and the answer thereto prove any facts alleged in the amended petition in addition to those alleged in the original petition and which are not inconsistent therewith. Julian *v.* Stephens, 3 S. W. 596, 8 Ky. L. Rep. 867.

1. Stark *v.* Barrett, 15 Cal. 361.

introduce evidence of both.[2] Under the general issue matter which goes to affect the title, as the confirmation of an infant's deed, may be shown.[3] And under such issue or a general denial matters of defense generally which affect the title are admissible.[4] But where plaintiff proves his title by a patent issued by the state granting the premises in controversy as "swamp and overflowed" lands, defendant cannot prove that they are dry and fit for cultivation, where he has not brought or offered to bring himself into relations either with the state or the United States.[5] And if the question arises on the validity of the original title of the parties, and not on the extent of the claim or the act of limitations, evidence is not admissible as to the payment of taxes on the land, it not affecting the question of title.[6] Again where an answer sets up title to only a portion of the demanded premises proofs are not admissible thereunder unless it particularly describes such portion.[7] And a deed is not admissible in evidence where it conveys a less interest than that claimed in the declaration.[8] Nor is evidence admissible of title to other lands than those described in the declaration, the latter lands only being considered in issue.[9]

b. Title Out of Plaintiff. Under a general denial or the general issue a defendant may introduce evidence showing title out of plaintiff and in himself,[10] or in a third person,[11] although defendant does not connect himself

Under allegation of title and right to possession plaintiff may show that he is the owner of the equity of redemption in the land as against a mere trespasser (Arrington *v.* Arrington, 114 N. C. 116, 19 S. E. 278), or in an action by trustees of a school district dedication or adverse possession or both (Singleton *v.* Chittenden County School Dist. No. 34, 10 S. W. 793, 10 Ky. L. Rep. 851).

2. Enders *v.* Sternbergh, 2 Abb. Dec. (N. Y.) 31, 1 Keyes (N. Y.) 264, 33 How. Pr. (N. Y.) 464.

One relying on documentary evidence of title and prior possession may if he fails to prove title in one way prove it in the other. Morton *v.* Folger, 15 Cal. 275.

3. McCormic *v.* Leggett, 53 N. C. 425.

4. *Indiana.*— Vail *v.* Halton, 14 Ind. 344.

New Jersey.— Stewart *v.* Camden, etc., R. Co., 33 N. J. L. 115.

Utah.— Eastman *v.* Gurrey, 15 Utah 410, 49 Pac. 310.

Wisconsin.— Mather *v.* Hutchinson, 25 Wis. 27; Lain *v.* Shepardson, 23 Wis. 224.

United States.— Henderson *v.* Wanamaker, 79 Fed. 736, 25 C. C. A. 181.

See 17 Cent. Dig. tit. "Ejectment," § 231.

Particular matters admissible.— Under the general issue a defendant may introduce evidence of a homestead right (Johnson *v.* Adleman, 35 Ill. 265; Kipp *v.* Bullard, 30 Minn. 84, 14 N. W. 364; Morrison *v.* Watson, 95 N. C. 479): that plaintiff who claimed under patent from the United States was dead at the time the patent issued (Collins *v.* Brannin, 1 Mo. 540); or to disprove the joint title of several plaintiffs suing jointly (Cheney *v.* Cheney, 26 Vt. 606). So under the general denial it is decided that evidence is admissible of any legal or equitable title (Adam *v.* Johnson, 63 Kan. 886, 65 Pac. 662); of any fact to show that plaintiff had no right of entry when suit was brought (Sparrow *v.* Rhoades, 76 Cal. 208, 18 Pac. 245, 9 Am. St. Rep. 197; Stockton *v.* Knock, 73 Cal. 425, 15 Pac. 51. See Bell *v.* Brown, 22 Cal. 671); or in an action by one claiming under the purchase of an adverse claim to his wife's lands by a husband that the husband's purchase inured to the wife's benefit (Hickman *v.* Link, 97 Mo. 482, 10 S. W. 600). But where by code the plea of general issue is limited to cases where defendant relies on a denial of the cause of action as set forth by plaintiff and requires that in all cases defendant must specially plead matters of defense, evidence of the satisfaction of the mortgage under which plaintiff claims is not admissible under plea of not guilty. Slaughter *v.* Doe, 67 Ala. 494. See Matkin *v.* Marx, 96 Ala. 501, 11 So. 633.

That the deed of trust was delivered as an escrow under which plaintiff claims title and that the sale thereunder was made at the wrong place may be shown under a general denial. Goff *v.* Roberts, 72 Mo. 570.

5. Carder *v.* Baxter, 28 Cal. 99.

6. Quin *v.* Brady, 8 Watts & S. (Pa.) 139.

7. Anderson *v.* Fisk, 36 Cal. 625.

If a disclaimer is entered by defendant as to a part of the land, that part is not within the issue and evidence of title thereto is irrelevant. Waugh *v.* Andrews, 24 N. C. 75.

8. Hardin *v.* Kirk, 49 Ill. 153, 95 Am. Dec. 581.

9. Ramsey *v.* Henderson, 91 Mo. 560, 4 S. W. 408.

10. Smith *v.* Hobbs, 49 Kan. 800, 31 Pac. 687; Armstrong *v.* Brownfield, 32 Kan. 116, 4 Pac. 185; Clayton *v.* Barton County School Dist. No. 1, 20 Kan. 256; Hall *v.* Dodge, 18 Kan. 277; Howton *v.* Roberts, 49 S. W. 340, 20 Ky. L. Rep. 331; Macey *v.* Stark, 116 Mo. 481, 21 S. W. 1088; Davis *v.* Peveler, 65 Mo. 189. But see Brent *v.* Long, 99 Ky. 245, 35 S. W. 640, 18 Ky. L. Rep. 137.

11. Matkin *v.* Marx, 96 Ala. 501, 11 So. 633; Raynor *v.* Timerson, 46 Barb. (N. Y.) 518; Woods *v.* Bonner, 89 Tenn. 411, 18 S. W. 67; Walker *v.* Fox, 85 Tenn. 154, 2 S. W. 98; Meade *v.* Lawe, 32 Wis. 261. But see Phelps *v.* Yeomans, 2 Day (Conn.) 227, hold-

therewith.[12] It has, however, been determined that evidence of a conveyance to a third person after the commencement of the action is not admissible unless such defense is set up by the original or supplemental answer,[13] or by plea *puis darrien continuance*.[14] And likewise to render evidence admissible of a title so acquired by defendant it should be set up by the latter plea.[15]

c. **Invalidity of Deed.** The invalidity of a deed offered in evidence as a link in a chain of title may be shown, although not specially pleaded.[16]

3. **Limitations and Adverse Possession.** Where a complaint avers ownership in fee and right to possession at the commencement of the action a plaintiff may show that his grantor has been in adverse possession for the period required by statute before the commencement of the action.[17] Under a general denial or the general issue evidence is admissible to show that the statute of limitations has run and of title by adverse possession.[18] And although the champerty statute is not

ing that where defendant pleads the general issue and claims no title in himself evidence is not admissible of a deed from plaintiff's grantor to a stranger.

Evidence to show a conveyance by plaintiff of his title to one through whom defendant claims is admissible. Estes *v.* Long, 71 Mo. 605. But see Kennedy *v.* McQuaid, 56 Minn. 450, 58 N. W. 35, holding that defendant cannot under a general denial prove that plaintiff after acquiring title transferred it to a third person.

In an action by a landlord against a tenant predicated on a forfeiture of the premises the latter may under the general issue show that the former has lost his title to the premises subsequent to the execution of the lease. Orleans County Grammar School *v.* Parker, 25 Vt. 696.

Under Oreg. Code, § 226, evidence is not admissible of a title in defendant or another unless the fact is pleaded. Hall *v.* Austin, 11 Fed. Cas. No. 5,925, Deady 104; Stark *v.* Starr, 22 Fed. Cas. No. 13,307, 1 Sawy. 15.

12. Dyson *v.* Bradshaw, 23 Cal. 528; Bleidorn *v.* Pilot Mountain Coal, etc., Co., 89 Tenn. 166, 204, 15 S. W. 737; Cowan *v.* Hatcher, (Tenn. Ch. App. 1900) 59 S. W. 689.

13. Moss *v.* Shear, 30 Cal. 467.

14. Jenney *v.* Potts, 41 Mich. 52, 1 N. W. 898.

15. Spratt *v.* Price, 18 Fla. 289; Jennings *v.* Dockham, 99 Mich. 253, 58 N. W. 66; Hurd *v.* Raymond, 50 Mich. 369, 15 N. W. 514. *Compare* Mowry *v.* Blandin, 64 N. H. 3, 4 Atl. 882, holding that a title so acquired should be pleaded in bar.

An exception is held to exist in the case of a tax deed in the hands of the original purchaser, it being declared that if no injustice is done the deed may relate back to the day on which such purchaser was entitled to it, and if that date precede the date on which issue was joined it may be shown under the general issue. Spratt *v.* Price, 18 Fla. 289.

16. *California.*— Roberts *v.* Chan Tin Pen, 23 Cal. 259.

Nebraska.— Staley *v.* Housel, 35 Nebr. 160, 52 N. W. 888; Franklin *v.* Kelley, 2 Nebr. 79.

New York.— Hughes *v.* Hughes, 10 Misc. 180, 30 N. Y. Suppl. 937.

North Carolina.— Helms *v.* Green, 105 N. C. 251, 11 S. E. 470, 18 Am. St. Rep. 893; Mobley *v.* Griffin, 104 N. C. 112, 10 S. E. 142; Fitzgerald *v.* Shelton, 95 N. C. 519.

Wisconsin.— Gould *v.* Sullivan, 84 Wis. 659, 54 N. W. 1013, 36 Am. St. Rep. 955, 20 L. R. A. 487.

See 17 Cent. Dig. tit. "Ejectment," § 231.

That a deed was a forgery may be shown under a general denial, and it is held in Missouri that Rev. St. 1899, § 746, providing that the execution of an instrument shall be deemed confessed unless denied by a verified answer does not apply. Patton *v.* Fox, 169 Mo. 97, 69 S. W. 287.

Truth of recitals in a deed may be attacked under the general issue in an action, by the purchaser at a sheriff's sale against defendants in possession based on such deeds. Meyers *v.* Conover, 65 N. J. L. 187, 46 Atl. 709.

Where a marriage with deceased owner and her will are set up in defense, evidence is admissible, in behalf of plaintiff, attacking their validity without an amendment of the petition. Medlock *v.* Merritt, 102 Ga. 212, 29 S. E. 185.

17. Gillespie *v.* Jones, 47 Cal. 259.

18. *Connecticut.*— Trowbridge *v.* Royce, 1 Root 50.

Florida.— Coffee *v.* Groover, 20 Fla. 64; Horne *v.* Carter, 20 Fla. 45; Neal *v.* Spooner, 20 Fla. 38; Weiskoph *v.* Dibble, 18 Fla. 24.

Illinois.— Stubblefield *v.* Borders, 92 Ill. 279.

Michigan.— Miller *v.* Beck, 68 Mich. 76, 35 N. W. 899.

Mississippi.—Wilson *v.* Williams, 52 Miss. 487.

Missouri.— Hedges *v.* Pollard, 149 Mo. 216, 50 S. W. 889; Collins *v.* Pease, 146 Mo. 135, 47 S. W. 925; Bird *v.* Sellers, 113 Mo. 580, 21 S. W. 91; Stocker *v.* Green, 94 Mo. 280, 7 S. W. 279, 4 Am. St. Rep. 382; Holmes *v.* Kring, 93 Mo. 452, 6 S. W. 347; Fairbanks *v.* Long, 91 Mo. 628, 4 S. W. 499; Fulkerson *v.* Mitchell, 82 Mo. 13; Hill *v.* Bailey, 76 Mo. 454 [*affirming* 8 Mo. App. 85]; Nelson *v.* Brodhack, 44 Mo. 596, 100 Am. Dec. 328.

Nebraska.— Murray *v.* Romine, 60 Nebr. 94, 82 N. W. 318; Oldig *v.* Fisk, 53 Nebr. 156, 73 N. W. 661; Fink *v.* Dawson, 52 Nebr. 647, 72 N. W. 1037.

North Carolina.— Freeman *v.* Sprague, 82

pleaded a defendant may show that at the time of the execution of plaintiff's deed the land conveyed was held adversely to his grantor.[19] If plaintiff who relies on title acquired by adverse possession for the prescribed period under the statute of limitations alleges seizin generally in his complaint, without setting out the statute or the nature of his title, an exception to the statute need not be pleaded by defendant to render evidence admissible to show that he is within such exception.[20]

4. Possession and Right of Possession. All evidence admissible on the question of possession and the extent thereof is declared to be admissible under the general issue.[21] Under the allegation of ouster a holding over by defendant may be shown.[22] If plaintiff relies on prior possession evidence is admissible of a judgment recovered by him against a third party before entry by defendant, and acts of the officer thereunder putting him in possession.[23] Under the general issue evidence is admissible to disprove joint right of possession of several plaintiffs who count upon a joint title and right,[24] or of an abandonment by plaintiff before defendant's entry.[25] So under a general denial any fact showing that plaintiff had no right of entry when the action was commenced is admissible.[26] Evidence, however, of non-possession by defendant is admissible only where that fact is put in issue by special plea.[27] And a license or right in defendant to possession, where not pleaded, cannot be shown under a code provision that defendant shall not give in evidence any estate in himself or any license or right to the possession of land unless the same be pleaded in his answer.[28] Again it has been decided that a defendant who has disclaimed cannot show that he is in possession as agent of a stranger.[29]

5. Identity or Description of Property. Under the plea of not guilty the misnaming of the township where the land is situated may be shown.[30] Where a former recovery by defendant's landlord of the same lands of plaintiff is pleaded

N. C. 366. See also Farrior *v.* Houston, 95 N. C. 578.

See 17 Cent. Dig. tit. "Ejectment," § 232.

But see Allen *v.* McKay, (Cal. 1902) 70 Pac. 8; McCreery *v.* Duane, 52 Cal. 262; Hansee *v.* Mead, 27 Hun (N. Y.) 162; Raynor *v.* Timerson, 46 Barb. (N. Y.) 518; Orton *v.* Noonan, 25 Wis. 672.

Defense of adverse possession may be rebutted by plaintiff by evidence showing that he was an infant, when he acquired title, although he did not plead infancy by replication. Clayton *v.* Rose, 87 N. C. 106.

If plaintiff claims under a sale made under a mortgage after the debt was barred by the statute of limitations, defendant may avail himself of the statute under the general issue. Emory *v.* Keighan, 88 Ill. 482.

In California it has been decided that if defendant pleads the statute of limitations by reference to the section relied on as authorized by Code Civ. Proc. § 458, all facts necessary to constitute adverse possession may be shown under such section. Hagely *v.* Hagely, 68 Cal. 348, 9 Pac. 305.

19. Krauth *v.* Hahn, 65 S. W. 18, 23 Ky. L. Rep. 126.

20. Palmer *v.* Low, 18 Fed. Cas. No. 10,693, 2 Sawy. 248 [*affirmed* in 98 U. S. 1, 25 L. ed. 60].

21. Crandall *v.* Lynch, 20 App. Cas. (D. C.) 73, holding, however, that under such plea evidence is not admissible on the right of possession of plaintiff as against defendant to a particular portion of the premises, the issue being as to the right of possession to the whole.

Fraud in the entry of defendant may be shown without alleging it in the complaint. Depuy *v.* Williams, 26 Cal. 309.

Rightful possession by defendant as tenant may be shown where plaintiffs have no cause of action. Cunningham *v.* Roush, 157 Mo. 336, 57 S. W. 769.

22. Garrison *v.* Sampson, 15 Cal. 93.

23. Moon *v.* Rollins, 36 Cal. 333, 95 Am. Dec. 181.

24. Cheney *v.* Cheney, 26 Vt. 606.

25. Willson *v.* Cleaveland, 30 Cal. 192.

26. Semple *v.* Cook, 50 Cal. 26. See Jacob *v.* Carter, (Cal. 1894) 36 Pac. 381; Crowley *v.* Murphy, 11 Misc. (N. Y.) 579, 32 N. Y. Suppl. 806.

27. Edwardsville R. Co. *v.* Sawyer, 92 Ill. 377; Bernard *v.* Elder, 50 Miss. 336.

If a joint occupancy by defendants is alleged and not denied by their answer, evidence of an occupancy in severalty is not admissible. Fosgate *v.* Herkimer Mfg., etc., Co., 12 N. Y. 580 [*reversing* 9 Barb. 287, and *affirming* 12 Barb. 352].

Where there is an appearance for defendant, but no service, possession by defendant should be proved. McIntire *v.* Wing, 113 Pa. St. 67, 4 Atl. 197.

28. Oregon R., etc., Co. *v.* Hertzberg, 26 Oreg. 216, 37 Pac. 1019.

29. Duncan *v.* Sherman, 121 Pa. St. 520, 15 Atl. 565.

30. Stimmel *v.* Miller, 8 Pa. Co. Ct. 128.

in bar and this is traversed, the evidence should be confined to what disproves the issue, the identity of the land.[31]

6. Equitable Defenses. Where an equitable defense is not pleaded evidence of matters constituting such a defense is not admissible.[32] But where a defendant who had purchased the land in controversy and refused to pay the balance of the purchase-price after payment of a part thereof on account of plaintiff's defective title sets up such defective title by way of plea as an equitable defense evidence is admissible as to the part payment of the purchase-price.[33] And where plaintiffs claim under a patent from the United States and defendant merely sets up an equitable title evidence showing that the survey for the patent was incorrect was held inadmissible.[34]

F. Stipulations. The rules relating to issues and proof may, in ejectment as well as in other actions, be affected in their operation by the stipulations of the parties;[35] thus a stipulation filed by the parties that the action shall stand as an action of ejectment for the recovery of the premises in controversy will be construed as supplying such missing formal averments as may be required by statute in such actions.[36]

VII. Evidence.[37]

A. Burden of Proof — 1. On Plaintiff. The burden of proof is on plain-

But where the answer admits the possession of the premises demanded, described by lots and blocks, and alleges title in defendant, evidence is not admissible to show that the lots demanded are not coincident with those held by defendant by reason of a variance between different plats of the town site. Ming *v.* Foote, 9 Mont. 201, 23 Pac. 515.

31. Parks *v.* Moore, 13 Vt. 183, 37 Am. Dec. 589.

32. *California.*— Swain *v.* Duane, 48 Cal. 358.

Florida.— Petty *v.* Mays, 19 Fla. 652.

Missouri.— Bray *v.* Marshall, 75 Mo. 327.

Nebraska.— Colvin *v.* Republican Valley L. Assoc., 23 Nebr. 75, 36 N. W. 361, 8 Am. St. Rep. 114.

New York.— Barson *v.* Mulligan, 77 N. Y. App. Div. 192, 79 N. Y. Suppl. 31; Willey *v.* Greenfield, 64 N. Y. App. Div. 220, 71 N. Y. Suppl. 1046.

North Carolina.—Patterson *v.* Galliher, 122 N. C. 511, 29 S. E. 773; Talbert *v.* Becton, 111 N. C. 543, 16 S. E. 322; Rollins *v.* Henry, 78 N. C. 342.

Ohio.— Powers *v.* Armstrong, 36 Ohio St. 357; Stewart *v.* Hoag, 12 Ohio St. 623.

Wyoming.—Anderson *v.* Rasmussen, 5 Wyo. 44, 36 Pac. 820.

See 17 Cent. Dig. tit. "Ejectment," § 236.

But see Bynum *v.* Gold, 106 Ala. 427, 17 So. 667; East *v.* Peden, 108 Ind. 92, 8 N. E. 722; Travelers' Ins. Co. *v.* Walker, 77 Minn. 438, 80 N. W. 618.

Where an equitable title is not pleaded evidence showing such a title is not admissible.

California.— Manly *v.* Howlett, 55 Cal. 94; Kenyon *v.* Quinn, 41 Cal. 325; Cadiz *v.* Majors, 33 Cal. 288.

Minnesota.—Freeman *v.* Brewster, 70 Minn. 203, 72 N. W. 1068.

Missouri.— LeBeau *v.* Armitage, 47 Mo. 138; Kennedy *v.* Daniels, 20 Mo. 104.

Montana.— Lamme *v.* Dodson, 4 Mont. 560, 2 Pac. 298.

Nevada.— Brady *v.* Husby, 21 Nev. 453, 33 Pac. 801.

North Dakota.— McClory *v.* Ricks, 11 N. D. 38, 88 N. W. 1042.

Ohio.— Powers *v.* Armstrong, 36 Ohio St. 357.

See 17 Cent. Dig. tit. "Ejectment," § 236.

If complaint fails to set out the source of plaintiff's title, it is decided that under a general denial any defense equitable as well as legal may be shown. Parker *v.* Dacres, 1 Wash. 190, 24 Pac. 192.

33. Allison *v.* Elder, 45 Ga. 17.

34. Greer *v.* Mezes, 24 How. (U. S.) 268, 16 L. ed. 661.

35. Where a stipulation signed by the attorneys of both parties admits "that the plaintiff's testator, . . . was the owner of the premises prior to defendant's entry; that defendant entered under him, and now claimed the premises as her property and is in possession" the legal effect of the facts so admitted is not qualified by a closing provision "that defendant does not design by this to admit a tenancy of any kind." Haight *v.* Green, 19 Cal. 113. Again if in a case stated there is an allegation that the lineal and collateral heirs of a remote ancestor from whom the estate came "became extinct so far as the parties know" it is sufficient evidence to support a finding that there are no such heirs. Dowell *v.* Thomas, 13 Pa. St. 41.

Where the parties stipulate for a reference and for a conveyance by plaintiff to defendant within a certain time and on trial in pursuance of such stipulation judgment is rendered for plaintiff for the possession of the entire tract it is decided that defendant has an equitable title to the land agreed to be conveyed to him. Killey *v.* Wilson, 33 Cal. 690.

36. Lawe *v.* Hyde, 39 Wis. 345.

37. **Evidence** generally see Evidence.

tiff to establish the title, claim, interest, or right which he substantially asserts and upon which he relies as the basis of his recovery,[38] even though he may be required to prove a negative.[39] Within this rule plaintiff must show a superior or better title,[40] or a right of possession or entry;[41] a prior[42] or adverse possession;[43] a title to lands outside of boundaries, where a part of the premises is covered by other titles;[44] the identity of land as to its inclusion within boundaries,[45] and that the land in dispute is not that or a part of that included within an exception or reservation of the deed under which he claims.[46] So proof of actual ouster

38. *Alabama.*— Laster *v.* Blackwell, 133 Ala. 337, 32 So. 166; Edmondson *v.* Anniston City Land Co., 128 Ala. 589, 29 So. 596.

Colorado.— Richner *v.* Brisbane, 19 Colo. 385, 35 Pac. 740; Rittmaster *v.* Brisbane, 19 Colo. 371, 35 Pac. 736.

Illinois.— St. Louis, etc., R. Co. *v.* Warfel, 163 Ill. 641, 45 N. E. 169.

Indiana.—Graham *v.* Lunsford, 149 Ind. 83, 48 N. E. 627.

Iowa.— Greer *v.* Hartney, 53 Iowa 738, 4 N. W. 861.

Kentucky.— Chenault *v.* Quisenberry, 56 S. W. 410, 57 S. W. 234, 22 Ky. L. Rep. 79.

Louisiana.— Boyle *v.* West, 107 La. 347, 31 So. 794.

Maryland.— Richardson *v.* Baltimore, etc., R. Co., 89 Md. 126, 42 Atl. 938.

North Carolina.— Candler *v.* Long, 132 N. C. 675, 44 S. E. 368; Finch *v.* Finch, 131 N. C. 271, 42 S. E. 615.

Pennsylvania.— Hess *v.* Herrington, 73 Pa. St. 438, plaintiff must show a *prima facie* title.

South Carolina.— Hodge *v.* Hodge, 56 S. C. 263, 34 S. E. 517.

Texas.— Garrison *v.* Coffey, (Sup. 1887) 5 S. W. 638; Halsell *v.* McCutchen, (Civ. App. 1901) 64 S. W. 72; Lockridge *v.* Corbett, 31 Tex. Civ. App. 352, 73 S. W. 696.

See 17 Cent. Dig. tit. "Ejectment," § 244.

Burden of showing that the homestead was not acquired under laws requiring actual settlement and residence is not cast upon plaintiff by a recital in the patent that his claim was established pursuant to a specified act of congress. Grant *v.* Oliver, 91 Cal. 158, 27 Pac. 596, 861.

In ejectment by a daughter to recover, as heir at law, real estate of which her mother died seized, the father's death must be shown where he if living would be entitled to an estate by the curtesy. Rathbone *v.* Hamilton, 4 App. Cas. (D. C.) 475.

Plaintiff must prove notice where both parties claim title from a common source and he asserts that defendant is not a *bona fide* purchaser. Bodenheimer *v.* Chesson, 111 Ala. 539, 20 So. 364.

Plaintiff must show that execution debtor owned land, where he claims under an execution sale. Adams *v.* Yates, 143 Mo. 475, 45 S. W. 304. And see McGee *v.* Kane, 14 Ont. 226.

Termination of a life-estate must be proven by plaintiff, where he claims under a deed reserving such estate to grantors. Williams *v.* Woodruff, 138 Ala. 125, 35 So. 122.

Where the state seeks to recover canal lands it must first prove that the lands were formerly part of the canal system of the state. State *v.* Cincinnati Tin, etc., Co., 66 Ohio St. 182, 64 N. E. 68.

39. O'Brien *v.* Doe, 6 Ala. 787. And see Roland *v.* Fischer, 30 Ill. 224; Lane *v.* Gordon, 18 N. Y. App. Div. 438, 46 N. Y. Suppl. 57.

40. Doe *v.* Edmondson, 127 Ala. 445, 30 So. 61; Martin *v.* Kelley, 30 S. W. 612, 17 Ky. L. Rep. 200; Young *v.* Cox, 14 S. W. 348, 12 Ky. L. Rep. 347.

41. Wilson *v.* Johnson, 145 Ind. 40, 38 N. E. 38, 43 N. E. 930; Young *v.* Cox, 14 S. W. 348, 12 Ky. L. Rep. 347; Richardson *v.* Baltimore, etc., R. Co., 89 Md. 126, 42 Atl. 938.

42. Price *v.* Hallett, 138 Mo. 561, 38 S. W. 451.

43. Bowling *v.* Mobile, etc., R. Co., 128 Ala. 550, 29 So. 584; Beecher *v.* Ferris, 117 Mich. 108, 75 N. W. 294, 124 Mich. 9, 82 N. W. 617. And see Swift *v.* Mulkey, 14 Oreg. 59, 12 Pac. 76.

44. Putnam *v.* Tyler, 117 Pa. St. 570, 585, 12 Atl. 43.

45. Papin *v.* Allen, 33 Mo. 260; Maxwell Land Grant Co. *v.* Dawson, 151 U. S. 586, 14 S. Ct. 458, 38 L. ed. 279 [*affirming* 7 N. M. 133, 34 Pac. 191].

In cases of latent ambiguity in a deed the burden of proof rests upon plaintiff to show that a certain tract was within that conveyed to him. Bradish *v.* Yocum, 139 Ill. 386, 23 N. E. 114.

Plaintiff must prove that the boundaries are incorrect as marked upon the ground, where they differ from those in the plat accompanying the deed (Kron *v.* Daugherty, 9 Pa. Super. Ct. 163) or that defendant's occupancy extends over the boundary line (Harper *v.* Anderson, 132 N. C. 89, 43 S. E. 588). He must also prove the line he claims correct. Greif *v.* Norfolk, etc., R. Co., (Va. 1898) 30 S. E. 438.

Plaintiff must show locality of land as well as title, where both parties claim from a common source. Garrison *v.* Coffey, (Tex. Sup. 1887) 5 S. W. 638.

Where plaintiff claims that grantor occupies more land than he has reserved under his deed he must make out his case. Whoever asserts that he is trespassed upon must prove it. Reidinger *v.* Cleveland Iron Min. Co., 39 Mich. 30.

46. Harman *v.* Stearns, 95 Va. 58, 27 S. E. 601; Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347; Maxwell Land Grant Co. *v.* Dawson, 7 N. M. 133, 34 Pac. 191 [*affirmed* in 151 U. S. 586, 14 S. Ct. 458, 38 L. ed. 279]. And see Knapp *v.* Mosier, 40 S. W. 925, 19 Ky. L.

may be necessary.[47] Plaintiff may also take upon himself the burden of proving certain facts, where he attempts to do so instead of relying upon statutory presumptions in his favor.[48] And the burden of proof is not changed upon a second trial, although plaintiff has obtained restitution under judgment rendered on the first trial.[49] The burden of proof may also be again cast upon plaintiff in rebuttal.[50]

2. ON DEFENDANT. Where plaintiff sufficiently proves his case the burden of proof will be shifted to defendant; and where the latter substantially asserts and relies upon a fact as an affirmative issue he must establish the same.[51] So the

Rep. 435; Bernhardt *v.* Brown, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725; Gudger *v.* Hensley, 82 N. C. 481.

Where one concedes by claiming under a patent excluding certain prior grants that the title under the elder grant is superior to his, he must show that his land is outside the excluded territory and that it does not encroach upon the elder grant. Hall *v.* Martin, 89 Ky. 9, 11 S. W. 953, 11 Ky. L. Rep. 241.

47. Gilchrist *v.* Ramsay, 27 U. C. Q. B. 500.

When unnecessary.— Where one tenant in common under a will conveys the whole estate, claiming it as heir at law, and the other tenants in common bring ejectment against the grantee, proof of actual ouster is unnecessary. Scott *v.* McLeod, 14 U. C. Q. B. 574.

48. Claflin *v.* Robinhorst, 40 Wis. 482.

49. Donahue *v.* Klassner, 22 Mich. 252.

50. Lane *v.* Gordon, 18 N. Y. App. Div. 438, 46 N. Y. Suppl. 57; Davis *v.* Living, 50 W. Va. 431, 40 S. E. 365. And see Jennings *v.* Gorman, 19 Mont. 545, 48 Pac. 1111.

Abandonment of superior outstanding title shown by defendant must be established by plaintiff. Woods *v.* Bonner, 89 Tenn. 411, 18 S. W. 67; Buttery *v.* Brown, (Tenn. Ch. App. 1899) 52 S. W. 713.

Where both parties claim from a common source and plaintiff introduces a deed of anterior date and defendant shows that he purchased the land for value plaintiff must then rebut such evidence or show notice. Bynum *v.* Gold, 106 Ala. 427, 17 So. 667.

51. Hartley *v.* Ferrell, 9 Fla. 374; Horton *v.* Murden, 117 Ga. 72, 43 S. E. 786; Hadley *v.* Bean, 53 Ga. 685; Whatley *v.* Doe, 10 Ga. 74; Doe *v.* Roe, Ga. Dec. 140. And see Mason *v.* Park, 4 Ill. 532; Henry *v.* Reichert, 22 Hun (N. Y.) 394; State *v.* Cincinnati Tin, etc., Co., 66 Ohio St. 182, 64 N. E. 68; Soper *v.* Guernsey, 71 Pa. St. 219.

Before plaintiff shows his right defendant need not prove title. Boyle *v.* West, 107 La. 347, 31 So. 794.

Burden is upon defendant to prove: Title in himself or third person, where plaintiff shows that his ancestor died in possession holding under title or color of title (Weaver *v.* Rush, 62 Ark. 51, 34 S. W. 256); invalidity of a tax deed under which plaintiff holds (Abbott *v.* Lindenbower, 46 Mo. 291); that plaintiff or his assignor is barred by foreclosure decree (Enos *v.* Cook, 65 Cal. 175, 3 Pac. 632); want of capacity of grantor (Alsop *v.* Weir, 7 Ky. L. Rep. 365); that land for which a military patent issued varies from the entry, where he attempts to impeach plaintiff's title under such patent (Rays *v.* Woods, 2 B. Mon. (Ky.) 217); the contrary of recitals in ancient documents as to ownership (Norris *v.* Hall, 124 Mich. 170, 82 N. W. 832); the contrary of recitals in a trust deed (McCallister *v.* Ross, 155 Mo. 87, 55 S. W. 1027); to destroy a *prima facie* title held from a junior grantee where defendant is a stranger to the title and does not claim under a senior grantee (Barber *v.* Robinson, 78 Minn. 193, 80 N. W. 968); to disprove the identity of persons claiming as heirs (Keech *v.* Enriquez, 28 Fla. 597, 10 So. 91); to show that title passed before plaintiff acquired it (Wunderlich *v.* Spradling, 121 Mo. 364, 25 S. W. 1063); title in another which would if true defeat plaintiff's recovery (Grigsby *v.* Akin, 128 Ind. 591, 28 N. E. 180; Richardson *v.* Baltimore, etc., R. Co., 89 Md. 126, 42 Atl. 938. And see Stokely *v.* Trout, 3 Watts (Pa.) 163); validity of such outstanding title (Wilson *v.* Braden, 48 W. Va. 196, 36 S. E. 367); where he claims under a subsequent deed from a grantor of the same name as plaintiff's grantor that the latter was not the owner of the land (Jackson *v.* Cody, 9 Cow. (N. Y.) 140); a paramount title (Camarillo *v.* Fenlon, 49 Cal. 202; Swift *v.* Mulkey, 14 Oreg. 59, 12 Pac. 76; Bracka *v.* Fish, 23 Wash. 646, 63 Pac. 561); possession of a mortgagee, and a purchaser of a tax lease under whom they claim, it being conceded that the one through whom plaintiff claimed was the former owner (Gross *v.* Welwood, 90 N. Y. 638); identity of grantees claiming under an act of congress as cultivated lotholders (Glasgow *v.* Baker, 14 Mo. App. 201); that a deed under a tax-sale of undivided interest, under which he claims, covers plaintiff's interest (Butler *v.* Porter, 13 Mich. 292); that he is within the exceptions of plaintiff's deed, where he claims land within the boundaries thereof under the exceptions (Bernhardt *v.* Brown, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725. See also Bowman *v.* Bowman, 3 Head (Tenn.) 47); a right of possession, where plaintiff has established a prescriptive title (Goodwin *v.* Scheerer, 106 Cal. 690, 40 Pac. 18); the validity of a municipal assessment lease and his right of possession thereunder (Bedell *v.* Shaw, 59 N. Y. 46); facts which take a claim under a parol gift out of the statute of frauds (Moore *v.* Small, 19 Pa. St. 461); that his occupation was a resumption of his former possession and reinstatement of his equitable title which had been divested by writ of habere

burden of a particular issue may be upon defendant, even though plaintiff be required to prove his whole cause.[52]

3. On Intervener. Where the litigants rest their claims upon equitable titles and an intervener's title is the oldest, the burden is upon the other claimants to show all the facts essential to constitute a superior title.[53]

4. As Affected by Pleadings. The burden of proof is put upon plaintiff by a denial in the answer,[54] by a reply setting up the invalidity of defendant's title and a denial of his ownership;[55] or by a rejoinder denying the allegations of a reply and putting in issue the character of defendant's interest in the land.[56] And he must establish his title as alleged.[57] Admissions in the answer may, however, be such as to shift the burden of proof upon defendants.[58] But a failure to answer does not admit the value of the premises for rent and the demand must be proved.[59] Matters pleaded in avoidance must also be proved.[60]

B. Presumptions — 1. In General. The expiration of a life-estate may be presumed from lapse of time,[61] and vendees under judicial sales are favored,[62] so

facias possessionem (Berwind *v.* Williams, 172 Pa. St. 1, 33 Atl. 353); an alleged surrender of a lease where it is a part of his case (Hague *v.* Ahrens, 53 Fed. 58, 3 C. C. A. 426); his adverse possession (Scales *v.* Doe, 127 Ala. 582, 29 So. 63; Dothard *v.* Denson, 72 Ala. 541; Hulsey *v.* Wood, 55 Mo. 252; Conkey *v.* John L. Roper Land Co., 126 N. C. 499, 36 S. E. 42; Swift *v.* Mulkey, 14 Oreg. 59, 12 Pac. 76; Lawrence *v.* Kenney, 32 Wis. 281), and affirmatively on alleged prescription under color of title (Bussey *v.* Jackson, 104 Ga. 151, 30 S. E. 646). The burden is also upon defendant where he recognizes title to have been originally in plaintiff and only claims the land by parol gift and adverse possession. Davis *v.* Davis, 68 Miss. 478, 10 So. 70. But he need not prove his own adverse possession as against plaintiff's assertion of adverse possession. Beecher *v.* Ferris, 117 Mich. 108, 75 N. W. 294.

Railroad company claiming title to land by condemnation under its charter must show a strict compliance therewith. Mobley *v.* Breed, 48 Ga. 44.

52. Owensboro, etc., R. Co. *v.* Barker, 22 S. W. 444, 15 Ky. L. Rep. 175.

53. Jackson *v.* Waldstein, (Tex. Civ. App. 1894) 27 S. W. 26.

54. Klinkner *v.* Schmidt, 114 Iowa 695, 87 N. W. 661; Beckman *v.* Richardson, 28 Kan. 648; Langley *v.* Jones, 26 Md. 462; Farley *v.* Parker, 4 Oreg. 269.

Genuineness of signature to deed under which plaintiff claims title must be established by him upon denial of his title in the answer. Weaver *v.* Whilden, 33 S. C. 190, 11 S. E. 686.

If title in plaintiff and wrongful entry by defendant be alleged and the latter sets up title in himself the burden of the whole cause is upon plaintiff. Owensboro, etc., R. Co. *v.* Barker, 22 S. W. 444, 15 Ky. L. Rep. 175.

Where all the averments are put in issue by defendant who in addition to his traverse alleges title and possession the burden of proving title rests upon plaintiff. Chenault *v.* Quisenberry, 56 S. W. 410, 57 S. W. 234, 22 Ky. L. Rep. 79.

Where both parties claim from a common source of title, plaintiff will only be required to show a good and connected claim of title from the common source down to himself to entitle him to recover. If plaintiff shows the better title, although not altogether free from objections, he will be entitled to recover, unless a paramount outstanding title is shown in another. Smith *v.* Laatsch, 114 Ill. 271, 2 N. E. 59.

55. Howard *v.* Lock, 22 S. W. 332, 15 Ky. L. Rep. 154.

56. Reno *v.* Blackburn, 72 S. W. 775, 24 Ky. L. Rep. 1976.

57. Chavanne *v.* Frizola, 25 La. Ann. 76.

Material averment neither denied nor admitted must be proven. Wilson *v.* Augur, 176 Ill. 561, 52 N. E. 289.

58. Collins *v.* Swanson, 121 N. C. 67, 28 S. E. 65; Bonham *v.* Bishop, 23 S. C. 96.

If defendant fails to deny the acts complained of in the possession of plaintiff and justifies under a claim of title, the burden of proof is then upon him. Chenault *v.* Quisenberry, 56 S. W. 410, 57 S. W. 234, 22 Ky. L. Rep. 79.

59. Equitable Bldg., etc., Assoc. *v.* Holloway, 114 Ga. 780, 40 S. E. 742.

60. Shirey *v.* Cumberhouse, 41 Ark. 97; Wurts *v.* Mullen, 6 Colo. 576.

61. Stevenson *v.* Howard, 3 Harr. & J. (Md.) 554.

62. Whatley *v.* Doe, 10 Ga. 74 (holding that vendees under judicial sales shall not be put to the same proof as in cases of persons buying land from individuals); Bowman *v.* Fry, 1 Yeates (Pa.) 21. And see Purl *v.* Miles, 9 La. Ann. 270. But *compare* Frazee *v.* Nelson, 179 Mass. 456, 61 N. E. 40, 88 Am. St. Rep. 391; Daudt *v.* Harmon, 16 Mo. App. 203 [*criticized* in Murphy *v.* De France, 105 Mo. 53, 15 S. W. 949, 16 S. W. 861].

Purchaser at execution sale who has recorded certificate before any conveyance from debtor is presumed, until the contrary appears, to be entitled to recover against subsequent grantees of debtor. Atwood *v.* Bearss, 45 Mich. 469, 8 N. W. 55.

recitals may create presumptions,[63] or may be inferior evidence;[64] and recitals in a public statute may be *prima facie* evidence, although they are not conclusive, between private individuals. Recitals, in private statutes, however, although admissible against the state and subsequent grantees, do not bind those not parties.[65] Nor does a statement in the constitution of a state create a rule of evidence and raise a presumption of title in the people against an actual occupant.[66] A sale and trust deed will after the sale and recording of the deed be presumed to have been made in accordance with the provisions of the trust.[67] And lapse of time may raise a presumption that a trust created by an assignment was executed and the land reconveyed or released to the assignor.[68] The jury may under certain circumstances presume a satisfied term to have been surrendered to the *cestui que use*,[69] and a waiver and abandonment of title may be inferred from the circumstances.[70] Repeated acts of recognition of plaintiff's title may afford a presumption that defendant came into possession under the lessor of plaintiff.[71] But a party will not be aided by presumptions favoring the validity or sufficiency

Strong presumption that sheriff's sale never took place exists where neither the sheriff nor the attorney had any recollection thereof, the records having been destroyed by fire. George *v.* Thomason, 63 Ill. 149.

Upon ejectment by a purchaser at a foreclosure sale it will not be presumed on appeal that a stranger to the record purchased from the mortgagor before the foreclosure proceedings. Bateman *v.* Miller, 118 Ind. 345, 21 N. E. 292.

Publication of sheriff's sale will not be presumed where the sheriff has filed an execution without any return thereon. Claflin *v.* Robinhorst, 40 Wis. 482 [*distinguishing* Woodman *v.* Clapp, 21 Wis. 350].

But where a tax-sale is based upon charges of record, presumption favors their validity until the contrary is shown. Drennan *v.* Beierlein, 49 Mich. 272, 13 N. W. 587.

63. Beall *v.* Lynn, 6 Harr. & J. (Md.) 336, holding that a conveyance from a patentee may be presumed from recitals in a deed from his immediate grantee coupled with possession by subsequent grantees under a claim of title.

Assertions of title or claims of ownership in deeds, however ancient, are never evidence in favor of persons claiming under the grantor, except in connection with other proof of a long continued and undisputed possession in accordance with the right or title claimed. McKinnon *v.* Bliss, 21 N. Y. 206.

Recitals in sheriff's return to ejectment writ showing defendant's possession are not as strong evidence as a deed duly executed and recorded from defendant before judgment is entered against him. Yost *v.* Brown, 126 Pa. St. 92, 17 Atl. 533.

Validity of "existing lease" is presumed from recitals in a deed of a portion of town commons, under the act of March 21, 1874. Woods *v.* Soucy, 184 Ill. 568, 56 N. E. 1015.

Where a sheriff files an execution without any return as to his doings thereon and plaintiff fails to show any publication or notice of the sale, such publication cannot be presumed, nor is it sufficiently proved by the recitals in the deed. Claflin *v.* Robinhorst, 40 Wis. 482.

64. Short *v.* Clay, 1 A. K. Marsh (Ky.) 371, holding that residence of the title-holder at the date of a commissioner's deed will not be presumed as against the recitals of non-residence in their bond, in a case where to render the deed operative the holder of the title must have been a non-resident.

65. McKinnon *v.* Bliss, 21 N. Y. 206.

Deeds, patents, and even acts of parliament may be presumed to support the long and uninterrupted possession of a right or claim of right; but a conveyance will never be presumed to defeat the claim of a person showing a good paper title, unless there has been an adverse possession or enjoyment under claim of right, in accordance with the fact presented. Doe *v.* Butler, 3 Wend. (N. Y.) 149.

66. People *v.* Trinity Church, 22 N. Y. 44 [*affirming* 30 Barb. 537].

67. Fulton *v.* Johnson, 24 W. Va. 95.

68. King *v.* Manning, 20 N. J. L. 612.

69. Goodtitle *v.* Jones, 7 T. R. 43, holding also that if no such presumption is made, and it appears in a special verdict that such term is still outstanding in a trustee who is not joined in bringing the ejectment, the *cestui que trust* cannot recover. See Doe *v.* Sybourn, 7 T. R. 2, 2 Esp. 499, 4 Rev. Rep. 363.

No less time than twenty years will raise a presumption that a mortgaged term has been assigned or surrendered, although defendant in ejectment setting up the mortgaged term as a bar neither proves that interest continues to be paid nor accounts for his possession of the mortgage deed. Doe *v.* Calvert, 5 Taunt. 170, 14 Rev. Rep. 733, 1 E. C. L. 94.

A term assigned to attend the inheritance will not be presumed to have been surrendered, unless there has been a dealing with the estate in such a manner as reasonable men would not have dealt with it unless the term had been put an end to. Garrard *v.* Tuck, 8 C. B. 231, 13 Jur. 871, 18 L. J. C. P. 338, 65 E. C. L. 231.

70. Brandt *v.* Phillippi, 82 Cal. 640, 23 Pac. 122.

71. Jackson *v.* Croy, 12 Johns. (N. Y.) 427.

of title deeds, where he is able to produce them and fails to do so.[72] Nor can identity of names be presumed in favor of a plaintiff.[73] And it will not be presumed without evidence that the holder of an outstanding title was dead at the commencement of the suit.[74]

2. **As to Title From Government or Grantor.** Title is presumed to be in plaintiff where it is shown that he deraigned title under a patent from the government,[75] and plaintiff makes a *prima facie* case by introducing his deed in evidence and proving title in his grantor and possession by him.[76]

3. **As to Possession and Right of Possession.** Possession raises a presumption of title until the contrary be shown,[77] especially when it has continued for a long time;[78] but this presumption of course disappears if the title is shown in another,[79] and if plaintiff is shown to have the legal title he is presumed to have the right of possession,[80] until a better right is shown.[81] Possession is presumed where title is found or conceded to be in a person;[82] and where defendant was in possession, shortly before and shortly after commencement of the action, his possession will be presumed during the intermediate period, unless the contrary be shown.[83] That a deed is more than thirty years old does not raise a presumption precluding the necessity of proving title or possession of grantors, especially when the deed is not shown to antedate the occupancy of defendant.[84] Nor will grants or releases from co-grantees of plaintiff's grantor be presumed, in the absence of

72. Nay *v.* Mograin, 24 Kan. 75.

73. Ambs *v.* Chicago, etc., R. Co., 44 Minn. 266, 46 N. W. 321. See also Doe *v.* Roe, Ga. Dec. 140.

74. Mosheimer *v.* Ussleman, 36 Ill. 232.

75. Morrill *v.* Chapman, 35 Cal. 85. See also Treat *v.* Lawrence, 42 Wis. 330.

That all necessary preliminary steps to the issuance of a patent were taken will be presumed. Smith *v.* Pipe, 3 Colo. 187.

Where lands in dispute are wild and uncultivated and in possession of no one, patents afford presumption that title was in the state when it issued them, the state also being the common source of title. Hewitt *v.* Butterfield, 52 Wis. 384, 9 N. W. 15.

When presumption of title in United States does not exist.— Where plaintiff, mortgagee, proved that the mortgagor was in possession of the land at the time he made the mortgage and it appeared that he subsequently conveyed to and delivered possession to defendant who made application to the land-office to enter the land as a homestead and his application was pending at the time of the trial, it cannot be presumed that the title of the land is in the United States. Preiner *v.* Meyer, 67 Minn. 197, 69 N. W. 887.

76. Stowell *v.* Spencer, 190 Ill. 453, 60 N. E. 800.

Presumption arises, upon proof that a common ancestor left a will, that he willed the land which must be rebutted by the heirs to establish title in them. Cox *v.* Beaufort County Lumber Co., 124 N. C. 78, 32 S. E. 381.

Where plaintiff adduces a chain of title to himself from a source known to be valid, it is not necessary to show possession in each of the immediate grantees, but such possession will be presumed. Arents *v.* Long Island R. Co., 89 Hun (N. Y.) 126, 34 N. Y. Suppl. 1085.

77. See *supra*, II, C, 4.

Good faith of the holder of color of title will be presumed in the absence of anything to the contrary. Fisher *v.* Bennehoff, 121 Ill. 426, 13 N. E. 150.

It will be presumed that legal title was in the father at the time of his decease, where plaintiff and defendant both claim under him, the former by will and the latter by gift before his death. Doe *v.* Savoy, 28 N. Brunsw. 168.

78. Brown *v.* Oldham, 123 Mo. 621, 27 S. W. 409; Dunn *v.* Eaton, 92 Tenn. 743, 23 S. W. 163; Fletcher *v.* Fuller, 120 U. S. 534, 7 S. Ct. 667, 30 L. ed. 759. See also *supra*, II, C, 4.

A grant may be presumed in order to quiet a long possession. Fuller *v.* Fletcher, 44 Fed. 34.

Long and peaceable possession raises the presumption of a grant in cases not within the statute of limitations, or where such possession is consistent with a grant and other circumstances make it reasonable to presume such a grant. Townsend *v.* Downer, 32 Vt. 183.

Possession long held under deed also raises a presumption that the deed was recorded within time limited by law. Smith *v.* Steele, 3 Harr. & M. (Md.) 103.

79. Dothard *v.* Denson, 72 Ala. 541. And see *supra*, II, C, 4.

80. McCarthy *v.* Brown, 113 Cal. 15, 45 Pac. 14.

81. Lamme *v.* Dodson, 4 Mont. 560, 2 Pac. 298.

82. Harison *v.* Caswell, 17 N. Y. App. Div. 252, 45 N. Y. Suppl. 560; Doherty *v.* Matsell, 11 N. Y. Civ. Proc. 392; Doe *v.* Butler, 3 Wend. (N. Y.) 149; Yost *v.* Brown, 126 Pa. St. 92, 17 Atl. 533; Dexter *v.* Hall, 15 Wall. (U. S.) 9, 21 L. ed. 73.

83. Eaton *v.* Woydt, 26 Wis. 383.

84. McClellan *v.* Zwingli, 70 Hun (N. Y.) 600, 24 N. Y. Suppl. 371.

evidence of acts of possession and ownership over the whole tract, or of recognition of his title to the whole.[85]

4. As to Prior or Adverse Possession. A prior possession creates a presumption of title which entitles plaintiff to recover against a naked trespasser.[86] And this presumption can only be rebutted or overcome by showing title in defendant, or an outstanding title in a third party, or that plaintiff's title was subordinate and permissive, or that the action is barred by the statute of limitations.[87] So a prior possession for several years, accompanied by the erection of valuable improvements and other acts of ownership, raises a presumption of title.[88] And actual prior possession of a part of a tract, when supported by deeds purporting to convey an interest in the entire tract, establishes a *prima facie* case as against mere trespassers.[89] A hostile possession may be shown by proof that defendant was in possession when suit was commenced.[90]

5. As to Entry. Where one enters into possession under conveyance from one claiming title, the title is presumed good until the contrary is shown,[91] and where an entry on which a grant of land is founded is not in evidence, it will be presumed that the grant followed the entry in respect to the location of the land.[92] Where a brother and an unmarried adult sister settle upon an abandoned improvement and the sister assists him in all the work of clearing and cultivation, there is no presumption that the entry and settlement of the land is that of the brother, but the question is properly left to the jury as one of fact.[93]

6. Overcoming or Rebutting Presumptions. A person has the benefit of a presumption until it is overcome, as it may be,[94] by proof of facts inconsistent with the supposed existence of a grant or deed,[95] or by showing a better title or right,[96] or an adverse possession.[97] But a mixed possession will not prevent the presumption of a deed, unless held by both parties claiming title to the same land.[98]

C. Admissibility[99] — 1. In General — a. Competency and Relevancy Generally. The principle underlying the rule which requires evidence to be competent, relevant, and material to the issue applies to ejectment, as to all other classes of actions.[1] And evidence which tends to raise a false and irrelevant issue should

85. Mackinnon *v.* Barnes, 66 Barb. (N. Y.) 91.

86. Green *v.* Jordan, 83 Ala. 220, 3 So. 513, 3 Am. St. Rep. 711; Wilson *v.* Glenn, 68 Ala. 383; Hallett *v.* Eslava, 2 Stew. (Ala.) 115; Hutchinson *v.* Perley, 4 Cal. 33, 60 Am. Dec. 578; Jones *v.* Nunn, 12 Ga. 469.

In the absence of proof of title in either party, a presumption of title in favor of the first possessor arises. Fowke *v.* Darnall, 5 Litt. (Ky.) 316.

87. Wilson *v.* Glenn, 68 Ala. 383.

88. Allred *v.* Elliott, 71 Ala. 224. See also Hallett *v.* Eslava, 2 Stew. (Ala.) 115.

89. Bowling *v.* Mobile, etc., R. Co., 128 Ala. 550, 29 So. 584.

Where no notices of title were attached to the record and plaintiff claimed the land as part of a certain lot and defendant defended for it as part of another lot, plaintiff was held bound to prove his title to the lot as he claimed. Cascaden *v.* Conway, 17 U. C. Q. B. 598.

90. Sharp *v.* Ingraham, 4 Hill (N. Y.) 116.

91. Pitney *v.* Leonard, 1 Paige (N. Y.) 461.

92. Perry *v.* Clift, (Tenn. Ch. App. 1899) 54 S. W. 121.

93. Cambria Iron Co. *v.* Tombs, 48 Pa. St. 387.

94. Hallett *v.* Eslava, 2 Stew. (Ala.) 115; People *v.* Trinity Church, 30 Barb. (N. Y.) 537. See also Walbridge *v.* Gilmour, 22 U. C. C. P. 135.

Presumption of title arising from prior possession may be rebutted. Robertson *v.* Kirby, 25 Tex. Civ. App. 472, 61 S. W. 967.

95. Fuller *v.* Fletcher, 44 Fed. 34.

96. Eagle, etc., Mfg. Co. *v.* Gibson, 62 Ala. 369.

97. Dexter *v.* Hall, 15 Wall. (U. S.) 9, 21 L. ed. 73. See also Doherty *v.* Matsell, 11 N. Y. Civ. Proc. 392.

98. Beall *v.* Lynn, 6 Harr. & J. (Md.) 336.

99. **Evidence admissible to show adverse possession** see 1 Cyc. tit. Adverse Possession.

1. Beattie *v.* Crewdson, 124 Cal. 577, 57 Pac. 463.

Within the above rule evidence is admissible of controlling material facts (Fernsler *v.* Seibert, 114 Pa. St. 196, 1 Atl. 154, 6 Atl. 165); where it is applicable to one of two demises but not as to the other (Slaughter *v.* Doe, 67 Ala. 494. See also Doe *v.* Fern, 3 Campb. 190; Doe *v.* Read, 12 East 57); where it is competent as to some of the defendants, although not as to others (Russell *v.* Erwin, 41 Ala. 292); of the purpose for which a certain sum of money was furnished

not be received, as it would necessarily tend to obscure the actual issues in the case.[2]

b. Collateral Proceedings, Judgments, and Records — (I) *When Admissible.*[3] The pleadings, the verdict, and the judgment in an action of trespass *quare clausum fregit* taken on the general issue with leave to give special matter in evidence, together with parol proof that the right to the land had been brought in question in such action, are competent evidence in ejectment brought for the same land.[4] And a verdict and judgment in an action of trespass *vi et armis* under the plea of *non cul* and *liberum tenementum* aided by parol evidence are admissible in ejectment between the same parties for the same land.[5] Evidence of proceedings to condemn is also admissible in behalf of a defendant who is a transferee of a railroad company's rights which was duly empowered to condemn lands.[6] And a writ of ejectment, although not set forth in plaintiff's abstract of title, is competent evidence.[7] Defendant may also upon proper plea go into proof

by the wife and her accompanying directions where both husband and wife sue in ejectment claiming a purchase of the land by them each furnishing a portion of the money (Ray *v.* Long, 132 N. C. 891, 44 S. E. 652); and a statutory rule excluding evidence is not inclusive of ejectment when it does not embrace that action and is inapplicable (Copperthwait *v.* McCord, 6 Fed. Cas. No. 3,216, 2 McLean 143). See further as to admissibility Bradley *v.* Lightcap, 201 Ill. 511, 66 N. E. 546; Gilman *v.* Rispelle, 18 Mich. 145; Breeden *v.* Hanley, 95 Va. 622, 29 S. E. 328.

Within the above rule evidence is inadmissible of the value of the premises, except so far as it affects mesne profits (Merrill *v* Whitaker, 42 Ga. 403. See also Hoover *v.* Gonzalus, 11 Serg. & R. (Pa.) 314); of the bad character of one of the parties through whose hands the title had passed, but who was connected with the case in no other way than as his name so appears in the title (Boatright *v.* Porter, 32 Ga. 130); that claimant was for years too poor to sue (Fuller *v.* Fletcher, 44 Fed. 34); of a warrant and survey which neither interfered with the survey of the land in dispute nor adjoined it (Bratton *v.* Mitchell, 3 Pa. St. 44); of a copy of paper recorded in the town clerk's office purporting to be a survey of the road, to prove the recognition of the highway by adjoining land proprietors, as it does not disprove the title of an adjoining proprietor (Wooster *v.* Butler, 13 Conn. 309); that if a line was run as claimed by defendant, plaintiff could not get out to the highway (Webster *v.* Green, 60 S. W. 714, 22 Ky. L. Rep. 1456); of an offer to donate land, of which plaintiff was not in possession, to public enterprises (Edmonston *v.* Anniston City Land Co., 128 Ala. 589, 29 So. 596); and to show, where neither party claims under a proper title, that prior to plaintiff's possession the land had been in possession of other parties (Foot *v.* Murphy, 72 Cal. 104, 13 Pac. 163). Evidence is also incompetent of an oral agreement between defendant and one to whom he conveyed the land, and under whom plaintiff claims, that defendant should have the right to redeem. McGinnis *v.* Fernandez, 126 Ill. 228, 19 N. E. 44. And a paper is inadmissible where it furnishes no evidence of any material fact. Wooster *v.* Butler, 13 Conn. 309. So evidence to show motive of the deed and its consideration is not a proper subject of inquiry in ejectment as the parties stand upon their legal rights. This rule applies to a case where evidence is offered to show the business and property interests of grantors in ejectment based upon breach of a condition in a deed against erection of certain buildings. Wakefield *v.* Van Tassell, 202 Ill. 41, 66 N. E. 830, 95 Am. St. Rep. 207. See also Gray *v.* Chicago, etc., R. Co., 189 Ill. 400, 59 N. E. 950; Chicago, etc., R. Co. *v.* Hull, 24 Nebr. 740, 40 N. W. 280; Perry *v.* Scott, 51 Pa. St. 119; Swartz *v.* Swartz, 4 Pa. St. 353, 45 Am. Dec. 697; Lagoria *v.* Dozier, 91 Va. 492, 22 S. E. 239; Burnett *v.* Caldwell, 9 Wall. (U. S.) 290, 19 L. ed. 712. And see further as to inadmissibility of evidence Equitable Securities Co. *v.* Green, 113 Ga. 1013, 39 S. E. 434; McKinney *v.* Doane, 155 Mo. 287, 56 S. W. 304; Fritz *v.* Menges, 179 Pa. St. 122, 36 Atl. 213; Washabaugh *v.* Entriken, 34 Pa. St. 74; Beam *v.* Gardner, 18 Pa. Super. Ct. 245.

Rejection for insufficient authentication of foreign deed offered by defendant is immaterial, as plaintiff's right to recover depends on his proving title in himself. Crooks *v.* Whitford, 47 Mich. 283, 11 N. W. 159.

Admission of incompetent evidence is not prejudicial to plaintiff, when offered by defendant for the purpose of connecting his own title with a prior grant, where proof of such grant would of itself render plaintiff's claim of title invalid. Smyth *v.* New Orleans Canal, etc., Co., 93 Fed. 899, 35 C. C. A. 646.

2. Grant *v.* Levan, 4 Pa. St. 393.

3. Documentary evidence and records to identify land see *infra*, VII, C, 2.

Judgments and records as to title see *infra*, VII, C, 3, b.

4. Robinson *v.* Sutton, 2 A. K. Marsh. (Ky.) 304.

5. Hoey *v.* Furman, 1 Pa. St. 295, 44 Am. Dec. 129.

6. St. Louis, etc., R. Co. *v.* Needles, 85 Ill. 462.

7. Logan *v.* Quigley, (Pa. 1887) 11 Atl. 92.

of the title upon which he recovered in an ejectment suit, he having failed to justify and the judgment having been set aside as irregular.[8]

(II) *WHEN INADMISSIBLE.* Subject to certain exceptions, if an action is between other parties than those in a former one and there is no privity between them, the verdict and judgment in the prior suit is inadmissible to prove any essential allegation or fact established thereby or which was necessary to the rendition thereof.[9] And a commissioner's report of a sale of land which the law does not require him to make, or declare that it shall be evidence of the statements it contains, is no evidence of anything except that it was filed.[10] The record of a pending suit by the same plaintiff against defendant's grantor for other land is not admissible,[11] and neither is the record of a judgment of dismissal of an action of forcible detainer between other parties.[12] An award appealed from has no merit or weight as testimony.[13] And an intervening petition and the proceedings on issue thereon, to which plaintiff was not a party and which issues are still pending, should be excluded.[14] So an application in the nature of a vacating warrant filed since the action was brought is inadmissible,[15] and a judgment for damages in an action for trespass on land in a justice's court is not evidence against defendant therein in ejectment by plaintiff in that suit.[16]

c. Acts of Estoppel. Evidence of acts of plaintiff constituting an estoppel,[17] or of acts of plaintiff's lessor which tend to conclude him and those who derive title under him, is admissible.[18] So the lessor may be concluded by his acts of location and of agreement with the lessees, but whether defendants to whom the lessor sold the tract of which the leased lands were a part will be bound depends upon their knowledge.[19] Again acts of defendant operating as an admission of plaintiff's title may preclude him from putting plaintiff to further proof of title.[20]

d. Self-Disserving Admissions, Declarations, and Acts. Self-disserving admissions by a predecessor in title and in possession, including his declarations or acts which so operate, and even acts of the owner done in his own interest, as in case of maps, monuments, or boundaries, are competent and admissible against one claiming under him.[21] But statements made by plaintiff as to his interest in the

8. Bikker *v.* Beeston, 2 F. & F. 410.

9. Stinchcomb *v.* Marsh, 15 Gratt. (Va.) 202, holding that the record of another action of ejectment between other parties is not competent on the question of boundaries or location of the land in controversy.

Copy of shorthand notes of statement in court by defendant's counsel as to limitations in deeds, given in evidence by defendant on a former trial of title to same property on ejectment by the same lessors of plaintiff against a different defendant, are not recoverable on the part of the same lessors of plaintiff in a second ejectment against another party. Doe *v.* Ross, 10 L. J. Exch. 201, 7 M. & W. 102.

Evidence given by a witness on the trial of a former action of ejectment is not on the death of such witness admissible for a plaintiff in a subsequent action brought to recover the same property, if the last action, although against the same defendant and involving the same question of title, is not brought by the same plaintiff as in the former action or by one claiming under him, but by the father of the plaintiff in such former action. Morgan *v.* Nicholl, L. R. 2 C. P. 117, 12 Jur. N. S. 963, 36 L. J. C. P. 86, 15 L. T. Rep. N. S. 184, 15 Wkly. Rep. 110. See Doe *v.* Derby, 1 A. & E. 783, 3 L. J. K. B. 191, 3 N. & M. 782, 28 E. C. L. 363.

10. Bissett *v.* Bowman, 54 Ill. 254. *Compare* Davis *v.* Blacksher Co., 131 Ala. 401, 30 So. 790.

11. Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13. See also Umlauf *v.* Bowers, 7 Pa. Dist. 83.

12. Hardin *v.* Forsythe, 99 Ill. 312.

13. Shaeffer *v.* Kreitzer, 6 Binn. (Pa.) 430.

14. Atkison *v.* Dixon, 96 Mo. 582, 10 S. W. 163.

15. Shippen *v.* Aughenbaugh, 4 Yeates (Pa.) 328.

16. Gobble *v.* Minnich, 10 Pa. St. 488.

17. Scott *v.* Lairamore, 32 S. W. 172, 17 Ky. L. Rep. 613.

18. Jackson *v.* Ogden, 4 Johns. (N. Y.) 140. And see Jarvis *v.* Lynch, 157 N. Y. 445, 52 N. E. 657 [*affirming* 91 Hun 349, 36 N. Y. Suppl. 220].

19. Thompson *v.* Ridelsperger, 144 Pa. St. 416, 22 Atl. 826.

20. Penlington *v.* Brownlee, 28 U. C. Q. B. 189; Drake *v.* North, 14 U. C. Q. B. 476; Doe *v.* Walker, 8 U. C. Q. B. 571.

Admissions by defendant of possession and ouster see VII, C, 5.

21. Dunn *v.* Eaton, 92 Tenn. 743, 23 S. W. 163. See also Roberts *v.* Rice, 69 N. H. 472, 45 Atl. 237; Levi *v.* Gardner, 53 S. C. 24, 30 S. E. 617. *Compare* Hackett *v.* Webster, 97 Md. 404, 55 Atl. 480.

property are not admissible in favor of defendant to establish a resulting trust in favor of persons of whom defendant was not a creditor.[22]

2. IDENTITY AND DESCRIPTITION OF PROPERTY. It has very generally been held that parol,[23] extrinsic,[24] and documentary evidence,[25] records,[26] locations, plats, and

Admission by one during his tenancy under whom one of the plaintiffs claims affects such plaintiff only. Grant *v.* Levan, 4 Pa. St. 393.

Admissions by defendant of possession and ouster see *infra*, VII, C, 5.

Declarations made by one acting under power of attorney for his brother in executing a deed that he was *non compos mentis* at the execution of the power and of the deed are inadmissible. Bensell *v.* Chancellor, 5 Whart. (Pa.) 371, 34 Am. Dec. 561.

22. Pfeffer *v.* Kling, 171 N. Y. 668, 64 N. E. 1125 [*affirming* 58 N. Y. App. Div. 179, 68 N. Y. Suppl. 641].

Declarations of plaintiff against his interest as to the location of boundaries are admissible. Neal *v.* Hopkins, 87 Md. 19, 39 Atl. 322.

That plaintiff had said he did not claim by adverse possession is inadmissible in ejectment based upon adverse possession. Porter *v.* Gaines, 151 Mo. 560, 52 S. W. 376.

23. Bridwell *v.* Brown, 48 Ga. 179 (a case of claimed mistake as to description); Ames *v.* Lowry, 30 Minn. 283, 15 N. W. 247 (holding that parol evidence is and must of necessity be always admissible to identify the property described in and conveyed by a deed and to ascertain to what the particulars of description apply).

Instances.— A government surveyor, who had also served as a county surveyor, may state, according to the line he had established, in what section the land in dispute belonged, and this is not within the objection which excludes opinion evidence. Conrad *v.* Sackett, 8 Kan. App. 635, 56 Pac. 507. So parol evidence is admissible to prove the boundary, and a surveyor's report is not required. Mercer *v.* Hauts 4 Bibb (Ky.) 399. It is also admissible to identify the boundaries of land with the location on a plat when it does not appear upon the plat that the land was that in which witness was interested (Hall *v.* Gittings, 2 Harr. & J. (Md.) 112), and to show the identity of the block with a differently numbered block in a subsequently recorded plat, for the purpose of locating the same and to charge a subsequent purchaser with notice (Ames *v.* Lowry, 30 Minn. 283, 15 N. W. 247).

24. McElrath *v.* Haley, 48 Ga. 641, holding that extrinsic circumstances, acts, and sayings to show what land was intended under a will by applying the description to objects were admissible in ejectment in behalf of the remainder-man. See also Neal *v.* Hopkins, 87 Md. 19, 39 Atl. 322; Cooks *v.* Whitford, 47 Mich. 283, 11 N. W. 159; Strubing *v.* Wunder, 2 Woodw. (Pa.) 474.

Question being as to the location of a street, a boundary of defendant's land, and its outlines, not having been designated by boundaries or plats, all acts prior to the date of defendant's deed, of persons owning abutting property, are admissible as evidence of what had been dedicated; not so their acts after such date. Neal *v.* Hopkins, 87 Md. 19, 39 Atl. 322.

That parties' instructions to a surveyor were not complied with in making locations on plats cannot be shown. Gittings *v.* Hall, 1 Harr. & J. (Md.) 14, 2 Am. Dec. 502.

To show the true location evidence is admissible that the original tract was of greater extent than calls of plat, and that plaintiff was in possession of all that the description in his deed called for. Kron *v.* Daugherty, 9 Pa. Super. Ct. 163.

25. Newman *v.* Virginia, etc., Steel, etc., Co., 80 Fed. 228, 25 C. C. A. 382, holding admissible a bond for title without sufficient description, in connection with oral testimony showing occupation thereunder.

Documentary evidence (tax receipts) is admissible to show the understanding of the parties as to lines and boundaries (St. Louis Public Schools *v.* Risley, 40 Mo. 356); to show the identity of two streams mentioned in a deed and in a survey in partition proceedings to identify the land (Sanscrainte *v.* Torongo, 87 Mich. 69, 49 N. W. 497); to show that the land described in the patent as in a certain county actually lay in another county (Chapman *v.* Doe, 2 Leigh (Va.) 329); and on behalf of defendant deeds recited in other deeds through which plaintiff deraigns title are admissible to show the boundaries of the land claimed by plaintiff (Phillippi *v.* Thompson, 8 Oreg. 428).

Evidence held inadmissible.— An instrument which does not describe the land (Morring *v.* Tipton, 126 Ala. 350, 28 So. 562; Hart *v.* Williams, 189 Pa. St. 31, 41 Atl. 983. See also Burke *v.* Jackson, 57 Hun (N. Y.) 320, 10 N. Y. Suppl. 577, 11 N. Y. Suppl. 2) or which is wanting in a sufficient description (Barron *v.* Barron, 122 Ala. 194, 25 So. 55; Hammond *v.* Norris, 2 Harr. & J. (Md.) 130; Cunningham *v.* Neeld, 198 Pa. St. 41, 47 Atl. 954) is inadmissible.

Where plaintiffs are forced to rely upon possession, no deeds or bonds should be admitted to show boundaries or possession, unless the boundaries of such instruments include the land in controversy, and no evidence of possession should be admitted unless of lands included in the boundaries in which were also included the land in controversy. Chenault *v.* Quisenberry, 56 S. W. 410, 57 S. W. 234, 22 Ky. L. Rep. 79.

26. Moore *v.* Smith, 14 Serg. & R. (Pa.) 388.

"Abstract of a grant" showing the land with sufficient certainty and that a grant was executed is admissible, even though the party offering it does not connect his own

surveys,[27] a draft of an unofficial survey showing the boundaries and location,[28] a copy of a plan to show the general location,[29] a levy,[30] and an "entry"[31] are admis-

title with that of the vendee. McLenan *v.* Chisholm, 64 N. C. 323.

Collateral proceedings, judgments, and records see *supra*, VII, C, 1, b.

Extracts from land books in another district, coupled with tax receipts of the land listed, are admissible. Virginia Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232.

Neither an entire record in condemnation proceedings nor application, report, or order are admissible, the application containing no mention of the land. Nashville, etc., R. Co. *v.* Hobbs, 120 Ala. 600, 24 So. 933.

27. *Alabama.*— Vandiver *v.* Vandiver, 115 Ala. 328, 22 So. 154.

California.— Robinson *v.* Forrest, 29 Cal. 317.

Illinois.— Elgin *v.* Beckwith, 119 Ill. 367, 10 N. E. 558.

Indiana.— Meikel *v.* Greene, 94 Ind. 344.

Kentucky.— Burgin *v.* Chenault, 9 B. Mon. 285.

Maryland.— Mitchell *v.* Mitchell, 8 Gill 98; Rogers *v.* Raborg, 2 Gill & J. 54; Howard *v.* Moale, 2 Harr. & J. 249; Jarrett *v.* West, 1 Harr. & J. 501; Davis *v.* Batty, 1 Harr. & J. 264; Scott *v.* Ollabaugh, 3 Harr. & M. 511.

Missouri.— Hannibal, etc., R. Co. *v.* Moore, 37 Mo. 338.

South Carolina.— Durant *v.* Strait, 13 S. C. 465.

See 17 Cent. Dig. tit. "Ejectment," § 250.

Evidence is admissible: of surveys made under a resolution of a corporation, in ejectment against a person claiming under its president (Union Canal Co. *v.* Loyd, 4 Watts & S. (Pa.) 393); in behalf of defendant, of a return of a survey, establishing title adverse to plaintiff's, made after suit brought (Galbraith *v.* Elder, 8 Watts (Pa.) 81); as an illustration merely, of a "sketch of plat" made by a non-expert grantor (Rapley *v.* Klugh, 40 S. C. 134, 18 S. E. 680); of explanatory notes of a surveyor, appointed to retrace lines, so far as they relate to marks on the ground and explain his own work, but not as to matters of possession (Lanning *v.* Case, 14 Fed. Cas. No. 8,072, 4 Wash. 169).

Evidence is inadmissible, of an unofficial survey, where the original location of the warrant is not proven, to apply the patent to land not described therein (Payne *v.* Howard, 107 Pa. St. 579); of the report of the surveyor-general detailing the history of his operations in making a survey (Clark *v.* Hammerle, 36 Mo. 620); of a survey made prior to the institution of the suit by order of court in another suit between other parties (Surget *v.* Little, 5 Sm. & M. (Miss.) 319); of a map made by order of the state harbor commissioners, but not shown to have been approved or adopted by them (People *v.* Klumpke, 41 Cal. 263. But see this case as to admissibility of diagram which is not an official plat); of locations, under Md. Code, art. 75, § 78 (Kelso *v.* Stigar, 75 Md. 376, 24 Atl. 18); and as against a tenant who was not a party to the survey of a plat filed in another case (Chiles *v.* Jones, 4 Dana (Ky.) 479).

An ex parte survey of a line in dispute in the absence of the parties and not ordered by the court is admissible in evidence as tending to show where the line is. McIntire *v.* Funk, 5 Litt. (Ky.) 33; Justice *v.* Luther, 94 N. C. 793. *Contra*, Surget *v.* Little, 5 Sm. & M. (Miss.) 319.

Plat not made by any public authority or not shown to be correct cannot be used to enable a witness to testify to objects thereon of essential importance in showing boundary line in controversy. Jacob Tome Institute *v.* Davis, 87 Md. 591, 41 Atl. 166.

Location of an object not located on the plat cannot be shown. Neal *v.* Hopkins, 87 Md. 19, 39 Atl. 322; Carroll *v.* Granite Mfg. Co., 11 Md. 399. And see Hughes *v.* Howard, 3 Harr. & J. (Md.) 9; Hall *v.* Gittings, 2 Harr. & J. (Md.) 380; Howard *v.* Moale, 2 Harr. & J. (Md.) 249; Mitchell *v.* Gover, 1 Harr. & J. (Md.) 507; Jarrett *v.* West, 1 Harr. & J. (Md.) 501; Carroll *v.* Norwood, 1 Harr. & J. (Md.) 100, 167; Hall *v.* Gough, 1 Harr. & J. (Md.) 119; Ruff *v.* Webster, 4 Harr. & M. (Md.) 499; Nelm *v.* Smith, 4 Harr. & M. (Md.) 389; Catrop *v.* Dougherty, 2 Harr. & M. (Md.) 383; Hawkins *v.* Middleton, 2 Harr. & M. (Md.) 119. Nor can plaintiff go out of the plat to prove defendant's possession of other lands. Anderson *v.* Stean, 2 Harr. (Del.) 50. See further as to evidence in conformity to location Clary *v.* Kimmell, 18 Md. 246; Wilson *v.* Inloes, 6 Gill (Md.) 121; Beall *v.* Bayard, 5 Harr. & J. (Md.) 127; Roseberry *v.* Seney, 3 Harr. & J. (Md.) 228.

Where whole tract is located on plats, deed conveying the whole is admissible, although not itself located, and two deeds, one for a specific portion and the other for the residue, are admissible, without being otherwise located. Langley *v.* Jones, 26 Md. 462.

Location cannot be made by an amendment to the plat which could not have been permitted at the time of the survey if sought to be then made under the same circumstances. Jacob Tome Institute *v.* Davis, 87 Md. 591, 41 Atl. 166.

The only case in which a map of property is receivable in evidence is where it is undisputed that at the time the map was made the property belonged to the person from whom both parties claim. Doe *v.* Lakin, 7 C. & P. 481, 32 E. C. L. 718.

28. Hoey *v.* Furman, 1 Pa. St. 295, 44 Am. Dec. 129.

29. Frazee *v.* Nelson, 179 Mass. 456, 61 N. E. 40, 88 Am. St. Rep. 391.

30. Beeson *v.* Hutchinson, 4 Watts (Pa.) 442.

31. Camden *v.* Haskill, 3 Rand. (Va.) 462, holding that an "entry" to identify calls of a patent is admissible, but inadmissible to

sible to identify the land or to establish the boundaries thereof. Evidence is also admissible of the location of an object which is one of the calls of the patent, upon the question of disputed boundary.[32]

3. Title and Right of Possession — a. In General. Extrinsic evidence bearing on the title or extent of the claim may be given.[33] Evidence is admissible to show title from a common source;[34] to show identity of the parties in the chain of title;[35] or to show the connection of defendant's claim of title with that of plaintiff.[36] So where defendant in ejectment sets up title in various ways plaintiff may give defendant's title in evidence, when he refuses to do so himself,[37] and plaintiff in ejectment may show the nature of the ouster by putting in evidence the deed under which defendant claimed.[38] Evidence is also admissible to show in certain cases an equitable right or title[39] or a contract to convey;[40] or a parol agreement to exchange property, fully executed in pursuance thereof;[41] and defendant may give his title in evidence.[42] He may also show valuable improvements made by him, where he claims against a prior unrecorded title.[43]

furnish particulars of a description not contained in the grant.

32. Northern R. Co. *v.* Jordan, 87 Cal. 23, 25 Pac. 273.

33. *Alabama.*— Gist *v.* Bearmont, 104 Ala. 347, 16 So. 20.

Arkansas.— Stewart *v.* Scott, 57 Ark. 153, 20 S. W. 1088.

Illinois.— Fyffe *v.* Fyffe, 106 Ill. 646.

Mississippi.— Kerr *v.* Farish, 52 Miss. 101.

New York.— Mangam *v.* Sing Sing, 86 Hun 604, 33 N. Y. Suppl. 843.

North Carolina.— Farmer *v.* Pickens, 83 N. C. 549.

Virginia.— Witherinton *v.* McDonald, 1 Hen. & M. 306, 3 Am. Dec. 603.

See 17 Cent. Dig. tit. "Ejectment," § 254 *et seq.*

Extrinsic evidence to show identity of parties is proper. Nixon *v.* Cobleigh, 52 Ill. 387.

To establish title from same party extrinsic evidence such as an affidavit is incompetent. Ryan *v.* McGehee, 83 N. C. 500.

34. Smythe *v.* Tolbert, 22 S. C. 133.

Parol evidence is admissible to show title from a common source. Finch *v.* Ullman, 105 Mo. 255, 16 S. W. 863, 24 Am. St. Rep. 383.

Plaintiff may ask defendant if he claims from the same person through whom plaintiff claims. Smith *v.* Lindsey, 89 Mo. 76, 1 S. W. 88.

35. Simmons *v.* Lane, 25 Ga. 178. And see Chiniquy *v.* Catholic Bishop, 41 Ill. 148; King *v.* Davis, 13 Pa. Co. Ct. 657; White *v.* Van Horn, 159 U. S. 1, 15 S. Ct. 1027, 40 L. ed. 55.

36. Mettler *v.* Miller, 129 Ill. 630, 22 N. E. 529.

37. Bratton *v.* Mitchell, 3 Pa. St. 44. But not as opposed to the rule that plaintiff must recover on the strength of his own title. West *v.* East Coast Cedar Co., 110 Fed. 725 [*affirmed* in 113 Fed. 737, 51 C. C. A. 411].

38. Steinfeld *v.* Ross, (Ariz. 1898) 53 Pac. 494.

39. Leblanc *v.* Ludrique, 14 La. Ann. 772; Daniel *v.* Crumpler, 75 N. C. 184. But see Geiges *v.* Greiner, 68 Mich. 153, 36 N. W. 48; McDonald *v.* Adams, 7 Watts & S. (Pa.) 371.

Evidence explanatory of transaction out of which alleged trust grew is admissible. Deitzler *v.* Mishler, 37 Pa. St. 82.

That former judgment determined an equitable title may be proved by parol and need not appear unaided in record. Meyers *v.* Hill, 46 Pa. St. 9.

Recovery on equitable title see *supra*, II, C, 6.

40. Palmer *v.* McCafferty, 15 Cal. 334; Hanby *v.* Tucker, 23 Ga. 132, 68 Am. Dec. 514.

Evidence is admissible which tends to develop the fact that defendant had gone into possession of the land under contract of purchase from plaintiff and had not complied therewith and had refused to surrender possession (Goodwin *v.* Markwell, 37 Fla. 464, 19 So. 885); of the wife's interest in the land at the time of her husband's death, to aid, in ejectment by the son of the widow against her grantee, proof of fraud in obtaining from the widow a surrender of the contract whereby the interests of the minors were affected (Hall *v.* Vanness, 49 Pa. St. 457); and of a legal title by deed executed in accordance with a parol contract for sale and also that possession was taken and improvements made, as there is no inconsistency between a title by deed and by parol, and the first failing, the second may be shown (Harden *v.* Hays, 14 Pa. St. 91).

Evidence is inadmissible of an agreement antedating plaintiff's deed, but which does not show title in defendant or any one else (Warner *v.* Hardy, 6 Md. 525); of matters disconnected with the question relative to an agreement and which does not tend to establish its existence, such as the purchase of fruit-trees by plaintiff from defendant in possession (Treadway *v.* Wilder, 16 Nev. 354); and in case of a conditional agreement to convey on a day specified, the condition must be shown to have been complied with or outstanding title is not proven (Raymond *v.* Jewell, 9 Mo. 21).

41. Ryan *v.* Tomlinson, 39 Cal. 639.

42. Isham *v.* Townsend, 1 Root (Conn.) 232.

43. Boggs *v.* Varner, 6 Watts & S. (Pa.) 469. See also Allen *v.* Mansfield, 108 Mo. 343, 18 S. W. 901.

b. Character and Scope of Evidence. The evidence admissible to show title or right of possession includes writings which have been duly executed,[44] although regularity and validity of the instrument are not essential;[45] grants, conveyances, or deeds generally,[46] and recitals contained therein,[47] subject to impeachment for

44. Solomon *v.* Yrisarri, 9 N. M. 480, 54 Pac. 752. And see Cunningham *v.* Mills, 102 Ga. 584, 30 S. E. 429; Salazar *v.* Longwill, 5 N. M. 548, 25 Pac. 927; Doe *v.* McLeod, 6 U. C. Q. B. O. S. 553.

Where heirs offer a patent lacking the state seal to show title in an ancestor it should go to the jury with an instruction that its validity depends upon its legal execution. Carter *v.* Edwards, 88 Va. 205, 13 S. E. 352. *Compare* Garrett *v.* Blakely, 9 U. C. C. P. 46.

45. Gist *v.* Beaumont, 104 Ala. 347, 16 So. 20; Root *v.* McFerrin, 37 Miss. 17, 75 Am. Dec. 49; Schuyler *v.* Marsh, 37 Barb. (N. Y.) 350. But see Solomon *v.* Yrisarri, 9 N. M. 480, 54 Pac. 752.

46. *Arizona.*— Steinfeld *v.* Ross, (1898) 53 Pac. 494; Tidwell *v.* Chiricahua Cattle Co., (1898) 53 Pac. 192.

California.— Partridge *v.* Shepard, 71 Cal. 470, 12 Pac. 480.

Colorado.— Milsap *v.* Stone, 2 Colo. 137.

Georgia.— Cook *v.* Winter, 68 Ga. 259, to show at least color of title.

Illinois.— Harpham *v.* Little, 59 Ill. 509.

Massachusetts.— Tyler *v.* Hammond, 11 Pick. 193.

Mississippi.— Root *v.* McFerrin, 37 Miss. 17, 75 Am. Dec. 49, to show color of title.

Missouri.— Mansfield *v.* Pollock, 74 Mo. 185, to show color of title in connection with other evidence.

New York.— Schuyler *v.* Marsh, 37 Barb. 350.

Pennsylvania.— Bennethum *v.* Bowers, 141 Pa. St. 105, 21 Atl. 520; Rhines *v.* Baird, 41 Pa. St. 256; Grant *v.* Levan, 4 Pa. St. 393.

See 17 Cent. Dig. tit. "Ejectment," § 255.

Deed is admissible, although not a link in a proper deraignment of title from the original owners, to show the boundaries of possession and the nature and extent of the claim of those holding under the original owners and to aid the presumption of a grant from long continued possession. Dunn *v.* Eaton, 92 Tenn. 743, 23 S. W. 163. So a deed is admissible, although it conveys no title (Gunn *v.* Wades, 65 Ga. 537); or is uncertain in its description (Payne *v.* Crawford, 102 Ala. 387, 14 So. 854); or is made after the commencement of the suit confirming and ratifying deeds made prior thereto (Crockett *v.* Campbell, 2 Humphr. (Tenn.) 411); or where it includes part of the tract described in complaint, where it is not otherwise objectionable (Green *v.* Jordan, 83 Ala. 220, 3 So. 513, 3 Am. St. Rep. 711); where it is in plaintiff's chain of title, to show the land admitted as owned by the grantor, even though it describes more land (Atwood *v.* Canrike, 86 Mich. 99, 48 N. W. 950); where it contains no waiver of homestead, where the grantor at the time of the execution had no homestead (Finlon *v.* Clark, 118 Ill. 32, 7 N. E. 475); or where plaintiff claims under a deed, even though it was recorded pending suit (Betts *v.* Dick, 1 Pennew. (Del.) 268, 40 Atl. 185). A deed is also admissible to show occupation by consent of plaintiff (Gage *v.* Eddy, 179 Ill. 492, 53 N. E. 1008); to show defendant's title, where he was in possession when the writ was issued and served and the sale under execution made under which plaintiff claims (Marks *v.* Baker, 2 Pa. Super. Ct. 167, 39 Wkly. Notes Cas. (Pa.) 12); to show that plaintiff has only an undivided interest and not the entire tract (Lewis *v.* McFarland, 9 Cranch (U. S.) 151, 3 L. ed. 687), even though the patentee of the other interest had not executed the deeds (Johnson *v.* Kyser, 127 Ala. 309, 27 So. 784).

Deed is inadmissible when offered by defendant, and the alleged grantor denies its execution and there is no evidence of any delivery (Bynum *v.* Hewlett, 137 Ala. 333, 34 So. 391); when executed under a void power of attorney, to show an outstanding title (Rigney *v.* Plaster, 88 Fed. 686); when executed on a sale for taxes, made after suit commenced (Dickinson *v.* Thornton, 65 Ark. 610, 47 S. W. 857); where made after suit commenced to correct a mistake in description in a prior deed (Green *v.* Jordan, 83 Ala. 220, 3 So. 513, 3 Am. St. Rep. 711).

In possessory action solely patents or title papers are inadmissible. Bailey *v.* Hickman, 12 La. 415.

As to character and effect of deed evidence is admissible that the holder of a quitclaim deed, from one who had received a warranty deed and had then executed back a bond for reconveyance to his grantor knew that the deed and bond were given as security for money and not for a conveyance and reconveyance. Pope *v.* Nichols, 61 Kan. 230, 59 Pac. 257. But evidence is inadmissible to show on behalf of defendant when the deed offered by plaintiff was made, where defendant disclaims any purpose to offer evidence of bad faith. Crandall *v.* Lynch, 20 App. Cas. (D. C.) 73. Nor can it be shown that the court had no jurisdiction to render the decree pursuant to which the deed offered by plaintiff was made, when the decree is regular on its face and shows jurisdiction. Eberville *v.* Leadville Tunneling, etc., Co., 28 Colo. 241, 64 Pac. 200.

Legal effect of deed cannot be restricted by manner of offer in evidence. Kirkpatrick *v.* Heydrick, 161 Pa. St. 447, 29 Atl. 4.

47. Swicard *v.* Hooks, 85 Ga. 580, 11 S. E. 863; Dunn *v.* Eaton, 92 Tenn. 743, 23 S. W. 163; Virginia, etc., Coal, etc., Co. *v.* Fields, 94 Va. 102, 26 S. E. 426; Atkinson *v.* Smith, (Va. 1896) 24 S. E. 901. See also Hilliard *v.* Connelly, 21 Pa. Super. Ct. 271.

Objection to admission of deed of trust so far as recitals therein are sought to be used as evidence *per se* against defendants, but not

fraud,[48] or forgery;[49] on behalf of the releasee therein a deed which purports to "remise, release, and quitclaim" title;[50] a lease, under certain circumstances;[51] a defective title bond;[52] mortgages;[53] a mortgage note;[54] abstracts of title;[55]

specifying any particular recitals, is properly overruled. Crandall *v.* Lynch, 20 App. Cas. (D. C.) 73.

Recital in a conveyance that a previous deed for the same land had been made to the same grantee is not evidence against an adversary claimant. Shackleford *v.* Smith, 5 Dana (Ky.) 232.

Recital in a deed of setting apart for homestead of the land will not *ipso facto* authorize the rejection of the deed as evidence. Willis *v.* Meadors, 64 Ga. 721.

Recitals in a lease of judicial proceedings whereby the lessor was authorized to execute the lease are not admissible to prove title for the lessee in ejectment by him against third party. Platt *v.* Picton, 3 Rob. (N. Y.) 64.

48. Clark *v.* Johnson, 5 Day (Conn.) 373; Brown *v.* Wyncoop, 2 Blackf. (Ind.) 230; Hughes *v.* Israel, 73 Mo. 538; McCall *v.* Carpenter, 18 How. (U. S.) 297, 15 L. ed. 389. See also Dickerson *v.* Evans, 84 Ill. 451; Rauer *v.* Thomas, 60 Kan. 71, 55 Pac. 285; Torrey *v.* Beardsly, 24 Fed. Cas. No. 14,104, 4 Wash. 242.

Evidence is inadmissible to prove fraud by showing what had taken place before the execution of the deed. Williams *v.* Mears, 2 Disn. (Ohio) 604. Nor can the grantor's fraud after he has parted with the title be shown. Kieth *v.* Catchings, 64 Ga. 773. So where both parties claim under a common grantor, defendant cannot show that such grantor made a fraudulent deed to his wife, for the purpose of showing that the deed to plaintiff was fraudulent (Witherow *v.* Biggerstaff, 87 N. C. 176); but in proving fraud as between husband and wife, although their *bona fides* is to be viewed with great caution, yet the rules of law must be mainly the same as in other cases (Tripner *v.* Abrahams, 47 Pa. St. 220).

Evidence in rebuttal of fraudulent intent of grantor to avoid creditors' rights is admissible. Warner *v.* Percy, 22 Vt. 155. See also Leiter *v.* Grimes, 35 Md. 434.

49. Williams *v.* Rawlins, 10 Ga. 491. See also Turner *v.* Tubersing, 67 Ga. 161; Redden *v.* Tefft, 48 Kan. 302, 29 Pac. 157.

Parol evidence is admissible to prove the forgery of a deed. Davis *v.* Hamblin, 51 Md. 525.

Evidence of forgery may be rebutted. Gardner *v.* Grannis, 57 Ga. 539.

50. Sessions *v.* Doe, 7 Sm. & M. (Miss.) 130.

51. Lewis *v.* Lewis, 4 Watts & S. (Pa.) 378.

Evidence is competent of entries on minutes of the police board in support of a lease from such board, and the prerequisites of a valid lease may be shown by parol. Phillips *v.* Doe, 13 Sm. & M. (Miss.) 31.

But evidence is immaterial, in an action between two lessees, as to the manner in which the first lease was obtained, unless the owner himself on that account seeks to avoid it prior to possession taken by the second lessee. Joyce *v.* Lynch, (Pa. 1886) 2 Atl. 494. Nor is evidence admissible of a lease by a stranger to defendant, it being immaterial whether the title was in either. Gobble *v.* Minnich, 10 Pa. St. 488. Again on the issue whether the lease of plaintiff to A, who had assigned to defendant, was by the month, evidence to show that defendant leased from A by the year is irrelevant. Waters *v.* Roberts, 89 N. C. 145.

52. Bell *v.* Coats, 56 Miss. 776.

53. Jouet *v.* Watkins, 6 N. J. L. 445; Morse *v.* Carpenter, 19 Vt. 613.

Evidence is admissible of execution of mortgage. Beaufort First Presb. Church *v.* Elliott, 65 S. C. 251, 43 S. E. 674. And plaintiff is entitled as mortgagee to recover. Wittkowski *v.* Watkins, 84 N. C. 456.

Where plaintiff's title is based on deed to secure notes defendant may show by parol the consideration of the notes, usury, etc. Einstein *v.* Butler, 65 Ga. 561.

That mortgage is absolutely void as against public policy, being in contravention of a statute prohibiting a wife becoming surety for her husband, may be shown. Price *v.* Cooper, 123 Ala. 392, 26 So. 238.

Where defendant claims under a trust deed, evidence is admissible that defendant after taking possession under said deed obtained a conveyance from plaintiff's grantees under a prior deed to show that after the execution of the prior deed plaintiff had no title. Scott *v.* Crego, 47 Barb. (N. Y.) 595.

Mortgage is inadmissible in ejectment by the grantee's heirs against an adjoining lot-owner, who is a stranger to both the deed and the mortgage. Burke *v.* Jackson, 57 Hun (N. Y.) 320, 10 N. Y. Suppl. 577, 11 N. Y. Suppl. 2.

54. McClendon *v.* Equitable Mortg. Co., 122 Ala. 384, 25 So. 30.

Mortgage, mortgage note, and records of suit to set aside a sale to satisfy creditor's claims, after a deed of gift to the wife, the mortgage being given to secure a loan made to satisfy purchaser at such sale, are all admissible in behalf of defendant in an action by the wife against the grantee of the mortgagee. Simmons *v.* Richardson, 107 Ala. 697, 18 So. 245.

Parol testimony is admissible to explain indorsements on mortgage notes (McDaniels *v.* Lapham, 21 Vt. 222); but is inadmissible to prove that the note produced on the trial is the one intended to be described in the deed, where it varies therefrom (Edgell *v.* Stanford, 3 Vt. 202).

55. Hart *v.* McGrew, (Pa. 1887) 11 Atl. 617, under a rule of court which provided that plaintiff should file an abstract of title under which he claimed in the office of the prothonotary.

certificates;[56] and records;[57] judgments or decrees generally;[58] tax books to show what land was assessed to the person paying taxes;[59] tax lists;[60] and tax receipts.[61]

Attempt to supply a deficiency in the record of the deeds by an abstract of title is insufficient, unless the recitals are sufficiently full. Cullen *v.* Casey, 1 Nebr. Unoff. 344, 95 N. W. 605.

56. Barron *v.* Barron, 122 Ala. 194, 25 So. 55; Wilson *v.* Marvin Rulofson Co., 201 Pa. St. 29, 50 Atl. 225.

Certificate of entry or a sheriff's deed describing a different tract of land from that claimed is incompetent. Hutchinson *v.* Kelly, 10 Ark. 178.

A certificate not of a character recognized as evidence under a statute or otherwise is inadmissible. Groover *v.* Coffee, 19 Fla. 61.

57. Moore *v.* Smith, 14 Serg. & R. (Pa.) 388.

Record is admissible where the purpose is not to show an adjudication of title, but merely to establish a link in plaintiff's chain of title as against defendant who was a party to that suit, even though no decree was passed against him (Smith *v.* Stevens, 82 Ill. 554. And see Virginia, etc., Coal, etc., Co. *v.* Fields, 94 Va. 102, 26 S. E. 426); where the parties are really, although not nominally the same in both suits and the land is the same (Calhoun *v.* Dunning, 4 Dall. (Pa.) 120, 1 L. ed. 767); of an amicable scire facias to show an actual possession consistent with defendant's title where the land is the same (Sailor *v.* Hertzogg, 10 Pa. St. 296); of a deed from a third person to the board of justices of a county where title is claimed through a board of county commissioners (Doe *v.* Fountain County M. E. Church, 2 Ind. 647); of probate proceedings through which occupant claimed (Avila *v.* Pereira, 120 Cal. 589, 52 Pac. 840); of an execution after due proof of loss of the original the parties consenting thereto (Hilton *v.* Singletary, 107 Ga. 821, 33 S. E. 715).

Judgment entry alone, unaccompanied by any other part of the record of such judgment or any sufficient explanation of its absence, is inadmissible when offered for any other purpose than to show the fact of its rendition, although there may be exceptions to the rule. Clem *v.* Meserole, (Fla. 1902) 32 So. 815.

Recorded notice of alleged location is inadmissible, where no law, but only a local custom, authorizes such notice and record. Pendo *v.* Beakey, 15 S. D. 344, 89 N. W. 655.

Validity of attachment proceedings by which defendant in ejectment came into possession of the lands may be considered. Winningham *v.* Trueblood, 149 Mo. 572, 51 S. W. 399.

Where right by adverse possession is in issue, pleadings in a former ejectment suit between the same parties and involving the same land are admissible to show that defendant asserted exclusive right to possession at the former suit, but the judgment in the former proceeding is not admissible, since one ejectment suit is no bar to another. Whitaker *v.* Whitaker, 157 Mo. 342, 58 S. W. 5.

58. *Alabama.*— Jernigan *v.* Flowers, 94 Ala. 508, 10 So. 437.

California.—Robinson *v.* Thornton, 129 Cal. 12, 61 Pac. 946; Spotts *v.* Hanley, 85 Cal. 155, 24 Pac. 738; McCourtney *v.* Fortune, 57 Cal. 617.

Ohio.— Buckingham *v.* Hanna, 2 Ohio St. 551.

Pennsylvania.— Cochran *v.* Sanderson, 151 Pa. St. 591, 25 Atl. 121; Soper *v.* Guernsey, 71 Pa. St. 219; McCullough *v.* Wallace, 8 Serg. & R. (Pa.) 181; Wilkins *v.* Anderson, 1 Phila. (Pa.) 134.

Texas.— Lochridge *v.* Corbett, 31 Tex. Civ. App. 676, 73 S. W. 96.

See 17 Cent. Dig. tit. "Ejectment," § 267.

And see Thompson *v.* Hall, 31 U. C. Q. B. 367; Orser *v.* Vernon, 14 U. C. C. P. 573; Doe *v.* Whitcomb, 8 Bing. 46, 1 Moore & S. 107, 21 E. C. L. 438.

Record of ejectment where plaintiff voluntarily nonsuited is admissible upon question of adverse possession. Barron *v.* Barron, 122 Ala. 194, 25 So. 55.

Verdict in a former ejectment suit for the same land, brought by persons to whom the present parties are privies, is admissible to establish the fact of payment of costs in that suit and to account for defendant coming into possession, and of plaintiff's acquiescence in the adverse title. Shaeffer *v.* Kreitzer, 6 Binn. (Pa.) 430.

Judgment by default in ejectment is *prima facie* evidence of his possession at the date of the writ, although not for any period anterior to it. Pearse *v.* Coaker, L. R. 4 Exch. 92, 38 L. J. Exch. 82, 20 L. T. Rep. N. S. 82.

When inadmissible.— Record of a suit showing an appeal is incompetent to prove the recovery, and is irrelevant if offered to show the date of the commencement of the action or to intercept an adverse possession and the continuity of possession. Chilton *v.* Wilson, 9 Humphr. (Tenn.) 399. And parties are not concluded as to title by a judgment in forcible entry and detainer. Walls *v.* Endel, 20 Fla. 86. For other cases in which judgment was held inadmissible see Malone *v.* Arends, 116 Ala. 19, 22 So. 500; Jordan *v.* Jordan, 103 Ga. 482, 30 S. E. 265; McDowell *v.* Sutlive, 78 Ga. 142, 2 S. E. 937; Dean *v.* Tucker, 58 Miss. 487; Gobble *v.* Minnich, 10 Pa. St. 488.

Collateral proceedings see *supra*, VII, C, 1, b.

59. Stumpf *v.* Osterhage, 111 Ill. 82.

60. Austin *v.* King, 97 N. C. 339, 2 S. E. 678.

61. Fagan *v.* Rosier, 68 Ill. 84, to prove payment of taxes by defendant for the statutory period of limitations under color of title. *Compare* Troth *v.* Smith, 68 N. J. L. 36, 52 Atl. 243, holding that tax receipts are not competent evidence to show title in plaintiff.

Evidence is also admissible of the payment of taxes[62] *ante litem motam* by a party not in actual possession;[63] and oral testimony of an assessor that he assessed the premises in the name of plaintiff as owner is admissible.[64]

c. Title by Descent. Evidence is admissible to show a title by descent or heirship.[65]

d. Title by Purchase[66]—(i) *In General.* Evidence is admissible of an assignment of the land in dispute for the benefit of creditors;[67] of plaintiff's minority when he made conveyance;[68] of the purchase of certain land by plaintiff's grantor, to rebut defendant's evidence of non-purchase;[69] of defendant's purchase of the land at a certain time, even though a long time prior to the date of the deed;[70] of the abandonment or relinquishment of an outstanding title set up in bar of a recovery or that it is not a subsisting operative title,[71] and of possession and acts of ownership with other circumstances to show a conveyance.[72]

(ii) *By Operation of Law.* Evidence is admissible of an inquisition of escheat, although it is not conclusive to establish the finding contained in it;[73] of accretion or alluvion;[74] of adverse possession;[75] or matters to disprove adverse

62. Baum *v.* Reay, 96 Cal. 462, 29 Pac. 117, 31 Pac. 561 (admissible to show claim of title and that it had not been abandoned); Partridge *v.* Shepard, 71 Cal. 470, 12 Pac. 480; Ellen *v.* Ellen, 16 S. C. 132 (held admissible to show a claim of ownership).

63. Ellis *v.* Harris, 106 N. C. 395, 11 S. E. 248.

64. Hager *v.* Hager, 38 Barb. (N. Y.) 92.

65. Bishop *v.* Lalouette, 67 Ala. 197; Miller *v.* Speight, 61 Ga. 460; Jones *v.* Bland, 112 Pa. St. 176, 2 Atl. 541; Lewis *v.* Lewis, 4 Watts & S. (Pa.) 378; Kerbough *v.* Vance, 6 Baxt. (Tenn.) 110.

An ancient account in the handwriting of the ancestor of the lessor of plaintiff found with the title deeds cannot be received in evidence in support of the title. Jackson *v.* Murray, Anth. N. P. (N. Y.) 143.

Evidence that creditors of defendant's ancestor levied on all his lands is inadmissible to rebut title in the ancestor, where defendant has no title in the lands sold. Grant *v.* Levan, 4 Pa. St. 393.

In behalf of a widow to whom an estate descended on allottee's death, evidence is admissible of an allotment under an act of congress, accompanied with evidence of the allottee's possession and occupation for more than twenty years, to show a legal title in allottee. Hammer *v.* Hammer, 39 Wis. 182.

One claiming under heirs may show who decedent's heirs were at any time after his decease, even though his conveyance was not obtained until long after. Taylor *v.* Youngs, 48 Mich. 268, 12 N. W. 208.

Statutory proceedings for determination of who are heirs may be given in evidence. Miller *v.* Davis, 106 Mich. 300, 64 N. W. 338.

66. See *supra*, VII, C, 3, a, b.

67. Rockwell *v.* McGovern, 40 N. Y. Super. Ct. 118 [*affirmed* in 69 N. Y. 294].

68. Miles *v.* Lingerman, 24 Ind. 385.

69. Ortley *v.* Chadwick, 30 N. J. L. 35.

70. Benner *v.* Hauser, 11 Serg. & R. (Pa.) 352.

71. Sharp *v.* Johnson, 22 Ark. 79.

72. Cahill *v.* Cahill, 75 Conn. 522, 54 Atl. 201, 732, 60 L. R. A. 706; Townsend *v.* Downer, 32 Vt. 183.

73. Van Kleek *v.* O'Hanlon, 21 N. J. L. 582. *Compare* Wilson *v.* Inloes, 6 Gill (Md.) 121.

Defendant in ejectment on escheat patent may show by parol that owner did not die intestate and without heirs. Brown *v.* Shilling, 9 Md. 74.

74. Elgin *v.* Beckwith, 119 Ill. 367, 10 N. E. 558, followed, however, in this case by act of the parties in purchase of alluvion.

75. Ledbetter *v.* Borland, 128 Ala. 418, 29 So. 579; Joy *v.* Stump, 14 Oreg. 361, 12 Pac. 929; Ireland *v.* Bagaley, 118 Pa. St. 148, 12 Atl. 321; Cave *v.* Anderson, 50 S. C. 293, 27 S. E. 693. See also Young *v.* Griffith, 71 N. C. 335.

Evidence admissible on the question of adverse possession includes: Deeds (Nashville, etc., R. Co. *v.* Hammond, 104 Ala. 191, 15 So. 935; Cockey *v.* Smith, 3 Harr. & J. (Md.) 552; King *v.* Merritt, 67 Mich. 194, 34 N. W. 689; Root *v.* McFerrin, 37 Miss. 17, 75 Am. Dec. 49; Kansas City *v.* Scarritt, 169 Mo. 471, 69 S. W. 283; Joy *v.* Stump, 14 Oreg. 361, 12 Pac. 929); deeds to show plaintiff's right as nominal plaintiff to his grantor's title to maintain the action, even though they are from parties against whom defendant could not claim adversely down to plaintiff against whom he claims adversely (Stringfellow *v.* Tennessee Coal, etc., Co., 117 Ala. 250, 22 So. 997); deeds and a plat of the premises (Johnson *v.* Johnson, 70 Mich. 65, 37 N. W. 712); a tax deed (Sprecker *v.* Wakeley, 11 Wis. 432); a tax deed, assessment rolls, and proceedings of court (Chabert *v.* Russell, 109 Mich. 571, 67 N. W. 902); tax receipts (Fagan *v.* Rosier, 68 Ill. 84), assessment books to show continuity of possession during supposed interruption of occupancy (Sailor *v.* Hertzogg, 10 Pa. St. 296); a properly authenticated copy of the surveyor's field notes, even though it contains some immaterial matters (Gilman *v.* Riopelle, 18 Mich. 145); a void decree and deed for the title (Logan *v.* Steele, 7 T. B. Mon. (Ky.) 101); a decree dismissing a bill on an entry (Speed *v.* Braxdell, 7 T. B. Mon. (Ky.) 568);

possession;[76] of title by dower, and in rebuttal thereof;[77] of title by curtesy;[78] of a sale by order of the court and a purchase thereunder;[79] of a foreclosure decree, the order of sale, and the sheriff's return and deed, upon the question of sale and purchase under foreclosure;[80] of the judgment, execution, return, and sheriff's

a former suit dismissed by plaintiff (Kile *v.* Fleming, 78 Ga. 1); an entry made by an alcalde of title papers of a former alcalde to show that claimants then made an open, adverse claim to the lands (Sill *v.* Reese, 47 Cal. 294); correspondence between the parties to show the character of the occupation and the acquiescence of plaintiffs in the claim (Stonestreet *v.* Doyle, 75 Va. 356, 40 Am. Rep. 731); a prior possession under claim of title (Jernigan *v.* Flowers, 94 Ala. 508, 10 So. 437; McCourtney *v.* Fortune, 57 Cal. 617; Piercy *v.* Sabin, 10 Cal. 22, 70 Am. Dec. 692. And see Frisbie *v.* Price, 27 Cal. 253); and also in rebuttal infancy on the part of one of defendant's grantors (Evans *v.* Baird, 44 Ga. 645).

Evidence inadmissible on question of adverse possession includes deeds which are void (Morris *v.* Tinker, 60 Ga. 466); muniments of title which are void (Knapp *v.* Harris, 60 Ga. 398); deeds as evidence of title against those holding under an adverse title of record with possession long enough to ripen into a title (Davidson *v.* Morrison, 86 Ky. 397, 5 S. W. 871, 9 Ky. L. Rep. 629, 9 Am. St. Rep. 295); void condemnation proceedings (Wilkinson *v.* St. Louis Sectional Dock Co., 102 Mo. 130, 14 S. W. 177); a decree that defendant was not liable for rents of land (Dean *v.* Tucker, 58 Miss. 487); and an application for continuance in another suit upon allegations which show a holding under the party claiming by adverse possession (Snyder *v.* Chicago, etc., R. Co., 112 Mo. 527, 20 S. W. 885).

Remote grantor's motive in doing certain acts as against trespassers is inadmissible unless plaintiff states that he had such motive in doing the act. Gilman *v.* Riopelle, 18 Mich. 145.

Special acts of ownership by husband after possession is taken is inadmissible in an action by heirs claiming in right of the wife, against vendees of the husband, where the husband and wife entered together and acquired title by adverse possession. McLeod *v.* Bishop, 110 Ala. 640, 20 So. 130.

Loose parol statements cannot show the character and extent of adverse possession, irrespective of the validity of the transfer of real estate under the civil law in force in New Mexico in 1868. Maxwell Land-Grant Co. *v.* Dawson, 151 U. S. 586, 14 S. Ct. 458, 38 L. ed. 279 [*reversing* 7 N. M. 133, 34 Pac. 191].

76. Savery *v.* Moore, 71 Ala. 236; Abbey Homestead Assoc. *v.* Willard, 48 Cal. 614; Nutwell *v.* Tongue, 22 Md. 419; State University *v.* Hogg, 9 N. C. 370.

Thus defendant's occupancy as plaintiff's tenant may be shown. Heath *v.* Wallace, 53 Cal. 436; Doe *v.* Gray, 2 Houst. (Del.) 135; Alexander *v.* Gibbon, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep. 757. And see Moore *v.* Dixon, 94 Pa. St. 53.

77. Smallwood *v.* Bilderback, 16 N. J. L. 497.

What evidence inadmissible.— Where the claim that a widow has made application for assignment of her dower was based upon memoranda found among but constituting no part of the files of the probate court they are inadmissible for any purpose. King *v.* Merritt, 67 Mich. 194, 34 N. W. 689.

78. Logan *v.* Quigley, (Pa. 1887) 11 Atl. 92.

79. Jay *v.* Stein, 49 Ala. 514 (holding that the record of the probate proceedings under which the sale was made is competent); Commercial Bank *v.* Doe, 9 Sm. & M. (Miss.) 613 (holding that an administrator's deed is admissible, where the record of proceedings in the probate court preliminary to the order of sale has been read).

Evidence of a conveyance made to heirs by a trustee appointed to make the sale to a purchaser who dies before it is made is inadmissible. Massey *v.* Massey, 4 Harr. & J. (Md.) 141.

Decrees.—The interlocutory and final decree is not admissible without producing the bill and answer (Lowry *v.* McDurmott, 5 Yerg. (Tenn.) 225); and the whole record should be offered, or so much of it as is necessary to show what land was directed to be conveyed (Masters *v.* Varner, 5 Gratt. (Va.) 168, 50 Am. Dec. 114). The decree itself is inadmissible to show the authority of the marshal to convey the land in the deed unless it designated the land directed to be conveyed. Dorsey *v.* Courtnay, 3 Harr. & J. (Md.) 474; Masters *v.* Varner, 5 Gratt. (Va.) 168, 50 Am. Dec. 114. And so is a decree of a county court directing a defendant residing in the district to convey lands situate in another county. Aldridge *v.* Giles, 3 Hen. & M. (Va.) 136.

80. Petty *v.* Mays, 19 Fla. 652; Splahn *v.* Gillespie, 48 Ind. 397. And see Dirst *v.* Morris, 14 Wall. (U. S.) 484, 20 L. ed. 722.

Evidence may be given of facts from which agency might be inferred, both in the husband and the mortgagor, for the wife, and consequently, from their acts and declarations, knowledge of the mortgage in her (Murphy *v.* Nathans, 46 Pa. St. 508); and a decree of foreclosure and notice of sale is not inadmissible because the county in which the land is situate is not stated in either, where it can be located by the mortgage, decree, and notice (Bryan *v.* Scholl, 109 Ind. 367, 10 N. E. 107).

Evidence is inadmissible of a deed from the assignee of the purchaser at the sale where foreclosure was only offered to show that the lien on which plaintiff's title was based had been extinguished (Robinson *v.* Thornton,

deed, to show a sale and purchase under execution;[81] of matters tending to impeach the deed provided it appear that they are otherwise unobjectionable;[82]

102 Cal. 675, 34 Pac. 120); of the decree and master's deed to show the right of possession against one in possession under a person holding the legal title since before the foreclosure suit was begun, and who was not a party thereto (Berlack *v.* Halle, 22 Fla. 236, 1 Am. St. Rep. 185); that deceased as agent of plaintiff, in ejectment against the widow and heirs, made a loan secured by mortgage and foreclosed and purchased it in his own name and has never accounted to plaintiff for the debt secured (Sagory *v.* Bouny, 42 La. Ann. 618, 7 So. 785); to show payment of the mortgage debt prior to judgment in a scire facias on the mortgage (Blythe *v.* McClintic, 7 Serg. & R. (Pa.) 341); and unless there has been fraud between the mortgagor and mortgagee, or the terre-tenant has not been a party to the scire facias on which the land was sold, such terre-tenant cannot give in evidence any matters he might have done under the scire facias suit (Nace *v.* Hollenback, 1 Serg. & R. (Pa.) 540).

81. White *v.* Rice, 48 Ind. 225.

Sheriff's deed is admissible (Clute *v.* Emmerich, 21 Hun (N. Y.) 122); if based upon a valid judgment and execution (Clem *v.* Meserole, (Fla. 1902) 32 So. 815. And see Hutchinson *v.* Kelly, 10 Ark. 178); or a valid judgment, sufficient execution and levy, advertisement and sale (Hughes *v.* Watt, 26 Ark. 228); and it has been held admissible where it recites enough to show its validity and regularity, the judgment and execution having been proven (Montgomery *v.* Robinson, 49 Cal. 258); and it may be admitted, notwithstanding misrecitals of the judgment or process order (Henley *v.* Mobile Branch Bank, 16 Ala. 552); or the fact that it contains no recital of the judgment and execution, evidence of the judgment and fieri facias with a waiver of inquisition having been shown (Cowperthwaite *v.* Carbondale First Nat. Bank, 102 Pa. St. 397). So it has been held that only the judgment or process under which the property was sold need be introduced; that intermediate executions need not be offered. Kane *v.* Doe, 9 Sm. & M. (Miss.) 387. But it has been held, and very properly, that a sheriff's deed to the wife under execution against the husband is inadmissible in evidence where it was not contended that the husband ever had title. Finch *v.* Finch, 131 N. C. 271, 42 S. E. 615.

Upon the question of title under an execution sale evidence is admissible of an execution, regular on its face (Wilson *v.* Campbell, 33 Ala. 249, 70 Am. Dec. 586); that the sheriff had the execution in hand at the time of sale, such execution having been lost (Ryan *v.* Martin, 91 N. C. 464); of copies of the writ, execution, and officer's return (Frazee *v.* Nelson, 179 Mass. 456, 61 N. E. 40, 88 Am. St. Rep. 391); of a copy of the records of an execution, officer's return, and of the town clerk's certificate that it is recorded (Otis *v.* Abel, 2 Root (Conn.) 521); of the record of dispossess proceedings by defendant against plaintiff, as against the defense of a subsequently acquired title, and to disprove fraud in the purchase, when plaintiff alleged an agreement by defendant to convey the lands to him (Seylar *v.* Carson, 69 Pa. St. 81); of the record of a judgment and proceedings against the administrator, in an action against decedent brought before his death (Riland *v.* Eckert, 23 Pa. St. 215); of a certified copy of the record of the board of property and a certified draft of survey, where defendant's claims under the sheriff's sale to show that defendant had claimed the land as his own before judgment on which sale was made (Harper *v.* Farmers', etc., Bank, 7 Watts & S. (Pa.) 204); or testimony to show that notices were seen in a newspaper and posted in different places and that the witness was present at the sale, to aid the presumptive evidence of the deed that the sheriff had performed his duty (Clute *v.* Emmerich, 21 Hun (N. Y.) 122); of a tenancy in common between the debtor and one admitted to defend as landlord to the tenant, who came in under the debtor (Knox *v.* Herod, 2 Pa. St. 26); of a recital in a mortgage to show a selection of a homestead of a parcel of land not before deeded, as the selection is made by acts of the party himself; the action by the execution purchaser, being resisted by the debtor's grantee on the ground that the officer levying the execution had not set off a homestead (Constantine First Nat. Bank *v.* Jacobs, 50 Mich. 340, 15 N. W. 500); to rebut a levy by showing that the proceeds of a sale under a former levy were insufficient to satisfy executions upon older judgments, levied at the same time (Smith *v.* Doe, 10 Sm. & M. (Miss.) 584); and of what was said by the sheriff at the time of the sale as part of the *res gestæ* (Grant *v.* Edwards, 86 N. C. 513).

Upon questions of title under execution sale evidence is inadmissible of executions issued on the judgment prior to the one under which the sale was made, unless they tend to prove satisfaction of the judgment or title in defendant (Kane *v.* Doe, 9 Sm. & M. (Miss.) 387); of the sheriff's certificate of sale which the party offering admits to be immaterial (Clute *v.* Emmerick, 12 Hun (N. Y.) 504). For other instances of evidence held inadmissible see Williams *v.* Cooper, 124 Cal. 666, 57 Pac. 577; Burton *v.* Pond, 5 Day (Conn.) 160; Miller *v.* Pence, 131 Ill. 122, 22 N. E. 817; Johnson *v.* Turner, (Md. 1891) 22 Atl. 1103; King *v.* Manning, 20 N. J. L. 612; McLean *v.* Paul, 27 N. C. 22; Hill *v.* Meyers, 43 Pa. St. 170; Mott *v.* Clark, 9 Pa. St. 399, 49 Am. Dec. 566; Payne *v.* Craft, 7 Watts & S. (Pa.) 458; Leeds *v.* Bender, 6 Watts & S. (Pa.) 315; Blythe *v.* McClintic, 7 Serg. & R. (Pa.) 341.

82. Hughes *v.* Watt, 26 Ark. 228 (by showing the falsity of the recitals therein); Hutchinson *v.* Kelly, 10 Ark. 178 (by show-

of matters showing or tending to show the invalidity of the sale;[83] and of a tax-sale or purchase.[84]

(III) *By Act of Parties*[85]—(A) *Public Lands or Grants.* In ejectment, upon the question of title to public lands, deeds,[86] patents,[87] or copies thereof,[88] duplicate receipts of the receiver of public moneys,[89] and in defendant's behalf a survey and patent made subsequently to affirmance of property in plaintiff's ancestor are admissible.[90] The following evidence has also been held admissible: A draft by the deputy surveyor, found among the official papers in his office;[91] correspondence between the surveyor-general and his deputy relating to the land for which an application for survey has been made;[92] certified copies from the

ing that the judgment under which the sale was made is void); Warfield *v.* Woodward, 4 Greene (Iowa) 386 (that the deed was executed and delivered before the period of redemption has expired).

83. St. Bartholomew's Church *v.* Wood, 61 Pa. St. 96. As for instance that the levy was made under a fieri facias after its return-day (Maynard *v.* Moore, 76 N. C. 158), that execution issued on a satisfied judgment (Weston *v.* Clark, 37 Mo. 568), or that there was a fraudulent combination to depress the value of the property at the sale (Smull *v.* Jones, 6 Watts & S. (Pa.) 122).

84. Hitchcox *v.* Rawson, 14 Gratt. (Va.) 526, holding that the record of the commissioner of delinquent lands of proceedings for sale was *prima facie* evidence at least of the forfeiture which necessitated the sale, and as a link in plaintiff's chain of title.

As to a tax-sale or purchase evidence is admissible of a tax deed to show that land described therein was the property of the grantee (Florence Land, etc., Co. *v.* Warren, 91 Ala. 533, 9 So. 384); of a tax deed executed by the deputy recorder and duly acknowledged by him in that capacity (Davis *v.* Living, 32 W. Va. 174, 9 S. E. 84); that defendant claiming under such deed while acting as plaintiff's agent sold wood to show that he had money to pay the taxes (McMahon *v.* McGraw, 26 Wis. 614); and a deed executed by the clerk of the supervisors to cure defects in deeds previously issued for lands sold to the county for taxes (Woodman *v.* Clapp, 21 Wis. 350).

As to a tax-sale or purchase evidence is inadmissible of a tax deed bearing date after suit commenced (Pitkin *v.* Yaw, 13 Ill. 251), or to supply defects in a tax deed void on its face (Burden *v.* Cook, 124 Mo. 23, 27 S. W. 351; Burden *v.* Taylor, 124 Mo. 12, 27 S. W. 349). So evidence is admissible of the payment of taxes by the owner in 1795, to aid proof of the payment of taxes in 1817, for non-payment of which the land was sold. Ankeny *v.* Albright, 20 Pa. St. 157.

Where plaintiff redeems land from a tax-sale in one county official maps thereof are admissible where the land is claimed to lie in different counties. Conover *v.* Russ, 29 Fla. 338, 10 So. 585.

85. See *supra*, VII, C, 3, a, b.

86. Bivins *v.* Vinzant, 15 Ga. 521; Rogers *v.* White, 68 Mich. 10, 35 N. W. 799; Morgan *v.* Curtenius, 17 Fed. Cas. No. 9,799, 4 McLean 366 [*affirmed* in 20 How. 1, 15 L. ed. 823].

Deed executed after the commencement of suit, reciting that it was given to enable a debt to be paid, is admissible. Hoover *v.* Gonzalus, 11 Serg. & R. (Pa.) 314.

87. Fenwick *v.* Gill, 38 Mo. 510, holding that a patent is admissible, even though defective in description, where it contains enough to ascertain the land.

Patent dated after demise laid is admissible. McCraven *v.* Doe, 23 Miss. 100. See also Winn *v.* Cole, Walk. (Miss.) 119.

Patent with a marginal entry stating it to be void and that another patent had issued is admissible. Maxwell *v.* Lloyd, 1 Harr. & M. (Md.) 212.

Patent and patent certificate issued after action is commenced is inadmissible. Laurissini *v.* Doe, 25 Miss. 177, 57 Am. Dec. 200. So a patent certificate to plaintiff's legal representatives without other evidence should be also excluded. Mattingly *v.* Hayden, 1 Mo. 439.

88. Carter *v.* Edwards, 88 Va. 205, 13 S. E. 352.

89. Birdwell *v.* Bowlinger, 5 Port. (Ala.) 86. But see *supra*, II, C, 7.

90. O'Hara *v.* Richardson, 46 Pa. St. 385.

United States surveys confirmed by the recorder as against persons claiming title prior to the act of May 26, 1824, are admissible. Milburn *v.* Carpenter, 28 Mo. 523; Milburn *v.* Hardy, 28 Mo. 514.

Survey of a tract near the tract in dispute is evidence that the deputy surveyor was in the neighborhood about the time at which the party offering it alleges his own survey to have been made. Hoover *v.* Gonzalus, 11 Serg. & R. (Pa.) 314.

Evidence of the entering a caveat against a survey, by plaintiff's grantor may be given, and that he had been vigilant in prosecuting his claim. Hoover *v.* Gonzalus, 11 Serg. & R. (Pa.) 314.

91. Hoover *v.* Gonzalus, 11 Serg. & R. (Pa.) 314.

Draft drawn by the former owner of the warrants under which plaintiff claims, showing the land claimed and excluding that in dispute, is admissible. Gratz *v.* Beates, 45 Pa. St. 495.

Plat of a survey of the town where the land is located is inadmissible to prove that certain subdivisions are swamp or overflowed lands in an action by a patentee as of swamp or overflowed land against a preëmption claimant. Robinson *v.* Forrest, 29 Cal. 317.

92. Ewing *v.* McKnight, 1 Serg. & R. (Pa.) 128.

registry of claims proved, or from the registry of confirmation or list of claims proved, or of an official survey by the surveyor-general, or a certificate of confirmation issued by the recorder upon such survey;[93] a recovery by plaintiff of adjacent lands against strangers, he being required to otherwise establish his title;[94] and testimony by which defendant offers to establish in part his preëmption right should not be rejected because such offer does not embrace every fact necessary to establish the defense.[95] A deed or patent is, however, subject to impeachment.[96] And the title under a patent may be controverted by one who claims under an imperfect title depending on a settlement, warrant, or location without a patent, and then the question will be to whom the patent ought to have been granted by the land-office.[97] Parol evidence may also be given to ascertain the true grantee of lands, when permitted by statute in case of a mistake in the grant.[98] And the presumption that a warrant belongs to the warrantee named therein may be rebutted.[99] But in case of a preëmption patent it cannot be shown that lands were not open to settlement, but were swamp or overflowed lands.[1] Nor can it be shown that a certain person was entry taker and that he failed to make his entry as required by statute.[2] Evidence is also inadmissible to show that plaintiff is not within the provisions of the preëmption law under which he claims;[3] that land deeded by the government had been assigned twenty-nine years before to another person;[4] that the land was within the exterior boundaries of a Mexican grant and not subject to homestead entry;[5] and in an action of ejectment involving the identity of the patentee a witness who cannot identify the land in dispute with that he was on when he had a conversation with the occupant as to who selected the latter parcel cannot testify to such conversation in the absence of evidence of the identity of the two parcels.[6]

(B) *Gift and Partition.*[7] Evidence is admissible of a gift[8] and of a partition

93. Clark *v.* Hammerle, 36 Mo. 620.

Certified copy of public surveys is admissible. Hannibal, etc., R. Co. *v.* Moore, 37 Mo. 338.

Evidence is inadmissible of certificates of the recorder of land titles prior to the act of May 26, 1824 (Primm *v.* Haren, 27 Mo. 205), or of a certificate of the United States register of the location of lands by plaintiff's grantor as agent of the state (Slaughter *v.* Fowler, 44 Cal. 195).

Evidence showing a right to certificate of confirmation is as good evidence as the certificate itself. Biehler *v.* Coonce, 9 Mo. 347.

94. Towle *v.* Palmer, 1 Abb. Pr. N. S. (N. Y.) 81.

95. Tyler *v.* Green, 28 Cal. 406, 87 Am. Dec. 130.

96. Allen *v.* Robinson, 3 Bibb (Ky.) 326; Sherman *v.* Buick, 93 U. S. 209, 23 L. ed. 849.

Grant issued on a forged certificate may be shown. Boreing *v.* Singery, 4 Harr. & M. (Md.) 398, 2 Harr. & J. (Md.) 455.

97. Hoover *v.* Gonzalus, 11 Serg. & R. (Pa.) 314; Gonzalus *v.* Hoover, 6 Serg. & R. (Pa.) 118.

Evidence to impeach plaintiff's title by showing that a preëmption ought not to have been allowed or that other persons have superior or equitable claims is inadmissible. Rector *v.* Gaines, 19 Ark. 70.

98. Sykes *v.* McRory, 32 Ga. 348, as to lands acquired by state lotteries.

Patent cannot be impeached by parol. Gallipot *v.* Manlove, 2 Ill. 156.

99. Campbell *v.* Galbreath, 1 Watts (Pa.) 70.

1. Ehrhardt *v.* Hogaboom, 115 U. S. 67, 5 S. Ct. 1157, 29 L. ed. 346.

Oral testimony to show that the land is not swamp or overflowed land is admissible as against defendant claiming under a patent of land as such, plaintiff claiming under a title from the United States. Thornton *v.* Thompson, 28 Cal. 602.

2. Tyrrell *v.* Mooney, 5 N. C. 401.

3. Sweeptzer *v.* Gaines, 19 Ark. 96.

4. Scott *v.* Detroit Young Men's Soc., 1 Dougl. (Mich.) 119.

5. Grant *v.* Oliver, 91 Cal. 158, 27 Pac. 596, 861.

6. Brown *v.* Quinland, 75 Mich. 289, 42 N. W. 940.

7. **Admissibility of deeds, leases,** etc., see *supra*, VII, C, 3, d, (III), (A).

8. Allison *v.* Burns, 107 Pa. St. 50, where there was also a taking possession, improvements, and continued uninterrupted possession in this case.

Where a gift is accompanied by immediate possession, a bill of sale made subsequent to gift is not competent evidence to defeat such title or right. Turner *v.* Gonzales, (Indian Terr. 1901) 64 S. W. 565.

Whether or not a parol transfer or gift of land was sufficient under the civil law in force in New Mexico in 1868, title to land cannot be established by loose parol statements, without identification, delimitation of boundaries, or delivery of possession. Maxwell Land-Grant Co. *v.* Dawson, 151 U. S.

or division by cotenants or heirs to prove title to plaintiff in the action of ejectment.[9]

(c) *Devise.* A will is admissible, although it contains no description of the land but disposes of the estate as an entirety.[10] And defendants may offer a will in evidence,[11] or it may be admitted in rebuttal.[12]

4. Of Facts Judicially Noticed. Public statutes and grants may be read in evidence where they constitute the title papers of either party in ejectment, and it is not error to read them to the jury, since it is permissible to prove any fact that is judicially known.[13]

5. Possession of Defendant and Ouster. Plaintiff may put in evidence the deeds under which defendant claims to prove the nature of the ouster;[14] and as tending to prove ouster the acts of defendant in insisting upon the actual and exclusive possession of the entire premises, even though he was informed that plaintiffs claimed an undivided interest in the land, are competent.[15] And defendant may prove his own act of taking possession,[16] and his acts of exclusive character to sustain his allegation of possession.[17] Defendant's possession and the character thereof may also be shown by deeds under which he entered;[18] by a

586, 14 S. Ct. 458, 38 L. ed. 279 [*reversing* 7 N. M. 133, 34 Pac. 191].

Payment of taxes by alleged donor's estate after defendant took possession and non-payment of taxes by alleged donee may be shown. Allen *v.* Mansfield, 108 Mo. 343, 18 S. W. 901.

9. Hancock *v.* Lopez, 53 Cal. 362; Nichols *v.* Nichols, 133 Pa. St. 438, 19 Atl. 422, 149 Pa. St. 172, 24 Atl. 194; Mellon *v.* Reed, 123 Pa. St. 1, 15 Atl. 906.

Particular instances.—Where amicable partition is alleged by defendant he may give in evidence a release by other parties to the partition. Calhoun *v.* Hays, 8 Watts & S. (Pa.) 127, 42 Am. Dec. 275. If parol partition is set up after waiver of the will it operates to vest the title in the heir which title cannot be divested by parol. Jackson *v.* Vosburgh, 9 Johns. (N. Y.) 270, 6 Am. Dec. 276. And a bond conditioned to abide by division, the bond having been executed about fifty years before suit, was admitted where defendant claimed under the obligor. Dale *v.* Fassett, 3 Harr. & J. (Md.) 119. So acts not amounting to a formal partition may be proven. Nutwell *v.* Tongue, 22 Md. 419. But evidence of an understanding at the time of a division amongst testator's children that if any of them should be dissatisfied with the portion that fell to them some one of the other children would exchange with the dissatisfied party is properly excluded as not amounting to a contract. Crawley *v.* Blackman, 81 Ga. 775, 8 S. E. 533.

10. Tripp *v.* Fausett, 94 Ga. 330, 21 S. E. 572. And see Hart *v.* Williams, 189 Pa. St. 31, 41 Atl. 983; Criswell *v.* Altemus, 7 Watts (Pa.) 565.

Papers may be read in evidence relating to the land, although part of the testator's interest accrued after making the will. Burke *v.* Young, 2 Serg. & R. (Pa.) 383.

Will is inadmissible where it makes no reference to, and does not appear to have any connection with, the land in dispute (Blakey *v.* Morris, 89 Va. 717, 17 S. E. 126); where it has not been legally established (Swazey *v.* Blackman, 8 Ohio 5; Osborne *v.* Leak, 89 N. C. 433. And see Smith *v.* Shackleford, 9 Dana (Ky.) 452; Reno *v.* Blackburn, 72 S. W. 775, 24 Ky. L. Rep. 1976; Rothschild *v.* Hatch, 54 Miss. 554. But *compare* Thomas *v.* Ayres, 13 N. J. L. 153); or where there is nothing to show its date or whether the property had been acquired before or after its execution (Reeves *v.* Low, 8 App. Cas. (D. C.) 105).

Evidence of waiver of the provisions of a will should be received. Gilman *v.* Gilman, 111 N. Y. 265, 18 N. E. 849 [*reversing* 1 N. Y. St. 567].

Possession of a widow based on what she believes her husband's will, coupled with adverse possession for fifteen years, perfects her title as adverse to heirs. Reno *v.* Blackburn, 72 S. W. 775, 24 Ky. L. Rep. 1976.

11. Kirkpatrick *v.* Heydrick, 161 Pa. St. 447, 29 Atl. 4.

12. Gardner *v.* Granniss, 57 Ga. 539.

13. Mobile Transp. Co. *v.* Mobile, 128 Ala. 335, 30 So. 645, 86 Am. St. Rep. 143, 64 L. R. A. 333.

14. Steinfeld *v.* Ross, (Ariz. 1898) 53 Pac. 494.

15. Bailey *v.* Bailey, 36 Mich. 181.

Acts of a county in employing a person as its agent to keep the fences in repair tends to show the possession of the county in ejectment against it for land claimed by it to have been dedicated for public use. Barry *v.* Sonoma County, 43 Cal. 217.

Evidence that defendant had torn down plaintiff's house in part is important on the question of ouster. Gray *v.* Dixon, 74 Cal. 508, 16 Pac. 305.

16. Hood *v.* Hood, 2 Grant (Pa.) 229.

17. Lucas *v.* Richardson, 68 Cal. 618, 10 Pac. 183.

18. McMinn *v.* Mayes, 4 Cal. 209; McAulay *v.* Earnhart, 46 N. C. 502.

Deed may be rejected when offered merely to prove the extent of defendant's possession. Million *v.* Riley, 1 Dana (Ky.) 359, 25 Am. Dec. 149.

bond for a title,[19] or by an agreement which establishes only an equitable estate;[20] and by parol evidence.[21] Again record evidence is admissible to show the date when defendant was placed in possession.[22] And in ejectment against several proof of what portion was occupied by one may be given.[23] It may also be shown, in ejectment to recover from a tenant, that defendant had continued in the occupancy of the land and was withholding possession.[24] But a judgment of forcible entry and detainer brought by a tenant of plaintiff in ejectment against defendant is inadmissible to show actual possession in defendant at that time.[25]

D. Weight and Sufficiency of — 1. Prima Facie Case and Preponderance of Evidence Generally. Plaintiff in order to authorize a recovery must establish his case by a preponderance of evidence,[26] or to the reasonable satisfaction of the jury;[27] and by a parity of reasoning defendant's evidence need not preponderate to authorize a recovery by him, but it is sufficient if it be equipoised.[28] Ordinarily plaintiff may recover upon showing a *prima facie* case,[29] but a verdict for plaintiff is not warranted where the evidence fails to show either title to the premises, or prior possession or right thereto, or that defendant's possession is that of a mere wrong-doer.[30] Nor can plaintiff recover where his case is completely met by conveyances showing title out of him into defendant.[31] In order to defeat an ejectment by showing outstanding title in a stranger such title must be clearly established.[32] If an equitable defense is relied on it must be distinctly proved.[33]

2. Identity and Description of Property. Primarily the evidence must suf-

19. Harle *v.* McCoy, 7 J. J. Marsh. (Ky.) 318, 23 Am. Dec. 407.

20. Lafferty *v.* Whitesides, 1 Swan (Tenn.) 123.

21. Van Rensselaer *v.* Vickery, 3 Lans. (N. Y.) 57; Hurd *v.* Tuttle, 2 D. Chipm. (Vt.) 43.

22. Lewis *v.* Watson, 98 Ala. 479, 13 So. 570, 39 Am. St. Rep. 82, 22 L. R. A. 297.

23. Ellis *v.* Janes, 10 Cal. 456.

24. McKissick *v.* Ashby, 98 Cal. 422, 33 Pac. 729.

25. Davis *v.* Perley, 30 Cal. 630.

26. Rittmaster *v.* Brisbane, 19 Colo. 371, 35 Pac. 736; Robinson *v.* Nail, 2 Indian Terr. 509, 52 S. W. 49; Patterson *v.* Hansel, 4 Bush (Ky.) 654; Page *v.* Simpson, 188 Pa. St. 393, 41 Atl. 638.

Exclusion of reasonable doubt.— It is decided in certain cases that the evidence must be so cogent and satisfactory as to exclude a reasonable doubt. Goodin *v.* Goodin, 172 Mo. 40, 72 S. W. 502. Thus it has been held that in all ejectments brought on account of disputed boundaries plaintiff has to show beyond any reasonable doubt that he is entitled to some land at least of which defendant is in possession. Doe *v.* Jones, 7 U. C. Q. B. 385. And see Babaun *v.* Lauson, 27 U. C. Q. B. 399. And in case of escheat the evidence must exclude all reasonable doubt that the tenant whose lands are claimed as escheated died without heirs. Jackson *v.* Etz, 5 Cow. (N. Y.) 314.

27. Edmondson *v.* Anniston City Land Co., 128 Ala. 589, 29 So. 596.

28. Wall *v.* Hill, 1 B. Mon. (Ky.) 290, 36 Am. Dec. 578. And see Steed *v.* Knowles, 97 Ala. 573, 12 So. 75.

29. Eames *v.* McGregor, 43 Mich. 313, 5 N. W. 408; Simmons *v.* Minick, 12 Nebr. 536, 11 N. W. 849; Jones *v.* Bland, 116 Pa. St. 190, 9 Atl. 275. And see Jandon *v.* McDowell, 56 Ill. 53; Clason *v.* Baldwin, 152 N. Y. 204, 46 N. E. 322 [*affirming* 68 Hun 404, 23 N. Y. Suppl. 50]; Covert *v.* Robinson, 24 U. C. Q. B. 282; Eccles *v.* Paterson, 22 U. C. Q. B. 167.

Where plaintiff proves a common source and shows an older title he makes out a *prima facie* case entitling him to recover unless defendant, not being estopped, can show that he claims under another and different title. Anderson *v.* Reid, 10 App. Cas. (D. C.) 426.

Prima facie title does not as a matter of law entitle plaintiff to recover submerged lands appurtenant to shore land the title to which has been divested out of the owner by adverse possession. Illinois Steel Co. *v.* Bilot, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905.

30. Hitch *v.* Robinson, 73 Ga. 140.

Requested instruction that "plaintiffs, having shown only a paper title in this case, without possession in them, or any one under whom they claim, are not entitled to recover" is properly refused, where it is stipulated that the persons under whom plaintiffs claim title by a series of conveyances were the owners of the land and were seized thereof for the purposes of partition. Bunting *v.* Lutz, 132 Pa. St. 192, 19 Atl. 53.

31. Lytle *v.* Anchor Duck Mills, 117 Ga. 869, 45 S. E. 271.

Outstanding title must sufficiently appear to have been available at the time of the commencement of suit in order to constitute a defect in plaintiff's deraignment of title. Baum *v.* Roper, 132 Cal. 42, 64 Pac. 128.

32. Braintree *v.* Battles, 6 Vt. 395.

33. McCauley *v.* Fulton, 44 Cal. 355; Williams *v.* Milligan, 183 Pa. St. 386, 38 Atl. 1015. And see Wylie *v.* Mansley, 132 Pa. St. 65, 18 Atl. 1092; Hoover *v.* Hoover, (Pa. 1888) 12 Atl. 276; Edwards *v.* Morgan, 100 Pa. St. 330.

ficiently identify the land as that sued for,[34] or the identification must be such that a competent surveyor could locate the land.[35] Evidence as to location must not be of that indefinite character which permits the court or jury to reach a determination only by way of speculation.[36] A *prima facie* case will, however, be established where the boundaries are such that the courts will take judicial notice thereof, and this is coupled with other facts in evidence.[37] Surveys are not required in all cases and the land may be located by any other competent evidence.[38] And physical situation may be such as to prevail over plats and surveys.[39] If a mistake in the original survey is alleged, evidence that the boundaries have been defined for more than twenty years by physical objects is sufficient to warrant submitting the case to the jury.[40] If the description of the land in the deed corresponds substantially with that sued for it is sufficient proof of identity,[41] and this is so where the instrument describes the land and also refers to that by which the description can be made certain.[42] Again use and occupancy of contiguous property without disturbance for a time long enough to show that the owners knew their boundary line will be sufficient evidence of an agreement to establish such line and to preclude the parties from thereafter disputing it.[43]

8. Title and Right of Possession — a. In General. Plaintiff is entitled to recover upon an agreement in writing acknowledging ownership in lands, where the title of ownership is set forth in the instrument and the existence and loss of the primordial title is shown.[44] So in ejectment brought against defendant in execution by the lessee of the vendee of the purchaser at the execution, plaintiff will be entitled to recover on evidence of title in plaintiff's lessor before the demise, although in the declaration the demise is laid in blank,[45] and affidavits founded on conversations with the parties and an examination of deeds of record are sufficient to show that the parties claim title from a common source.[46] If, however, the testimony is sufficient to sustain a finding that plaintiff's lessor was

34. Brown *v.* King, 107 N. C. 313, 12 S. E. 137; Webster *v.* Harris, (Tenn. Sup. 1902) 69 S. W. 782, 59 L. R. A. 324; Tellico Mfg. Co. *v.* Mitchell, (Tenn. Sup. 1886) 1 S. W. 514. And see Stalford *v.* Goldring, 197 Ill. 156, 64 N. E. 395; Agnew *v.* Perry, 120 Ill. 655, 12 N. E. 70.

So far as the exterior boundaries are concerned plaintiff in order to recover must identify the land claimed. Miller *v.* Holt, 47 W. Va. 7, 34 S. E. 956; Holly River Coal Co. *v.* Howell, 36 W. Va. 489, 15 S. E. 214.

If lands described in the deed and in the declaration do not vary plaintiff need only show the identity of the lands with those possessed by defendant. Wilkerson *v.* Moulder, 15 Mo. 609.

If recovery of one room is sought evidence must designate which room. Sanford *v.* Herron, 161 Mo. 176, 61 S. W. 839, 84 Am. St. Rep. 703.

Plaintiff must satisfactorily prove the location of the land where his title rests upon that of another person through whom he claims. Pinkerton *v.* Ledoux, 3 N. M. 252, 5 Pac. 721.

35. Lane *v.* Abbott, 23 Nebr. 489, 37 N. W. 82.

36. Jarvis *v.* Lynch, 157 N. Y. 445, 52 N. E. 657 [*affirming* 91 Hun 349, 36 N. Y. Suppl. 220].

37. McMaster *v.* Morse, 18 Utah 21, 55 Pac. 70.

38. Patterson *v.* Crenshaw, 32 S. C. 534, 11 S. E. 390.

39. Illinois Steel Co. *v.* Bilot, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905.

40. Diehl *v.* Zanger, 39 Mich. 601.

Separate drafts of surveys are evidence superior to connected drafts in case of any discrepancy between them, but both are in evidence on the question of location. Gratz *v.* Beates, 45 Pa. St. 495.

41. Rand *v.* Skillin, 63 Me. 103.

Where description of land in the declaration and in the title paper apparently conflict it is error to instruct the jury that they "may correct errors in the calls of the declaration by the proof, in the same way that a grant may be corrected by reference to the plat and certificate." Pyatt *v.* Gallaher, 3 Lea (Tenn.) 289.

42. Newman *v.* Virginia, etc., Steel, etc., Co., 80 Fed. 228, 25 C. C. A. 382.

43. Brummell *v.* Harris, 148 Mo. 430, 50 S. W. 93.

44. Kittridge *v.* Cane, 22 La. Ann. 519.

45. Snowdon *v.* McKinney, 7 B. Mon. (Ky.) 258, holding that, commencement of the lessor's title being shown, if the date of the demise is to be fixed by construction, that construction will be most reasonable which fixes it at a period when the title would have authorized the demise to be made.

46. Hartshorn *v.* Dawson, 79 Ill. 108.

A claim that the parties have a common grantor is not shown by evidence that defendant had in his possession a chain of title to the premises in dispute, a link of which

dead at the time the action was brought the right to recover on the demise is defeated.[47]

b. Ownership of Several Lots or of Undivided Interest. One of several lots may be recovered where the evidence is sufficient to show the ownership of that one, but is insufficient to show ownership of the others.[48] But if plaintiff claims an undivided interest he must not only show his interest, but he must also definitely and specifically show the *quantum* thereof;[49] and this rule applies where plaintiffs are tenants in common.[50]

c. Judgments, Decrees, Records, and Abstracts of Title. While no right is definitely determined by a judgment in ejectment,[51] yet when a party enters under such a judgment and then conveys to a third person for a valuable consideration, who enters under his deed, such entry and possession afford *prima facie* evidence of right.[52] So an award may be sufficient evidence of title to support or defeat ejectment.[53] And decrees confirming title in one, coupled with a deed, will make a complete title;[54] and a title is sufficiently proved by an enrolled decree and conveyance thereunder without introducing the proceedings previous to the decree.[55] In case a certified copy of a record of a former action is competent evidence, and defendant offers no evidence, it is sufficient if rendered upon the issues to constitute an estoppel.[56] If records are shown to have been destroyed and copies thereof are relied on they need not contain all the entries, but only those necessary to establish the chain of title.[57] But mere abstracts of title are insufficient where they are unintelligible without other proof.[58]

d. Title by Descent. If plaintiff claims by descent it is sufficient for him in the first instance to prove his heirship, and that the ancestor from whom he derived title was the person last seized of the premises.[59] There must, however,

was a conveyance from the person claimed by plaintiff to be the common grantor. McConnell *v.* Cherokee Min. Co., 114 Ga. 84, 39 S. E. 941.

47. Watson *v.* Tindal, 24 Ga. 494, 71 Am. Dec. 142.

48. Baxter *v.* Newell, 88 Minn. 110, 92 N. W. 525. And see Morgan *v.* Patton, 4 T. B. Mon. (Ky.) 453.

49. Parrott *v.* Dyer, 105 Ga. 93, 31 S. E. 417.

50. Doe *v.* King, 6 Exch. 791, 20 L. J. Exch. 301, 2 L. M. & P. 493.

If evidence shows tenancy in common a judgment will be unsupported which allows a recovery of an undivided proportionate part, instead of finding such a tenancy and letting plaintiff into possession thereof as such. Burgel *v.* Prisser, 89 Cal. 70, 26 Pac. 787.

51. Jackson *v.* Diefendorf, 3 Johns. (N. Y.) 269.

52. Jackson *v.* Richtmyer, 13 Johns. (N. Y.) 367. And see *infra*, VIII, E, 4.

Judgment in trespass quare clausum fregit is not conclusive, where the only plea is *liberum tenementum*, of title in ejectment for the same land between the same parties. Sabins *v.* McGhee, 36 Pa. St. 453.

Instruction that if complaint in a former suit showed that defendant in the case at bar was charged therein with having an interest in the land in dispute then the judgment was conclusive is erroneous. Warner *v.* Mullane, 23 Wis. 450.

Plaintiff's prayer to instruct the jury that proceedings in a former ejectment suit offered by defendant in evidence collaterally do not vest any title in defendant is not too general, as every point on which the former decision was demanded must be assumed to have been considered and determined therein. Walter *v.* Alexander, 2 Gill (Md.) 204.

53. Moore *v.* Helms, 74 Ala. 368.

54. Bradish *v.* Grant, 119 Ill. 606, 9 N. E. 332, 11 N. E. 258.

Where the right to impeach a deed is not involved in proceedings in partition, such proceedings not being appropriate for litigation between parties in respect to title, the judgment does not become *res adjudicata* to prevent impeaching the deed in ejectment. McCall *v.* Carpenter, 18 How. (U. S.) 297, 15 L. ed. 389.

55. Grebbin *v.* Davis, 2 A. K. Marsh. (Ky.) 16.

Decree declaring conveyance a fraud, when admissible, is sufficient proof of the fraud. McClennan *v.* Solomon, 23 Fla. 437, 2 So. 825, 11 Am. St. Rep. 381.

56. Aiken *v.* Lyon, 127 N. C. 171, 37 S. E. 199.

57. Glos *v.* Patterson, 195 Ill. 530, 63 N. E. 272.

58. Weeks *v.* Downing, 30 Mich. 4.

59. Jones *v.* Bland, 116 Pa. St. 190, 9 Atl. 275. See also Wood *v.* Haines, 72 Ga. 189; Brown *v.* Colson, 41 Ga. 42; Roberts *v.* Foreman, 22 Ga. 283.

Proof of intestate's dying in possession is prima facie evidence of seizin in fee and sufficient unless rebutted, where ejectment is brought by administrator. Carnall *v.* Wilson, 21 Ark. 62, 76 Am. Dec. 351.

be some proof of substantially the above character to justify a recovery by plaintiff.[60] Proof that defendant claims title under an heir of plaintiff's grantor is sufficient *prima facie* evidence of common source to maintain plaintiff's title if otherwise good.[61] It is also held that the evidence of a plaintiff claiming by descent should exclude every possibility of title in another in the line of descent.[62] And a defendant who shows ownership and occupation by a remote ancestor and possession by an immediate ancestor and conveyance to the latter may recover.[63]

e. Title by Purchase — (I) *In General.* An unlocated land certificate coupled with other evidence will support the presumption of a sale.[64] And if the evidence sufficiently shows a fraudulent sale and purchase of plaintiff's lands by one in a confidential relation, there being no element of estoppel, plaintiff is entitled to recover the premises in ejectment.[65]

(II) *Partition.* If plaintiff relies upon a parol partition of land he need not establish the same by as great a degree of proof as is required in case of a parol sale.[66] And where plaintiff's proof of title under proper proceedings in partition is complete and defendant's possession is admitted, a clear right to recovery is shown.[67] Again if a release of a part, including nearly all the premises, is shown to have been made for the purpose of making partition, and all the lots of the patent are held agreeably thereto, and no outstanding title in the remaining patentees appears, perfect title to the whole becomes a legal inference.[68]

(III) *By Operation of Law* — (A) *Escheat.* An escheat grant is *prima facie* evidence that the land granted was liable to escheat at the date of issuing the escheat warrant and not antecedently.[69]

(B) *Possession, Prior and Adverse Possession.* Possession is *prima facie* proof of seizin or title[70] as against those who are unable to produce any better

Deed purporting to be executed by heirs is not *prima facie* evidence that they are heirs of the patentee, but the death of the patentee and their relation to him should be shown. Clevinger *v.* Hill, 4 Bibb (Ky.) 498.

Deed to plaintiff's mother of a life-estate, remainder to her children, possession by the mother, and evidence that plaintiff was the only child and that her mother was dead makes out a *prima facie* case. McLendon *v.* Horton, 95 Ga. 54, 22 S. E. 45.

That decedent died intestate and that children in possession are his heirs is shown *prima facie* by a record issued on a judgment against decedent's "administrator." McCormick *v.* Skelly, 201 Pa. St. 184, 50 Atl. 765.

Father's possession is evidence of title in the heir, and a widow claiming, where children are living, must connect her title by right with that of her husband as against defendant heir. Doe *v.* Barnard, 13 Q. B. 945, 13 Jur. 915, 18 L. J. Q. B. 306, 66 E. C. L. 945; 3 & 4 Wm. IV, c. 27, § 34.

60. Brandenburg *v.* Seigfried, 75 Ind. 568. And see Enders *v.* Sternbergh, 52 Barb. (N. Y.) 222; Stockley *v.* Cissna, 119 Fed. 812, 56 C. C. A. 324.

Evidence was held sufficient to justify a finding that no interest was taken in the land as the owner's heir. Peniston *v.* Schlude, 171 Mo. 132, 71 S. W. 146.

61. Stinnett *v.* House, 1 Tex. Unrep. Cas. 484.

62. Posey *v.* Hanson, 10 App. Cas. (D. C.) 496.

63. Hawes *v.* Rucker, 94 Ala. 166, 10 So. 85.

64. Lochridge *v.* Corbett, 31 Tex. Civ. App. 676, 73 S. W. 96.

65. Roe *v.* Doe, 31 Ga. 544.

66. Howell *v.* Mellon, 189 Pa. St. 169, 42 Atl. 6.

67. Wright *v.* McCormick, 77 N. C. 158.

68. Doe *v.* Campbell, 10 Johns. (N. Y.) 475.

69. Wilson *v.* Inloes, 6 Gill (Md.) 121. And see Jackson *v.* Page, 4 Wend. (N. Y.) 585.

70. *Alabama.*— Wilson *v.* Glenn, 68 Ala. 383.

Arkansas.— John Henry Shoe Co. *v.* Williamson, 64 Ark. 100, 40 S. W. 703.

California.— Plume *v.* Seward, 4 Cal. 94, 60 Am. Dec. 599; Hicks *v.* Davis, 4 Cal. 67; Hutchinson *v.* Perley, 4 Cal. 33, 60 Am. Dec. 578.

Colorado.— Sears *v.* Taylor, 4 Colo. 38.

Georgia.— Jones *v.* Nunn, 12 Ga. 469.

Illinois.— Harland *v.* Eastman, 119 Ill. 22, 8 N. E. 810.

New York.— Tuttle *v.* Jackson, 6 Wend. 213, 21 Am. Dec. 306; Jackson *v.* Winslow, 9 Cow. 13; Jackson *v.* Town, 4 Cow. 599, 15 Am. Dec. 405.

United States.— Burt *v.* Panjaud, 99 U. S. 180, 25 L. ed. 451.

England.— Doe *v.* Barnard, 13 Q. B. 945, 13 Jur. 915, 18 L. J. Q. B. 306, 66 E. C. L. 945; Asher *v.* Whitlock, L. R. 1 Q. B. 1, 11 Jur. N. S. 925, 35 L. J. Q. B. 17, 13 L. T. Rep. N. S. 254, 14 Wkly. Rep. 26; Doe *v.* Penfold, 8 C. & P. 536, 34 E. C. L. 878; Doe *v.* Dyball, 3 C. & P. 610, M. & M. 346, 14 E. C. L. 742.

evidence.[71] Proof of prior possession by plaintiff claiming ownership is *prima facie* evidence of ownership and seizin, and is sufficient to authorize a recovery unless defendant shall show better title.[72] So plaintiff is entitled to recover where he shows prior possession in his grantor or in others to whose title he is privy.[73] So a *prima facie* right to possession is shown by warranty deed from defendant to plaintiff.[74] Possession may be sufficiently evidenced by acts of ownership done upon the land,[75] but vague and unsatisfactory evidence of possession will not warrant a recovery.[76] In case a party relies upon an adverse possession he may recover upon sufficiently proving an occupation for the time and in the manner necessary to constitute such adverse holding.[77] The holding of the legal title of unim-

Canada.— Donnelly *v.* Ames, 27 Ont. 271; Eccles *v.* Paterson, 22 U. C. Q. B. 167.

Mere possession by defendant even if by descent cast, will not dispense with the necessity of proof of title. Geiger *v.* Kaigler, 15 S. C. 262.

71. Caffrey *v.* McFarland, 1 Phila. (Pa.) 555. And see Truitt *v.* Grandy, 115 N. C. 54, 20 S. E. 293.

72. *Alabama.*— Russell *v.* Irwin, 38 Ala. 44.

Arkansas.— John Henry Shoe Co. *v.* Williamson, 64 Ark. 100, 40 S. W. 703; Jacks *v.* Dyer, 31 Ark. 334.

Florida.— Seymour *v.* Creswell, 18 Fla. 29.

Illinois.— Barger *v.* Hobbs, 67 Ill. 592; Brooks *v.* Bruin, 18 Ill. 539; Davis *v.* Easley, 13 Ill. 192; Doe *v.* Herbert, 1 Ill. 354, 12 Am. Dec. 192.

Indiana.— Robinoe *v.* Doe, 6 Blackf. 85.

Kansas.— Mooney *v.* Olsen, 21 Kan. 691.

Michigan.— Cook *v.* Bertram, 86 Mich. 356, 49 N. W. 42; Shaw *v.* Hill, 79 Mich. 86, 44 N. W. 422; Johnson *v.* Johnson, 70 Mich. 65, 37 N. W. 712; Covert *v.* Morrison, 49 Mich. 133, 13 N. W. 390; Bennett *v.* Horr, 47 Mich. 221, 10 N. W. 347; Gamble *v.* Horr, 40 Mich. 561; McFarlane *v.* Ray, 14 Mich. 465.

New York.—Day *v.* Alverson, 9 Wend. 223; Jackson *v.* Harder, 4 Johns. 202, 4 Am. Dec. 262; Jackson *v.* Hazen, 2 Johns. 22.

It is a well settled rule in relation to possessory rights that prior possession is *prima facie* evidence of title.

Alabama.—Dothard *v.* Denson, 72 Ala. 541.

Florida.— Ashmead *v.* Wilson, 22 Fla. 255.

Georgia.— Jones *v.* Easley, 53 Ga. 454.

Idaho.— Fairbough *v.* Masterson, 1 Ida. 135.

Mississippi.— Lum *v.* Reed, 53 Miss. 73; Kerr *v.* Farish, 52 Miss. 101; Hicks *v.* Steigleman, 49 Miss. 377.

Ohio.— Newman *v.* Cincinnati, 18 Ohio 323.

Texas.— Wilson *v.* Palmer, 18 Tex. 592.

Vermont.— Reed *v.* Shepley, 6 Vt. 602.

Facts which in law constitute possession must be sufficiently proven where plaintiff relies exclusively on paper title. Florida Southern R. Co. *v.* Burt, 36 Fla. 497, 18 So. 581.

Proof of prior possession held sufficient.— Where the issue is prior possession, proof by plaintiff that he was in possession by his servants of houses on the demanded premises makes a *prima facie* case sufficient to go to the jury. Donahue *v.* Gallavan, 43 Cal. 573. For other cases in which the evidence was held sufficient to show prior possession see Hestres *v.* Brannan, 21 Cal. 423; Robinson *v.* Gantt, 1 Nebr. Unoff. 51, 95 N. W. 506; Doe *v.* Thomson, 9 N. Brunsw. 461.

Prior actual possession of land by a plaintiff seeking to recover from a mere intruder is not established by evidence that his agent on one occasion granted permission to a third person to lodge some of his cotton-pickers in a hut that had been erected upon the land by a squatter in the absence of proof that it was so occupied. John Henry Shoe Co. *v.* Williamson, 64 Ark. 100, 40 S. W. 703. For other cases in which the evidence was held insufficient to show prior possession see Daubenbiss *v.* White, (Cal. 1892) 31 Pac. 360; Polack *v.* McGrath, 32 Cal. 15; Florida Southern R. Co. *v.* Burt, 36 Fla. 497, 18 So. 581.

73. Harrell *v.* Enterprise Sav. Bank, 183 Ill. 538, 56 N. E. 63; Jones *v.* Spradling, 7 S. W. 31, 9 Ky. L. Rep. 756, a possession and claim of title was shown by plaintiffs to have been in them and their vendors for a great many years, long enough to have vested in them a perfect title, and there was no conflicting testimony.

74. Ashton *v.* Ashton, 11 S. D. 610, 79 N. W. 1001.

Possession under a deed and contract purporting to convey title is *prima facie* evidence of title against one who claims no right in himself and sufficient until it is in some manner met by the defense. Johnson *v.* Johnson, 70 Mich. 65, 37 N. W. 712.

75. Hunter *v.* Starin, 26 Hun (N. Y.) 529.

76. Garner *v.* Wright, 77 Cal. 85, 19 Pac. 184.

77. Eddy *v.* Gage, 147 Ill. 162, 35 N. E. 347 (entry here was under deed); Campbell *v.* Braden, 96 Pa. St. 388; McMaster *v.* Morse, 18 Utah 21, 55 Pac. 70 (*prima facie* case established for plaintiff); Fletcher *v.* Fuller, 120 U. S. 534, 7 S. Ct. 667, 30 L. ed. 759; Fuller *v.* Fletcher, 44 Fed. 34. And see Lair *v.* Mayfield, 46 Ill. 500.

Evidence held insufficient to show adverse possession.—Proof of adverse possession alone for ten years is not sufficient to show title, but it must also appear that the state has actually or presumptively parted with its title. Kolb *v.* Jones, 62 S. C. 193, 40 S. E. 168. For other cases in which the evidence was held insufficient see Jackson *v.* Town, 4

proved land for a longer period of time than that fixed by the statute, coupled with improvements and payment of taxes, is a sufficient showing to support a verdict.[78] And the possession of wild land may be established by any use that clearly indicates an appropriation to the use of the person claiming the property.[79] A showing of a *prima facie* title under a certificate of purchase from the federal government may also be overcome by proof that at the time of the location the land was in the adverse possession of the adverse party.[80]

(c) *Execution, Tax, and Foreclosure Sales.* A *prima facie* or sufficient case may according to the circumstances be established by evidence showing a title under an execution[81] or tax-sale,[82] or under a foreclosure decree and sale.[83] But

Cow. (N. Y.) 599, 15 Am. Dec. 405; Price *v.* Jackson, 91 N. C. 11; Thomas *v.* Dempsey, 53 S. C. 216, 31 S. E. 231; Cumberland River Estate *v.* Williams, (Tenn. Ch. App. 1900) 57 S. W. 396.

78. Baum *v.* Reay, 96 Cal. 462, 29 Pac. 117, 31 Pac. 561.

79. Eddy *v.* Gage, 147 Ill. 162, 35 N. E. 847.

Admissions of an actual occupation in plaintiff's pleadings and in the return upon the service of the declaration are evidence of weight which, coupled with the payment of all taxes for seven years under color of title while the land was vacant and unoccupied, is sufficient evidence that the holding was under color of title, especially when the fact is undisputed. Holbrook *v.* Gouveneur, 114 Ill. 623, 3 N. E. 220.

Proof that land was vacant and unoccupied within the period necessary to establish adverse possession against the state is *prima facie* sufficient to warrant a recovery. Wendell *v.* Jackson, 8 Wend. (N. Y.) 183, 22 Am. Dec. 635. See also Doe *v.* White, 3 N. Brunsw. 595.

80. McTarnahan *v.* Pike, 91 Cal. 540, 27 Pac. 784.

81. Royon *v.* Gullee, (Cal. 1884) 3 Pac. 672; Roe *v.* Ross, 2 Ind. 99; Locke *v.* Coleman, 4 T. B. Mon. (Ky.) 315 (coupled with evidence of possession); Soper *v.* Guernsey, 71 Pa. St. 219.

To make out a prima facie case plaintiff need only show judgment of a court of competent jurisdiction, the execution issued therein, and the sheriff's deed. Los Angeles County Bank *v.* Raynor, 61 Cal. 145. See also Birkbeck *v.* Kelly, (Pa. 1897) 9 Atl. 313. But see Benners *v.* Rhinehart, 109 N. C. 701, 14 S. E. 93. And proof that plaintiff bought under an execution sale and that the judgment debtor was in possession when the judgment was docketed *prima facie* proves title. Colvin *v.* Baker, 2 Barb. (N. Y.) 206. So plaintiff on showing title out of the state and a sheriff's deed to the property may recover. Wainright *v.* Bobbitt, 127 N. C. 274, 37 S. E. 336. The recitals of a sheriff's deed are also *prima facie* evidence of the execution, levy, and sale. Hardin *v.* Cheek, 48 N. C. 135, 64 Am. Dec. 600. But the sheriff's vendee does not show title or possession in the execution debtor by offering the levy and the sheriff's deed in evidence. Herber *v.* Shoemaker, 7 Pa. Co. Ct. 496.

Introduction by defendant of the sheriff's deed of plaintiff's title is admission that the latter owned the property at the date of the execution sale. Rumfelt *v.* O'Brien, 57 Mo. 569.

82. Stevenson *v.* Black, 168 Mo. 549, 68 S. W. 909.

One claiming under a tax deed must show his title back to government or to one in possession (Grayson *v.* Schlamm, 126 Ind. 142, 25 N. E. 810); and the mere production of a tax deed from the state auditor is insufficient to establish title (Moreau *v.* Detchemendy, 41 Mo. 431); nor can an outstanding tax-title be predicated upon a deed from a city reciting only that the tax-collector conveyed the land to the city for the consideration specified (Beecher *v.* Hicks, 7 Lea (Tenn.) 207). But plaintiff is entitled in the absence of evidence of defendant's title to recover merely on proof of a tax deed (Moore *v.* Byrd, 118 N. C. 688, 23 S. E. 968), or upon showing title out of the state, the assessment of taxes and sale therefor, and a sheriff's deed to him (Foust *v.* Ross, 1 Watts & S. (Pa.) 501).

Where the claim is under a tax deed and a decree quieting title the invalidity of the tax deed is immaterial unless the decree is void. Priest *v.* Robinson, 64 Kan. 416, 67 Pac. 850.

That no redemption was had is only proven *prima facie* by the tax deed, and the fact of redemption may be shown. Cooper *v.* Shepardson, 51 Cal. 298.

83. Daniels *v.* Henderson, 49 Cal. 242; Scott *v.* Singer, 54 Ga. 689; Sinclair *v.* Jackson, 8 Cow. (N. Y.) 543.

Although a sheriff's certificate of sale is prima facie evidence of title and the proceedings under power of sale in mortgage regular, yet the certificate of sale is not proof of mortgage and power. Anderson *v.* Schultz, 37 Minn. 76, 33 N. W. 440.

Where evidence shows title by purchase from the purchaser under a foreclosure sale and defendant had made default, and he claims to have made improvements included in the mortgage by mistake and that plaintiff in the foreclosure suit had notice of his adverse possession and his evidence fails to sustain his claim, a finding for him will not be sustained. Burkhard *v.* Schneider, 80 Ind. 140.

Where plaintiff after foreclosure and redemption expired procures the deed, defendant unlawfully withholding the property

a decree of foreclosure, where jurisdiction was not obtained over the mortgagor, is not evidence that the mortgage debt was due and unpaid, in ejectment by the mortgagee against a stranger who claims the mortgaged premises under a tax deed.[84]

(IV) *By Act of Parties*—(A) *Public Lands or Grants.* Evidence which is sufficient, *prima facie* at least, to establish title to or ownership of public lands includes, subject to the qualifications elsewhere stated by us,[85] certificates of purchase,[86] or confirmation;[87] a certificate of the recorder of land titles,[88] of survey,[89] and of location,[90] a patent or grant;[91] recitals of heirship in a patent issued to one as heir of a homestead claimant;[92] a deed of conveyance from the trustees of the internal improvement fund;[93] a deed of the surveyor-general and the statute authorizing him to sell;[94] descriptive lists of the lands granted, certified, approved, and filed in conformity with the statute;[95] copies of resolutions and of the act of cession duly authenticated, according to act of congress;[96] and records in a book of proceedings of commissioners to determine certain preëmption claims.[97] A claim, however, of the variance of a patent from an entry must be shown by clear, satisfactory, and unequivocal proof.[98]

(B) *Private Grant or Act*—(1) Grant, Conveyance, or Deed—(a) In General. The oldest grant is conclusive evidence at law except in the case of an older legal entry.[99] A deed is, however, evidence only of a conveyance of such title as the grantor had in the land;[1] and where title is disputed the mere production of a deed without other proof is insufficient;[2] but it is sufficient for

precludes the necessity of showing that the latter's possession was unlawful. Brown *v.* Cox, 158 Ind. 364, 63 N. E. 568.

If the record fails to show that the mortgage to plaintiff was made before the deed to defendant, the former cannot recover under a foreclosure claim. Sidwell *v.* Schumacher, 99 Ill. 426.

84. Fladland *v.* Delaplaine, 19 Wis. 459.

The title of a purchaser at a foreclosure sale, who is a stranger to the decree, may be proven by the decree, the order confirming the sale, and the sheriff's deed. Moore *v.* Frazer, 15 Oreg. 635, 16 Pac. 869.

85. Title to public lands, etc., see *supra*, II, C, 7.

86. Wright *v.* Roseberry, 81 Cal. 87, 22 Pac. 336; Richter *v.* Riley, 22 Cal. 639; Gallipot *v.* Manlove, 2 Ill. 156.

87. Milburn *v.* Hardy, 28 Mo. 514.

88. Macklot *v.* Dubreuil, 9 Mo. 477, 43 Am. Dec. 550.

89. Carroll *v.* Norwood, 4 Harr. & M. (Md.) 287, coupled here with other strong evidence raising a presumption of the issuance of a patent. *Compare* Hall *v.* Gough, 1 Harr. & J. (Md.) 119, as to a grant based upon a certificate of survey returned and upon possession.

90. Stanway *v.* Rubio, 51 Cal. 41.

91. Wiggins *v.* Lusk, 12 Ill. 132; Brady *v.* Begun, 36 Barb. (N. Y.) 533; Parkison *v.* Bracken, 1 Pinn. (Wis.) 174, 39 Am. Dec. 296; Gibson *v.* Chouteau, 13 Wall. (U. S.) 92, 20 L. ed. 534 [*reversing* 39 Mo. 536].

State grant is considered not as the title, but as evidence by which it is shown that the prerequisites of the law have been complied with. Winter *v.* Jones, 10 Ga. 190, 54 Am. Dec. 379.

Patent embracing a town lot, although issued for a mining claim, makes out a *prima facie* case. Abbott *v.* Primeaux, 16 Nev. 361.

Patent may be attacked by evidence tending to show, in favor of one who had acquired a preëmption right, that the land officers in granting a subsequent patent had been falsely and fraudulently misled. Campbell *v.* Buckman, 49 Cal. 362.

92. Chant *v.* Reynolds, 49 Cal. 213.

Recitals in a patent are not sufficient to show that the title is of an earlier date than the patent. Marsh *v.* Brooks, 8 How. (U. S.) 223, 12 L. ed. 1056.

Recital of the date of the certificate of survey upon which a grant is founded is not sufficient evidence of the time when the survey was made. Henderson *v.* Parker, 3 Harr. & J. (Md.) 117.

Recitals in a warrant, when corroborated, may be sufficient to show that a previous warrant was issued. James *v.* Stookey, 13 Fed. Cas. No. 7,185, 2 Wash. 139.

93. Bell *v.* Kendrick, 25 Fla. 778, 6 So. 868.

94. Jackson *v.* Belknap, 12 Johns. (N. Y.) 96.

95. Hannibal, etc., R. Co. *v.* Moore, 37 Mo. 338.

96. Augustus *v.* Graves, 9 Barb. (N. Y.) 595.

97. Delaunay *v.* Burnett, 9 Ill. 454.

98. Taylor *v.* Fletcher, 7 B. Mon. (Ky.) 80. And see Rays *v.* Woods, 2 B. Mon. (Ky.) 217.

99. Bass *v.* Dunwiddie, 2 Fed. Cas. No. 1,092, Brunn. Col. Cas. 190, Cooke (Tenn.) 130.

1. Doe *v.* Edmondson, 127 Ala. 445, 30 So. 61.

2. McClellan *v.* Zwingli, 70 Hun (N. Y.) 600, 24 N. Y. Suppl. 371; Dominy *v.* Miller,

plaintiff in order to make *prima facie* proof of title to trace his title back to an immediate or remote grantor who at the time of the conveyance was in possession of the land,[3] or to show that his ancestor died in possession under claim or color of title,[4] or trace his title back to the government.[5] A right to possession also results, and plaintiff can rest his case, in the absence of evidence by defendant, where he proves title from a common source,[6] and a title traced from an ancestor who acquired the fee by adverse possession is sufficient.[7] So plaintiff's deed and possession will establish a *prima facie* case as against the holder of a tax-title.[8] Again where defendant has purchased under a deed and is in possession it is *prima facie* evidence that he claims under that title.[9] And where defendant has a deed of land and has held possession thereunder for a time nearly long enough to acquire title by adverse possession his right cannot be overcome by slight evidence.[10]

(b) RECITALS IN DEEDS. Recitals in a deed may constitute *prima facie* evidence of the facts recited.[11]

(c) LOST DEEDS. Proof of matters essential to the maintenance of a claim of legal title, or to show that a deed was executed, delivered, and destroyed, must

33 Barb. (N. Y.) 386; Roberts *v.* Baumgarten, 51 N. Y. Super. Ct. 482 [*affirmed* in 110 N. Y. 380, 18 N. E. 96].

Mere production by plaintiff of the deed of his grantor is insufficient, where he is not the common grantor and is not shown to have had title or possession. Ablard *v.* Fitzgerald, 87 Wis. 516, 58 N. W. 745.

Deed offered purporting to be by certain heirs, without evidence that they were all heirs, **or proof** that the alleged decedent was dead, **is insufficient.** McCrellis *v.* Wells, (Tenn. Ch. App. 1900) 64 S. W. 293.

Where neither a deed nor letter of attorney on which it is based contains any evidence of any obligation having been given by the ancestor to convey the land, there is no sufficient evidence of such obligation in the absence of other proof. Lancaster *v.* McClary, 2 Litt. (Ky.) 4.

If defendant offers no evidence recovery may be had upon producing a deed of the land. Nelson *v.* Omaha, 62 Nebr. 823, 88 N. W. 154.

3. Anderson *v.* McCormick, 129 Ill. 308, 21 N. E. 803; Applegate *v.* Doe, 2 Ind. 169. And see Coombs *v.* Hertig, 162 Ill. 171, 44 N. E. 392.

4. Weaver *v.* Rush, 62 Ark. 51, 34 S. W. 256.

5. Middleton *v.* Westeney, 7 Ohio Cir. Ct. 393, holding that to make out a *prima facie* case plaintiff must show a conveyance or chain of title from the person in possession and occupancy of the land at the time of executing the deed thereof, or must run his title to someone shown or admitted to be the common source of title or back to the government.

6. Dean *v.* Gorton, 177 Ill. 624, 52 N. E. 880; Roosevelt *v.* Hungate, 110 Ill. 595. See also Zahm *v.* Dopp, 19 N. Y. Suppl. 863.

If parties claim from a common source evidence is insufficient which fails to show a perfect chain of title to plaintiff or any actual possessor by his predecessors in title other than mapping or platting by them as against a defendant in actual possession. L'Engle *v.* Reed, 27 Fla. 345, 9 So. 213. *Compare* Manes *v.* Slater, 48 Ga. 589.

Where a married woman is a common source of title to both parties, it is not error to fail to charge that plaintiff must prove acquisition of title from the common source by a good and legal title, where an instrument in evidence is construed to be a valid conveyance of land from such woman to plaintiff. Rawles *v.* Johns, 54 S. C. 394, 32 S. E. 451.

If there is no proof of a common source of title, or that one whose deed is introduced as part of plaintiff's chain of title ever had any title, judgment must be for defendant. Rogers *v.* Vanderburg, 168 Mo. 430, 68 S. W. 340.

When evidence is insufficient to show right of possession in plaintiff see Grindo *v.* McGee, 111 Wis. 531, 87 N. W. 468.

7. McWhorter *v.* Hetzell, 124 Ind. 129, 24 N. E. 743.

8. Zink *v.* McManus, 49 Hun (N. Y.) 583, 3 N. Y. Suppl. 487 [*affirmed* in 121 N. Y. 259, 24 N. E. 467].

9. Holbrook *v.* Brenner, 31 Ill. 501.

10. Emery *v.* Johnson, 37 Nebr. 53, 55 N. W. 225.

11. McCreery *v.* Duane, 52 Cal. 293, holding that a recital in a deed given by a trustee of facts showing that the grantee is one of the beneficiaries to whom the trustee by the terms of the trust was required to convey are *prima facie* evidence of such facts in ejectment by the grantee against one not claiming to be a beneficiary under the trust.

Recitals, in a power of attorney executed thirty-six years before the trial of the heirship of the constituents in such power, from another of the devisees, together with slight parol proof of such heirship, are *prima facie* sufficient to entitle a party claiming such a conveyance by virtue of such power to recover in an action of ejectment. Jackson *v.* Russell, 4 Wend. (N. Y.) 543.

Recitals cannot have the effect of an estoppel in favor of one who was neither a party nor a privy to the deed. Miller *v.* Holman, 1 Grant (Pa.) 243.

not be of a slight and doubtful character, or vague, unsatisfactory, and inadequate, without substantial support or corroboration.[12]

(d) Execution, Delivery, and Registration. The fact that a deed in defendant's chain of title is missing will not prevent a judgment in his favor, where the evidence shows that such deed had in fact been executed but not recorded.[13] And if it is clear that the officers represented in certificates of acknowledgment were in fact what they represented themselves to be, and that they are authorized to take acknowledgments and make such certificates, such certificates become *prima facie* evidence of execution sufficient to entitle the deed to be read in evidence.[14] But the delivery of a deed is not necessarily evidenced by possession.[15]

(e) Identity of Names. Defendant may prove that a person claiming as patentee, although of the same name, was not the patentee intended by the grant.[16] Identity of names, however, in a deed and patent is sufficient proof of identity of persons unless some circumstance calculated to create doubts of such identity, beyond the mere fact of change of residence between the receipt of one conveyance and another, is shown.[17]

(2) Gift or Contract to Convey. A written contract of sale of land to plaintiff is not sufficient to warrant a recovery without proof of the vendor's title.[18] And where an attempt is made to set up a parol contract of sale against a father by a son, or by somone claiming under him, the evidence of the contract must be direct, positive, express, and unambiguous.[19] Clear and satisfactory proof is also required to find that defendant holds under plaintiff, where the latter has abandoned an agreement for sale and defendant has a clear legal title from the commonwealth and has held possession for years under a claim of ownership.[20]

12. Williams *v.* Milligan, 183 Pa. St. 386, 38 Atl. 1015. And see Steward *v.* Scott, 57 Ark. 153, 20 S. W. 1088; Greer *v.* Young, 113 Ga. 120, 38 S. E. 314; Payne *v.* Ormond, 44 Ga. 514.

Sworn statement of a person claiming land under a deed alleged to have been lost is not alone sufficient against parties claiming the land under the will of the alleged grantor. Napton *v.* Leaton, 71 Mo. 358.

13. Billingsley *v.* Ricketts, 32 Nebr. 438, 49 N. W. 443.

Deed of exchange executed alone by one of the parties and his wife may with other proof constitute some evidence of a conveyance by the other party. Goodell *v.* Labadie, 19 Mich. 88.

Manuscript found in a county clerk's office, where it had remained for about seventeen years, and purporting to be register of sales by the commissioner of forfeitures should, to make legal and sufficient evidence of sale, have been authenticated by the commissioner, or some proof should have been given that the book with this entry in it was found in the possession of the commissioner, or among his papers if he was dead. Jackson *v.* Miller, 6 Wend. (N. Y.) 228, 21 Am. Dec. 316.

As against only a naked possession evidence is insufficient where it consists only of a paper, which purports to be a deed, but is a nullity, being without seal and not acknowledged as required by statute and made by a married woman without her husband joining, especially so when made by a person who deraigned no title from any source and was never in possession. Carn *v.* Haisley, 22 Fla. 317.

In an action by one alleging purchase from an ancestor, if heirs do not in their answer deny the signature of the ancestor to a contract of sale under which plaintiff claims, the signature need only be proved by one subscribing witness and by preliminary evidence by which the deed was admitted to registry. Tesson *v.* Gusman, 27 La. Ann. 266.

14. Mott *v.* Smith, 16 Cal. 533.

Certificate from the office of the secretary of state that no such person as the witness who attested the deed as justice of the peace was justice at the time the deed was executed is conclusive on issue of forgery unless rebutted. Williams *v.* Goodall, 60 Ga. 482.

15. Tyler *v.* Hall, 106 Mo. 313, 17 S. W. 319, 27 Am. St. Rep. 337.

16. Jackson *v.* Goes, 13 Johns. (N. Y.) 518, 7 Am. Dec. 399. And see Begg *v.* Begg, 56 Wis. 534, 14 N. W. 602.

Evidence that the name of one from whom defendant claimed to deduce his title was identical with the name of the person who had owned the certificate of location is *prima facie* proof of identity of the persons. Gitt *v.* Watson, 18 Mo. 274.

17. Mott *v.* Smith, 16 Cal. 533.

18. Anderson *v.* Rasmussen, 5 Wyo. 44, 36 Pac. 820.

Equitable title see *supra*, II, C, 6.

19. Edwards *v.* Morgan, 100 Pa. St. 330. See also Zenor *v.* Johnson, 111 Ind. 42, 11 N. E. 616; Harris *v.* Richey, 56 Pa. St. 395.

Where one is the real owner of lands by gift from his father and occupies, sells, conveys, and mortgages it, pays the taxes and claims to be the owner for over twenty years, opposing claimants failing to show a better title cannot recover. Ramey *v.* Crum, 69 S. W. 950, 24 Ky. L. Rep. 741.

20. Crail *v.* Crail, 6 Pa. St. 480.

Where possession is held under a parol contract of sale for a great length of time, the possessor is not to be held, in ejectment against him by the holder of the legal title, to the same strictness of proof of the contract required in case of a recent bargain.[21] If defendant relies on possession and valuable improvements under an oral contract of purchase from plaintiff's grantor of which plaintiff had notice, the defense, to prevail against plaintiff's title, must be established by evidence as clear and satisfactory as would be necessary to enforce specific performance of a contract in a court of equity.[22] If the evidence shows an intention of the donor to convey an absolute estate to defendants and the donee had been in actual possession, they are entitled to recover.[23]

(c) *Devise.* If plaintiff claims as devisee it is sufficient in the first instance to prove the will and the seizin of his ancestor, as by showing his possession at his decease.[24] Such evidence is necessary, however, to entitle plaintiff to recover.[25] The will offered to show title must be shown to embrace the land in controversy. Unless this is done the will is not competent evidence.[26]

4. Possession and Ouster — a. Possession. The fact of possession is usually a question for the jury,[27] and may be shown by circumstantial evidence,[28] such as an entry to make partition coupled with a claim of right,[29] being landlord of the

21. Richards *v.* Elwell, 48 Pa. St. 361.

22. Davis *v.* Holbrook, 25 Colo. 493, 55 Pac. 730. And see Dawson *v.* Dawson, 26 Nebr. 716, 42 N. W. 744, where the evidence of defendant was held not to be of sufficient credibility and weight to support his claim of a parol gift.

23. International Bank *v.* Fife, 95 Mo. 118, 8 S. W. 241. For other cases in which the evidence was held sufficient or insufficient to show a gift see Goodin *v.* Goodin, 172 Mo. 40, 72 S. W. 502; Shroyer *v.* Smith, 204 Pa. St. 310, 54 Atl. 24.

24. Jones *v.* Bland, 116 Pa. St. 190, 9 Atl. 275.

Probate of a will unappealed from is *prima facie* evidence of its validity. Holliday *v.* Ward, 19 Pa. St. 485, 57 Am. Dec. 671. And see Hendrix *v.* Boggs, 15 Nebr. 469, 20 N. W. 28. And if the transcript of the record of probate is admitted in evidence and proofs contained in the record show that the will was duly admitted to probate it is sufficient. Allaire *v.* Allaire, 37 N. J. L. 312.

Evidence of testator's death.— The appearance of a defendant, naming himself executor when admitted in ejectment instead of the tenant in possession, is no evidence in the suit of the death of his alleged testator under whom he claims. Buntin *v.* Duchane, 1 Blackf. (Ind.) 26.

25. Enders *v.* Sternbergh, 52 Barb. (N. Y.) 222.

26. Gaines *v.* Carriker, 50 Mo. 564.

27. *Connecticut.*— Gage *v.* Smith, 27 Conn. 70.

Georgia.— Fitzgerald *v.* Williams, 24 Ga. 343.

North Carolina.— Truitt *v.* Grandy, 115 N. C. 54, 20 S. E. 293; Springs *v.* Schenck, 99 N. C. 551, 6 S. E. 405, 6 Am. St. Rep. 552.

Wisconsin.— Elofrson *v.* Lindsay, 90 Wis. 203, 63 N. W. 89, whether the premises were occupied when defendant entered and whether he entered with plaintiff's consent.

United States.— Koons *v.* Bryson, 69 Fed. 297, 16 C. C. A. 227.

See 17 Cent. Dig. tit. "Ejectment," § 297.

28. **Circumstances sufficient to show possession.**— *California.*—Moore *v.* Moore, (1893) 34 Pac. 90.

Georgia.— Williamson *v.* Mosley, 110 Ga. 53, 35 S. E. 301; Fitzgerald *v.* Williams, 24 Ga. 343.

Illinois.— Goodhue *v.* Baker, 22 Ill. 262, building a house on the premises and residing therein.

Kentucky.— Smith *v.* Shackleford, 9 Dana 452; Smith *v.* Moore, 6 Dana 417.

New York.— Porter *v.* McGrath, 41 N. Y. Super. Ct. 84, statement in an answer that he holds under a mortgage together with the declaration that he was the occupant, and the statement of another witness to that effect.

North Carolina.— Brittain *v.* Daniels, 94 N. C. 781, using a spring and a spring-house built by him on the premises.

See 17 Cent. Dig. tit. "Ejectment," § 297.

Service of a writ in ejectment and a return thereon are only *prima facie* evidence of defendant's possession. Haupt *v.* Haupt, 157 Pa. St. 469, 27 Atl. 768 (return of service on summons in ejectment, together with return on a writ of habere facias possessionem in a previous similar action for the same land); Thornton *v.* Britton, 144 Pa. St. 126, 22 Atl. 1048 (also holding that it is conclusive evidence of possession at the time of the service); Corley *v.* Pentz, 76 Pa. St. 57; Kirkland *v.* Thompson, 51 Pa. St. 216; Gratz *v.* Benner, 13 Serg. & R. (Pa.) 110 (this applies to all defendants); Dietrick *v.* Mateer, 10 Serg. & R. (Pa.) 151; Cooper *v.* Smith, 9 Serg. & R. (Pa.) 26, 11 Am. Dec. 658.

On appeal slight evidence is required to sustain judgment, when the question of defendant's possession was not raised in the court below. Pickett *v.* Doe, 5 Sm. & M. (Miss.) 470, 43 Am. Dec. 523.

29. Kirkland *v.* Thompson, 51 Pa. St. 216.

tenant in possession,[30] or reading in evidence leases from the person under whom plaintiff claimed.[31] But there can be no recovery unless the possession is affirmatively established as a substantial fact.[32]

b. Ouster. The fact of ouster may also be shown by circumstantial evidence,[33] such as the possession of a party claiming exclusive right to possession.[34] To establish ouster as between persons having a joint interest the evidence must clearly show an adverse holding inconsistent with the joint interest.[35]

VIII. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

A. Course and Conduct of Trial[36]—**1. Proceedings Preliminary to Trial—a. In General.** Parties must comply with rules of practice[37] as to joining issues and putting the cause on the trial list.[38] Plaintiff may also be required to elect against which of several he will proceed to take judgment where the action is against several, but it appears that their possession is not joint but several and adverse.[39] The court cannot, however, during the action order the sheriff to take possession without giving the oath or bond required of a receiver.[40]

b. Separate Trials as to Several Defendants. The court may as a matter of sound discretion[41] and even without any motion therefor[42] order separate trials,

30. Oakland Gas Light Co. v. Dameron, 67 Cal. 663, 8 Pac. 595; Smith v. Shackleford, 9 Dana (Ky.) 452. But the admission of one party to defend as landlord is no evidence that the party first sued held as tenant. Curry v. Raymond, 28 Pa. St. 144.

31. Pickett v. Doe, 5 Sm. & M. (Miss.) 470, 43 Am. Dec. 523, in the absence of other evidence.

32. **Circumstances insufficient to show possession.**— *California.*— Spangel v. Dellinger, 42 Cal. 148; Wilson v. Corbier, 13 Cal. 166; Sunol v. Hepburn, 1 Cal. 254, that defendant had horses and cattle grazing on the land.

Georgia.— Knight v. Isom, 113 Ga. 613, 39 S. E. 103.

Louisiana.—Tulane v. Levinson, 2 La. Ann. 787.

Maine.— Thompson v. Knight, 7 Me. 439.

New York.—Martin v. Rector, 30 Hun 138; Jackson v. Myers, 3 Johns. 388, 3 Am. Dec. 504, payment of taxes and execution of partition deeds is insufficient to show actual possession, although they might show claim of title.

See 17 Cent. Dig. tit. "Ejectment," § 297.

Proof of possession at a certain date is insufficient to show possession at a prior date. Delano v. Bennett, 90 Ill. 533.

33. Tibbets v. Bakewell, (Cal. 1894) 35 Pac. 1007; Doe v. Horn, 9 L. J. Exch. 129, 5 M. & W. 564; Doe v. Barnes, 2 N. Brunsw. 426.

Ouster may be legally inferred from a written acknowledgment of defendant, made at the time of service of the writ, that he was in possession claiming land as his own. Giddings v. Canfield, 4 Conn. 482.

Evidence that land was so inclosed as to deprive plaintiff of possession is unnecessary to establish ouster. Sheldon v. Mull, 67 Cal. 299, 7 Pac. 710.

34. Allyn v. Mather, 9 Conn. 114.

35. Velott v. Lewis, 102 Pa. St. 326. See also the following cases:

Alabama.— Philpot v. Bingham, 55 Ala. 435.

Michigan.— Carpenter v. Carpenter, 119 Mich. 167, 77 N. W. 703.

New York.— Clark v. Crego, 47 Barb. 599.

North Carolina.— Hargrove v. Powell, 19 N. C. 97.

South Carolina.— Baum v. Bowen, 53 S. C. 471, 31 S. E. 338.

36. Trial generally see TRIAL.

37. Sledge v. Doe, 51 Ala. 386, holding that if defendant appears and offers to plead not guilty, but refuses to enter into the consent rule prescribed by the practice, the court may disregard his plea, and render judgment against the casual ejector, but cannot strike the plea from the files and render judgment by default against defendant.

Party should apply to have his name struck out when he receives summons, where he claims no interest in the land. D'Arcy v. White, 24 U. C. Q. B. 570. But see Kerr v. Waldie, 4 Ont. Pr. 138.

Plaintiff need not file statement of claim. Laidlaw v. Ashbaugh, 9 Ont. Pr. 6. See also Doe v. Roe, 22 N. Brunsw. 423, as to bill of particulars.

38. Galloway v. Saunders, 2 Serg. & R. (Pa.) 405.

As to regularity of notice of trial, it is too late to object thereto after defendant's appearing and confessing the lease. Doe v. Dougall, 2 U. C. C. P. 169.

Notice of trial served immediately after entry of appearance is regular. Laidlaw v. Ashbaugh, 9 Ont. Pr. 6.

39. Keene v. Barnes, 29 Mo. 377.

40. College Corner, etc., Gravel Road Co. v. Moss, 77 Ind. 139.

41. Young v. Adams, 14 B. Mon. (Ky.) 127, 58 Am. Dec. 654.

42. Judson v. Malloy, 40 Cal. 299.

Where defendants take a joint defense they cannot be permitted at the trial to sever their defense. Carroll v. Norwood, Harr. & J. (Md.) 167.

when it becomes apparent that several parcels of land are separate and distinct and that the several defendants rely upon different sources of title.

e. Submission to Arbitration. An amicable action of ejectment may be maintained, and the same paper which contains the agreement to enter an amicable action may contain an agreement to refer.[43]

d. Entry of Consent Rule. In an action at common law defendant in possession is allowed to defend by entering into the consent rule, by which he confesses lease, entry, and ouster, and puts in his plea of not guilty and insists upon his title only.[44] Or if he wishes to deny ouster he may apply to the court for a special rule to confess lease and entry only.[45] The entry on the minutes of the court of the usual consent rule in an action of ejectment is for the purpose of that suit conclusive that the fact took place as recorded and that it was done and entered of record under the direction of the court.[46] Where the tenant enters into the consent rule and is made defendant instead of the casual ejector it is error to proceed to trial and judgment against him without filing a declaration against him; and his pleading to the original declaration against the casual ejector will not cure the error.[47] A judgment by default for eviction without service of the common

43. The action in such case is entered first, then follows the reference, and a submission is valid without proof by a subscribing witness of an agreement to submit, the requirements of the statute having been complied with, and the referees having been sworn under the rule and having made their award. Massey *v.* Thomas, 6 Binn. (Pa.) 333. See 3 Cyc. 591.

44. *Alabama.*— Wilkerson *v.* McDougal, 48 Ala. 517.

Georgia.— Hilliard *v.* Doe, 7 Ga. 172.

New Jersey.— Den *v.* Keen, 17 N. J. L. 313.

New York.—Jackson *v.* Denniston, 4 Johns. 311.

Pennsylvania.— Wilson *v.* Campbell, 1 Dall. 126, 1 L. ed. 66.

Tennessee.— Huddleston *v.* Hughlett, 1 Humphr. 64; Price *v.* Carter, 5 Yerg. 302.

West Virginia.— Southgate *v.* Walker, 2 W. Va. 427.

See 17 Cent. Dig. tit. "Ejectment," § 143; and Adams Ejectm. 294.

The object of the consent rule is to insure a trial upon the merits and to preclude either party from obtaining advantage of the fictitious proceedings in the action. Adams Ejectm. 294.

Defendant must confess lease, entry, and ouster for all the tenements laid in the declaration. Wilson *v.* Campbell, 1 Dall. (Pa.) 126, 1 L. ed. 66. It is not sufficient to confess lease, entry, and ouster of all the lands described in defendant's title papers, since the plea ought to relate to the possession of defendant. Carter *v.* Parrot, 1 Overt. (Tenn.) 65.

Where there are several defendants in possession of the premises, who hold by separate titles without any connection or community of interest between them, plaintiff will be compelled on application of defendants to enter into a separate rule with each. Jackson *v.* Scoville, 5 Wend. (N. Y.) 96. *Compare* Jackson *v.* Travis, 3 Cow. (N. Y.) 356.

The consent rule is always considered as filed, under the practice in Georgia. Hilliard *v.* Doe, 7 Ga. 172.

In an action by one tenant in common, who has not been ousted, against his cotenant, the latter may enter into the consent rule, where he does not dispute the title as to part of the premises only, and plaintiff may take judgment as to the residue by default. Langendyck *v.* Burhans, 11 Johns. (N. Y.) 461.

Persons served with notice as tenants in possession in ejectment may enter into the consent rule or not at their pleasure. If they do not, as to them, judgment will be entered against the casual ejector. Hancock *v.* Fen, 24 N. J. L. 544.

45. Van Bibber *v.* Frazier, 17 Md. 436; Jackson *v.* Lyons, 18 Johns. (N. Y.) 398.

A special rule will be granted to a tenant in common to confess lease and entry, but not ouster, where he does not dispute his cotenant's title. Hargrove *v.* Powell, 19 N. C. 97. And see Jackson *v.* Stiles, 6 Cow. (N. Y.) 397.

The lessor is not bound of course to enter into a special rule, but only on application to the court. Jackson *v.* Stiles, 2 Cow. (N. Y.) 442; Doe *v.* Day, 8 N. Brunsw. 440.

The only case in which a special consent rule is necessary has been held to be where an actual entry is necessary to be made upon the land previous to suit brought. Newman *v.* Foster, 3 How. (Miss.) 383, 34 Am. Dec. 98.

46. Hughes *v.* Wilkinson, 37 Miss. 482; Gwin *v.* Williams, 27 Miss. 324.

47. Harvey *v.* Doe, 3 Ill. 480; Ayres *v.* Doe, 3 Ill. 307. But see Hurst *v.* Ker, 12 Fed. Cas. No. 6,935, 1 Wash. 189, after defendant appears and has entered into the common rule, a rule on plaintiff for trial, or *non prosequitur* may be taken by the former, although the declaration has not been changed so as to make it against the real defendant.

order has been held to be erroneous.[48] But a person who has been in possession of real estate claiming to be the agent of persons who have long since sold and who has never paid rent will not be permitted to open a default judgment and contest the title on the ground that he had no notice of the suit.[49]

2. CONDUCT OF TRIAL — a. Legal and Equitable Issues. Equitable issues[50] and defenses should be tried first,[51] although it is held that legal issues may be tried first, unless prejudicial consequences are clearly shown.[52] The court may also separately try the issues raised by legal and equitable defenses.[53]

b. As to Defendants Generally. Defendants may withdraw an unsupported claim of payment for improvements.[54] And defendant who pleads title by adverse possession and has a deed under which his grantor claimed title is not bound to produce such deed on motion of plaintiff.[55] Again an objection that plaintiff's evidence does not show title from a common source cannot be insisted upon after defendant has introduced evidence which with plaintiff's shows such claim.[56]

c. View of Premises by Jury. Where the statute authorizes the court to direct a view of the premises by the jury, such view is limited to the property in litigation.[57] Again under an early decision it is held that a common but not a special rule for a view by the jury will be granted, where it does not appear that resistance will be made, and it would add much to the expense and be oppressive to defendant.[58]

d. Surveys. A survey and plat are not indispensable to a trial.[59] Where a

48. Weatherhead *v.* Cunningham, 4 Dana (Ky.) 78. And see Myers *v.* McMillan, 4 Dana (Ky.) 485; Freeman *v.* Oldham, 4 T. B. Mon. (Ky.) 419.

One admitted to defend cannot take advantage of the fact that a judgment entered against the tenants in possession was irregular for want of service of the common order. Gray *v.* Patton, 2 B. Mon. (Ky.) 12.

The return of service must appear to have been by an officer authorized to serve it, where there is no affidavit. Myers *v.* Smith, 5 B. Mon. (Ky.) 279.

Where defendant does not appear it is not error to enter the common order at the time of filing the declaration. Campbell *v.* Adams, Ky. Dec. 16.

49. Wharton *v.* Botham, 3 Watts & S. (Pa.) 158.

50. Steele *v.* Boley, 7 Utah 64, 24 Pac. 755.

Where a cross petition sets up an equitable defense, defendant having taken issue on affirmance of the original petition, it is proper to try first the issues on the cross petition. Dodsworth *v.* Hopple, 33 Ohio St. 16.

51. Schieffery *v.* Tapia, 68 Cal. 184, 8 Pac. 878.

Defendant waives the right to have equitable issues tried first if he acquiesce without objection to trial of the entire cause. George *v.* Silva, 68 Cal. 272, 9 Pac. 257.

52. Du Pont *v.* Davis, 35 Wis. 631.

53. Chambers *v.* Jones, 17 Mont. 156, 42 Pac. 758.

Verdict upon legal title may be suspended to await determination of the equitable questions. Moore *v.* Smith, 24 S. C. 316.

54. Booth *v.* Small, 25 Iowa 177.

55. Jackson *v.* Newton, 18 Johns. (N. Y.) 355.

Defendant may be required to deposit deeds on which he relies in defense, in the clerk's office for inspection upon the affidavit of plaintiff that he expects to prove them to be forgeries. Jackson *v.* Jones, 3 Cow. (N. Y.) 17.

56. Scates *v.* Henderson, 44 S. C. 548, 22 S. E. 724.

57. Wright *v.* Carpenter, 50 Cal. 556, holding that the result of the jury's examination cannot be used by them as independent evidence in the case.

58. Den *v.* Woodward, 4 N. J. L. 122.

Court will grant rule for special view where after a common rule granted for a view one of the showers has been obstructed in running a necessary line. Snyder *v.* Van Natta, 7 N. J. L. 25.

Motion for view will not be granted when the affidavit fails to state that the boundaries are in question. Wickham *v.* Waters, Col. Cas. (N. Y.) 55.

59. King *v.* Jordan, 46 W. Va. 106, 32 S. E. 1022. Especially a survey made by order of the court. Duren *v.* Kee, 50 S. C. 444, 27 S. E. 875.

As to surveys, proceedings, etc., see *supra*, IV, G.

Court may refuse an order of survey and proceed without it, when it is not asked for until the case is called for trial nearly two years after issue joined, and a refusal to make such order on motion of defendant is not error. King *v.* Jordan, 46 W. Va. 106, 32 S. E. 1022.

Under the New York code, which applies to all actions relating to real property irrespective of the title of the article, a survey of the property may be ordered by the court. N. Y. Code Civ. Proc. § 1682. And see Howe's Cave Lime, etc., Co. *v.* Howe's Cave

survey is necessary the trial may be postponed without costs until it is made.[60] While a warrant of resurvey has been held to be properly directed where it is a question of fact on issue, whether the land in controversy was within the lines of a certain tract,[61] under the Maryland code the court should refuse to issue an order for a resurvey where both parties claim from a common source.[62]

3. PRELIMINARY OR SUPPLEMENTAL PROOF — a. General Rules as to Order of Proof. The rule applies in ejectment[63] that it is unnecessary that evidence be in proper order,[64] since parties are not restricted to any particular order in introducing their evidence,[65] but may offer it in the order preferred by themselves, accompanied by an offer to show its relevancy during the progress of the case;[66] subject, however, to the rule that the order of the introduction and admission of evidence is in the sound discretion of the court.[67]

b. Preliminary Proof Generally. Questions which are preliminary, and not objectionable as attempts to prove title or the contents of written instruments by parol, are admissible;[68] but a question assuming a fact[69] as to the existence of an agreement as to the delivery of a deed will not be allowed without first showing that there was an agreement.[70] Another rule which applies in ejectment is that where a deed sought to be used in evidence purports to be executed under a judgment it is necessary to prove such judgment as the foundation of the power to execute the deed, or in other words the necessary prerequisites of the deed should be proven.[71] There is, however, a class of cases in which preliminary

Assoc., 88 Hun (N. Y.) 554, 34 N. Y. Suppl. 848.

60. Gourdine *v.* Theus, 2 Brev. (S. C.) 35.

61. Shartzer *v.* Mountain Lake Park Assoc., 86 Md. 335, 37 Atl. 786.

Although the statute allows amendments at bar in every case of plats and certificates of survey, yet it will only authorize amendments in respect to matters which were unknown or overlooked at the time of survey; and a new location can be made only in obedience to specific instructions as to the boundaries, courses, and distances to be surveyed. Jacob Tome Inst. *v.* Davis, 87 Md. 591, 41 Atl. 166; Md. Pub. Gen. Laws, art. 75, § 81.

62. Kelso *v.* Stigar, 75 Md. 376, 24 Atl. 18; Md. Code, art. 75, § 78.

63. Brignam City *v.* Crawford, 20 Utah 130, 57 Pac. 842.

64. Harper *v.* Farmers', etc., Bank, 7 Watts & S. (Pa.) 204.

65. Welborn *v.* Anderson, 37 Miss. 155.

In ejectment under a tax-sale of unseated lands, bought by county commissioners, defendant may first prove his redemption before producing the conveyance, as the consent of the commissioners to redemption must precede the conveyance. Philadelphia *v.* Miller, 49 Pa. St. 440.

66. Warner *v.* Hardy, 6 Md. 525.

But plaintiff need not state that he intends to follow the record of a patent by evidence of title, from the patentee to himself, as without the original conveyance other conveyances would be futile. Green *v.* Holmes, (Kan. App. 1899) 58 Pac. 128.

Preliminary proof or offer to prove is necessary. Van Auken *v.* Monroe, 38 Mich. 725.

67. Weston *v.* Clark, 37 Mo. 568; Harden *v.* Hays, 14 Pa. St. 91. See also Dubois *v.* Campau, 24 Mich. 360.

Convenience and expedition is the basis of the rule permitting the court to exercise its discretion in admitting evidence out of its proper order, and the court is not bound to it in practice. Kennedy *v.* Bogert, 7 Serg. & R. (Pa.) 97.

68. Taylor *v.* Youngs, 48 Mich. 268, 12 N. W. 208.

69. **Drafts of land,** offered before any title by warrant or location is shown, are not admissible in behalf of defendant. Sample *v.* Robb, 16 Pa. St. 305.

Preliminary proof is required of the performance of a condition precedent to render a deed admissible. Stumpf *v.* Osterhage, 111 Ill. 82.

Vendee in possession alleging fraud in the sale must in ejectment by the vendor who has repurchased first show the invalidity of plaintiff's title, next the fraud, and then that he was induced to purchase. Crumb *v.* Wright, 97 Mo. 13, 10 S. W. 74.

70. Hewitt *v.* Clark, 91 Ill. 605.

71. Anderson *v.* McCormick, 129 Ill. 308, 21 N. E. 803; Anderson *v.* Robinson, 75 Ga. 375; Green Bay, etc., Canal Co. *v.* Groat, 24 Wis. 210. See also Clute *v.* Emmerick, 12 Hun (N. Y.) 504; Gilmore *v.* Taylor, 5 Oreg. 89; Weyand *v.* Tipton, 5 Serg. & R. (Pa.) 332; Waggoner *v.* Wolf, 28 W. Va. 820, 1 S. E. 25. And *compare* Rockwell *v.* Brown, 54 N. Y. 210; Allison *v.* Rankin, 7 Serg. & R. (Pa.) 269; Whitman *v.* Haywood, 77 Tex. 557, 14 S. W. 166.

Executor's deed is inadmissible, without showing the necessary preliminary steps to a sale and conveyance of the premises by executors, such as a compliance with the statutory prerequisites or an express power in the will. White *v.* Moses, 21 Cal. 43.

Municipal ordinances and maps of a city prepared under authority thereof, offered to show that the premises were part of a street

proof is not required, as where grants or deeds are themselves *prima facie* proof of regularity.[72]

c. Supplementary Proof Generally. A deed or other instrument or record may if it is inadmissible merely for want thereof[73] be made admissible by introducing within the rules of evidence the necessary supplementary proof as to parties, where an ambiguity as to them is legally capable of explanation;[74] by evidence, when necessary, of authority to execute the instrument;[75] and by proof connecting defendant's claim of title and to the lands with the deed, even though he was not a party to such deed.[76]

d. Of Possession, Title, or Right to Convey. Evidence of title need not be introduced in any particular order, provided that at the conclusion of the evidence a regular title is made out.[77] It is not necessary therefore for plaintiff to first show title out of the commonwealth and then trace each successive transfer down to himself,[78] although he may do so, as it is not necessary to begin at his deed and go down to the government;[79] nor need plaintiff in the first instance show title prior to the conveyance to himself, where defendant claims under the title derived through plaintiff.[80] Again the time of the introduction of documents for the purpose of showing by what claim, title, or right defendant had entered into possession, or how he had been put in possession, and that his possession had been derived from the common ancestor and under a sheriff's deed, is immaterial.[81] Although a deed from the original grantor is properly admitted where it is preceded by proof of his possession,[82] yet there must be some proof of title or of right to convey[83] in grantors or testators, where grants, deeds, or wills

purporting to be dedicated to public use, are inadmissible in the absence of a prior condemnation or dedication of the property. Smith *v.* Inge, 80 Ala. 283.

Not error to admit a deed from the city for the non-payment of paving taxes without first proving the regularity of the proceedings for the assessment and laying of taxes. It is a question simply of order of proof. Dubois *v.* Campau, 24 Mich. 360.

Where a copy of the purported survey is accompanied by no evidence of authenticity or legality it is inadmissible. Wooster *v.* Butler, 13 Conn. 309.

72. Whitney *v.* Marshall, 17 Wis. 174.

Such proof is unnecessary in case of a registered deed. Doe *v.* Roe, 36 Ga. 463; Ga. Code, § 674, except in case of affidavit of forgery. And execution need not be proven of a receipt over twenty years old, or of a title bond over thirty years old, there being no suspicion as to its genuineness; nor is preliminary proof of possession under the latter necessary if such bond is otherwise relevant. Woods *v.* Montevallo Coal, etc., Co., 84 Ala. 560, 3 So. 475, 5 Am. St. Rep. 393. So the record of a patent is admissible without preliminary proof accounting for the original patent, where the statute makes such record *prima facie* evidence of the existence of the patent and conclusive proof of the existence of the records. Green *v.* Holmes, (Kan. App. 1899) 58 Pac. 128.

73. Holt *v.* Martin, 51 Pa. St. 499.

74. Morse *v.* Carpenter, 19 Vt. 613.

75. Maus *v.* Wilson, 15 Pa. St. 148.

Deed, executed by an attorney in fact, should be admitted when accompanied by such evidence of the power as is obtainable, even though no written power is produced and no direct evidence of the existence of the power is given. Ensign *v.* McKinney, 12 Abb. N. Cas. (N. Y.) 463.

76. Garrigues *v.* Harris, 17 Pa. St. 344.

The record of a judgment by a stranger to a pending ejectment, obtained against defendant in a former action, should be rejected as evidence of a prior or superior title to plaintiff's, unless accompanied with an offer of independent proof showing an ancient and superior title. White *v.* Evans, 47 Barb. (N. Y.) 179.

77. Langley *v.* Jones, 26 Md. 462; Reid *v.* Dodson, 1 Overt. (Tenn.) 396.

Defendant's title need not be shown in the first instance by plaintiff. Odom *v.* Weathersbee, 26 S. C. 244, 1 S. E. 890.

78. Jones *v.* Bland, 116 Pa. St. 190, 9 Atl. 275.

79. Green *v.* Holmes, (Kan. App. 1899) 58 Pac. 128.

Producing the grant of the proprietary is the first step in deducing title. If that is wanting and inferior testimony is resorted to for presuming a grant, the foundation must be laid by stating and combining all the facts existing in the case on which a grant may be presumed. Cockey *v.* Smith, 3 Harr. & J. (Md.) 20.

80. Worley *v.* Hicks, 161 Mo. 340, 61 S. W. 818.

81. Weston *v.* Clark, 37 Mo. 568.

82. Roper *v.* McFadden, 48 Cal. 346. See also Warner *v.* Henby, 48 Pa. St. 187. And *compare* Peaceable *v.* Keep, 1 Yeates (Pa.) 440.

83. Goundie *v.* Northampton Water Co., 7 Pa. St. 233. See also Schrack *v.* Zubler, 34 Pa. St. 38. But *compare* White *v.* Scofield,

do not specifically appear to convey the land in controversy;[84] or to state the principle broadly the party offering a document or writing must show how it is admissible or offer to connect it or it will be inadmissible, where such paper is *prima facie* irrelevant,[85] or does not show upon its face any connection with the land in controversy.[86]

e. Of Identity of Land. It is not only competent to show by parol proof or explanatory evidence the connection of the papers offered with the land in controversy,[87] but it may be necessary that the description in the grant, deed, or conveyance be aided by other testimony,[88] although the uncontroverted testimony of a witness will be sufficient aid,[89] especially where he is an expert surveyor.[90] It is also decided that although a deed does not upon its face embrace the land in suit, such fact need not be shown as a foundation for its introduction, as a party is not obliged to locate on the ground the calls of a deed before it is admitted in evidence.[91]

f. Exclusion of Evidence on Failure to Connect. If evidence is received and some important link necessary to establish the right claimed is wanting it may then be excluded.[92]

84 Ga. 56, 10 S. E. 591; Lowes *v.* Holbrook, 1 Harr. & J. (Md.) 153.

Documents issued by other states are recognized without other proof than inspection of their seals, and whether they are connected with the case depends upon the whole evidence offered; and title of state trustees, although not original, is of such a public character that their deed is *prima facie* evidence of title in the grantee subject to be overcome by proof. Groover *v.* Coffee, 19 Fla. 61.

Deed may be received without proof of ownership where it is so ancient that no living person can in the nature of things testify to acts of ownership of the grantor or grantee, and while within this rule a decree in partition is admissible without proof of possession yet it is not sufficient evidence of title of one claiming under it without showing some subsequent or modern possession by the parties who have received later deeds in plaintiff's chain of title. Greenleaf *v.* Brooklyn, etc., R. Co., 132 N. Y. 408, 30 N. E. 762, 28 Abb. N. Cas. (N. Y.) 161 [*reversing* 5 Silv. Supreme 279, 8 N. Y. Suppl. 30].

Mortgage over twenty years old cannot be set up to show an outstanding title to defeat ejectment without proof of possession under the mortgage or of the present existence of the debt. Moreau *v.* Detchemendy, 41 Mo. 431.

Principle applies to a judgment debtor, where judgment, on which land was sold and defendant purchased, is offered in evidence. Kennedy *v.* Bogert, 7 Serg. & R. (Pa.) 97.

84. Stumpf *v.* Osterhage, 111 Ill. 82.

85. McGarrity *v.* Byington, 12 Cal. 426.

86. Florida Sav. Bank, etc., Exch. *v.* Smith, 21 Fla. 258. But see *infra*, VIII, A, 3, e.

Ancient charter of township containing no description of land itself is admissible in evidence and may be rendered perfect when accompanied with proof of actual location and division among the proprietors. Robinson *v.* Gillman, 3 Vt. 163.

Relation of a deed to the case should be shown when offered, where the deed standing by itself shows nothing; but if the offer is accompanied by a declaration that it will be followed by other proof showing its connection with the chain of title it is admissible, otherwise not. McKibben *v.* Newell, 41 Ill. 461.

87. Florida Sav. Bank, etc., Exch. *v.* Smith, 21 Fla. 258; McMaster *v.* Morse, 18 Utah 21, 55 Pac. 70, holding also that parol evidence will not be excluded by reference in the deed to a certain survey.

88. Chicago, etc., R. Co. *v.* Hardt, 138 Ill. 120, 27 N. E. 910; Stephens *v.* Taylor, 3 Baxt. (Tenn.) 214. *Compare* Earnshaw *v.* Crout, 23 Kan. 560; Daniels *v.* Burso, 40 Ill. 307; Dixon *v.* Fuller, 196 Pa. St. 349, 46 Atl. 553.

Deed referred to in the deed offered must be produced where the deed making such reference does not sufficiently specify the land. Hammond *v.* Norris, 2 Harr. & J. (Md.) 130.

Identity of name in patents and deeds of two tracts in the same county, taken in connection with the long possession of those under whom plaintiff claims and the absence of all evidence of any adverse claim or outstanding title, is sufficient. Carroll *v.* Carroll, 16 How. (U. S.) 275, 14 L. ed. 936.

Subsequent deeds must also, where they describe the property only in general terms, be aided by other evidence to identify the description with that of the prior deed. Jarvis *v.* Lynch, 13 N. Y. Suppl. 703.

That land was the same as that excepted out of the deed may be inferred by the jury when aided by proof of possession for twenty-nine years. Marshall *v.* Goodwin, 2 Dana (Ky.) 58.

89. Thompson *v.* Kauffelt, 110 Pa. St. 209, 1 Atl. 267.

90. Lanier *v.* Orr, 110 Ga. 267, 34 S. E. 306.

91. Hogans *v.* Carruth, 18 Fla. 587. But see *supra*, VIII, A, 3, d.

92. Williams *v.* Doe, 2 Ill. 502. In this case the evidence was excluded evidently upon this principle, which is stated generally by the court as having been applied in some

4. Scope of Inquiry and Powers of Court — a. Scope of Inquiry Generally. Although in ejectment certain matters may be considered which are evidently within the principle which permits courts to take cognizance within certain limits of questions ancillary, incidental to, or growing out of the main action,[93] yet equities will not be considered in the absence of a plea in regard thereto.[94] In certain jurisdictions, however, equitable matters may be determined without resort to an independent suit in equity.[95]

b. Powers of Court Generally. The court may require plaintiffs to elect on which one of two separate declarations they will proceed, both actions being docketed as one suit.[96] The court may also stay proceedings,[97] and may upon motion strike out parcels of land to which plaintiff's right is conceded.[98] The giving of further evidence also rests in the sound discretion of the court.[99] But the court cannot after judgment try title of a third party as intervener;[1] nor if there is a dispute as to the inheritance will the court compel the trustee of an outstanding term attending the inheritance to lend his name to either party;[2] nor can it require pending action security from defendant for mesne profits.[3]

c. On Default or Disclaimer. Where defendant answers but fails to appear when the cause is called, the court may proceed to try the cause without a jury.[4] After a disclaimer by defendant of all right, title, and interest in the land, and a denial of possession, plaintiff may take judgment or go to trial on the issue of defendant's possession.[5]

5. Questions For Court and Jury. With its qualifications, and to substantially the same extent that it governs in other cases,[6] the general rule and statement applies in ejectment that questions of law are for the determination of the court,[7]

states. See also Lowes *v.* Holbrook, 1 Harr. & J. (Md.) 153.

93. Elder *v.* Schumacher, 18 Colo. 433, 33 Pac. 175, holding that the court may determine questions relating to the validity of a deed relied on to prove title. *Compare* East Norway Lake Church *v.* Halvorson, 42 Minn. 503, 44 N. W. 663.

Ancillary and incidental jurisdiction of courts see Courts, 11 Cyc. 677.

94. Garner *v.* Black, 95 Tex. 125, 65 S. W. 876 [*affirming* (Civ. App. 1901) 63 S. W. 918].

95. Swope *v.* Weller, 119 Mo. 556, 25 S. W. 204.

After an equitable defense is dismissed the court should proceed with trial at law. Thomas *v.* Lawlor, 53 Cal. 405.

Equitable rights of parties may be adjudged at the instance of plaintiff as well as at the instance of defendant. Oellrich *v.* Georgia R. Co., 73 Ga. 389.

Residuary legatee holding part of the lands by an unrecorded mortgage cannot, in ejectment by testator's executors claiming under a prior judgment sale, require an adjustment of his equities growing out of his rights as legatee. Wilson *v.* Shoenberger, 34 Pa. St. 121.

96. Hardin *v.* Kirk, 49 Ill. 153, 95 Am. Dec. 581.

97. Jackson *v.* Stiles, 3 Wend. (N. Y.) 429.

Court may refuse to stay proceedings until the costs of the first suit are paid, where a second ejectment is brought in consequence of the tenant's refusal to enter into a consent rule containing a proper description of the premises. Doe *v.* Roe, 8 N. Brunsw. 84. See Doe *v.* Thomson, 9 N. Brunsw. 596.

98. Mower *v.* Mower, 20 Wend. (N. Y.) 635.

99. It is not a matter of the right of plaintiff after he has closed his case. Snowhill *v.* Snowhill, 23 N. J. L. 447.

1. Atkison *v.* Dixon, 89 Mo. 464, 1 S. W. 13.

2. Doe *v.* King, 2 Dowl. P. C. 580.

3. France *v.* French, 2 Pa. Co. Ct. 165.

4. Doll *v.* Feller, 16 Cal. 432.

Judgment will not be given upon the pleadings without evidence, even if there is no answer. Chester *v.* Field, 87 Cal. 422, 25 Pac. 493. *Compare* Bario *v.* Blumner, 1 N. M. 552.

Failure to plead admits those allegations upon which judgment should have been rendered and a jury impaneled to assess damages. So held in Stennett *v.* Scott, 7 Ark. 280.

5. Duncan *v.* Sherman, 121 Pa. St. 520, 15 Atl. 565.

6. **As to unreliability of rule** in its application see 1 Greenleaf Ev. (16th ed.) p. 163, § 81*f*.

7. **The court may decide:** Whether or not from the facts of the case a question arises whether the premises were left *animo revertendi* (McCall *v.* Doe, 17 Ala. 533); upon questions as to the proper parties plaintiff, as to proceedings in the probate court, the loss of a conveyance and its contents secondarily proven (Seaward *v.* Malotte, 15 Cal. 304); an equitable estoppel (Tarpey *v.* Madsen, 26 Utah 294, 73 Pac. 411); and whether a defense warrants specific performance and enjoining the ejectment suit will first be

for example, questions as to the validity, interpretation, and effect of writings,[8] or as to what constitutes title, seniority of title, adverse possession, and color of title, as distinguished from the facts upon which such questions arise;[9] and that questions of fact are for the determination of the jury,[10] especially where the

passed by the court (Weber *v.* Marshall, 19 Cal. 447).

When question of renunciation of dower is not for the court see Bradley *v.* Drayton, 48 S. C. 234, 26 S. E. 613.

Questions for jury do not include: The date of delivery of a writing where there is no evidence that its delivery was deferred after the date of its execution until the expiration of the statutory period for the acquisition of title by adverse possession (Dausch *v.* Crane, 109 Mo. 323, 19 S. W. 61); title established by undisputed evidence (Fisher *v.* Muecke, 82 Iowa 547, 48 N. W. 936); estoppel of plaintiff by his own conduct from claiming land (Tunstall *v.* Cobb, 109 N. C. 316, 14 S. E. 28); an issue which is within the equitable jurisdiction of the court, and an issue whether another summons was formerly in the record (Rice *v.* Bamberg, 59 S. C. 498, 38 S. E. 209); whether defendant signed a certain contract, where the evidence is conclusive that he did not sign it (Commonwealth Title Ins., etc., Co. *v.* Dakko, 89 Minn. 386, 94 N. W. 1088); or in a suit by heirs the question whether a marriage took place at any time, a regular marriage at a specific time and place being relied on (Blackburn *v.* Crawfords, 3 Wall. (U. S.) 175, 18 L. ed. 186). And where the evidence fails to show any user of the land the court may refuse to submit the question to the jury. Brookhaven *v.* Smith, 118 N. Y. 634, 23 N. E. 1002, 7 L. R. A. 755 [*affirming* 6 N. Y. St. 742]. And defendant in ejectment by the purchaser at a foreclosure sale is not entitled as a "mortgagor or his assignee" to the benefit of Ala. Code (1886), § 2707, providing that in an action against the mortgagor or one holding under him defendant may have the jury ascertain the amount due on the mortgage debt. Matkin *v.* Marx, 96 Ala. 501, 11 So. 633.

Jury should not be allowed to consider whether land described in the complaint was susceptible of location, where they were instructed that plaintiff should recover unless the land had been conveyed to a certain defendant. Holmes *v.* Deppert, 122 Mich. 275, 80 N. W. 1094.

Ejectment must be tried by the court without the jury under Law Reform Act (1868), § 18, subject only to the judge's discretion to direct one. Humphreys *v.* Hunter, 20 U. C. C. P. 456.

8. Seaward *v.* Malotte, 15 Cal. 304; Quinn *v.* Eagleston, 108 Ill. 248; Burke *v.* Lee, 76 Va. 386; Florida Southern R. Co. *v.* Loring, 51 Fed. 932, 2 C. C. A. 546.

The court must determine the legal effect of a record where it is not shown to be incomplete (Rice *v.* Bamberg, 59 S. C. 498, 38 S. E. 209); title dependent upon written evidence (Connellogue *v.* English, 8 Watts & S. (Pa.) 11); and the construction of the written return of the sheriff of a levy under execution and the *quantum* of estate conveyed by the sheriff's deed (Hoffman *v.* Danner, 14 Pa. St. 25). And where defendant's claim is through a patent, and he establishes that plaintiff's claim under said patent is invalid, he is not entitled to try the legal issues to the jury. Cornelius *v.* Kessel, 58 Wis. 237, 16 N. W. 550. Again, it is error to permit a record of partition to go to the jury to prove that the land in dispute had been assigned to plaintiff. Whitacre *v.* Ilhaney, 4 Munf. (Va.) 310.

9. Reid *v.* Anderson, 13 App. Cas. (D. C.) 30.

Whether a grant can fairly be implied from possession of a certain character is for the court to decide. Castro *v.* Gill, 5 Cal. 40.

Whether deeds show title in party offering them must rest with the court and not with the jury. Hunt *v.* Missouri Pac. R. Co., 75 Mo. 252.

10. *Alabama.*— Louisville, etc., R. Co. *v.* Massey, 136 Ala. 156, 33 So. 896, 96 Am. St. Rep. 17.

California.— Weber *v.* Marshall, 19 Cal. 447.

Georgia.— Vickery *v.* Benson, 26 Ga. 582.

Maryland.— Hackett *v.* Webster, 97 Md. 404, 55 Atl. 480; Ringgold *v.* Malott, 1 Harr. & J. 299; Helm *v.* Howard, 2 Harr. & M. 57.

Massachusetts.— Hall *v.* Thayer, 5 Gray 523.

Missouri.— Whitaker *v.* Whitaker, 157 Mo. 342, 58 S. W. 5.

Nebraska.— Jewett *v.* Black, 60 Nebr. 173, 82 N. W. 375.

Nevada.— Staininger *v.* Andrews, 4 Nev. 59.

New Jersey.—Bouvier *v.* Baltimore, etc., R. Co., 65 N. J. L. 313, 47 Atl. 772.

New York.— Lucas *v.* Johnson, 8 Barb. 244.

North Carolina.— Kendrick *v.* Dellinger, 117 N. C. 491, 33 S. E. 438.

Pennsylvania.— Richards *v.* Buffalo, etc., R. Co., 137 Pa. St. 524, 19 Atl. 931, 21 Am. St. Rep. 892; Miller *v.* McCullough, 104 Pa. St. 624; McLaughlin *v.* Fulton, 104 Pa. St. 161; Richards *v.* Elwell, 48 Pa. St. 361; McIldowny *v.* Williams, 28 Pa. St. 492; Breiden *v.* Paff, 12 Serg. & R. 430.

South Carolina.— Bradley *v.* Drayton, 48 S. C. 234, 26 S. E. 613.

Wisconsin.— Larson *v.* Pederson, 115 Wis. 191, 91 N. W. 659.

Canada.—Doe *v.* Savoy, 28 N. Brunsw. 168; Stewart *v.* Cameron, 20 U. C. Q. B. 193.

See 17 Cent. Dig. tit. "Ejectment," § 307 *et seq.*

Questions for the jury may include: The ascertainment of the damages, there being no plea (Cushwa *v.* Cushwa, 9 Gill (Md.) 242); an issue of fact between plaintiff's legal title and defendant's equitable title (Kern *v.* Howell, 180 Pa. St. 315, 36 Atl. 872, 57 Am. St. Rep. 641); the consideration of a deed of release (Budd *v.* Budd, 30 Pittsb. Leg. J.

evidence is conflicting,[11] and includes the facts upon which title, seniority of title, and adverse possession under claim and color of title must be based,[12] facts relating to fraud,[13] facts relating to identity of premises[14] and their location,[15] facts relating to liens,[16] and facts relating to occupancy,[17] ouster,[18] and tortious eviction,[19] and facts relating to the possession of the premises.[20] But this rule is not exclu-

(Pa.) 428); whether a will was probated and has been lost, and if a purported copy is a true copy (Counts *v.* Wilson, 45 S. C. 571, 23 S. E. 942); and evidence showing plaintiff's title to be complex and their interests difficult to determine (Odom *v.* Weatherbee, 26 S. C. 244, 1 S. E. 890).

An instruction "that the plaintiffs cannot recover in the action, because the evidence does not show any right to recover the possession of any share, interest or portion of the premises, at the commencement of the suit" takes the whole case away from the jury and can only be sustained where there is no evidence whatever tending to make out a case for plaintiffs. Dubois *v.* Campau, 24 Mich. 360. But an instruction is correct that "the written evidence of title, together with the admissions of the parties, authorized them to find for plaintiff, since the execution of the papers had been passed on by the Court." Such charge amounts only to an announcement of the law as to the effect of the conveyances, and of the admission of defendants. Stark *v.* Barrett, 15 Cal. 361.

It may be intimated to the jury by the trial court that there has been an abandonment, where it submits the facts to their consideration with instructions as to what constitutes an abandonment. Sample *v.* Robb, 16 Pa. St. 305.

Recitals in deeds, as against strangers, must be submitted with proper instructions. Florida Southern R. Co. *v.* Loring, 51 Fed. 932, 2 C. C. A. 546.

11. Holloway *v.* Louisville, etc., R. Co., 92 Ky. 244, 17 S. W. 572, 13 Ky. L. Rep. 481; Taylor *v.* Davis, 65 S. W. 7, 23 Ky. L. Rep. 1266; Dausch *v.* Crane, 109 Mo. 323, 19 S. W. 61; Close *v.* Benjamin, (Pa. 1887) 9 Atl. 51; Enders *v.* Sternberg, 2 Abb. Dec. (N. Y.) 31, 1 Keyes (N. Y.) 264, 33 How. Pr. (N. Y.) 464. See Bryce *v.* King, 44 Mich. 181, 6 N. W. 233; Moore *v.* Small, 19 Pa. St. 461.

12. Reid *v.* Anderson, 13 App. Cas. (D. C.) 30.

13. For example the effect of testimony to estblish fraud in procuring the deed (Costillo *v.* Thompson, 9 Ala. 937), or fraud, under a claim that defendant's mortgage was obtained by fraud (Richardson *v.* Steere, (R. I. 1890) 45 Atl. 151).

14. Munson *v.* Munson, 30 Conn. 425; Thompson *v.* Ridelsperger, 144 Pa. St. 416, 22 Atl. 826 (identity, when it can be determined only by extrinsic evidence); Brown *v.* Armstrong, Ir. R. 7 C. L. 130.

Whether the description in the complaint will apply to the land is for the jury to determine. Moss *v.* Shear, 30 Cal. 467.

Whether the land is within the tract surveyed and granted is a question for the jury. Bates *v.* Illinois Cent. R. Co., 1 Black (U. S.) 204, 17 L. ed. 158.

Identity of articles of agreement with those recited in the deed is a question for the jury. Allen *v.* Allen, 45 Pa. St. 468.

15. Fish *v.* Chicago, etc., R. Co., 84 Minn. 179, 87 N. W. 606.

A mistake in description of land presents a question for the jury. Johnson *v.* Duncan, 90 Ga. 1, 16 S. E. 88.

The true location of a section line differently located by different surveyors is for the jury to decide. Herpel *v.* Malone, 56 Mich. 199, 22 N. W. 283.

What quantity of land was intended to be sold under a sheriff's deed, when from the uncertainty of description a doubt is raised as to the boundaries of the levy, may be determined by the jury. Hoffman *v.* Danner, 14 Pa. St. 25.

16. Kime *v.* Polen, (Pa. 1887) 8 Atl. 783.

17. Bass *v.* Dinwiddie, 2 Fed. Cas. No. 1,092, Brunn. Col. Cas. 190, Cooke (Tenn.) 130.

The intention of an entry and the right by which and the extent to which it was made is for the jury to determine. Helm *v.* Howard, 2 Harr. & M. (Md.) 57.

Who was an "actual occupant" is a question for the jury. Martin *v.* Rector, 101 N. Y. 77, 4 N. E. 183.

18. Harmon *v.* James, 7 Sm. & M. (Miss.) 111, 45 Am. Dec. 296.

19. Adams *v.* Tiernan, 5 Dana (Ky.) 394; Sprigg *v.* Bynum, 10 La. 464.

20. *Alabama.*— Johnson *v.* Kyser, 127 Ala. 309, 27 So. 784.

California.— Hicks *v.* Davis, 4 Cal. 67.

Connecticut.— Gage *v.* Smith, 27 Conn. 70.

Georgia.— Oliver *v.* Williams, 25 Ga. 217; Scisson *v.* McLaws, 12 Ga. 166.

North Carolina.— Cowles *v.* McNeill, 125 N. C. 385, 34 S. E. 499; Truitt *v.* Grandy, 115 N. C. 54, 20 S. E. 293; Springs *v.* Schenck, 99 N. C. 551, 6 S. E. 405, 6 Am. St. Rep. 552.

Wisconsin.— Elofrson *v.* Lindsay, 90 Wis. 203, 63 N. W. 89.

United States.— Koons *v.* Bryson, 69 Fed. 297, 16 C. C. A. 227.

See 17 Cent. Dig. tit. "Ejectment," § 308.

Question of fact for the jury may include: Actual possession in the ancestor (Abram *v.* Will, 6 Ohio 164); character of possession (O'Hara *v.* Richardson, 46 Pa. St. 385); possession, where plaintiff bases his claim upon adverse possession (Moran *v.* Higgins, 40 S. W. 928, 19 Ky. L. Rep. 456); prior possession (Florida Southern R. Co. *v.* Loring, 51 Fed. 932, 2 C. C. A. 546); whether possession was held adversely under claim of title (Davis *v.* Furlow, 27 Md. 536); whether possession was obtained by consent of and under plaintiff (Jones *v.* Porter, 3 Penr. & W. (Pa.) 132); whether possession was left *animo revertendi* (McCall *v.* Doe, 17 Ala.

sive, for subject to certain qualifications the court may pass upon the facts, where the action of ejectment is substituted for a bill for specific performance in case of a parol contract for land.[21] So equitable defenses are generally for the court,[22] and even if the court in its discretion leave such questions to the jury[23] their findings may be disregarded.[24]

6. **Submission of Issues.** The court need not submit to the jury facts which are adjudicated, but only such issues as remain undetermined.[25] Nor need issues be submitted which are not involved[26] or facts which are immaterial under the pleadings;[27] and the framing and submission of special issues, involving both legal and equitable defenses, is erroneous.[28] Again issues may be refused when tendered by plaintiffs without reference to the rights of defendants under the pleadings.[29] The issue of damages should, however, be submitted with the issues upon the main question.[30] And where an issue is sufficient in form and substance, as the presentation of an issue controlling the determination of the case, it is properly submitted.[31]

7. **Direction of Verdict.** A verdict may be directed where there is no conflict or doubt under the evidence as to the facts;[32] where plaintiff has made out a case by *prima facie* proof and there is no rebutting evidence;[33] where the issue being one of law is decided by the court;[34] where an equitable title is set up and the

533); adverse possession when claimed by both parties and there is evidence for both parties (Beecher *v.* Ferris, 124 Mich. 9, 82 N. W. 617); upon an issue of location of line, the question whether defendant acquired title to said line by adverse possession (McCormick *v.* Kreinke, 179 Ill. 301, 53 N. E. 549); and the sufficiency of acts of appropriate dominion (Sharon *v.* Davidson, 4 Nev. 416).

21. Moore *v.* Small, 19 Pa. St. 461.

22. Bodley *v.* Ferguson, 30 Cal. 511; Downer *v.* Smith, 24 Cal. 114; Suessenback *v.* Deadwood First Nat. Bank, 5 Dak. 477, 41 N. W. 662; Olendorf *v.* Cook, 1 Lans. (N. Y.) 37. *Compare* Walton *v.* Gray, 29 Iowa 440; Burger *v.* Dankel, 100 Pa. St. 113; Dobbs *v.* Kellogg, 53 Wis. 448, 10 N. W. 623.

23. Weber *v.* Marshall, 19 Cal. 447.

24. Brownlee *v.* Martin, 28 S. C. 364, 6 S. E. 148.

25. Fisher *v.* Muecke, 82 Iowa 547, 48 N. W. 936; Vaughan *v.* Parker, 112 N. C. 96, 16 S. E. 908.

26. Riley *v.* Hall, 119 N. C. 406, 26 S. E. 47; Tyson *v.* Shepherd, 90 N. C. 314.

27. Overcash *v.* Kitchie, 89 N. C. 384.

28. Weber *v.* Marshall, 19 Cal. 447.

29. Allen *v.* Allen, 114 N. C. 121, 19 S. E. 269.

30. Cheek *v.* Watson, 90 N. C. 302.

31. Ray *v.* Long, 132 N. C. 891, 44 S. E. 652.

Illustrations.— If title is alleged in plaintiff without stating the source, the issues submitted to the jury should be so framed as to allow plaintiff to prove title in any manner he can; and when plaintiff tenders such issues, properly framed, it is error to refuse them, and to submit instead, issues which, although proper in themselves, narrow the question to the chain of title stated in defendant's answer as the one through which plaintiff claims. Davidson *v.* Gifford, 100 N. C. 18, 6 S. E. 718. But where plaintiffs do not show that they were prevented from fully enlightening the jury in the law applicable to the facts, they cannot question the sound discretion of the court in making up the issues. Redmond *v.* Mullenax, 113 N. C. 505, 18 S. E. 708.

32. *Georgia.*— Perry *v.* Saylor, 118 Ga. 219, 44 S. E. 993; Ballard *v.* James, 117 Ga. 823, 45 S. E. 68; Briscoe *v.* Holder, 111 Ga. 877, 36 S. E. 960; Carr *v.* Georgia L. & T. Co., 108 Ga. 757, 33 S. E. 190; Brundage *v.* Bivens, 105 Ga. 805, 32 S. E. 133; Padgett *v.* Hawkins, 100 Ga. 93, 26 S. E. 608.

Illinois.— Casey *v.* Kimmel, 181 Ill. 154, 54 N. E. 905; Anderson *v.* McCormick, 129 Ill. 308, 21 N. E. 803.

Michigan.—Stoinski *v.* Pulte, 77 Mich. 322, 43 N. W. 979.

Minnesota.—Hallam *v.* Doyle, 35 Minn. 337, 29 N. W. 130.

Mississippi.— Goforth *v.* Stingley, 79 Miss. 398, 30 So. 690.

North Carolina.— Isler *v.* Harrison, 71 N. C. 64.

Rhode Island.—Richardson *v.* Steere, (1890) 45 Atl. 151.

Wisconsin.— Blodgett *v.* Hitt, 29 Wis. 169.

See 17 Cent. Dig. tit. "Ejectment," § 312.

Facts not warranting the direction of a verdict see Bailey *v.* Selden, 124 Ala. 403, 26 So. 909; Mickle *v.* Montgomery, 111 Ala. 415, 20 So. 441; Crummey *v.* Bentley, 114 Ga. 746, 40 S. E. 765; Murphy *v.* Campau, 33 Mich. 71; Campbell *v.* Hughes, 12 W. Va. 183.

Instruction is not objectionable that if the jury find for plaintiff their verdict will be that they "find for plaintiffs for the recovery for the possession of the premises first described in the complaint," where the answer raises no question as to the amount of land plaintiff might recover and defendant asks no instruction as to such amount. Feliz *v.* Feliz, 105 Cal. 1, 38 Pac. 521.

33. Anderson *v.* McCormick, 129 Ill. 308, 21 N. E. 803.

34. Brummett *v.* Campbell, 32 Wash. 358, 73 Pac. 403.

evidence is in the court's opinion insufficient to prevail against the legal title;[35] where there is an absence of evidence of title in plaintiff;[36] or where defendant gives no evidence, but relies upon the insufficiency of plaintiff's title.[37] But the court errs in giving a general affirmative charge where there is a conflict of evidence.[38]

B. Dismissal and Nonsuit — 1. GENERALLY. The rules governing the dismissal or discontinuance of actions in general as well as the general rules as to the entering a nonsuit or a *nolle prosequi*[39] apply to actions of ejectment. One of several separate lessors may have his name stricken from the declaration.[40] Plaintiff may also strike out two defendants and proceed against a third.[41] Again, although it is generally true that none but defendant can nonsuit, yet if there are several defendants judgment of nonsuit may be by one of them, and where several defendants plead jointly nonsuit may be granted against plaintiff after the death of one of the defendants, without a substitution of his representative.[42]

35. Williams *v.* Milligan, 183 Pa. St. 386, 38 Atl. 1015.

36. Scott *v.* Nickum, 193 Pa. St. 371, 44 Atl. 437.

37. Foust *v.* Ross, 1 Watts & S. (Pa.) 501.

38. Dougherty *v.* Powe, 127 Ala. 577, 30 So. 524.

It is error to give a general charge in favor of the grantee under a sheriff's deed, bringing ejectment, as against the execution debtor's wife, introducing in evidence a deed from her husband, executed and filed before issuance of the execution. Hardy *v.* Gunn, 122 Ala. 666, 25 So. 621, 45 L. R. A. 804.

39. See, generally, DISMISSAL AND NONSUIT.

Plaintiff may dismiss the suit whenever he thinks proper, notwithstanding the beneficial interest in such suit is in another. White *v.* Nance, 16 Ala. 345. He may also for good cause, upon motion for judgment as in case of a nonsuit, discontinue without costs, unless defendant has given security for any judgment that may be recovered against him. Fort *v.* Palmerton, 19 Wend. (N. Y.) 94. Plaintiff cannot, however, after the right to a new trial is granted him, discontinue his suit and commence a new action in the same or another court. Brown *v.* King, 107 N. C. 313, 12 S. E. 137. See also Carleton *v.* Darcy, 75 N. Y. 375. Nor can plaintiff who is ruled to bring an ejectment discontinue the suit without good cause shown. Knabb *v.* Conner, 23 Pa. Co. Ct. 237.

Defendant, if he answer by a full disclaimer and the answer be not falsified, is entitled to judgment dismissing the action with costs. Webster *v.* Pierce, 108 Wis. 407, 83 N. W. 938. See also Noe *v.* Card, 14 Cal. 576.

A contract between plaintiff and defendant to dismiss precludes prosecution of the action and a recovery by plaintiff, unless defendant has violated or abandoned the contract. Hunt *v.* Siemers, 22 Tex. Civ. App. 94, 53 S. W. 387.

Operation and effect.— By consenting to a nonsuit plaintiff waives his right to a decision by the jury. Lord *v.* Buffum, 19 Me. 195. And a discontinuance by plaintiff as to one defendant is held to be a discontinuance as to all. Torrey *v.* Forbes, 94 Ala. 135, 10 So. 320. A discontinuance against a tenant in possession is also a discontinuance of the action. Peters *v.* Allison, 1 B. Mon. (Ky.) 232, 36 Am. Dec. 574. But plaintiff cannot dismiss his suit against a tenant in possession and use the tenant as a witness against one who was admitted to defend with him. Peters *v.* Allison, 1 B. Mon. (Ky.) 232, 36 Am. Dec. 574. Again dismissal of the action at the instance of plaintiff settles no rights of the parties and is not an admission of any right or title in defendant, and is not a bar to and cannot be shown in evidence in a second action. Van Vliet *v.* Olin, 1 Nev. 495. It is decided, however, that a nonsuit will operate as a bar to a future action by the same plaintiff, unless the second action is commenced within the period specified in the statute for bringing such second action (Porter *v.* Maxwell, 1 Bailey (S. C.) 68); but a second suit may under the statute be brought on terms within a limited time (Benbow *v.* Levi, 50 S. C. 120, 27 S. E. 655).

40. Scott *v.* Sears, 31 N. C. 87.

Name of a lessor may be stricken out on his own motion at any stage of the proceedings, where the rights of defendant are not affected, on paying his share of the costs. Jackson *v.* Stiles, 5 Cow. (N. Y.) 418.

One of several plaintiffs cannot discontinue with the result of defeating the action as to the other plaintiffs. Cooper *v.* Cooper, 1 Phila. (Pa.) 129.

41. Cunningham *v.* Bradley, 26 Ga. 238.

Where certain heirs are defendants and they claim no title whatever, and no relief is claimed against them, the suit should be dismissed as to them with costs. Wall *v.* Fairley, 73 N. C. 464.

42. Nickle *v.* McFarland, 7 Watts (Pa.) 406.

Several plaintiffs.— 36 Vict. c. 135, §§ 10–12 (O), respecting the property of religious institutions, authorizes only the appointment of successors to trustees dead or legally removed, and does not empower the congregation to remove trustees competent and willing to act. The three plaintiffs in this case claimed title under a conveyance to two of them, and to H, one of the defendants, as a trustee of a congregation named, alleging that H had been since removed from the

2. At What Stage of the Action[43]— a. Before Trial. The suit may be dismissed where plaintiff waives the first trial and makes no demand for another after a long time;[44] or where after a plea of not guilty plaintiff is in default in that after moving for trial he fails to file a description of the land as required, join issue, and put the cause on the trial list.[45] A dismissal should also be entered where there is ground for believing that the suit is prosecuted ostensibly in a vendor's name, for a champertous vendee's benefit, unless upon a rule or otherwise such ostensible vendor and lessor should have an opportunity to be heard, and it should then appear that the suit was so prosecuted with his knowledge and consent.[46] That the court has no jurisdiction to grant the equitable relief asked for by plaintiff does not justify a dismissal of his action at law, which on its face does not purport to have any connection with the other grounds of relief.[47]

b. At Trial. Ordinarily, in determining whether or not a nonsuit should be granted, the question is not one of sufficiency of the evidence, but whether there was any evidence;[48] and a nonsuit is improper where there is any evidence tending to prove plaintiff's case,[49] or where a *prima facie* case is established.[50] The case should also be submitted to the jury under proper instructions, even though plaintiff and defendant make out a case and the court is of the correct opinion

office of trustee, and plaintiff T appointed in his stead. Defendants denied plaintiffs' title. The conveyance contained no clause for the removal of trustees or the appointment of new ones, and the congregation under the statute above mentioned had assumed to appoint plaintiff T in place of H. It was held that plaintiffs must wholly succeed or wholly fail as to the title alleged, and that the appointment of T being invalid a nonsuit must be entered. Lage *v.* Mackenson, 40 U. C. Q. B. 388.

43. See, generally, Dismissal and Nonsuit.

Nolle prosequi after verdict.— It is not error to enter after verdict a *nolle prosequi* as to some of the defendants, there being no contribution. Freedly *v.* Mitchell, 2 Pa. St. 100.

44. Kohn *v.* Barr, 40 Kan. 45, 19 Pac. 335.

45. Galloway *v.* Saunders, 2 Serg. & R. (Pa.) 405.

46. Marks *v.* Jordan, 3 B. Mon. (Ky.) 116. *Compare* Coogler *v.* Rogers, 25 Fla. 853, 7 So. 391.

47. McNeady *v.* Hyde, 47 Cal. 481.

Where equitable defense is filed by defendant, who is an obligee in a bond for a title and the action is by the obligor to recover on defendant's failure to pay the entire purchase-money, it is error to dismiss the case, because plaintiff declined to amend his declaration so as to change the action to assumpsit for recovery of the purchase-money. Allison *v.* Elder, 45 Ga. 17. But a cause is properly dismissed where the equitable defense set up as a bar to plaintiff's cause of action is sufficient, and where the pleadings fail to show that plaintiff is entitled to any further relief he cannot complain that defendant was not granted other and further relief asked for. Sims *v.* Steadman, 62 S. C. 300, 40 S. E. 677.

48. Bradley *v.* Drayton, 48 S. C. 234, 26 S. E. 613.

Nonsuit is improper where there is evidence that plaintiff went into possession and paid taxes for more than twenty years (Kolb *v.* Jones, 62 S. C. 193, 40 S. E. 168); where the ground is the serving of process the day before the demise laid in the declaration (Williams *v.* Snowhill, 13 N. J. L. 23, 22 Am. Dec. 496); where there was evidence of title in plaintiff's father, and he became an owner of all his father's title (Benne *v.* Miller, 149 Mo. 228, 50 S. W. 824); where plaintiff gave evidence of possession for thirteen years and of acts of ownership by fencing, etc., also that defendant came upon the land five or six years before without permission (Whale *v.* Hitchcock, 34 L. T. Rep. N. S. 136); or where there is some evidence tending to prove all the material allegations of the complaint (McKee *v.* Greene, 31 Cal. 418).

Nonsuit is proper where there is no evidence of possession for seven years after the deed to plaintiff's father (Caudle *v.* Long, 132 N. C. 675, 44 S. E. 368); or where plaintiff cannot maintain ejectment (Zander *v.* Valentine Blatz Brewing Co., 89 Wis. 164, 61 N. W. 763). And defendant may have a nonsuit as to such portion of the demanded premises as plaintiff's evidence shows were in his own possession at the time of the commencement of the action. Dillon *v.* Center, 68 Cal. 561, 10 Pac. 176.

49. William *v.* Burnet, Wright (Ohio) 53; Bradley *v.* Drayton, 48 S. C. 234, 26 S. E. 613. See also King *v.* Manning, 20 N. J. L. 612 (holding that the evidence should have gone to the jury); Showers *v.* Emery, 16 Ohio 294 (where it was held that there was no such failure of evidence by plaintiff as to justify a nonsuit).

Where there is some evidence of title by adverse possession, it is error to refuse to permit the case to go to the jury by ordering a nonsuit. Garrett *v.* Weinberg, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70.

50. Bartley *v.* Phillips, 165 Pa. St. 325, 30 Atl. 842.

Rule applies even though it is claimed that

that plaintiff cannot recover.[51] It is decided, however, that a nonsuit is properly granted where plaintiff fails to establish his title or right of possession,[52] or defendant was in possession or had trespassed on the land.[53] The court may also allow a voluntary nonsuit to be entered.[54]

C. Verdict and Findings[55] — **1. Sufficiency in General.** Whenever a verdict is sufficiently certain to enable the court to give judgment and the sheriff to deliver possession it will be sustained.[56] A verdict must, however, sufficiently show what was awarded to plaintiff,[57] and must not be so uncertain that a writ of possession cannot be issued upon it;[58] and a verdict which is not in accordance with the contention of either party is erroneous.[59] Again if there is evidence tending to support an issue in bar of the action and also of adverse possession the court must find thereon.[60]

2. Essentials, or Specific Matters of Sufficiency. Primarily it is held that the verdict or findings should be responsive to the material issues,[61] although an

plaintiff's possession is unlawful under act of congress. Gonder *v.* Miller, 21 Nev. 180, 27 Pac. 333.

51. Kile *v.* Fleming, 78 Ga. 1.

52. Young *v.* Fager, 200 Pa. St. 329, 49 Atl. 952.

Nonsuit will not be granted where plaintiff has shown no title out of the state, where it appears, although not very distinctly, that plaintiff and defendant claim under a common source; nor can it be sustained on the ground of the uncertainty of the description of the land, where defendant admits plaintiff's ownership, nor, for the same reason principally, on the ground that if the land is capable of location the evidence is contradictory as to the description and insufficient. Wiseman *v.* Green, 123 N. C. 395, 31 S. E. 668.

Where defendant has shown title in a third person he may without going through all his evidence take the opinion of the court on that title by motion for nonsuit. Proprietary *v.* Ralston, 1 Dall. (Pa.) 18, 1 L. ed. 18.

Where defendant moves for nonsuit and intends to rely on the point that the deed offered in evidence by plaintiff and admitted without objection does not include the demanded premises, he should distinctly so state in his motion. Sanchez *v.* Neary, 41 Cal. 485.

53. Stanley *v.* Shoolbred, 25 S. C. 181.

54. Knabb *v.* Conner, 23 Pa. Co. Ct. 237.

55. **Verdict and findings** generally see Trial.

Forms of verdict in ejectment see Adams Ejectm. 489 *et seq.*

56. This certainty may be in the verdict itself or by reference to something of a permanent and public nature. Hagey *v.* Detweiler, 35 Pa. St. 409.

When sufficient.— A finding that the land descended to plaintiff, without showing any fact that she was divested of her title or right of entry, is sufficient to enable the court to declare the judgment of law for plaintiff. Miller *v.* Shackleford, 4 Dana (Ky.) 264. And since tenants in common may recover premises either on a joint demise or upon separate demise by each of them, it is no ground for setting aside an award that it finds plaintiff's lessors to be tenants in common, where the declaration contains no joint demise. Den *v.* Brands, 15 N. J. L. 465.

When insufficient.— Where the case turns upon a question of the redelivery of a certain deed a verdict is insufficient which fails to respond to the question in express terms. Miller *v.* Shackleford, 4 Dana (Ky.) 264. And a finding of title to two persons, one of whom conveyed as sole heir to the other, is defective where the fact that he was sole heir or how he became so is not found. Sayles *v.* Curtis, 45 Mich. 279, 7 N. W. 909. Again a verdict which finds for plaintiff to recover the seizin and possession but also gives defendant the right to remove certain buildings is erroneous. Roberti *v.* Atwater, 42 Conn. 266.

Verdict for the use and benefit of a house and store-room is a verdict for them because they are capable of delivery under a writ of possession, and it is none the less certain because they cannot be advantageously enjoyed without a curtilage. Miller *v.* Casselberry, 47 Pa. St. 376.

57. Smith *v.* Cornett, 38 S. W. 689, 18 Ky. L. Rep. 818.

In ejectment against several, if they occupy distinct parcels in severalty, plaintiff may elect to take a verdict against one of them, whereupon a verdict will be rendered in favor of all the other defendants. Rogers *v.* Arthur, 21 Wend. (N. Y.) 598.

58. Roe *v.* Doe, 30 Ga. 608. See also Southern Iron Works *v.* Georgia Cent. R. Co., 131 Ala. 649, 31 So. 723.

59. Harris *v.* Johnson, 44 S. W. 948, 19 Ky. L. Rep. 1865.

60. Christy *v.* Spring Valley Water-Works, 84 Cal. 541, 24 Pac. 307.

61. Knight *v.* Roche, 56 Cal. 15; Abbott *v.* Roach, 113 Ga. 511, 38 S. E. 915.

Finding in a former case as to the duration of defendant's right is not part of the judgment, where it was not a matter in issue, as any finding by the court as to matters not involved or litigated is a nullity and binds no one. Yeates *v.* Briggs, 95 Ill. 79.

Upon immaterial issue finding is not required, especially where the essential fact is

immaterial[62] or slight variance from the pleadings will not vitiate;[63] and mere informalities in verdicts will be disregarded.[64] The count or defense on which the finding is based should be specified[65] with sufficient certainty.[66] There may, however, be an amendment or correction in certain cases,[67] even at a subsequent term,[68] except there be a substantial defect.[69] Again, subject to such exceptions as exist under those decisions which do not require that the land be described,[70] it is an underlying principle or rule, asserted indirectly or directly in terms, in all the cases involving the sufficiency or certainty of a designation or description, that such designation or description is sufficient where it is at least reasonably certain or

covered. Cooper *v.* Miller, 113 Cal. 238, 45 Pac. 325.

It is not error to refuse to find a fact in regard to a conveyance to a third person, where there is no material issue thereon. Moss *v.* Shear, 30 Cal. 467.

Findings, although clumsily drawn, may substantially cover the issues of entry, use, and occupation. Thompson *v.* Brannan, 76 Cal. 618, 18 Pac. 783.

Verdict, although informal, may be sufficient. Hawley *v.* Twyman, 24 Gratt. (Va.) 516.

Verdict or finding is responsive to issue when it finds defendant guilty and the estate established in plaintiff to be an estate in fee (Goodhue *v.* Baker, 22 Ill. 262); when plaintiff sues for the lands and its revenues and defendant claims certain improvements, and the verdict determines that the improvements are compensated by the revenues (Vicksburg, etc., R. Co. *v.* Elmore, 46 La. Ann. 1237, 15 So. 701); and where the material issue was who had title, but it was immaterial how it was acquired, a finding that it was in plaintiff for a certain reason is within the issue (Arp *v.* Jacobs, 3 Wyo. 489, 27 Pac. 800). And when the verdict for plaintiff is in effect a finding that plaintiffs unlawfully withheld possession of the premises as alleged in the declaration it is sufficient where it responds to the issues and is substantially in conformity with the statute. Messick *v.* Thomas, 84 Va. 891, 6 S. E. 482.

62. Benn *v.* Hatcher, 81 Va. 25, 59 Am. Rep. 645. See also Arp *v.* Jacobs, 3 Wyo. 489, 27 Pac. 800.

But where plaintiff has made but one location of the beginning of the tract the jury cannot, by reversing the lines, etc., find a beginning for plaintiff different from that located by him. Hammond *v.* Norris, 2 Harr. & J. (Md.) 130.

63. Bartley *v.* Bingham, 34 Fla. 19, 24, 15 So. 592, 593.

64. Hutchison *v.* Kelly, 1 Rob. (Va.) 123, 39 Am. Dec. 250.

Where the substance of a verdict is precisely what the statute requires it to contain, but it is defective as to the prescribed form, it will not be reversed because of such formal defect when no substantial right of the adverse party is affected thereby. Allard *v.* Lamirande, 29 Wis. 502.

65. Anderson *v.* Fisk, 36 Cal. 625.

If the declaration contains three counts, the first on the name of two parties and the other two on the names of each separately, the failure of the jury to find upon the first and second does not furnish a sufficient ground upon which to set aside their verdict on the third count. Myers *v.* Ford, 9 W. Va. 184.

66. Drake *v.* Root, 2 Colo. 685.

67. Coffee *v.* Groover, 20 Fla. 64; Bear *v.* Snyder, 11 Wend. (N. Y.) 592; Thompson *v.* Mattern, 115 Pa. St. 501, 9 Atl. 70; Cambria Iron Co. *v.* Tombs, 48 Pa. St. 387; Lynch *v.* Cox, 23 Pa. St. 265.

Modification of a verdict by defendant remitting a certain part of the land is erroneous where plaintiff is entitled to judgment. Duren *v.* Kee, 50 S. C. 444, 27 S. E. 875. *Compare* Alexander *v.* Wheeler, 78 Ala. 167.

Court cannot strike off conditional part of a verdict and find absolutely for plaintiff, no question of law being reserved. Eberts *v.* Thompson, 113 Pa. St. 19, 4 Atl. 194.

68. Hadlock *v.* Hadlock, 22 Ill. 384.

69. Wise *v.* Hine, 1 Greene (Iowa) 62. See also Hughe *v.* Howard, 3 Harr. & J. (Md.) 9.

70. Chapman *v.* Holding, 60 Ala. 522 (holding that only when the verdict is for less than the entire premises sued for is it necessary to describe the part found for plaintiff); Elizabethport Cordage Co. *v.* Whitlock, 37 Fla. 190, 20 So. 255; Grace *v.* Martin, 83 Ga. 245, 9 S. E. 841. See also Messick *v.* Thomas, 84 Va. 891, 6 S. E. 482.

The distinction is that where plaintiff fails to show title to a part of the land laid in the declaration, which defendant is in possession of, the verdict should find the exact quantity of land to which plaintiff is entitled; but where defendant is found guilty generally, the verdict need not find the exact quantity of land, but it extends over the land laid in the declaration. Little *v.* Bishop, 9 B. Mon. (Ky.) 240. And where the verdict is only for part of the land claimed it ought to specify such part by metes and bounds or by reference, so that the part can be identified. Brogan *v.* Savage, 5 Sneed (Tenn.) 689; Loard *v.* Philips, 4 Sneed (Tenn.) 566. See also Slocum *v.* Compton, 93 Va. 374, 25 S. E. 3. So where a part of the land claimed is found for plaintiff and part for defendant, the verdict must specify and describe the parts found for each by some method of description reasonably definite, such as is required of a declaration in that action. Wilson *v.* Braden, 48 W. Va. 196, 36 S. E. 367. See also Low *v.* Settle, 22 W. Va. 387.

capable of being made certain so that the land may be identified,[71] otherwise it is insufficient.[72] There should also under certain decisions be a designation of the title, interest, or estate, or of the nature, extent, or quality thereof, or a finding upon such issue.[73] In connection with the last preceding propositions it may be

71. *California.*— Johnson *v.* Vance, 86 Cal. 128, 24 Pac. 863.

Florida.— Russell *v.* Marks, 32 Fla. 456, 14 So. 40.

Illinois.— Clark *v.* Day, 93 Ill. 480.

Maryland.—Howard *v.* Moale, 2 Harr. & J. 249.

Michigan.— Lockwood *v.* Drake, 1 Mich. 14.

Missouri.— Meier *v.* Meier, 105 Mo. 411, 16 S. W. 223; Buse *v.* Russell, 86 Mo. 209; Lemmon *v.* Hartsook, 80 Mo. 13.

Nebraska.— Carvena *v.* Thurston, 59 Nebr. 343, 80 N. W. 1048.

New York.— Leprell *v.* Kleinschmidt, 112 N. Y. 364, 19 N. E. 812.

Pennsylvania.— Greeley *v.* Thomas, 56 Pa. St. 35; Miller *v.* Casselberry, 47 Pa. St. 376; Clement *v.* Youngman, 40 Pa. St. 341; Tyson *v.* Passmore, 7 Pa. St. 273; Ross *v.* Barker, 5 Watts 391; Tryon *v.* Carlin, 5 Watts 371; Green *v.* Watrous, 17 Serg. & R. 393; Harris *v.* Pittsburg, etc., R. Co., 11 Pa. Super. Ct. 6.

South Carolina.— Robertson *v.* Sharpton, 17 S. C. 592.

Tennessee.— Singleton *v.* Ake, 3 Humphr. 626.

United States.— Deputron *v.* Young, 134 U. S. 241, 10 S. Ct. 539, 33 L. ed. 923.

See 17 Cent. Dig. tit. "Ejectment," § 332.

A description may be made certain by reference to the declaration (Farrow *v.* Farrow, 2 J. J. Marsh. (Ky.) 388. See Elliott *v.* Sutor, 3 W. Va. 37. But see De Clemente *v.* Winstanley, 8 Misc. (N. Y.) 45, 28 N. Y. Suppl. 513); to the land "described in the pleadings" (Johns *v.* McCullough, 2 S. W. 912, 8 Ky. L. Rep. 689); to the land "as it stands in the writ" (Emig *v.* Diehl, 76 Pa. St. 359); to a plat (Myers *v.* Ford, 9 W. Va. 184); and to a recorded deed or diagram (Smith *v.* Brotherline, 62 Pa. St. 461), although a surveyor's report is no part of a verdict (Elliott *v.* Sutor, 3 W. Va. 37). But a verdict finding for defendants and fixing the line "as shown on" a certain map is uncertain. Lewis *v.* Childers, 13 W. Va. 1. So a verdict for the "plaintiff, one-half of the survey, according to the draft signed by H. C., deputy-surveyor, and filed in this case; the land to be laid off according to quantity and quality, reserving to M. M. (the defendant), as much of the improvement as practicable," etc., is void for uncertainty. Martin *v.* Martin, 17 Serg. & R. (Pa.) 431. It is also declared that it is clear that the certainty of a verdict may be established by reference either to monuments on the ground, to recorded deeds, to diagrams filed of record, to warrants of survey, or to identified agreements, although a reference to a thing itself uncertain would doubtless be insufficient. Miller *v.* Casselberry, 47 Pa. St. 376. There may, however, be a rejection for surplusage in cases of the above character. Howze *v.* Dew, 90 Ala. 178, 7 So. 239, 24 Am. St. Rep. 783; Muir *v.* Meredith, 82 Cal. 19, 22 Pac. 1080; Kouns *v.* Lawall, 2 Bibb (Ky.) 236.

Jury are not estopped by the location made upon the plats, provided that the part for which they gave their verdict, if for plaintiff, is within his claim. Darnall *v.* Goodwin, 1 Harr. & J. (Md.) 282.

Jury may be properly instructed to ascertain plaintiff's title and to set out in verdict the boundaries of land recovered by plaintiff, where one count is upon title of two plaintiffs in fee, a second count upon the title of one plaintiff in fee, and the third count upon the title of the other plaintiff for life, and plaintiffs concede that they cannot recover all of the land described. McColgan *v.* Langford, 6 Lea (Tenn.) 108.

72. *Alabama.*— Alexander *v.* Wheeler, 69 Ala. 332, 78 Ala. 167.

California.— Northern R. Co. *v.* Jordan, 87 Cal. 23, 25 Pac. 273.

Georgia.— Cowdery *v.* Johnson, 113 Ga. 981, 39 S. E. 978; Abbott *v.* Roach, 113 Ga. 511, 38 S. E. 955; McCullough *v.* East Tennessee, etc., R. Co., 106 Ga. 275, 32 S. E. 97.

Indiana.— Cincinnati, etc., R. Co. *v.* Clifford, 113 Ind. 460, 15 N. E. 524.

Kentucky.— Harris *v.* Johnson, 44 S. W. 948, 19 Ky. L. Rep. 1865.

Michigan.— Munger *v.* Grinnell, 9 Mich. 544.

Missouri.— Benne *v.* Miller, 149 Mo. 228, 50 S. W. 824; Brummell *v.* Harris, 148 Mo. 430, 50 S. W. 93.

Ohio.— Kyser *v.* Cannon, 29 Ohio St. 359.

Pennsylvania.— Nolan *v.* Sweeny, 80 Pa. St. 77; Hunt *v.* McFarland, 38 Pa. St. 69; Hagey *v.* Detweiler, 35 Pa. St. 409; O'Keson *v.* Silverthorn, 7 Watts & S. 246; Harrisburgh *v.* Crangle, 3 Watts & S. 460; Stewart *v.* Speer, 5 Watts 79; Burdick *v.* Norris, 2 Watts 28; Smith *v.* Jenks, 10 Serg. & R. 153.

Virginia.— Gregory *v.* Jackson, 6 Munf. 25. See also Clay *v.* White, 1 Munf. 162.

West Virginia.— Miller *v.* Holt, 47 W. Va. 7, 34 S. E. 956.

United States.— Pensacola Ice Co. *v.* Perry, 120 U. S. 318, 7 S. Ct. 576, 30 L. ed. 663.

See 17 Cent. Dig. tit. "Ejectment," § 332.

Matter intended to be explanatory does not vitiate. Lemmon *v.* Hartsook, 80 Mo. 13.

Uncertainty may be cured by agreement of plaintiff filed in supreme court permitting defendant to take the land reserved to him at his election as regards boundaries. Burdick *v.* Norris, 2 Watts (Pa.) 28.

73. *California.*— Wickersham Banking Co. *v.* Rice, 137 Cal. 506, 70 Pac. 546.

Florida.—Lungren *v.* Brownlie, 22 Fla. 491.

stated as a matter of course that the verdict should not be excessive.[74] Other essentials are that there should be a determination of the right of possession[75] in a designated party,[76] or a finding that plaintiff is entitled to the possession;[77] and

Illinois.— Long *v.* Linn, 71 Ill. 152; Koon *v.* Nichols, 63 Ill. 163; Patterson *v.* Hubbard, 30 Ill. 201; Rawlings *v.* Bailey, 15 Ill. 178.

Kentucky.— Craig *v.* Taylor, 6 B. Mon. 457.

Michigan.— Shaw *v.* Hill, 79 Mich. 86, 44 N. W. 422.

Tennessee.—Van Fossen *v.* Pearson, 4 Sneed 362.

West Virginia.— Oney *v.* Clendenin, 28 W. Va. 34; Low *v.* Settle, 22 W. Va. 387.

See 17 Cent. Dig. tit. "Ejectment," § 332 *et seq.*

Designation is sufficient when the finding is that defendant has a good and perfect title to the demanded premises (Frazier *v.* Crowell, 52 Cal. 399); that he is the owner of the land (Hadlock *v.* Hadlock, 22 Ill. 384); that he is guilty of the trespass and that plaintiff recover the term yet to come mentioned in the declaration (Salmons *v.* Webb, 12 B. Mon. (Ky.) 365); where the quantity of plaintiff's estate is found in express terms (Russell *v.* Marks, 32 Fla. 456, 14 So. 40); where the verdict is "for the plaintiff" his title described in the declaration being the only issue (Kershner *v.* Kershner, 36 Md. 309); that plaintiff is entitled in fee to the possession of the lands described in said declaration "except the 100 acres claimed by W. A. on the west of said lands" (Rivier *v.* Pugh, 7 Heisk. (Tenn.) 715); and where the verdict set out the wills of a grandfather and father, and then stated that if a son took under the father's will the jury find for plaintiff, if under the grandfather's for defendant, as it submits to the court merely the construction of the wills (Callis *v.* Kemp, 11 Gratt. (Va.) 78).

Practice is to be commended of defining in the verdict the extent of plaintiff's interest either by metes and bounds or as an undivided interest. Allen *v.* Salinger, 103 N. C. 14, 8 S. E. 913. See also Pierce *v.* Wanett, 32 N. C. 446.

Court will if requested specify in the findings the facts constituting the claim of title set up by the opposite party. Morrill *v.* Chapman, 35 Cal. 85.

Finding, which is a mere inadvertence as to possession, will not defeat judgment where the other findings are sufficient on that point. Fisher *v.* Slattery, 75 Cal. 325, 17 Pac. 235.

Verdict should not be for defendant as "not guilty" where he only claims an ascertainable specific interest and plaintiff claims the entire tract, but should be for plaintiff except as to defendant's specific right. Reynolds *v.* Cook, 83 Va. 817, 3 S. E. 710, 5 Am. St. Rep. 317.

Words "right or title of a plaintiff" as used in 2 N. Y. Rev. St. p. 308, § 31, providing that "if the right or title of a plaintiff in ejectment expire after the commencement of the suit, but before trial, the verdict shall be returned according to the fact," refer to the estate or interest in the premises which for the time being is in the possession of plaintiff and to the title on which he seeks to recover, and not merely to the person who is at the time the owner of the estate. Van Rensselaer *v.* Owen, 48 Barb. (N. Y.) 61, 33 How. Pr. (N. Y.) 12. See Lang *v.* Wilbraham, 2 Duer (N. Y.) 171.

Misdescription in verdict is no ground of exception, as where it includes the entire interest in lands instead of one third. Faussett *v.* Carpenter, 5 Bligh N. S. 75, 5 Eng. Reprint 241.

74. Towery *v.* Waldrup, 113 Ga. 137, 38 S. E. 302; Bringhurst *v.* Grand Rapids, etc., R. Co., 78 Mich. 570, 44 N. W. 414; Reilly *v.* Blaser, 61 Mich. 399, 28 N. W. 151; Price *v.* Breckenridge, 77 Mo. 447.

Plaintiffs are not entitled to verdict for any greater fractional amount than that to which they affirmatively show they are entitled. Crummey *v.* Bentley, 114 Ga. 746, 40 S. E. 765.

75. Asia *v.* Hiser, 22 Fla. 378.

"Immediate" right of possession by plaintiff is sufficiently found under a verdict that "she is entitled to recover from the defendant the following premises in fee simple," etc. Bartley *v.* Bingham, 34 Fla. 19, 24, 15 So. 592, 593.

Verdict that plaintiff is entitled to recover all the premises claimed, and that all defendants were in possession of part, or claimed title to such part at the commencement of the action, is not objectionable. Messick *v.* Thomas, 84 Va. 891, 6 S. E. 482.

76. Wise *v.* Hine, 1 Greene (Iowa) 62.

Special verdict finding that both demandant and tenant claimed in fee under one A is a substantial finding of seizin of demandant. Creigh *v.* Henson, 10 Gratt. (Va.) 231.

Where verdict recites that plaintiff is the owner and entitled to possession of a certain part of the premises and adds "as to all the remainder of the premises in dispute we find . . . that defendants are the owners . . . by virtue of full compliance with the local rules, the laws of Colorado," etc., applies as well to the ownership and right of possession of plaintiff as to that of defendant. Taylor *v.* Parenteau, 23 Colo. 368, 48 Pac. 505. See also Hutchison *v.* Kelly, 1 Rob. (Va.) 123, 39 Am. Dec. 250.

Federal statutes in support of adverse claims to mining locations do not apply to actions under the code, and the jury cannot find a verdict against both parties. Wood *v.* Chapman, 24 Colo. 134, 49 Pac. 136.

77. Craig *v.* Bennett, 146 Ind. 574, 45 N. E. 792. See Curtis *v.* Boquillas Land, etc., Co., (Ariz. 1903) 71 Pac. 924; Russell *v.* Marks, 32 Fla. 456, 14 So. 40.

Court's finding is erroneous that plaintiffs were "not the owners nor entitled to the possession of any part of the lands described in the complaint," where it appeared that the land so described belonged to plaintiff, even

also a finding upon or determination of the issues of ouster by and possession of defendant,[78] except defendant admits his possession.[79] The value of improvements and of the premises should also be found when a material issue.[80]

3. CHARACTER OF — a. General or Special. The jury may render a general verdict[81] and it will be sufficient[82] if warranted by the evidence;[83] or the jury may find specially[84] as a matter of right in their discretion;[85] and they should so find when the nature of the case so requires.[86] Again, it has been decided, the

though the evidence showed that defendants never were in possession. Glassell *v.* Hansen, 135 Cal. 547, 67 Pac. 964.

78. Soto *v.* Irvine, 60 Cal. 436 (holding that finding on issue of possession of defendant is necessary); Hamblin *v.* Warner, 30 Mich. 95 (holding that a finding that plaintiffs hold adversely to the title set up by plaintiff is essential to recovery). But *compare* Curtis *v.* Boquillas Land, etc., Co., (Ariz. 1903) 71 Pac. 924.

Finding is sufficient as to ouster that on a certain date "defendant did oust and eject plaintiff from the possession . . . and has ever since wrongfully and unlawfully withheld said possession," etc., the words "wrongfully and unlawfully" being surplusage and probable facts need not be stated. McCarthy *v.* Brown, 113 Cal. 15, 45 Pac. 14. And see Johnson *v.* Vance, 86 Cal. 128, 24 Pac. 863. Finding is also sufficient "that defendant has done wrong and disseisin in manner and form as alleged in the plaintiff's declaration, so far as respects the plaintiff's right in his mother's dower." Kinney *v.* Williams, 2 Day (Conn.) 68.

Verdict is sufficiently certain that "we the jury find the defendant guilty of improperly withholding the property in question," etc. (Patrick *v.* Young, 18 Fla. 50), or that "defendant is guilty of unlawfully withholding," etc. (Minkhart *v.* Hankler, 19 Ill. 47).

It is not necessary that the verdict expressly declare "defendant to be guilty" (Russell *v.* Marks, 32 Fla. 456, 14 So. 40); nor need it be found that defendant wrongfully withholds possession where verdict is for plaintiff and declares that he is entitled to possession (Lockwood *v.* Drake, 1 Mich. 14).

79. Johnson *v.* Vance, 86 Cal. 128, 24 Pac. 863.

80. Coltart *v.* Moore, 79 Ala. 361. See also Uhlig *v.* Garrison, 2 Dak. 99, 2 N. W. 258.

81. McKay *v.* Glover, 52 N. C. 41. See also Buckley *v.* Cunningham, 4 Bibb (Ky.) 285; McCraven *v.* Doe, 23 Miss. 100.

Taking general verdict and taking possession of right land at peril. See Doe *v.* Curtis, (Mich. T.) 4 Vict.; McBride *v.* Lee, 16 U. C. C. P. 315.

Verdict is general, covering all the issues, where it is in favor of plaintiff against defendant for the possession of the premises described in the complaint herein, and the sum of sixty-five dollars damages, and it is not limited by the words "for the possession of the premises described in the complaint herein." Hutton *v.* Reed, 25 Cal. 478.

Where defendants pleaded severally the general issue it was proper to instruct the jury to bring in a general verdict against all those who had not shown that they were in possession of separate parcels. Greer *v.* Mezes, 24 How. (U. S.) 268, 16 L. ed. 661. See also Cambria Iron Co. *v.* Tomb, 53 Pa. St. 422.

Partial recovery see *infra*, VIII, E, 3, b.

82. Joy *v.* McKay, 70 Cal. 445, 11 Pac. 763; Pike *v.* Sutton, 21 Colo. 84, 39 Pac. 1084. See also Emery *v.* Osgood, 1 Allen (Mass.) 244; Ewing *v.* Alcorn, 40 Pa. St. 492.

General verdict will bind all defendants unless they answer separately or demand separate verdicts. Ellis *v.* Jeans, 7 Cal. 409.

Verdict for defendants generally is good where in ejectment against three one confessed judgment for himself alone and the others took defense for the undivided two thirds. Cambria Iron Co. *v.* Tombs, 53 Pa. St. 422.

83. Jones *v.* Chesapeake, etc., R. Co., 14 W. Va. 514. See also Reeder *v.* Smith, 1 Harr. & M. (Md.) 158.

Proof of an easement is not sufficient to entitle defendant to a general verdict where it is not pleaded in defense. He is in such case only entitled to a verdict that he has an easement in the *locus in quo*. Burlew *v.* Hunter, 41 N. Y. App. Div. 148, 58 N. Y. Suppl. 453.

84. McCraven *v.* Doe, 23 Miss. 100, holding that the jury may find a special verdict designating by metes and bounds the precise part they find for plaintiff.

It is improper to call for a special verdict giving defendants title to the lands described in their pleas, and giving plaintiffs title to that disclaimed by defendants, where a joint verdict is given for defendants upon a plea distinctly defining their possession, and disclaiming all interest in the residue of the land claimed by plaintiffs. McColgan *v.* Langford, 6 Lea (Tenn.) 108.

85. Griswold *v.* Dexter, 62 Barb. (N. Y.) 648.

86. Warren *v.* Henshaw, 2 Aik. (Vt.) 141, holding that the verdict of a tenant against his cotenant should be special and describe the interest to be recovered.

Necessity of finding actual ouster in special verdict by tenant in common against cotenant is not dispensed with by entry, made at the time the tenant in possession is admitted as defendant, reciting that he confesses the lease, entry, and ouster in the declaration supposed, and agrees to insist on the title only at the trial. Taylor *v.* Hill, 10 Leigh (Va.) 457.

court may direct them to find a special verdict,[87] or the parties may agree on a case stipulating that it shall have the effect of a special verdict.[88] Such verdict or finding should, however, be sufficient;[89] and a special finding in response to a question submitted is insufficient if equivocal.[90]

b. Conditional.[91] Ordinarily the verdict must be for plaintiff or defendant, and it cannot impose conditions.[92]

c. Joint or Several. Although the general issue is pleaded severally by defendants the jury may nevertheless bring in a joint verdict against all those who do not show that they were in possession of separate parcels.[93] And where defendants join in a general denial, but do not set forth with a specific description the parcels severally occupied and claimed by them, they are not entitled to claim separate verdicts merely by virtue of a prayer therefor in their answer.[94] But if several defendants occupy distinct parcels in severalty a verdict may be taken against one only.[95] A several verdict may also be rendered for a part of the land based on the rights of some of the plaintiffs, where on a joint demise an equitable plea is filed which affects them differently.[96] Again it has been held that a husband and wife must recover jointly, as there cannot be a judgment in favor of one and against the other.[97] And if a verdict in an action brought by several joint plaintiffs is in favor of some of them and silent as to the others it is defective.[98]

4. CONSTRUCTION AND OPERATION. Resort may be had to the rules governing the

87. McKay *v.* Glover, 52 N. C. 41. But *compare* Griswold *v.* Dexter, 62 Barb. (N. Y.) 648.

Direction of verdict generally see *supra*, VIII, A, 7.

88. Mooberry *v.* Marye, 2 Munf. (Va.) 453.

89. Cropper *v.* Carlton, 6 Munf. (Va.) 277.

Judgment is not supported by special finding that plaintiff was the owner in fee at a special date about forty years before trial, where she had alleged that she was "owner in fee simple." Craig *v.* Bennett, 146 Ind. 574, 45 N. E. 792.

Seizin in crown need not be found in special verdict which traces title to a grant from the governor of Virginia of lands lying within the proprietary of Northern Neck. Birch *v.* Alexander, 1 Wash. (Va.) 34.

Special verdict finding lease, entry, and ouster in declaration mentioned sufficiently admits that all proper defendants are in possession, unless there is an express finding to the contrary. Mooberry *v.* Marye, 2 Munf. (Va.) 453.

90. Woodson *v.* McCune, 17 Cal. 298.

91. **Conditional verdict in equitable ejectment** see *infra*, XI, I.

92. Broach *v.* Kelly, 71 Ga. 698. See also Collins *v.* Rush, 7 Serg. & R. (Pa.) 147.

Where defendants have no equity to protect and their title is legal the verdict should be absolute and not conditional. Murphy *v.* Nathans, 46 Pa. St. 508.

Finding that plaintiff is entitled "on conditions hereinafter expressed" to the possession and requiring the payment of a certain sum for improvements and which is neutralized by a finding that defendant's possession is unlawful is insufficient in the first instance to support a judgment for plaintiff or in the second instance for defendant. Moffitt *v.* Rosencrans, 136 Cal. 416, 69 Pac. 87.

93. Greer *v.* Mezes, 24 How. (U. S.) 268, 16 L. ed. 661.

Where defendants "severally" entered into a common rule, etc., and "severally" came and defended, etc., but made no application for separate proceedings, or even for separate findings, it was decided that a joint verdict against all should not be set aside on the ground that it appeared by the proof that they held not jointly, but each a separate tenement. Smith *v.* Shackleford, 9 Dana (Ky.) 452. On the other hand although several defendants in possession of separate parts of the premises entered in the consent rule and pleaded jointly, a verdict that each defendant separately was guilty as to that part of the premises in his separate possession and not guilty as to the other parts is good, and plaintiff is entitled to judgment against defendants severally according to the verdict. Jackson *v.* Woods, 5 Johns. (N. Y.) 278. See also Wilson *v.* Baird, 19 U. C. C. P. 98.

94. Patterson *v.* Ely, 19 Cal. 28. See also Lick *v.* Stockdale, 18 Cal. 219; McGarvey *v.* Little, 15 Cal. 27.

In an action against several, where it appears that the possession or claim of one of them extends only to part of the land in question, it is not necessary that separate verdicts be rendered, although such defendant has not disclaimed as to the remainder. Beckwith *v.* Thompson, 18 W. Va. 103.

95. Rogers *v.* Arthur, 21 Wend. (N. Y.) 598.

96. Rumph *v.* Truelove, 66 Ga. 480.

97. Bartow *v.* Draper, 5 Duer (N. Y.) 130.

98. Wood *v.* McGuire, 17 Ga. 361, 63 Am. Dec. 246.

interpretation of verdicts generally,[99] in order to arrive at a fair exposition of the verdict or of the intent of the jury where the verdict is not satisfactorily clear.

5. Setting Aside. Generally a verdict or finding which is insufficient may be set aside.[1] And a verdict obtained by plaintiff on a count on a supposed demise by a party, without his authority or his concurring in the action, will be set aside.[2]

D. New Trial For Cause and Arrest of Judgment — 1. New Trial[3] — a. Statutory Provisions. A statute giving a party a new trial as of right does not take away the right to move for a new trial because of error or irregularity.[4] Again, where the statute governing ejectment makes it divisible both as to the land and the parties, and the granting of a new trial is in the court's discretion, it may order such new trial as to half of a lot allowing the verdict to stand as to the other half.[5] If a statute provides that after judgment by default the court may grant a new trial if satisfied that justice will be promoted, the default con-

99. **Construction, operation, and effect of verdicts** generally see Trial. See also Kidder *v.* Stevens, 60 Cal. 414 (where it is said that the court will also read all the facts in a special verdict or finding in the light of the rules of law, and where under the law the allegation of time as to seizin and ouster is not a material issue there need not be an express finding as to ownership on the date of the seizin alleged); Cincinnati *v.* Hamilton County Com'rs, 7 Ohio 88 (where resort was had to public history and to official deeds to ascertain facts which had not been found in its verdict).

A verdict that plaintiff is the owner of a specified fractional part of the land will by the aid of testimony showing his interest to be an undivided one be interpreted to mean an undivided fractional part. Allen *v.* Salinger, 103 N. C. 14, 8 S. E. 913.

If there is a verdict upon the demises of a part only of the lessors, which is not limited to any quantity less than the whole, it must be understood as a verdict for the whole land when it does not appear by the record that the other lessors, upon whose demises there is no finding, had any interest or title in or to the land. Beaty *v.* Hudson, 9 Dana (Ky.) 322.

If there is no formal finding that defendant was ever in actual possession, the court will consider whether the combined effect of the facts found is to show such possession or estop him from denying it. Lowenstein *v.* Ecker, 155 Pa. St. 304, 26 Atl. 448.

The award of referees cannot give a right to land, but it will settle a dispute about land and is more operative than a verdict which is not conclusive, as such an award may be conclusive under an agreement that it shall be final. Calhoun *v.* Dunning, 4 Dall. (Pa.) 120, 1 L. ed. 767.

The report of referee's finding for plaintiff is good, although neither damages nor costs are awarded. Austin *v.* Snow, 2 Dall. (Pa.) 157, 1 L. ed. 329, 1 Yeates (Pa.) 156.

The word "plaintiffs" will be construed to mean the only plaintiff in the case, as what is meant by the words "plaintiff" or "plaintiffs" in a verdict or judgment must necessarily be determined by the pleadings. Williams *v.* Ewart, 29 W. Va. 659, 2 S. E. 881.

1. Cropper *v.* Carlton, 6 Munf. (Va.) 277.

2. Doe *v.* Fillis, 2 Chit. 170, 18 E. C. L. 569.

The court refused to set aside a verdict, where defendant appeared and notice of trial was served on September 18 for October 30, and on the evening of October 29 defendant served a notice of confession on plaintiff at his residence, thirty miles from the assize town, where his attorney had gone; and on October 30 a verdict was taken, defendant not appearing, plaintiff's attorney being ignorant of the confession. Row *v.* Quinlan, 21 U. C. Q. B. 452.

On an application to set aside verdict on the original demises it appeared that a judge's order was obtained to amend the proceedings after the consent rule and plea had been filed, by adding three new demises, and no proceedings had been taken under the order until the commission day of the assizes, some months after the granting of the order, when the *nisi prius* record was passed with additional demises. The record was entered for trial, and after the jury had been sworn, and the plaintiffs had given evidence, defendants objected to the amendment, and refused to confess lease, entry, and ouster, except to the original demises, and a verdict was entered for plaintiffs on the original demises only. It was decided that the new demises added to the *nisi prius* record did not violate the *nisi prius* record or verdict; and that the lessors of the plaintiffs could abandon the order to amend. Doe *v.* Dougall, 2 U. C. C. P. 169.

3. **New trials** generally see New Trial.

4. Goodhue *v.* Baker, 22 Ill. 262.

The court has power to grant a new trial on other grounds than those specified in certain sections of a statute, where another section authorizes the granting of a new trial in ejectment in the discretion of the court on the application of either party. White *v.* Poorman, 24 Iowa 108.

5. McNab *v.* Stewart, 15 U. C. C. P. 189. See also McBride *v.* Lee, 16 U. C. C. P. 315.

templated is a failure to answer and not a failure to appear after the cause is called to trial, after issue joined and inquest taken.[6]

b. Grounds. It may be generally stated that a new trial will be granted for sufficient cause, but what constitutes such cause must necessarily depend upon the showing in each particular case.[7] There are, however, certain common grounds upon which a new trial will be granted; as where a verdict is against evidence, in which case it has been held that it will be awarded as a matter of right in ejectment,[8] and more readily where the verdict is against defendant.[9] A new trial will also be allowed on the ground of newly discovered evidence, as in the case of a subsequent discovery that plaintiff had conveyed his title to a third person.[10] A new trial will not, however, be granted where it appears from the whole case that justice has been done, and that the party moving therefor had on the trial all the advantages of his title in favor of the possession of his tenant in whose name he was permitted to defend.[11]

c. On Terms. Where a case is within the statute so providing, the judgment may be vacated on a verdict in ejectment and a new trial be awarded on terms.[12] And it is not error to grant defendant's motion for a new trial unless plaintiff should release a certain portion of the lands to which it was conceded that defendant had gained title by adverse possession; the practice of imposing terms on a party achieving an excessive recovery as a condition for refusing a new trial being applicable to ejectment equally with other actions, notwithstanding the verdict fixes the boundaries of the lands recovered.[13]

d. Second New Trial or New Trial After Second Judgment. Where the statute so provides the granting of a second new trial is within the sound discretion of the court.[14] Again, where the court has authority to grant a new trial

6. Sacia *v.* O'Connor, 47 N. Y. Super. Ct. 53.

7. See, generally, NEW TRIAL.

When new trial may be granted.— *New Jersey.*— Bouvier *v.* Baltimore, etc., R. Co., 63 N. J. L. 313, 47 Atl. 772; Stewart *v.* Johnson, 18 N. J. L. 87; Den *v.* Vancleve, 5 N. J. L. 589.

New York.— Jackson *v.* Kinney, 14 Johns. 186.

Pennsylvania.— Strubing *v.* Wunder, 2 Woodw. 474.

Virginia.— Geddy *v.* Butler, 3 Munf. 345.

Canada.— Doe *v.* Welling, 11 N. Brunsw. 470; Doe *v.* Devine, 3 N. Brunsw. 411.

See 17 Cent. Dig. tit. "Ejectment," § 348 *et seq.*

When new trial may not be granted.— *Kentucky.*— Thomas *v.* See, 8 B. Mon. 5.

New York.— Seneca Nation *v.* Knight, 23 N. Y. 498.

Tennessee.— Peck *v.* Carmichael, 9 Yerg. 325.

Virginia.— Hutchison *v.* Kelly, 1 Rob. 23, 39 Am. Dec. 250.

Canada.— Ferrier *v.* Moodie, 12 U. C. Q. B. 379.

8. Skinner *v.* Tibbitts, 13 N. Y. Civ. Proc. 370.

Court will exercise its equitable powers and set aside a verdict for plaintiff where it clearly appears that certain land was intended by the parties to be included in a deed to defendant but it was omitted by mistake. Lotz *v.* Reading Iron Co., 10 Pa. Co. Ct. 497.

New trial instead of remittitur will be ordered where the verdict is for the whole tract and the proof is for less. Stream *v.* Lloyd, 128 Ill. 493, 21 N. E. 533.

9. Muhlenburg *v.* Florence, 5 Ohio 245.

10. Cranmer *v.* Porter, 41 Cal. 462.

But the proof must not be such as was accessible to the moving party on the first trial without a satisfactory reason for not having produced it, nor should such evidence be merely cumulative. Laflin *v.* Herrington, 17 Ill. 399. See also Lewis *v.* McMullin, 5 W. Va. 582.

It is not sufficient ground for a new trial that defendant has discovered since the trial that the grant under which plaintiff claimed was fraudulent and that title is outstanding in third person. Smith *v.* Winton, 1 Overt. (Tenn.) 230, 3 Am. Dec. 755.

Surveyor's error not discovered in time to be corrected, where the failure to discover the error was due to negligence and not to "unavoidable" casualty will not constitute ground for a new trial. Bruce *v.* Bowren, 56 S. W. 414, 21 Ky. L. Rep. 1764.

11. Roe *v.* Doe, 36 Ga. 611.

12. Phyfe *v.* Masterson, 45 N. Y. Super. Ct. 338. See also McNab *v.* Stewart, 15 U. C. C. P. 189.

13. Fry *v.* Stowers, 98 Va. 417, 36 S. E. 482. See also Conley *v.* Lee, 12 U. C. Q. B. 456. But see Shiflet *v.* Dowell, 90 Va. 745, 19 S. E. 848.

Nor will judgment and execution be set aside to let a person in to defend, although he makes affidavit setting forth a clear title and offers to pay costs. Doe *v.* Roe, 3 Taunt. 506.

14. Riggs *v.* Savage, 9 Ill. 129; Vance *v.* Schuyler, 6 Ill. 160.

after the rendition of a second judgment in ejectment, if satisfied that justice will be promoted thereby, it may refuse to grant such new trial, applied for on the ground of absence of a material witness and of counsel, where the nature of the defense to be interposed is not shown.[15]

e. Vacating Order Granting New Trial. It has been held that a court of law may vacate an order granting a new trial in a judgment.[16]

2. Arrest of Judgment.[17] Likewise for sufficient reasons as in other actions a judgment may be arrested after verdict.[18]

E. Judgment[19]**— 1. Form, Requisites, and Sufficiency — a. Form and Requisites Generally.** Judgment may be entered against the casual ejector.[20] It should also direct recovery by the lessee and not by the lessor,[21] and may conclude with a *capiatur*.[22] If the estate is continued in heirs, judgment is to be rendered as if the lessor were alive, and a writ of possession may also be delivered.[23] A judgment in general terms may be rendered for defendant;[24] and plaintiff whose title is defeasible is entitled to a general judgment, if his title has not expired or been determined at the time of trial.[25] If an equitable defense is interposed the judgment is not defective in not finding the facts as in a chancery proceeding.[26] And in ejectment against one holding possession under a contract for purchase where he is in default under its terms the proper judgment would be an order for sale.[27] In case of a partial recovery, the judgment should be framed to show on its face that the case went against plaintiff on the merits as to that part of the land he failed to recover.[28] If there is a clause in a judgment which practically nullifies it it should be stricken out on motion.[29]

As a matter of favor a second new trial may, however, be granted, where the verdict may have been based on questions of pleadings and order of proof which may be obviated by the amendment of the answer. Barson *v.* Mulligan, 40 Misc. (N. Y.) 470, 82 N. Y. Suppl. 677.

15. Stahl *v.* Dayton, 126 Mich. 70, 85 N. W. 249.

On objections of a formal and technical character, a new trial will not be granted where the omission to make the same on a former trial is unexercised, even though they would have been tenable if taken in time. Phyfe *v.* Masterson, 45 N. Y. Super. Ct. 338.

16. Gillespie *v.* Rout, 39 Ill. 247, where it is held that in order to promote justice or to carry into effect an agreement of the parties, the violation of which equity would have restrained, and to prevent either party from obtaining an unfair advantage of the other, a court of law may vacate an order granting a new trial in ejectment, as motions of this character are within the equitable jurisdiction of courts of law over judgments, etc.

17. **Arrest of judgment** generally see Judgments.

18. As where the description be so indefinite that the court could not correct thereby an erroneous delivery of possession by the sheriff. Clark *v.* Clark, 7 Vt. 190.

But after issue joined on the title only, and a verdict for plaintiff for the land on one of the counts in the declaration mentioned, it is no ground for arrest of judgment that the two counts laid demises of the same land to different persons. Throckmorton *v.* Cooper, 3 Munf. (Va.) 93.

So a motion in arrest of judgment because the ejectment against the casual ejector was wrongfully entitled, and for other defendants, will be overruled where the declaration to which the real defendant pleaded was right. Huidekoper *v.* Burrus, 12 Fed. Cas. No. 6,849, 1 Wash. 257.

19. **Judgment** generally see Judgments.

Forms of judgment in ejectment see Adams Ejectm. 491 *et seq.* See also Mace *v.* Mace, 24 N. Y. App. Div. 291, 48 N. Y. Suppl. 831.

20. Connor *v.* Peugh, 18 How. (U. S.) 394, 15 L. ed. 432.

21. Bonta *v.* Clay, 5 Litt. (Ky.) 129.

22. Kavanaugh *v.* Dixon, Cooke (Tenn.) 408.

23. Wilson *v.* Hall, 35 N. C. 489.

24. Laramy *v.* Ruschke, 46 Minn. 125, 48 N. W. 561.

Where a judgment for plaintiff is reversed and a mandate issued to the court below to enter judgment for defendant an entry by said court that defendant hath right to the lands claimed is erroneous, as the judgment should have been entered that plaintiff had no title. Litchfield *v.* Dubuque, etc., R. Co., 7 Wall. (U. S.) 270, 19 L. ed. 150.

25. Hunt *v.* O'Neill, 44 N. J. L. 564.

26. Carter *v.* Prior, 78 Mo. 222.

27. Jasper County *v.* Tavis, 76 Mo. 13.

It is error, however, to render judgment only for a sale of the land, where plaintiff has shown a regular chain of title to himself through a sale under a power in a mortgage given by one under whom defendants claim as heirs. Rumley *v.* Puryear, 120 N. C. 291, 26 S. E. 775.

28. Rupiper *v.* Calloway, 105 Wis. 4, 80 N. W. 916.

29. Evans *v.* Schafer, 86 Ind. 135.

b. When Sufficient Generally. A judgment for plaintiff is proper where, although an equitable defense is set up, but imperfectly pleaded, the findings do not distinctly show defendant's equity.[30] A judgment may also properly find that plaintiffs are entitled to possession of a strip of land and that defendants are not entitled thereto under a prior judgment.[31] Again, although an order embraces both a finding and a judgment, it is not a nullity for that reason, where the order indicates a general finding for plaintiffs only as to a part of the land in controversy described therein, and the judgment is for the possession of the land so described.[32] If several demises are laid in the declaration, from several lessors, and the court give judgment for plaintiff to recover his "terms yet to come," the judgment will be sustained, and plaintiff can have only one execution.[33] And it is no objection that only one defendant answered, and he on his own account merely, when the others appeared and investigated the cause on its merits, but joined no issue.[34]

c. When Erroneous or Insufficient Generally. A judgment is erroneous when for the lessors instead of the nominal plaintiff;[35] or where the term of a demise in the declaration expires before verdict and judgment.[36] It is also error to direct a general verdict for defendant and to enter a judgment in his favor on the merits where it will conclude the question of title against plaintiff.[37] Again if judgment is erroneous as to one parcel of land it is so *in toto*, where it is on a single demise contained in a single count.[38] So a judgment against defendant has been held to be void in ejectment against a husband and wife.[39] It is also determined that a judgment is insufficient where it fails to award a writ of possession.[40]

d. Prerequisites to Judgment. Disclaimer after verdict,[41] entering into the consent rule,[42] or certain other matters[43] may be prerequisite to the rendition of a final judgment in ejectment.

30. Meador *v.* Parsons, 19 Cal. 294.

31. Rhoades *v.* Higbee, 21 Colo. 88, 39 Pac. 1099, holding that it is not erroneous because it assumes to correct such prior judgment by thus excluding said strip.

32. Such a judgment is proper if plaintiffs failed to show title to the remaining part of the land, and it will be assumed that the evidence warranted a finding as to the particular premises awarded to plaintiff. Morgan *v.* Eggers, 127 U. S. 63, 8 S. Ct. 1041, 32 L. ed. 56 [*affirming* 20 Fed. 666].

33. Camden *v.* Haskill, 3 Rand. (Va.) 462.

34. Nolen *v.* Wilson, 5 Sneed (Tenn.) 332.

Nor in an action against three is it error to enter judgment, although one of the defendants has entered an appearance and no issue has been made as to another, since the rights of these two are not adjudicated. Hambleton *v.* Wells, 4 Call (Va.) 213.

35. Chambers *v.* Handley, 3 J. J. Marsh. (Ky.) 98.

36. Roseberry *v.* Seney, 3 Harr. & J. (Md.) 228.

In a petitory action where plaintiff's case fails before the consideration of defendant's case begins, because of the insufficiency of plaintiff's showing, and it is so adjudged by the court, it is error to go further and pass judgment rejecting the plea of prescription set up by the answer. Rowson *v.* Barbe, 51 La. Ann. 347, 25 So. 139.

37. Zander *v.* Valentine Blatz Brewing Co., 89 Wis. 164, 61 N. W. 763.

38. Seward *v.* Jackson, 8 Cow. (N. Y.) 406.

39. Caldwell *v.* Stephens, 57 Mo. 589.

40. Meglemere *v.* Bell, 14 Nebr. 377, 15 N. W. 703. *Compare* Bartley *v.* Bingham, 34 Fla. 19, 24, 15 So. 592, 593, holding that if a judgment directs a writ of ejectment instead of a writ of habere facias it will not be reversed merely for that reason.

But a decree need not state that a writ of possession shall issue, where the proper mode of execution of a judgment is by such writ. State *v.* Bondy, 15 La. Ann. 573, 77 Am. Dec. 198.

Where plaintiff gets into possession before judgment and hence is not entitled to judgment that he recover the possession, he may still have judgment declaring the validity of his title. Woodley *v.* Hassell, 94 N. C. 157.

41. Where defendant does not disclaim possession but introduces positive testimony amounting to a disclaimer of title and possession as to part of the premises and a verdict is rendered for him for the whole land, judgment should not be rendered on the verdict until he disclaims in writing possession of the land not claimed. Lehigh Valley Coal Co. *v.* Beaver Lumber Co., 203 Pa. St. 544, 53 Atl. 379, 93 Am. St. Rep. 774.

42. Doe *v.* Roe, 1 Pennew. (Del.) 14, 39 Atl. 464, where it is held that judgment for plaintiff will not be rendered where he has entered an appearance, but has not entered into the consent rule nor laid any pretensions according to rules of court, but defendant must enter into the consent rule at once and lay his pretensions by the first rule day in vacation.

43. See *infra*, note 66.

e. Conformity With Verdict or Pleadings. The rule applies in ejectment that a judgment which is fatally variant from the verdict will not stand.[44] A trifling variance will not, however, vitiate the judgment;[45] and words awarding additional relief not in the findings may be stricken out under certain circumstances.[46] The judgment should also be supported by the complaint.[47] There may, however, be a judgment for possession, although there is no specific prayer therefor, where the complaint contains proper averments, a general prayer for relief, and there is a finding for possession.[48] So too a judgment in pursuance of an offer of defendant to allow plaintiff to take judgment must be responsive to the tender.[49]

f. Designation or Description of Land or Estate. The land should be designated or described with certainty[50] sufficient to enable a writ of possession

44. Obert *v.* Hammel, 18 N. J. L. 73, where verdict was for whole land and judgment only for part.

Applications of rule.— If the jury find a special verdict designating by metes and bounds the precise part they find for plaintiff the judgment must correspond thereto. McCraven *v.* Doe, 23 Miss. 100. So a judgment is erroneous which does not follow the verdict in designating the extent of the interest recovered. Meraman *v.* Caldwell, 8 B. Mon. (Ky.) 32, 46 Am. Dec. 537. If the verdict finds for plaintiff as to a part only of the land sued for and says nothing as to the balance it finds in effect that there is no cause of action as to it, and if the judgment dismisses the complaint as to such balance it is in accordance with the statutory provision that the judgment shall accord with the verdict. Rupiper *v.* Calloway, 105 Wis. 4, 80 N. W. 916.

A general judgment that plaintiff recover possession of the premises described in the declaration is erroneous where the verdict specially found that defendants were guilty of withholding from plaintiff the possession of a part thereof. Cole *v.* McLaughlin, 170 Ill. 278, 48 N. E. 948.

A judgment for possession and damages is not authorized by a general verdict which does not assess damages. Cannon *v.* Davies, 33 Ark. 56.

Plaintiff is entitled to a judgment non obstante veredicto where defendant virtually admits plaintiff's title but claims that it was divested by a sale for taxes and a deed to him which was adjudged void. Ward *v.* Phillips, 89 N. C. 215. But the evidence cannot be considered in determining a motion for judgment on the special findings, notwithstanding the general verdict; and when the facts found establish an apparent absolute title in plaintiff this will not overthrow the general verdict, because defendant may be entitled to possession. Cox *v.* Ratcliffe, 105 Ind. 374, 5 N. E. 5.

45. Camden *v.* Haskill, 3 Rand. (Va.) 462.

46. King *v.* Kindred, 38 Minn. 354, 37 N. W. 794, where the findings of fact referred only to the title of defendant and did not embrace liens or claims of plaintiff which might ripen into title, but justified awarding possession to defendant as owner in fee simple and the words stricken out were, "free and clear of all claims of the plaintiff."

47. Foster *v.* Wilson, 5 Mont. 53, 2 Pac. 310.

A judgment unauthorized by the pleadings and which is not asked for is erroneous. So where a petition is in ejectment plaintiff is entitled to no relief if not to possession of the property. Springfield Engine, etc., Co. *v.* Donovan, 147 Mo. 622, 49 S. W. 500.

Judgment should not follow an erroneous description in the petition. Cushing *v.* Conness, (Nebr. 1903) 95 N. W. 855.

48. Evans *v.* Schafer, 119 Ind. 49, 21 N. E. 448.

Judgment should not make an award for the value of the use of land concerning which plaintiff makes no claim and upon which there is no evidence. Alexander *v.* Parks, 72 S. W. 1105, 24 Ky. L. Rep. 2113. And if ejectment is for the recovery of land sold, but not conveyed, an award for a certain sum of money is bad and plaintiff cannot take out a habere facias. Montgomery *v.* Patterson, 13 Serg. & R. (Pa.) 150. So where only the recovery of the premises is asked for and no additional relief is sought the court in rendering judgment cannot give other and different relief by adjusting the equities of the parties. Milner *v.* Mutual Ben. Bldg. Assoc., 104 Ga. 101, 30 S. E. 648. It is also error to direct a general verdict for defendant and to enter judgment on the merits in his favor and thus conclude the question of title against plaintiff, where the defense does not set up any title to the land, but merely excuses the trespass. Zander *v.* Valentine Blatz Brewing Co., 89 Wis. 164, 61 N. W. 763.

If the court finds for defendant on all the issues decree should be entered as prayed in the answer. Chouteau Land, etc., Co. *v.* Chrisman, 172 Mo. 610, 72 S. W. 1062.

Judgment was affirmed which included more land than defendant took defense for, where the verdict was general for defendant for all the land for which he took defense on the plats. Easton *v.* Snavely, 4 Harr. & J. (Md.) 17.

49. Emerson *v.* Pier, 105 Wis. 161, 80 N. W. 1100.

50. Sturdevant *v.* Murrell, 8 Port. (Ala.) 317; Smith *v.* Cornett, 38 S. W. 689, 18 Ky. L. Rep. 818; McManus *v.* Stevens, 10 La. Ann. 177.

Designation of land, estate, etc., see *supra*, VIII, C, 2.

to be executed.[51] And it has been held that the particular estate or interest should also be designated.[52]

g. Joint or Several. It may be generally stated that the character in which the parties are sued, their pleadings and procedure as to trial, the nature of their possession, and the verdict or finding are important factors in determining whether a judgment should be joint[53] or several.[54] Nevertheless it has been held that a judgment may, however, be joint as to possession and separate as to damages,[55]

Reference to complaint may be made (Morse *v.* Hewett, 28 Mich. 481), and this will include an amended complaint (Smith *v.* Halliday, (Ark. 1890) 13 S. W. 1093). Judgment may also be entered upon a correct and particular description following a general description of the property claimed in the declaration but containing an evident omission. Anderson *v.* Tinney, 5 Mackey (D. C.) 335. But a reference to the complaint will be insufficient where the description therein is too vague and uncertain (Williams *v.* Kelso, 7 La. 406. See also Robertson *v.* Drane, 100 Mo. 273, 13 S. W. 405), or where it is so incorrect that the land cannot be located thereby (Balliett *v.* Veal, 140 Mo. 187, 41 S. W. 736).

Description may be aided by diagrams, surveys, or plats (Carlisle *v.* Killebrew, 91 Ala. 351, 8 So. 355, 24 Am. St. Rep. 915. See also Foreman *v.* Redman, 5 S. W. 556, 9 Ky. L. Rep. 531); but judgment for the "premises in the plat described" is erroneous when the plat made no part of the record (Woolry *v.* Clay, 3 A. K. Marsh. (Ky.) 135). If plaintiff makes two locations of his claims on plats and there is a general verdict and judgment the judgment is erroneous. Gitting *v.* Hall, 1 Harr. & J. (Md.) 14, 2 Am. Dec. 502.

Judgment is sufficient where it designates or describes the lands with certainty (Sims *v.* Thompson, 30 Ala. 158; Muir *v.* Meredith, 82 Cal. 19, 22 Pac. 108. See also Kleiner *v.* Bowen, 166 Ill. 537, 46 N. E. 1087), or so that they can be identified (Rosenthal *v.* Matthews, 100 Cal. 81, 34 Pac. 624; Lawrence *v.* Davidson, 44 Cal. 177; Simpson *v.* Shannon, 5 Litt. (Ky.) 322). And it is no objection to a general judgment for defendant that it defines a line between plaintiff and defendant, when such line is the question litigated. Laramy *v.* Ruschke, 46 Minn. 125, 48 N. W. 561.

Extent of the unlawful occupation may be marked by a certain boundary fixed by the verdict. Morgan *v.* Eggers, 20 Fed. 666.

51. Franklin *v.* Haynes, 119 Mo. 566, 25 S. W. 223.

52. Koon *v.* Nichols, 63 Ill. 163; Beranek *v.* Beranek, 113 Wis. 272, 89 N. W. 146. See also Mapes *v.* Scott, 94 Ill. 379; Sphung *v.* Moore, 120 Ind. 352, 22 N. E. 319; Morse *v.* Hewett, 28 Mich. 481.

Judgment is erroneous that plaintiffs have "a fee simple title" to the premises when some of the plaintiffs are tenants by the curtesy only. Patterson *v.* Hubbard, 30 Ill. 201.

Particular decisions.—The validity of a judgment is not affected by the recital therein of an incorporeal right. Taylor *v.* Gladwin, 40 Mich. 232. And where plaintiff claimed three undivided fourth parts of certain tracts, a judgment that he do recover his term aforesaid in said tracts is correct. Carroll *v.* Carroll, 16 How. (U. S.) 275, 14 L. ed. 936. It is also proper for the judgment to define the extent of plaintiff's interest, where there is a finding that he holds an interest in common with others in the premises. Mahoney *v.* Middleton, 41 Cal. 41. And where the trial is by the court without a jury, a judgment that "the court finds that the plaintiff is seized in fee," and which also finds defendant guilty is sufficient. Harding *v.* Strong, 42 Ill. 148, 89 Am. Dec. 415. If the declaration alleges a title in fee in plaintiff and the verdict is guilty in manner and form as in the declaration complained, a judgment that plaintiff recover the lands and tenements in the declaration mentioned, gives the land to plaintiff in fee. Hawley *v.* Twyman, 24 Gratt. (Va.) 516.

53. Leese *v.* Clark, 28 Cal. 26.

Joint judgment may be rendered when defendants admit their possession to be joint and that it would be jointly defended. McClung *v.* Echols, 5 W. Va. 204. And where it is stipulated that defendants were in possession at the time of the commencement of the action, a joint judgment may properly be rendered against all the defendants for the portion to which plaintiff has some title. Horner *v.* Chicago, etc., R. Co., 38 Wis. 165. And, although one of several was not in possession, but claiming the whole was made a party under section 18 of the code, a recovery may be had against all of them jointly. Fosgate *v.* Herkimer Mfg., etc., Co., 12 Barb. (N. Y.) 352 [*affirmed* in 12 N. Y. 580].

54. Bayard *v.* Colefax, 2 Fed. Cas. No. 1,130, 4 Wash. 38.

Several judgments may be rendered in an action against several occupying different parts of the property, and this whether separate findings and verdicts be rendered upon a trial or the suit goes by default. Lick *v.* Stockdale, 18 Cal. 219. And where defendants occupy in severalty there can be no recovery against them jointly. Dillaye *v.* Wilson, 43 Barb. (N. Y.) 261. Separate judgments may also be given and each defendant may be found separately guilty for the part of the premises in his possession, where they are all joined in one suit and plaintiffs' title in relation to all is the same, although their possessions may be several and not joint. Jackson *v.* Andrews, 7 Wend. (N. Y.) 152, 22 Am. Dec. 574.

55. Andrews *v.* Carlile, 20 Colo. 370, 38 Pac. 465.

and in one decision it was held that the judgment may be separate as to the land and joint as to costs.[56]

h. Time of Rendition or Entry. Under the practice as to judgment against the casual ejector it could not be rendered until after the tenant in possession had defaulted,[57] and it was required to be entered before the jury were sworn, unless defendant took defense for all the land claimed.[58] And a judgment may be premature.[59]

i. Amendment or Setting Aside. A judgment in ejectment may be amended where it is defective only in form,[60] or where it fails to specify plaintiff's estate in the property recovered as required by statute.[61] And a judgment entry it has been held may be amended even to cure a material omission.[62] So too a judgment may be set aside and the case reinstated for sufficient cause,[63] upon an affi-

56. Elys *v.* Wynne, 22 Gratt. (Va.) 224.

57. Jackson *v.* Goodtitle, 7 Blackf. (Ind.) 129.

58. Clement *v.* Ruckle, 9 Gill (Md.) 326.

Where rule for judgment against casual ejector was not entered at the term in which the notice directed the tenant to appear, in consequence of a proposition made by him to settle the claim, and which he afterward refused to carry out, a rule for judgment was delivered to be entered at the next term. Doe *v.* Roe, 11 N. Brunsw. 285.

59. Where the action is not ready for submission, a judgment for plaintiffs on sustaining a demurrer to the answer filed by appearing defendants is premature. Jones *v.* Griffin, 74 S. W. 713, 25 Ky. L. Rep. 117.

60. Doe *v.* Owen, 2 Blackf. (Ind.) 452.

It is no objection to the amendment of a judgment for plaintiff that another judge at special term has on motion if defendant vacated it and granted a new trial, where such action is ministerial. Gasz *v.* Strick, 9 N. Y. Suppl. 408.

Provision for restitution of the premises to him, inserted by defendant, without any direction from the court, in a judgment on a new trial should not be ordered stricken from the judgment, as defendant is entitled as a matter of course to restoration, even though the mere verdict did not authorize the insertion of such clause. Martin *v.* Rector, 28 Hun (N. Y.) 409.

It is proper to refuse to amend a judgment by striking out the award of possession, so as to make it conform to the verdict, it being apparent that the court had found for plaintiffs on all the issues not submitted to the jury. Barson *v.* Mulligan, 77 N. Y. App. Div. 638, 79 N. Y. Suppl. 34.

Judgment cannot be amended so as to describe land in possession of defendant, where it is entered on default on a complaint which does not describe any such land. Haggin *v.* Lorenz, 15 Mont. 309, 39 Pac. 285. And where there is not sufficient evidence to authorize the rendition of a judgment *nunc pro tunc* in accordance with an agreement changing the boundary line the previous judgment must stand. Chighizola *v.* Doe, 24 Ala. 237.

61. Gasz *v.* Strick, 9 N. Y. Suppl. 408.

62. Mabson *v.* McGowen, 54 Ala. 167.

Erroneous entry of a joint judgment does not preclude plaintiff from trying for and having several judgments against defendants. Leese *v.* Clark, 28 Cal. 26.

63. Thomas *v.* Newton, 23 Fed. Cas. No. 13,905, Pet. C. C. 444.

Judgment may be set aside: For good cause, after the term, where it is against the casual ejector (Lytle *v.* Fenn, 15 Fed. Cas. No. 8,651, 3 McLean 411); where a stranger in possession claiming under a title *prima facie* valid and distinct from plaintiff's was ejected under a judgment by default against the casual ejector (Howard *v.* Kennedy, 4 Ala. 592, 39 Am. Dec. 307); as to a deceased joint lessor where trial was had before counsel were apprised of the death (Bryan *v.* Averett, 21 Ga. 401, 68 Am. Dec. 464); as against the original defendant where a party asks to be let in to defend, after judgment against such defendant, and claims under substantially the same title and makes out a sufficient case (Williams *v.* Brunton, 8 Ill. 600); where a memorandum of appearance is filed and notice is given to plaintiff's attorney, and a bill of particulars is demanded, but plaintiff's attorney instead of giving it signs judgment against the casual ejector and turns the tenant out of possession (Doe *v.* Roe, 22 N. Brunsw. 423); where affidavit of defendant shows sufficient excuse for not furnishing bond for costs as required by statute and also asserts a belief of good title (Beaner *v.* Pilley, 4 N. C. 329); as against the casual ejector, where the tenant in possession is shown to have been acting in collusion with plaintiff's lessor (Doe *v.* Roe, 4 U. C. Q. B. 366); and where judgment was signed against the casual ejector but plaintiff's proceedings were irregular (Doe *v.* Roe, 19 N. Brunsw. 102).

Judgment will not be set aside: After writ habere, etc., has been issued, because twenty-two years before the sheriff made return of service of the copy of the declaration on H, "tenant in possession," the action having been against S and A, "tenants in possession" (Amey *v.* Marshael, 63 Md. 369); on the ground of fraud and breach of contract where a motion for new trial on said ground was overruled (Moody *v.* Harper, 38 Miss. 599); on the ground of collusion between the lessor of plaintiff and tenant's wife in accepting service, more than a year having elapsed after execution of writ of possession (Doe *v.* Roe, (Hil. T.) 4 Vict.); and where more than two years have elapsed

davit of merits and upon terms.[64] A judge at chambers may also have power to set aside a judgment.[65]

2. DEFAULT JUDGMENTS — a. Prerequisites. Having in view the changes in the form of the action of ejectment, it may be generally stated that in order to obtain judgment by default such conditions precedent as exist in the particular jurisdiction must be complied with.[66] To this rule may also be generally referred the determination of the time of entry of such judgment,[67] as well also as the question whether or not such a judgment is authorized at a certain term.[68]

b. Setting Aside or Vacation of. A judgment by default may in the absence of laches,[69] upon affidavit[70] or other showing, be set aside for sufficient and proper

after judgment (Doe v. Tolman, 1 U. C. Q.-B. 520).

Motion to set aside may be made by one who acquired title from deceased defendant, although he was not a party to the action, in a cause where the judgment was irregularly taken after defendant's death, and plaintiff has sued out a writ of possession. Taylor v. Gooch, 110 N. C. 387, 15 S. E. 2.

After trial and vacation of the judgment on demand of defendant and notice on the journal, and continuance till the next term and dismissal of the suit without prejudice by plaintiff, a subsequent action brought within a year for the recovery of the same land cannot be maintained. Deming v. Douglass, 60 Kan. 738, 57 Pac. 954.

64. Watts v. Little, 6 U. C. L. J. 233.

65. Popplewell v. Abbott, 5 U. C. Q. B. O. S. 245.

66. Rule has been held to include: Appearance (Baron v. Abeel, 3 Johns. (N. Y.) 481, 3 Am. Dec. 515; Moyers v. Brown, 10 Humphr. (Tenn.) 77. See Williams v. Doe, 1 Sm. & M. (Miss.) 559; Auten v. Fen, 10 N. J. L. 227; Jackson v. Smith, 1 Johns. Cas. (N. Y.) 106. But see MacKenzie v. Renshaw, 55 Md. 291; Acts (1872), c. 346); filing a plea (Stennett v. Scott, 7 Ark. 280. See also Bray v. Fen, 8 N. J. L. 303); failure of the tenant to come in and defend after the death of the landlord who entered into the common rule (Huff v. Lake, 9 Humphr. (Tenn.) 137); a rule to plead (Paterson v. Evans, 18 Fed. Cas. No. 10,796, 3 Wall. Jr. 215); establishing the service of a declaration and notice (Jackson v. Stiles, 1 Cow. (N. Y.) 222) or writ (Michew v. McCoy, 3 Watts & S. (Pa.) 501. See Traer v. Bowman, 3 Penr. & W. (Pa.) 70); and releasing alleged damages where judgment is simply to establish title (Cushwa v. Cushwa, 9 Gill (Md.) 242). Nor does such default judgment become final without intervention of a court or jury (Smithson v. Briggs, 33 Gratt. (Va.) 180; James River, etc., Co. v. Lee, 16 Gratt. (Va.) 424). And although a landlord alone defends an action against him and his tenant, yet it will be understood that he defended for his tenant also, and a judgment by default against the tenant will not be allowed, especially when not demanded before trial or intimated that it would be so claimed. Carrol v. Mays, 8 Dana (Ky.) 178.

Rule has been held not to require: Proofs of any facts alleged in the complaint where the summons has been personally served on defendant within the state, and he has defaulted in appearing and pleading (Sayres v. Miller, 10 N. Y. Civ. Proc. 69), or the preliminary affidavit required by statute in some cases (Jackson v. Wilson, 3 Johns. Cas. (N. Y.) 295. See also Traer v. Bowman, 3 Penr. & W. (Pa.) 70).

But a judgment by default for want of appearance could only be against the casual ejector. Gardiner v. Murray, 4 Yeates (Pa.) 560. See also Williams v. Doe, 1 Sm. & M. (Miss.) 559.

A judgment upon nihil dicit could be entered only against the casual ejector and not against the tenant in possession. Cushwa v. Cushwa, 9 Gill (Md.) 242; Jackson v. Vischer, 2 Johns. Cas. (N. Y.) 106, Col. Cas. (N. Y.) 116, Col. & C. Cas. (N. Y.) 116.

Inserting the word "judgment" in the entry of the tenant's default for not appearing, etc., will not vitiate the rule nor be a ground for setting aside the default. So also following this by a rule for judgment generally without saying "against the casual ejector" is no ground for setting aside the default. Jackson v. Stiles, 5 Cow. (N. Y.) 418.

Where defendant has failed to enter an appearance within the time appointed the judgment contemplated by 57 Vict. c. 10, § 20, is not a judgment *nisi* at twenty days, but a rule for judgment absolute. Doe v. Nixon, 33 N. Brunsw. 209.

67. Auten v. Fen, 10 N. J. L. 237. And see Shirley v. Conway, 44 Miss. 434; Jackson v. Wood, 6 Cow. (N. Y.) 586.

68. Ivey v. Perry, 97 Ala. 583, 12 So. 65; Vanderslice v. Garven, 14 Serg. & R. (Pa.) 273; Traer v. Bowman, 3 Penr. & W. (Pa.) 70; Young v. Cooper, 12 Phila. (Pa.) 331.

69. Amey v. Marshael, 63 Md. 369; Dennis v. Kelso, 28 Md. 333; Klinefelter v. Carey, 3 Gill & J. (Md.) 349. See also Jackson v. Stiles, 10 Johns. (N. Y.) 67.

Where several years after service of the declaration and after the demise has run out a judgment by default is rendered against the casual ejector for want of an appearance by the tenant, such judgment will be set aside. Rutherford v. Fen, 20 N. J. L. 299.

70. Byrne v. Alas, 68 Cal. 479, 9 Pac. 850; Wood v. Wood, 9 Johns. (N. Y.) 257; McCormick v. Magruder, 15 Fed. Cas. No. 8,723, 2 Cranch C. C. 227; Doe v. Roe, 7 N. Brunsw. 259.

Statutory requirement of particular affidavits see Williams v. Brunton, 8 Ill. 600.

cause.[71] Defendant cannot, however, assail a default judgment where he fails as required by statute to file a bond or is excused therefrom.[72] But the court need not specify the grounds for setting aside the default.[73]

8. Extent of Award or Relief — a. General Rules. The action being a possessory one, plaintiff can only have judgment in ejectment for the possession wrongfully withheld from him and only to the extent thereof;[74] and he cannot recover more than he demands,[75] or be awarded land not specified in the complaint.[76] And if there is no defense as to a part of the land claimed plaintiff is entitled to judgment therefor.[77] Again, although judgment may be had to the extent of an undivided interest,[78] but not for a different estate,[79] yet plaintiff cannot recover an entirety where he declares for such undivided interest,[80] as the

Affidavit held fatally defective see Springfield, etc., R. Co. v. Ross, 88 Ill. 179.

71. *California.*— Mowry v. Nunez, (1893) 33 Pac. 1122; Dimick v. Deringer, 32 Cal. 488; Barrett v. Graham, 19 Cal. 632.

Illinois.— Williams v. Brunton, 8 Ill. 600.

Maryland.— Dennis v. Kelso, 28 Md. 333.

New York.— Jackson v. Stiles, 4 Johns. 493.

Ohio.— Bowie v. Roe, 1 Ohio Dec. (Reprint) 167, 3 West. L. J. 81.

Pennsylvania.— Wharton v. Botham, 3 Watts & S. 158.

Tennessee.— Conn v. Whiteside, 6 Humphr. 47; Cravins v. Armour, 6 Yerg. 467.

See 17 Cent. Dig. tit. "Ejectment," § 368.

Default will not be opened where defendants after commencement of the action and before default had conveyed their interest in the land to another who did not join in the motion or ask to have the action continued in the names of defendants. Moore v. Kellogg, 58 Cal. 385.

72. Jones v. Best, 121 N. C. 154, 28 S. E. 187.

73. Crossland v. Admire, 118 Mo. 87, 24 S. W. 154.

74. Smith v. Shackleford, 9 Dana (Ky.) 452; Goldsmith v. Smith, 21 Fed. 611.

Application of rule.— Where possession is denied and plaintiff proves possession by defendant of only a part of the tract he cannot have judgment for the entire tract. Ogilvie v. Copeland, 145 Ill. 98, 33 N. E. 1085. Recovery is also limited to the possession of the tenant on whom the declaration and notice are served in whose stead the landlord is admitted to defend. Crockett v. Lashbrook, 5 T. B. Mon. (Ky.) 530, 17 Am. Dec. 98. And the recovery is only for the unexpired portion of the term laid in the demise. Doe v. Reynolds, 27 Ala. 364.

If defendant defends as to the whole of a tract he will be entitled to none of it, where plaintiff has legal title to the whole and has been in possession of a part, although defendant has been in possession of the other part long enough to acquire title by limitations. Symonds v. Trueblood, 3 N. C. 235.

Upon default against a casual ejector, if it be shown that there are other persons in possession, holding different parcels in severalty, judgment will not be allowed for the whole tract sued for, but only for the part of which the person was in possession on whom the declaration was served. Thomas v. Orrell, 27 N. C. 569, 44 Am. Dec. 58.

75. *California.*— Reay v. Butler, (1885) 7 Pac. 669.

Florida.— Horne v. Carter, 20 Fla. 45.

Kentucky.— Davis v. Whitesides, 1 Bibb 510; Scott v. Bealle, 1 A. K. Marsh. 69.

Maryland.— Magruder v. Peter, 4 Gill & J. 323.

Michigan.— See Twogood v. Hoyt, 42 Mich. 409, 4 N. W. 445.

United States.— Patton v. Cooper, 18 Fed. Cas. No. 10,834, Brunn. Col. Cas. 193, Cooke (Tenn.) 133.

England.— Denn v. Purvis, 1 Burr. 326.

See 17 Cent. Dig. tit. "Ejectment," § 369 *et seq.*

When judgment is not for more land than plaintiff claims under particular facts see Hall v. Gittings, 2 Harr. & J. (Md.) 380.

76. Scott v. Rhodes, (Cal. 1895) 41 Pac. 878.

Although if there is any extension of possession within plaintiff's claim pending litigation it is held that there may be an award therefor. Taylor v. Cox, 2 B. Mon. (Ky.) 429.

77. Richardson v. Williams, 37 Ark. 542; Doe v. Horn, Smith (Ind.) 242; Berry v. Willett, 2 Harr. & M. (Md.) 376; Jackson v. Underwood, 1 Wend. (N. Y.) 95.

78. Young v. Adams, 14 B. Mon. (Ky.) 127, 58 Am. Dec. 654. See also Allie v. Schmitz, 17 Wis. 169.

If evidence discloses extent of plaintiffs' undivided share, where they hold in common with others, they may have judgment for such share, otherwise not. Wentworth v. Mullen, 2 Mona. (Ohio) 544.

79. Almond v. Bonnell, 76 Ill. 536; Clark v. Thompson, 47 Ill. 25, 95 Am. Dec. 457; Lyon v. Kain, 36 Ill. 362.

If plaintiff declare for a fee he may recover a term of nine hundred and ninety-nine years. Rood v. Willard, Brayt. (Vt.) 67. And under averment of seizin in fee a life-estate was recovered. Casey v. Casey, 55 Vt. 518.

80. Carroll v. Norwood, 5 Harr. & J. (Md.) 155 [*compare* Matthews v. Turner, 64 Md. 109, 21 Atl. 224]; Gamble v. Daugherty, 71 Mo. 599. See also Keefe v. Doreland, 16 Mont. 16, 39 Pac. 916; Mitchell v. Campbell, 19 Oreg. 198, 24 Pac. 455.

extent of such interest limits the extent of the recovery.[81] Judgment for plaintiff is also limited by his own title deed, where he relies thereon;[82] nor can plaintiff be awarded the easement of another upon the land,[83] and this includes a public easement.[84] In certain cases, however, and notwithstanding the above general rule first stated, other relief may be granted,[85] and in some jurisdictions equitable relief may be decreed.[86] So a judgment may, it is decided, provide for redemption.[87] But partition cannot be awarded under a general denial.[88] The successful plaintiff, as will hereafter be shown,[89] may also be entitled to damages for the unlawful detention of the land and to costs.[90]

b. Partial Recovery. Plaintiff may be awarded a less quantity than he claims;[91] or any undivided portion or fractional quantity of the whole tract

81. *Indiana.*—Martin v. Neal, 125 Ind. 547, 25 N. E. 813.
Iowa.— Hughes v. Holliday, 3 Greene 30.
Kansas.— Holmden v. Janes, 42 Kan. 758, 21 Pac. 591.
Kentucky.— Petty v. Malier, 14 B. Mon. 246.
Virginia.— Nye v. Lovitt, 92 Va. 710, 24 S. E. 345.
See 17 Cent. Dig. tit. "Ejectment," § 369 *et seq.*

82. Jones v. Cowman, 2 Sandf. (N. Y.) 234.
If ancestor's title is subject to a certain privilege or license under the deed, plaintiff's judgment should be limited by such proviso. De Lancey v. Piepgras, 138 N. Y. 26, 33 N. E. 822.

83. Camden, etc., R. Co. v. Stewart, 18 N. J. Eq. 489. See also Fisher v. Higgins, 5 T. B. Mon. (Ky.) 140.
As to easements, etc., see *supra*, II, C, 1, f.

84. Syracuse Gas Light Co. v. Rome, etc., R. Co., 11 N. Y. Civ. Proc. 239.

85. White v. Rush, 58 Mo. 105, holding that the deed could be set aside, but that defendant could not be ordered to pay taxes and a trust debt, such relief not being asked. But see Hart v. Henderson, 17 Mich. 218.
Ancillary and incidental jurisdiction of courts see 11 Cyc. p. 677.

86. Weber v. Marshall, 19 Cal. 447.
Foreclosure may be decreed. Goodell v. Starr, 127 Ind. 198, 26 N. E. 793.
Judgment for equitable relief cannot be rendered in ejectment. Hildebrand v. Bunnschu, 40 S. W. 920, 19 Ky. L. Rep. 430.
That defendant be enjoined from claiming title to the land recovered and that plaintiff be adjudged the owner and put into possession cannot be asked, as plaintiff must rely upon his judgment as a bar. Doyle v. Franklin, 40 Cal. 106.

87. Healy v. O'Brien, 66 Cal. 517, 6 Pac. 386. See also Goodman v. Nichols, 44 Kan. 22, 23 Pac. 957.
Remedy must be by a bill in equity where there is a right to redeem a part and absolute judgment will be rendered for the whole. Partridge v. Gordon, 15 Mass. 486.

88. Roberts v. Lanam, 92 Ind. 380. See also Ryerss v. Wheeler, 25 Wend. (N. Y.) 434, 37 Am. Dec. 243. And *compare* Leeper v. Neagle, 94 N. C. 338.

89. **Damages recoverable** see *infra*, IX.
Costs recoverable see *infra*, VIII, I.

90. Goldsmith v. Smith, 21 Fed. 611.

91. *Colorado.*— Roche v. Campbell, 4 Colo. 254.
Connecticut.—Hillhouse v. Mix, 1 Root 246, 1 Am. Dec. 41.
Illinois.— Kleiner v. Bowen, 166 Ill. 537, 46 N. E. 1087; Pardee v. Lindley, 31 Ill. 174, 83 Am. Dec. 219.
Kansas.— Everett v. Lusk, 19 Kan. 195.
Kentucky.—Dickerson v. Tabot, 14 B. Mon. 60; Scott v. Bealle, 1 A. K. Marsh. 69; Bowles v. Sharp, 4 Bibb 550; Davis v. Whitesides, 1 Bibb 510.
Maryland.— Magruder v. Peter, 4 Gill & J. 323; Carroll v. Norwood, 5 Harr. & J. 155.
Michigan.— Moran v. Lezotte, 54 Mich. 83, 19 N. W. 757.
New York.— Kellogg v. Kellogg, 6 Barb. 116; Vrooman v. Weed, 2 Barb. 330; Barley v. Roosa, 13 N. Y. Suppl. 209, 20 N. Y. Civ. Proc. 113; Holmes v. Seely, 17 Wend. 75; Bear v. Snyder, 11 Wend. 592.
North Carolina.— Lenoir v. South, 32 N. C. 237; Huggins v. Ketchum, 20 N. C. 550; Bowden v. Evans, 3 N. C. 222.
Ohio.— Treon v. Emerick, 6 Ohio 391.
Vermont.— Chapin v. Scott, N. Chipm. 33.
United States.— McArthur v. Porter, 6 Pet. 205, 8 L. ed. 371; Oscamp v. Crystal River Min. Co., 58 Fed. 293, 7 C. C. A. 233; Morgan v. Eggers, 20 Fed. 626; Patton v. Cooper, 18 Fed. Cas. No. 10,834, Brunn. Col. Cas. 193, Cooke (Tenn.) 133.
England.— Denn v. Purivs, 1 Burr. 326; Doe v. Lewis, 2 D. & L. 667, 14 L. J. Exch. 198, 13 M. & W. 241; Alcock v. Wilshaw, 2 E. & E. 633, 6 Jur. N. S. 628, 29 L. J. Q. B. 143, 2 L. T. Rep. N. S. 55, 105 E. C. L. 633; Doe v. Wilson, 2 Stark. 477, 20 Rev. Rep. 724, 3 E. C. L. 495. See also Rowe v. Power, 2 B. & P. N. R. 2; Doe v. King, 6 Exch. 791, 20 L. J. Exch. 301.
See 17 Cent. Dig. tit. "Ejectment," § 373.
Amendment of claim may be necessary in order to recover less. Deininger v. McConnel, 41 Ill. 227. But see *contra*, Vrooman v. Weed, 2 Barb. (N. Y.) 330; Barley v. Roosa, 13 N. Y. Suppl. 209, 20 N. Y. Civ. Proc. 113.
Defendant cannot complain that judgment is given plaintiff for less land than he is entitled to. Crawford v. Aherns, 103 Mo. 88, 15 S. W. 341.
If there are several demises of separate tracts laid in different counts judgment may be taken on the count proved. Fite v. Doe, 1 Blackf. (Ind.) 127. See also Bronson v.

claimed;[92] or he may obtain judgment for a smaller undivided part than that for which he declares.[93]

e. Conditional Judgment.[94] It is determined that a judgment may be rendered in ejectment subject to its being released and vacated upon the performance of certain conditions;[95] or that it may be adjudged that the title shall vest upon the doing of specified acts.[96]

d. As to Co-Plaintiffs or Co-Defendants. The rule is that one of several joint plaintiffs cannot recover alone.[97] But recovery may be had by or against

Paynter, 20 N. C. 527; Godfrey *v.* Cartwright, 15 N. C. 487.

Rule applies as well to the quantity of the interest as to the extent of the premises. Bear *v.* Snyder, 11 Wend. (N. Y.) 592.

Where plaintiff proves title to possession of any part of the premises sued for he must recover, and the court will not go into the question of boundary in order to determine the precise quantity of land to which he is entitled. Doe *v.* Curtis, (Mich. T.) 4 Vict.; McNab *v.* Stewart, 15 U. C. C. P. 189; Doe *v.* Ramsay, 7 U. C. Q. B. 446. But see McBride *v.* Lee, 16 U. C. C. P. 315.

92. *Alabama.*— Jones *v.* Walker, 47 Ala. 175; Baker *v.* Chastang, 18 Ala. 417.

Illinois.— Almond *v.* Bonnell, 76 Ill. 536.

Indiana.— Doe *v.* Abernathy, 7 Blackf. 442.

Kentucky.— Ward *v.* Harrison, 3 Bibb 304.

Maryland.— Matthews *v.* Turner, 64 Md. 109, 21 Atl. 224. *Compare* Benson *v.* Musseter, 7 Harr. & J. 208; Carroll *v.* Norwood, 5 Harr. & J. 155.

Missouri.— Gray *v.* Givens, 26 Mo. 291.

New York.— Vrooman *v.* Weed, 2 Barb. 330; Ryerss *v.* Wheeler, 25 Wend. 434, 37 Am. Dec. 243; Van Alstyne *v.* Spraker, 13 Wend. 578; Harrison *v.* Stevens, 12 Wend. 170. See also Jackson *v.* Van Bergen, 1 Johns. Cas. 101.

Virginia.— Callis *v.* Kemp, 11 Gratt. 78.

England.— Doe *v.* Wippel, 1 Esp. 360.

See 17 Cent. Dig. tit. "Ejectment," § 373.

Contra.— Todd *v.* Kauffman, 19 D. C. 304 (but qualified as to recovery of lesser undivided interest than that claimed); Hardin *v.* Kirk, 49 Ill. 153, 95 Am. Dec. 581; Clark *v.* Thompson, 47 Ill. 25, 95 Am. Dec. 457; Murphy *v.* Orr, 32 Ill. 489; Rupert *v.* Mark, 15 Ill. 540; Riehl *v.* Bingenheimer, 28 Wis. 84; Bresee *v.* Stiles, 22 Wis. 120; Allie *v.* Schmitz, 17 Wis. 169.

Amendment is necessary to recover undivided part under claim for the whole. Smith *v.* Long, 3 N. Y. Civ. Proc. 396, 12 Abb. N. Cas. (N. Y.) 113. But see *supra*, note 91.

Plaintiff was held entitled to recover two undivided third parts. It was urged that plaintiff being held so entitled the *postea* should be awarded to him generally, but held not. Lyster *v.* Ramage, 26 U. C. Q. B. 233. See McBride *v.* Lee, 16 U. C. C. P. 315; McNab *v.* Stewart, 15 U. C. C. P. 189. But where defendant defended for the whole, giving no notice of defense as tenant in common, under the Ejectment Act, and the evidence showed that she was entitled to an undivided moiety, it was held that defendant not having limited her defense the plaintiff was entitled to the *postea*. Leech *v.* Leech, 24 U. C. Q. B. 321.

Where entire premises are demanded and homestead interest is found to exist there can be no judgment for the excess over the homestead. That interest can only be severed in the statutory method. Canfield *v.* Hard, 58 Vt. 217, 2 Atl. 136.

93. *California.*— Halsey *v.* Martin, 22 Cal. 645.

District of Columbia.— Todd *v.* Kauffman, 19 D. C. 304.

Kentucky.— Gist *v.* Robinet, 3 Bibb 2; Todd *v.* McGee, 2 Bibb 350.

New York.— Truax *v.* Thorn, 2 Barb. 156; Van Alstyne *v.* Spraker, 13 Wend. 578. See also Hinman *v.* Booth, 21 Wend. 267.

Vermont.— Casey *v.* Casey, 35 Vt. 518.

See 17 Cent. Dig. tit. "Ejectment," § 373.

Contra.— Lyon *v.* Kain, 36 Ill. 362; Allie *v.* Schmitz, 17 Wis. 169.

If a certain fraction is claimed a lesser fraction may be recovered, as where an undivided ninth part is claimed and title to one-eighteenth part is proved. Bowden *v.* Evans, 3 N. C. 222.

If plaintiff claims an undivided share of a specified quantity of acres he may recover such share in a less quantity. But if he claims an undivided half, he cannot recover an undivided third, fourth, or the whole, nor if he claim the whole can he recover an undivided half, third, or fourth of the premises. Holmes *v.* Seely, 17 Wend. (N. Y.) 75.

94. Conditional judgment in equitable ejectment see *infra*, XI, I.

95. Stevenson *v.* Scott, 188 Pa. St. 234, 41 Atl. 533. See also Knox *v.* Easton, 38 Ala. 345.

Expiration of time for performance.— But where the condition allowed in effect a redemption from the execution sale under which plaintiff claimed, and the time for redemption had expired, it was decided that the judgment could not be sustained. Coolbough *v.* Roemer, 30 Minn. 424, 15 N. W. 869.

96. Chouteau Land, etc., Co. *v.* Chrisman, 172 Mo. 610, 72 S. W. 1062. See also Ward *v.* Matthews, 73 Cal. 13, 14 Pac. 604.

97. Oates *v.* Beckworth, 112 Ala. 356, 20 So. 399.

But where coheirs sue, and one of them is barred and the other is not, judgment may be rendered against the one barred and in favor of the one not barred. Pendergrast *v.* Gullatt, 10 Ga. 218.

If the jury find in favor of plaintiffs named in one count, but fail to find as to other plaintiffs, these may confess in favor of defend-

one or more co-defendants.[98] And judgment may be rendered against that one only of the co-defendants who is in possession.[99]

e. **As to Cotenant or Tenant in Common.** A tenant in common may recover to the extent of his interest and have judgment to be let into possession with defendant to the extent of the interest shown.[1] And where some of a number of tenants in common bring action against one in possession without right, they can have judgment only for their respective shares.[2]

f. **Growing Crops.** Since growing crops, as between the successful plaintiff and the evicted defendant, belong to the realty,[3] plaintiff who recovers the land is entitled thereto.[4] He is also entitled to the crops growing or cut,[5] or partly cut and partly uncut, where they were planted after the action was commenced;[6] and crops planted after judgment and growing when plaintiff takes possession after affirmance of the judgment belong to him.[7] The recovery of crops has, however, been held to rest upon the fact whether or not rent for that year has been recovered as mesne profits. If it has been recovered the crops belong to the tenant, if not, plaintiff is entitled to the growing crops as against defendant.[8]

4. **Construction, Operation, and Effect.**[9] A judgment in ejectment is a recovery of possession without prejudice to the title.[10] A judgment for plaintiff raises the presumption that defendant was shown to be in possession at the time

ants, and thereupon judgment may be rendered in their favor against the latter plaintiffs. Strader *v.* Goff, 6 W. Va. 257.

So if one plaintiff holds the legal title in his own right and as trustee of his coplaintiffs he is entitled to recover the entire property. Adler *v.* Sewell, 29 Ind. 598.

98. Gordon *v.* Sizer, 39 Miss. 805; Humphries *v.* Huffman, 33 Ohio St. 395. See also Marr *v.* McIntosh, 21 Mo. 541.

Where defendant's lessee, the actual occupant, has not been joined, as required by statute, the court cannot so far adjudicate his rights as to give plaintiff judgment subject to defendant's easement. Roby *v.* New York Cent., etc., R. Co., 142 N. Y. 176, 36 N. E. 1053 [*reversing* 65 Hun 532, 20 N. Y. Suppl. 551].

99. Burke *v.* Table Mountain Water Co., 12 Cal. 403.

1. Lenoir *v.* Valley River Min. Co., 113 N. C. 513, 18 S. E. 73; Allen *v.* Salinger, 103 N. C. 14, 8 S. E. 913. See also Gatton *v.* Tolley, 22 Kan. 678; Overcash *v.* Kitchie, 89 N. C. 384; Holdfast *v.* Shepard, 28 N. C. 361; Evarts *v.* Dunton, Brayt. (Vt.) 70.

A tenant in common can only recover against a stranger to the extent of his title. So held in Kirk *v.* Bowling, 20 Nebr. 260, 29 N. W. 928. See also Johnson *v.* Hardy, 43 Nebr. 368, 61 N. W. 624, 47 Am. St. Rep. 765 [*overruling* Crook *v.* Vandervoort, 13 Nebr. 505, 14 N. W. 470].

In a suit by one tenant in common against his cotenant for an undivided moiety plaintiff may be awarded one moiety by default, and defendant be entitled to judgment as to the other moiety. Jackson *v.* Lyons, 18 Johns. (N. Y.) 398.

2. Wilson *v.* Chandler, 60 Ga. 129.

If tenants in common demand an entirety and prove a right to a moiety they will recover according to the right which they prove and the judgment will be to put them into possession without putting out him who is rightfully in in virtue of his interest. Hillhouse *v.* Mix, 1 Root (Conn.) 246, 1 Am. Dec. 41; Oscamp *v.* Crystal River Min. Co., 58 Fed. 293, 7 C. C. A. 233.

3. Huerstal *v.* Muir, 64 Cal. 450, 2 Pac. 33; McGinniss *v.* Fernandez, 135 Ill. 69, 26 N. E. 109, 25 Am. St. Rep. 347; Altes *v.* Hinckler, 36 Ill. 275, 85 Am. Dec. 407; Huston *v.* Skaggs, 7 Ky. L. Rep. 592.

4. Davis *v.* Callahan, 66 Mo. App. 168. See also Carlisle *v.* Killebrew, 89 Ala. 329, 6 So. 756, 6 L. R. A. 617.

Defendant must make proof of fact that he has crops planted and growing upon the land in order to obtain the benefit of retaining the lands, where there is a verdict in favor of plaintiff, and when the case is tried upon an agreed statement of facts which contains no recital as to growing crops the suggestion thereof comes too late if made just before judgment is rendered. Burrows *v.* Pickens, 129 Ala. 648, 29 So. 694.

5. McCaslin *v.* State, 99 Ind. 428.

6. McLean *v.* Bovee, 24 Wis. 295, 1 Am. Rep. 185.

7. Cox *v.* Hamilton, 69 N. C. 30.

8. Craig *v.* Watson, 68 Ga. 114; Gardner *v.* Kersey, 39 Ga. 664, 99 Am. Dec. 484.

9. **Conclusiveness of judgment** in ejectment see Judgments.

10. *California.*— Mahoney *v.* Middleton, 41 Cal. 41, also holding that it neither directly nor indirectly transfers the title.

Illinois.— Coleman *v.* Doe, 3 Ill. 251.

New York.— Jackson *v.* Wilson, 3 Johns. Cas. 295, judgment by default.

Rhode Island.— Barber *v.* James, 21 R. I. 279, 43 Atl. 101, holding that if the declaration does not set forth plaintiff's title, a judgment for him determines no question of title but merely gives him possession.

Virginia.— Chapman *v.* Armistead, 4 Munf. 382.

England.— Doe *v.* Horde, Cowp. 689.

See 17 Cent. Dig. tit. "Ejectment," § 379.

A judgment against an agent of the government negatives all presumptions of privity

of the commencement of the action;[11] relates back, with relation to the trespass, to the day of the demise;[12] and if it awards possession of the premises impliedly adjudges that plaintiff is the owner in fee thereof.[13] A judgment may also be in the nature of a decree for specific performance and pass the title as effectually as if done by the mutual consent of the parties.[14]

F. Execution and Enforcement of Judgment[15] — **1. Right of Entry, or to Possession and Writ Therefor — a. In General.** A successful claimant has a right of entry independent of process, even though the case is within the occupant laws or possession has been given under a writ of habere facias and afterward the premises are restored to defendant.[16] A writ of possession is also unnecessary where defendant quits possession or has had only technical possession;[17] nor will the writ be issued where defendant has disclaimed title;[18] or where plaintiff who recovers has accepted defendant for tenant.[19] But the fact that defendant has a statutory right to a new trial does not militate against plaintiff's right to such a writ.[20] The court may, however, refuse to put plaintiff in possession pending appeal, where defendant has made improvements for which he might have a claim.[21] And the right to such a writ may be kept in abeyance and made conditional by stipulation between the parties;[22] or the issuance of the writ may depend upon the doing of certain acts as prerequisites.[23] Execution may also issue after the death of plaintiff[24] or of his lessor,[25] or after the death of defendant;

of contract in the nature of an implied lease between the owner and the government. Langford *v.* U. S., 12 Ct. Cl. 338.

A judgment in the singular on two demises, one valid the other void, will be considered as on the valid demise. Cox *v.* Lacey, 3 Litt. (Ky.) 334.

Unless the possession be changed by certiorari, or execution of writ of possession, the judgment does not change the possession, nor preclude relying on the statute of limitations. Batterton *v.* Chiles, 12 B. Mon. (Ky.) 348, 54 Am. Dec. 539.

11. Tubbs *v.* Ghirardelli, 45 Cal. 231.

12. Foster *v.* Foster, 10 U. C. Q. B. 607.

13. Bell *v.* Peterson, 105 Wis. 607, 81 N. W. 279.

A judgment that defendants had no right of possession is equivalent to a judgment that they had no title, although it does not state the character of the title. Mace *v.* Mace, 24 N. Y. App. Div. 291, 48 N. Y. Suppl. 831.

14. Smith *v.* Frankfort, etc., R. Co., 72 S. W. 1088, 24 Ky. L. Rep. 2040.

15. **Executions** generally see Executions.

16. Tribble *v.* Frame, 5 Litt. (Ky.) 187.

After verdict and judgment, where the landlord defends, execution may be issued against him without any further order of the court. Doe *v.* Bennett, 4 B. & C. 897, 7 D. & R. 61, 10 E. C. L. 849.

17. Craft *v.* Yeaney, 66 Pa. St. 210.

Where defendant, a tenant in common, gives a deed of the premises to plaintiff it is such an ouster as to terminate the tenancy and an actual execution of the writ becomes unnecessary. Vasquez *v.* Ewing, 24 Mo. 31, 66 Am. Dec. 694.

18. Jordan *v.* Burke, 4 L. T. N. S. (Pa.) 123.

But on defendant's disclaimer of part of the premises, plaintiff's lessor may take out a writ of possession for the part disclaimed before trial as to the rest. Squires *v.* Riggs, 3 N. C. 150.

19. Fisher *v.* Johnston, 25 U. C. Q. B. 616.

20. Dawson *v.* Chippewa Cir. Judge, 127 Mich. 328, 86 N. W. 801.

21. Strabala *v.* Lewis, 80 Iowa 510, 45 N. W. 871.

Right affected by improvements or crops. — Where the law so provides, claimant in possession who has been adjudged not to be the owner may, in an action to recover for the improvements, retain possession until the latter proceeding is determined. Webster City, etc., R. Co. *v.* Newson, 70 Iowa 355, 30 N. W. 738. And although the successful claimant, under the occupying claimant law, is entitled to a writ of possession where he pays into court the amount reported against him, yet defendant cannot be evicted until he has had an opportunity to gather growing crops, where improvements were made by himself. Frame *v.* Smith, 5 Litt. (Ky.) 305. If defendant, after commissioners are appointed under the occupant laws, fails to cause them to act and report, plaintiff may have an order for a writ of possession. Bodley *v.* Hord, 7 T. B. Mon. (Ky.) 321.

22. Gillespie *v.* Rout, 39 Ill. 247.

On non-performance of certain stipulations execution may properly issue. Doe *v.* Roe, 5 N. Brunsw. 511.

23. Howard *v.* Murray, 203 Pa. St. 464, 53 Atl. 342, holding that if plaintiffs are entitled to possession under a deed conditioned to make certain payments to designated persons no habere facias will issue until plaintiffs pay into court to those legally entitled to receive the same the amount contracted to be paid.

24. Weaver *v.* Wible, 72 Pa. St. 469.

Where one of two plaintiffs dies after judgment, execution may issue without scire facias, but must be in joint names of both plaintiffs. Howell *v.* Eldridge, 21 Wend. (N. Y.) 678.

25. Penn *v.* Klyne, 19 Fed. Cas. No. 10,936, Pet. C. C. 446.

but there should be a revivor of the judgment[26] or a suggestion of the death.[27] A purchaser may also be authorized to control the judgment and revive it in the name of the executor of plaintiff, for the purpose of gaining possession.[28] Again, a transferee of plaintiff, after judgment, may become invested with the legal right of entry and take possession.[29] If plaintiff has recovered his term in the undivided share of one tenant in common, the lessors must at their peril take out a writ of possession only for the land of which they have title.[30]

b. Notice or Taxation of Costs. It is not a prerequisite to the issuance of a writ of possession that a notice thereof should be filed or that costs be taxed, where the statute as to costs is permissive and implies a right to take separate writs.[31]

c. Alias Writ. Although it is determined that after execution, by putting plaintiff in possession, and return of a writ of possession, an alias writ is not generally issuable,[32] especially where plaintiff is turned out by a stranger;[33] nevertheless it has been held that such an alias writ may issue in certain cases.[34] And on the hearing for the issuance of such alias writ, and as bearing on the question whether

Where defendants are part of heirs of a lessor the proceedings under judgment and execution should be modified by not putting defendant out of possession but by putting in the other heirs with them. Wilson *v.* Hall, 35 N. C. 489.

26. State *v.* Michaels, 8 Blackf. (Ind.) 436.

27. Where without a suggestion of the death of one of the terre-tenants the writ stated that the judgment was against two defendants and proceeded against the other terre-tenant only, advantage may be taken of the defect. Nesbit *v.* Manro, 11 Gill & J. (Md.) 261.

28. Ball *v.* Lively, 4 Dana (Ky.) 369.

29. Tribble *v.* Frame, 5 Litt. (Ky.) 187.

30. Godfrey *v.* Cartwright, 15 N. C. 487.

But the lessor ought not to take possession under a judgment against the casual ejector while an issue with one of the tenants in joint possession is undetermined, even though there has been a default of appearance by the other tenant. Doe *v.* Esterbrooks, 3 N. Brunsw. 119.

31. Dawson *v.* Chippewa Cir. Judge, 127 Mich. 328, 86 N. W. 801. But see Beasley *v.* Chapman, 6 L. R. Ir. 393.

Motion for leave to issue execution on a judgment of reëntry need only be served on defendant in the action, under N. Y. Code Civ. Proc. § 1378. Shultes *v.* Sickles, 70 Hun (N. Y.) 479, 24 N. Y. Suppl. 145.

32. Rousset *v.* Reay, (Cal. 1893) 31 Pac. 900, 32 Pac. 171; Gresham *v.* Thum, 3 Metc. (Ky.) 287, 77 Am. Dec. 174; Hinton *v.* McNeil, 5 Ohio 509, 24 Am. Dec. 315. See also Weatherhead *v.* Cunningham, 4 Dana (Ky.) 78; Fowler *v.* Currie, 2 Dana (Ky.) 52, 26 Am. Dec. 436; Dent *v.* Simmons, 7 J. J. Marsh. (Ky.) 42.

But to prevent the issuance of an alias writ the delivery of possession must be effectual and not merely formal, and if plaintiff be put into possession under circumstances plainly intimating that such possession is but formal and momentary, and he is accordingly ousted again, such putting into possession is insufficient and an alias writ may issue immediately. Gresham *v.* Thum, 3 Metc. (Ky.) 287, 77 Am. Dec. 174.

Where lapse of time after reëntry is sufficient to create title by adverse possession, motion for alias writ should not be entertained. Rousset *v.* Reay, (Cal. 1893) 31 Pac. 900, 32 Pac. 171.

33. U. S. *v.* Slaymaker, 27 Fed. Cas. No. 16,313, 4 Wash. 169.

One who is not a party to the suit, although the writ of possession is issued against him, and who reëenters may show on a motion for an alias writ that he was not a member of defendant's family, and that his possession was open and notorious, and that he was **owner of the premises** and was not a party to the ejectment suit. Rousset *v.* Reay, (Cal. 1893) 31 Pac. 900, 32 Pac. 171.

34. As where defendant again enters by force and dispossesses plaintiff (Griffeth *v.* Dobson, 3 Penr. & W. (Pa.) 228; U. S. *v.* Slaymaker, 27 Fed. Cas. No. 16,313, 4 Wash. 169. See also Doe *v.* Roe, 2 Dowl. P. C. N. S. 407, 7 Jur. 352; Stacpole *v.* Walsh, L. R. 6 Ir. 444. But see Doe *v.* Roe, 1 Taunt. 55; Wilson *v.* Chanton, 6 L. T. Rep. N. S. 255, 10 Wkly. Rep. 465); where, although the return-day of the writ has not arrived, plaintiff is dispossessed by a person claiming under defendant's title (Jackson *v.* Hawley, 11 Wend. (N. Y.) 182; Van Rensselaer *v.* Witbeck, 2 Lans. (N. Y.) 498); where the person against whom the writ is to run is guilty of contempt (Rousset *v.* Reay, (Cal. 1893) 31 Pac. 900, 32 Pac. 171); where, although the title under which defendant claims has been acquired by him since judgment rendered, the statute permits such writs to be **awarded within a limited time** (Philadelphia *v.* Hood, 3 Pa. Super. Ct. 373); and where there is not a compliance with a mandatory statutory requirement for service a certain number of days before the return of a rule to show cause (Chambers *v.* Jones, 1 Pennew. (Del.) 209, 39 Atl. 1098).

Notice to party to whom alias writ is directed should be given. White *v.* Robinson, 3 Pennyp. (Pa.) 222.

Grounds of restitution see *infra*, VIII, H, 2.

defendant had reëntered into possession of any of plaintiff's land as described in the judgment, evidence of a resurvey, made after the trial by the surveyor who testified on the trial, is not improper.[35]

2. FORM AND REQUISITES.[36] The writ should pursue the judgment,[37] and if the land is designated and described so that upon the face of the writ it is possible of identification by the sheriff, it is not void for uncertainty;[38] but if the writ[39] or both the writ and judgment are insufficient to show the location and extent of the premises it cannot be executed.[40] And the writ should be issued in the name of plaintiff in the original judgment even after conveyance to a third person of the land recovered.[41]

3. TIME OF ISSUANCE. A writ of possession may issue forthwith,[42] or within a year and a day after judgment,[43] but not thereafter,[44] although this rule does not apply when abrogated by statute.[45] But plaintiff cannot have a writ after the expiration of the demise laid.[46]

4. PERSONS SUBJECT TO OUSTER. It is the duty of the sheriff to oust the person against whom the judgment was rendered on which the writ of possession was issued;[47] and it may be broadly stated that such officer is bound to put plaintiff in full, actual, and complete possession, removing defendant as well as all other persons from the premises.[48] This rule includes persons claiming under defendant,[49]

35. Dutra *v.* Pereira, 135 Cal. 320, 67 Pac. 281.

36. **Forms of habere facias possessionem** see Adams Ejectm. 364 *et seq.*

Forms of writ of possession see Adams Ejectm. 497 *et seq.*

37. Williams *v.* Kelso, 7 La. 406.

Execution is irregular when issued on a judgment for an undivided interest but directs the sheriff to put plaintiff in possession of the whole premises. Skinner *v.* Hannan, 81 Hun (N. Y.) 376, 30 N. Y. Suppl. 987. It is also irregular to issue a joint habere facias upon separate judgment. Lowry *v.* Jenkins, 3 Bibb (Ky.) 314.

38. Lawrence *v.* Davidson, 44 Cal. 177.

Quantity of the land is not an essential part of the description in the writ where it is otherwise sufficiently described. Griffeth *v.* Dobson, 3 Penr. & W. (Pa.) 228.

39. Fenwick *v.* Floyd, 1 Harr. & G. (Md.) 172.

40. Williams *v.* Kelso, 7 La. 406.

So if it is impossible, taking the verdict as a whole, to ascertain what land is covered, such verdict finding for a portion only of the land, no writ of possession should issue. Hicks *v.* Brinson, 100 Ga. 595, 28 S. E. 380.

41. Penn *v.* Klyne, 19 Fed. Cas. No. 10,936, Pet. C. C. 446.

42. Bourguignon *v.* Boudousquie, 7 Mart. (La.) 156, so held even though the question of damages is left open.

43. Berry *v.* Triplett, 2 A. K. Marsh. (Ky.) 61.

44. Hess *v.* Sims, 1 Yerg. (Tenn.) 143, holding that if issued thereafter it is voidable and may be quashed.

In some jurisdictions, however, it has been held that no length of time can deprive a party of the right to issue a writ of possession. Riddle *v.* Ratliff, 8 La. Ann. 106. See also Shultes *v.* Sickles, 70 Hun (N. Y.) 479, 24 N. Y. Suppl. 145 [*affirmed* in 147 N. Y. 704, 41 N. E. 574]. But *compare* Van Rensselaer *v.* Wright, 56 Hun (N. Y.) 39, 8 N. Y. Suppl. 885; Van Rensselaer *v.* Shafer, 8 N. Y. Suppl. 888.

45. Bowar *v.* Chicago, West Div. R. Co., 136 Ill. 101, 26 N. E. 702, 12 L. R. A. 81 [*distinguishing* Oetgen *v.* Ross, 47 Ill. 142, 95 Am. Dec. 468]. See also Wilson *v.* School Trustees, 138 Ill. 285, 27 N. E. 1103.

46. Smith *v.* Hornback, 3 A. K. Marsh. (Ky.) 392; Robertson *v.* Morgan, 2 Bibb (Ky.) 148.

Judgment must be enforced within the period laid in the demise or right of entry thereunder is lost. Jackson *v.* Haviland, 13 Johns. (N. Y.) 229.

47. State *v.* Staed, 143 Mo. 248, 45 S. W. 50 [*reversing* 64 Mo. App. 453].

48. Union Tp. *v.* Bayliss, 40 N. J. L. 60; *Ex p.* Black, 2 Bailey (S. C.) 8. See also Hall *v.* Dexter, 11 Fed. Cas. No. 5,929, 3 Sawy. 434.

Defendant cannot restrain execution of the judgment by attorning to the holder of the paramount legal title and receiving possession from him. Harper *v.* Hill, 35 Miss. 63.

Persons in possession will be turned out where they were served with notice as tenants in possession, but refused to enter into the consent rule and judgment was entered as to them against the casual ejector, with stay of execution, but execution is thereafter returned. Hancock *v.* Fen, 24 N. J. L. 544.

49. *California.*— Huerstal *v.* Muir, 64 Cal. 450, 2 Pac. 33; Mayne *v.* Jones, 34 Cal. 483.

Kentucky.— Long *v.* Morton, 2 A. K. Marsh. 39, although not made a party.

Missouri.— State *v.* Harrington, 41 Mo. App. 439.

New York.—Jackson *v.* Tuttle, 9 Cow. 233, stating also when the rule should be otherwise.

Pennsylvania.— Hessel *v.* Johnson, 124 Pa. St. 233, 16 Atl. 855.

See 17 Cent. Dig. tit. "Ejectment," § 390 *et seq.*

since the commencement of the action;[50] all who enter pending the action,[51] although such persons came in under a third party, when it is not shown that the latter entered before suit brought, or under an adverse title;[52] all who have acquired possession subsequent to filing of the *lis pendens*, or who had actual notice of the pendency of the action;[53] the landlord of defendant tenant;[54] persons claiming under the landlord of defendant;[55] defendant's wife;[56] an owner of an undivided interest, notwithstanding another undivided interest is owned by his minor son;[57] and a third person claiming to be in possession in his own right.[58] But the rule does not generally include strangers to the proceeding,[59] unless they are in possession by collusion;[60] one claiming under such stranger;[61] one as to whom the suit was dismissed;[62] one whose possession is distinct from that for which the action is brought;[63] or one claiming under a paramount[64] or adverse paramount title,[65] without a day in court.[66] A recovery against one tenant in common alone authorizes only a divestiture of his possession and not that of those not sued;[67] nor can a writ of restitution against such tenant be served upon the grantee of defendant's cotenant in a deed executed pending litigation;[68] nor can one of two persons in joint possession be expelled under a writ of possession in an action by a stranger.[69] The sheriff is not clothed with any judicial power to

One in possession under a mortgage foreclosure against defendant cannot be ousted by writ of possession in defendant's favor. Huntington *v.* Forkson, 7 Hill (N. Y.) 195.

50. Fogarty *v.* Sparks, 22 Cal. 142. See also cases cited *supra*, note 49.

One is in privity with and presumed to hold under defendant where he enters the premises pending ejectment, and after recovery in a proceeding for writ of possession against him an answer alleging that he holds under an independent title is insufficient. Ritchie *v.* Johnson, 50 Ark. 551, 8 S. W. 942, 7 Am. St. Rep. 118.

51. Wallen *v.* Huff, 3 Sneed (Tenn.) 82, 65 Am. Dec. 49; Hickman *v.* Dale, 7 Yerg. (Tenn.) 149.

52. Leese *v.* Clark, 29 Cal. 664. See also Webster *v.* Filley, 43 Kan. 475, 23 Pac. 1080.

53. Fogarty *v.* Sparks, 22 Cal. 142.

One cannot rely upon failure to file lis pendens where he obtains possession after entry of final judgment, as the suit was merged in the judgment which became notice to all the world before he obtained possession. Wesley *v.* Tindal, 81 Fed. 612.

54. Smith *v.* Gayle, 58 Ala. 600 (although not made a defendant); Rogers *v.* Bell, 53 Ga. 94 (although not a formal party). But *compare* Oetgen *v.* Ross, 47 Ill. 142, 95 Am. Dec. 468.

Where landlord defends and pleads for his tenant habere facias rightfully issues against tenant in possession. Grubbs *v.* Pickett, 1 A. K. Marsh. (Ky.) 253.

55. Long *v.* Neville, 29 Cal. 131, even without notice of suit.

56. Huerstal *v.* Muir, 64 Cal. 450, 2 Pac. 33. See also Johnson *v.* Fullerton, 44 Pa. St. 466.

57. State *v.* Staed, 143 Mo. 248, 45 S. W. 50 [*reversing* 64 Mo. App. 453].

58. Kelly *v.* Northrop, 159 Pa. St. 537, 28 Atl. 364.

59. Mayo *v.* Sprout, 45 Cal. 99; Ford *v.* Doyle, 37 Cal. 346; Rogers *v.* Parish, 35 Cal. 127; Fogarty *v.* Sparks, 22 Cal. 142; Kercheval *v.* Ambler, 4 Dana (Ky.) 166 (rule qualified in this case); Kercheval *v.* Ambler, 7 J. J. Marsh. (Ky.) 626, 23 Am. Dec. 446; Georges *v.* Hufschmidt, 44 Mo. 179; Garrison *v.* Savignac, 25 Mo. 47, 69 Am. Dec. 448; Oakes *v.* Aldridge, 46 Mo. App. 11; *Ex p.* Reynolds, 1 Cai. (N. Y.) 500.

Execution may be enforced against a stranger who also claims to be in possession as a state officer. Wesley *v.* Tindal, 81 Fed. 612.

If two ejectments, by different plaintiffs with different titles, are brought against the same tenants, and one plaintiff recovers and is put in possession, and afterward the other recovers, the latter cannot turn out the former by his habere facias but must try his right in a new suit with him. Jones *v.* Chiles, 2 Dana (Ky.) 25.

Where a writ is actually, although illegally, issued to strangers after a writ had been issued to plaintiff, an application for a rehearing filed, and a supersedeas bond executed to plaintiff, they are liable to plaintiff on denial of their petition for rehearing, as in a common-law obligation, for all injuries sustained by issuance of the writ. Leech *v.* Karthaus, 135 Ala. 396, 33 So. 342.

60. Wetherbee *v.* Dunn, 36 Cal. 147, 95 Am. Dec. 166.

61. Krepps *v.* Mitchell, 156 Pa. St. 320, 27 Atl. 161, person asked to intervene but was refused.

62. McLeran *v.* McNamara, 60 Cal. 610.

63. Howard *v.* Kennedy, 4 Ala. 592, 39 Am. Dec. 307.

64. Atkison *v.* Dixon, 89 Mo. 464, 1 S. W. 13. See also Raw *v.* Stevenson, 24 Pittsb. Leg. J. (Pa.) 145.

65. Smith *v.* Pretty, 22 Wis. 655.

66. Hessel *v.* Fritz, 124 Pa. St. 229, 16 Atl. 853.

67. Breeding *v.* Taylor, 6 B. Mon. (Ky.) 62.

68. Wattson *v.* Dowling, 26 Cal. 124.

69. Stokes *v.* Morrow, 54 Ga. 597.

pass upon the right of parties, other than defendants, who are found upon the premises.[70]

5. TIME OF EXECUTION. It has been held that a writ of possession cannot be executed after the term as laid in the declaration [71] or after the return-day.[72]

6. MANNER OF EXECUTION. The court will not order the sheriff to execute a writ of possession in any particular manner,[73] although the plaintiff should point out the premises to the officer,[74] who should deliver possession according to the directions of the former who takes possession at his peril.[75] If, however, more land is delivered than is covered by the judgment, the delivery is good to the extent of the recovery.[76] Another rule is that there must be some sufficient dispossession or a notice given to yield possession.[77] And plaintiff may be put in possession, even though not all of defendant's goods [78] or not any of his personal property is removed;[79] or even though from the character and situation of the premises it is physically impossible to make an actual entry;[80] and the officer is not prevented from delivering the actual possession of land under water.[81] But if the interest of the lessors is not tangible or visible, the delivery of possession by the sheriff will be impossible.[82] If an undivided part is recovered, plaintiff is to be put into possession thereof with defendant.[83] Again, if two recoveries are had for the same land, one against a certain party and the other in favor of the latter against another, the sheriff, holding both writs, should execute them simultaneously, leaving the first party in possession against both.[84]

7. OFFICER'S RETURN. Defendant cannot call upon the marshal to return a writ of possession, although plaintiff may do so.[85] It has been held that the return is conclusive, as between the parties, as to the land held by defendant when the

70. Hall *v.* Dexter, 11 Fed. Cas. No. 5,929, 3 Sawy. 434. See also Monongahela Valley Camp Meeting Assoc. *v.* Patterson, 96 Pa. St. 469.

If he finds other persons in possession than those named, and there is a reasonable doubt whether or not he has a right to remove them, he may demand indemnity. Long *v.* Neville, 36 Cal. 455, 95 Am. Dec. 199. See also Hall *v.* Dexter, 11 Fed. Cas. No. 5,929, 3 Sawy. 434.

He is only authorized where the statute so limits him, to dispossess defendant and those claiming under him. He can receive no counter affidavits making any issue for subsequent trial. Powell *v.* Lawson, 49 Ga. 290.

71. Chambers *v.* Pleak, 6 Dana (Ky.) 426, 32 Am. Dec. 78.

72. U. S. *v.* Slaymaker, 27 Fed. Cas. No. 16,313, 4 Wash. 169. But see Witbeck *v.* Van Rensselaer, 2 Hun (N. Y.) 55 [*affirmed* in 64 N. Y. 27], holding that it may be executed thereafter, the command to return the writ being merely directory, and if possession is taken it will be presumed that the officer commenced to execute such writ before the return-day.

73. Bowie *v.* Brahe, 4 Duer (N. Y.) 676, 2 Abb. Pr. (N. Y.) 161.

74. Den *v.* O'Hanlin, 18 N. J. L. 127.

75. Simpson *v.* Shannon, 5 Litt. (Ky.) 322.

Inquiry as to subsequently acquired title.— It is decided that where plaintiff has recovered judgment and is entitled to receive possession, he is not bound to inquire as to a subsequently acquired title under which defendant claims to hold. Kercheval *v.* Ambler, 4 Dana (Ky.) 166.

76. Ball *v.* Doe, 1 Dana (Ky.) 60.

If the declaration, verdict, and judgment are general plaintiff may at his peril take possession under his writ to any extent he chooses subject to be put right by the court if he takes too much, but where a special verdict locates the premises the parties and the sheriff must be guided thereby. Jackson *v.* Rathbone, 3 Cow. (N. Y.) 291.

77. Lankford *v.* Green, 62 Ala. 314, holding that the sheriff's act in merely riding around the land and stating that he puts plaintiff in possession will not be an execution of the writ.

The sheriff may take a lease from defendant on a nominal rent and leave him in possession until the weather permits him to move. Wengert *v.* Zimmerman, 33 Pa. St. 508.

78. Scott *v.* Richardson, 2 B. Mon. (Ky.) 507, 38 Am. Dec. 170.

79. Witbeck *v.* Van Rensselaer, 64 N. Y. 27.

80. Falvey *v.* Elliott, 22 Alb. L. J. 156. In this case the recovery was for a strip of land on which defendant's wall projected a few inches, and plaintiff's house was so close to the wall that it was impossible to get between them, but the sheriff removed a portion of the wall which could be reached and returned that he had delivered possession and it was held sufficient.

81. Perrine *v.* Bergen, 14 N. J. L. 355, 27 Am. Dec. 63.

82. Rowan *v.* Kelsey, 18 Barb. (N. Y.) 484.

83. Ash *v.* McGill, 6 Whart. (Pa.) 391.

84. Miller *v.* Vaughan, 73 Ala. 312.

85. Penn *v.* Kline, 19 Fed. Cas. No. 10,934, 4 Wash. 64; U. S. *v.* Slaymaker, 27 Fed. Cas. No. 16,313, 4 Wash. 169.

notice in the suit was served;[86] but that it does not conclude one not a party to the ejectment action.[87] Again if the return to the writ is false plaintiff may seek redress by action.[88]

8. SATISFACTION OR RELEASE. If defendant takes the land recovered he is entitled to an immediate release of plaintiff's title at the time he gives a bond for its value.[89] And if there is a satisfaction of the judgment by a contract to sell, the terms of which are not fulfilled, the judgment cannot be thereafter revived, but resort must be had to the contract for the remedy.[90]

9. OPERATION AND EFFECT. Although a defendant evicted under a writ is estopped to deny that his prior possession was wrongful,[91] yet if the judgment is void the execution of the writ of habere facias does not divest defendant of his right of possession.[92] If lessors have joined and have recovered the whole tract, although on one demise, they can, when let into possession, hold according to their title;[93] and if plaintiff is put into possession under a judgment against one tenant he will hold to the extent of his title, unless another has a better possessory title, in which case he will be restricted to the possession under his judgment.[94] Again, the execution of the writ of possession may inure to the benefit of the lessee.[95]

10. STAY, QUASHAL, AND OTHER RELIEF. The court rendering the judgment may recall the writ of possession if justice requires;[96] or it may vacate or quash such writ, or an alias writ,[97] or a writ based on a judgment by default;[98] but the title cannot be retried on a motion to quash.[99] A stay of execution may also be granted,[1]

86. Kercheval *v.* Ambler, 4 Dana (Ky.) 166.

87. Kercheval *v.* Ambler, 7 J. J. Marsh. (Ky.) 626, 23 Am. Dec. 446.

88. Bowie *v.* Brahe, 4 Duer (N. Y.) 676, 2 Abb. Pr. (N. Y.) 161.

89. Collins *v.* Lane, 3 A. K. Marsh. (Ky.) 14.

If the judgment has been reversed because plaintiff was in possession of part of the land, for the occupation of which damages were given, he cannot release such part from the operation of the judgment and enforce the judgment as to the rest, if its location has not been determined. Ellis *v.* Jeans, 26 Cal. 272.

90. Hough *v.* Norton, 9 Ohio 45.

91. Mann *v.* Rogers, 35 Cal. 316.

92. Dedman *v.* Smith, 2 A. K. Marsh. (Ky.) 260.

93. Luckett *v.* Stith, 7 Dana (Ky.) 311.

94. Breeding *v.* Taylor, 6 B. Mon. (Ky.) 62.

95. Vanhorne *v.* Tilley, 1 T. B. Mon. (Ky.) 50. And *compare* Smith *v.* White, 5 Dana (Ky.) 376, holding that a surrender of possession by defendant upon service of a writ to one claiming to be but not in fact the plaintiff's agent will inure to the benefit of plaintiff.

96. Oetgen *v.* Ross, 47 Ill. 142, 95 Am. Dec. 468.

97. Miller *v.* Vaughan, 73 Ala. 312 (alias writ quashed for improper use of process); Coughanour *v.* Bloodgood, 27 Pa. St. 285; Thomas *v.* Newton, 23 Fed. Cas. No. 13,905, Pet. C. C. 444.

An order granting execution and order adjudging defendants in contempt and granting an alias writ will be set aside on application on sufficient cause shown. Hyde *v.* Boyle, 93 Cal. 1, 29 Pac. 247.

It is error to quash a habere facias where issued after the date of the supersedeas, but issued and executed before the certificate was filed in the office of the circuit court, and before notice to the officer or to plaintiff in the writ. Runyon *v.* Bennett, 4 Dana (Ky.) 598, 29 Am. Dec. 431.

Judge at chambers may set aside habere facias possessionem. Popplewell *v.* Abbott, 5 U. C. Q. B. O. S. 245.

One of separate defendants may move to quash execution. Lowry *v.* Jenkins, 3 Bibb (Ky.) 314.

98. Shappard *v.* ——, 7 N. J. L. 161.

99. Mayo *v.* Chiles, 1 Litt. (Ky.) 237.

The court will grant leave to take proof by affidavit on notice, and make surveys upon motion to quash a return and to show that more land was delivered than was authorized by the writ. Penn *v.* Isherwood, 5 Gill (Md.) 206.

1. Rumsey *v.* Otis, 133 Mo. 85, 34 S. W. 551; Allegheny Valley R. Co. *v.* Colwell, (Pa. 1888) 15 Atl. 927; Mather *v.* Akewright, 2 Binn. (Pa.) 93.

It is allowable to supersede the writ without superseding execution for mesne profits. Lum *v.* Reed, 53 Miss. 71.

Perpetual stay will be denied where defendant petitions therefor on the ground that facts were fraudulently misstated. Wheeling, etc., R. Co.'s Appeal, 1 Pennyp. (Pa.) 360.

Stay is not allowable: Of writ of possession on suggestion that title is in some other person (Sinclair *v.* Worthy, 60 N. C. 114, 84 Am. Dec. 357); of issuance of writ of possession upon application of one not entitled to nor in actual possession of the land described in the writ (Ferguson *v.* Wright, 115 N. C. 568, 20 S. E. 774); on notice of the landlord, jointly sued with the tenant, who has answered but the action as to him has

or an injunction awarded in a proper case.[2] But equitable relief will not be granted as to matters of legal cognizance, when no excuse is shown why complainant did not apply to a court of law therefor.[3]

G. Appeal and Error[4] — **1. Application of General Rules.** The general rules of appeal and error apply in determining by or against what parties error or appeal lies in actions of ejectment;[5] to the necessity of the presentation and reservation in the lower court of grounds of review;[6] to questions reviewable

been dismissed (Dimick *v.* Deringer, 32 Cal. 488); or in vacation at the instance of a stranger to the judgment (Hall *v.* Hilliard, 6 Ala. 43).

2. Stewart *v.* Pace, 30 Ark. 594; Hicks *v.* Brinson, 100 Ga. 595, 28 S. E. 380; Raw *v.* Stevenson, 24 Pittsb. Leg. J. (Pa.) 145; Cypreanson *v.* Berge, 112 Wis. 260, 87 N. W. 1081.

Illustrations.— A mere notice of application for provisional injunction does not suspend the right to proceed with the enforcement of judgment for possession prior to hearing the motion; and a provisional injunction will never issue after plaintiff has been actually placed in possession. Kamm *v.* Stark, 14 Fed. Cas. No. 7,604, 1 Sawy. 547. A motion is also properly denied to restrain execution when the mover was not a party to the ejectment suit, the affidavit not showing that he did not enter under defendants or in collusion with them. McCreery *v.* Everding, 54 Cal. 166. In an action, however, by one in possession to enjoin an enforcement of the judgment in ejectment to which he was not a party, it will be presumed that he obtained possession under defendant in the ejectment suit, in the absence of evidence to the contrary. Scheerer *v.* Goodwin, 125 Cal. 154, 57 Pac. 789. Again, it is not necessary, in such suit to enjoin, for plaintiff to show that he had a good and valid defense to the original action. Dodge *v.* Williams, 107 Ga. 410, 33 S. E. 468. And if defendant's title has been settled adversely in ejectment he may not set up to restrain the habere facias a lease subsequently made by the alleged owner, of an undivided fourth part of the premises, who was not a party defendant to the ejectment suit. Noyes *v.* Brooks, 10 Pa. Super. Ct. 250.

Defendant will be enjoined from interfering with the execution of process for the delivery of the premises. De Lancey *v.* Piepgras, 73 Hun (N. Y.) 608, 26 N. Y. Suppl. 807.

3. Moore *v.* Lockitt, 2 A. K. Marsh. (Ky.) 526.

Relief in equity will not be given where defendant by fair management and without fraud has delayed the ejectment until the demise has expired. Bowman *v.* Violet, 4 T. B. Mon. (Ky.) 350.

4. **Appeal and error** generally see Appeal and Error, 3 Cyc. 1 *et seq.*; 2 Cyc. 474 *et seq.*

5. See 2 Cyc. 626, 726. Thus a writ of error will lie by one made a party on the record by rule absolute affecting his right of possession, on return of the sheriff. Hessel *v.* Fritz, 124 Pa. St. 229, 16 Atl. 853. It will also lie in the name of the casual ejector (Walker *v.* Badger, 3 Bibb (Ky.) 433; Roe *v.* U. S. Bank, 3 Ohio 26. But see Stiles *v.* Jackson, 1 Blackf. (Ind.) 214), and by the attorney and landlord of deceased defendant, in the name of the heirs (Kellogg *v.* Forsyth, 24 How. (U. S.) 186, 16 L. ed. 654). Persons in possession, where a demise has been extended without notice to them, are entitled to be heard on a writ of error coram nobis. Ledgerwood *v.* Pickett, 15 Fed. Cas. No. 8,175, 1 McLean 143. A defendant "aggrieved" may also appeal. Simmons *v.* Spratt, 22 Fla. 370. But a writ of error will not lie by the tenant where he is not a party, the judgment being against the casual ejector (Connor *v.* Peugh, 18 How. (U. S.) 394, 15 L. ed. 432); by a tenant before he is made defendant (Bledsoe *v.* Den, 13 N. C. 314); by a tenant in possession to reverse a judgment by default (Walker *v.* Badger, 3 Bibb (Ky.) 433); against tenants not parties (Campbell *v.* Smith, 2 A. K. Marsh. (Ky.) 118); by one lessor of plaintiff against another, on the ground that more land was recovered on the demise of the latter, and less on that of the former, than should have been, all that is claimed having been recovered (Samyn *v.* McClosky, 2 Ohio St. 536); for or against several parties as to whom the suit has been dismissed (Masters *v.* Martin, 3 B. Mon. (Ky.) 176); nor by a party in ejectment who elects to institute proceedings under the occupying claimant's act (Buchanan *v.* Dorsey, 11 Nebr. 373, 9 N. W. 546). Nor are the parties entitled to an appeal, but only to a second trial, where the action is brought to recover specific real property and an issue of fact is made up (Smith *v.* Anderson, 20 Ohio St. 76). Nor can one plaintiff take advantage on appeal of an error affecting the other plaintiffs only where the action is on a joint and several demise of two lessors. Pintard *v.* Griffing, 32 Miss. 133.

6. See 2 Cyc. 660. See also the following cases:

Illinois.— Graham *v.* Anderson, 42 Ill. 514, 92 Am. Dec. 89.

Indiana.— Reid *v.* Mitchell, 95 Ind. 397. See also Holman *v.* Elliott, 86 Ind. 231.

Kentucky.— Brent *v.* Long, 99 Ky. 245, 35 S. W. 640, 18 Ky. L. Rep. 137; Davidson *v.* Morrison, 86 Ky. 397, 5 S. W. 871, 9 Ky. L. Rep. 629, 9 Am. St. Rep. 295; Winn *v.* Wilhite, 5 J. J. Marsh. 521; Miller *v.* Hoy, 4 Bibb 568.

New Mexico.— Coleman *v.* Bell, 4 N. M. 46, 12 Pac. 657.

New York.— Donovan *v.* Vandemark, 88 N. Y. 668 [*affirming* 24 Hun 141].

Ohio.— Middleton *v.* Westeney, 7 Ohio Cir. Ct. 393, 4 Ohio Cir. Dec. 650.

generally;[7] to waiver of and estoppel to allege error;[8] to presumptions and

Oregon.— Hemenway *v.* Francis, 20 Oreg. 455, 26 Pac. 301.

Pennsylvania.— Hill *v.* Hill, 43 Pa. St. 521.

West Virginia.— Kenna *v.* Quarrier, 3 W. Va. 210.

See 17 Cent. Dig. tit. "Ejectment," § 407.

For example a defendant in ejectment cannot in the appellate court, for the first time, raise the question as to whether it was necessary to make a demand for the possession. Colton *v.* Rupert, 60 Mich. 318, 27 N. W. 520. And he cannot so urge the defense that the ouster was by the defendant's lessor (Hodgkins *v.* Price, 137 Mass. 13; Dixon *v.* Doe, 23 Miss. 84), or that another than defendant was in possession (Carter *v.* Hunt, 40 Barb. (N. Y.) 89; Arnot *v.* McClure, 4 Den. (N. Y.) 41), or that he did not have notice of the lease under which plaintiff claims (Alexander *v.* Carew, 13 Allen (Mass.) 70). As a general rule a defendant who has not controverted plaintiff's title in the court below cannot do so in the appellate court. Perkins *v.* Dibble, 10 Ohio 433, 36 Am. Dec. 97. And **see Woods** *v.* Soucy, 184 Ill. 568, 56 N. E. 1015; Graham *v.* Anderson, 42 Ill. 514, 92 Am. Dec. 89. And it has even been held that if defendant denies the validity of plaintiff's title on a particular ground he will be confined to that ground of attack in the appellate court and cannot there urge another and different ground. Cope *v.* Kidney, 115 Pa. St. 228, 8 Atl. 836. If a defendant in ejectment claims the value of improvements, any reason why under the law he is not entitled to recover for the improvements must be presented to the court below and cannot be first urged on writ of error. Guild *v.* Kidd, 48 Mich. 307, 12 N. W. 158.

Objection must be taken at trial. Doe *v.* McGloyn, 9 N. Brunsw. 189; Kennedy *v.* Freeth, 23 U. C. Q. B. 92.

7. See 3 Cyc. 220. See also the following cases:

California.— Ellis *v.* Jeans, 26 Cal. 272.

Georgia.— Dobbs *v.* Fort, 92 Ga. 573, 17 S. E. 846.

Illinois.— Laflin *v.* Herrington, 17 Ill. 399. *Compare* Riggs *v.* Savage, 9 Ill. 129.

Kansas.— Ard *v.* Wilson, (Sup. 1899) 56 Pac. 80 [*affirming* 8 Kan. App. 471, 54 Pac. 511]; Culver *v.* Moeser, 46 Kan. 329, 26 Pac. 709; Harris *v.* Thompson, 23 Kan. 372.

Kentucky.— Swope *v.* Shafer, 22 S. W. 78, 15 Ky. L. Rep. 42.

Minnesota.— Laramy *v.* Ruschke, 46 Minn. 125, 48 N. W. 561.

Mississippi.— Summers *v.* Brady, 56 Miss. 10.

Missouri.— Kerstner *v.* Vorweg, 130 Mo. 196, 32 S. W. 298.

Nebraska.— Uppfalt *v.* Nelson, 18 Nebr. 533, 26 N. W. 362. See also Rupert *v.* Penner, 35 Nebr. 587, 53 N. W. 598, 17 L. R. A. 824; and 3 Cyc. 325.

New York.— Clason *v.* Baldwin, 13 N. Y. Suppl. 681, 20 N. Y. Civ. Proc. 291.

Pennsylvania.— Jones *v.* Hartley, 3 Whart. 178.

Court will not review: A decision as to the sufficiency of testimony on motion for nonsuit in a law case (Marion *v.* Aiken, 39 S. C. 33, 17 S. E. 511), or a ruling permitting plaintiff to amend his writ by adding a claim for damages (Lippett *v.* Kelly, 46 Vt. 516. See 3 Cyc. 327), nor will the court interfere with an order directing plaintiff to deliver possession to defendant, the parties having stipulated to dismiss the suit, although the entry of a judgment on the stipulation would have been the proper course. Wakely *v.* Delaplaine, 15 Wis. 554.

Judgment will not be disturbed: Unless plainly erroneous, where the evidence is conflicting, as to the contents of a lost deed under which plaintiffs claimed (Laster *v.* Blackwell, 133 Ala. 337, 32 So. 166. See 3 Cyc. 360), as to land being a mere accretion to plaintiff's land (Boyd *v.* Bethel, 9 S. W. 417, 9 Ky. L. Rep. 470), as to possession under an agreement for sale (Cutler *v.* Babcock, 79 Wis. 484, 48 N. W. 494), and as to title generally (Cox *v.* Reid, 9 S. W. 693, 10 Ky. L. Rep. 565); where the verdict is supported by substantial evidence, although an equitable defense is interposed (Carter *v.* Prior, 8 Mo. App. 577 [*affirmed* in 78 Mo. 222]); or where the evidence was sufficient for the jury to infer an adverse possession (Kirby *v.* Mayo, 13 Vt. 103). And where the finding on an application for a writ of possession is in accordance with the showing of the affidavits as to the inclusion of the land in suit the finding will not be disturbed. Cureton *v.* Garrison, 115 N. C. 550, 20 S. E. 723. So where there is a finding for "plaintiffs" instead of for plaintiff its sufficiency is not affected, although the bill of exceptions was styled as though there were two plaintiffs. Williams *v.* Ewart, 29 W. Va. 659, 2 S. E. 881.

Motion to enlarge security in the appeal-bond for the purpose of covering apprehended damages which plaintiff thinks he may sustain by being kept out of the land cannot be granted by court upon writ of error. Roberts *v.* Cooper, 19 How. (U. S.) 373, 15 L. ed. 687.

The unexpressed and implied findings may be reviewed upon the exception that the evidence was insufficient to justify the verdict and findings. Morrill *v.* Chapman, 35 Cal. 85.

8. See 3 Cyc. 242 *et seq.*; 2 Cyc. 643 *et seq.*

Silence of defendant may be equivalent to an admission that non-occupancy was proven and preclude him from disputing the sufficiency of proofs thereon. Geisinger *v.* Beyl, 80 Wis. 443, 50 N. W. 501. See also 3 Cyc. 253. But where on trial before a special jury an error is committed which defendant offers to have rectified the mere silence of plaintiff cannot be taken as a waiver of the error. Carter *v.* Ramsey, 1 Del. Co. (Pa.) 423.

inferences generally;[9] and to non-reversal for harmless error generally,[10] as well as for harmless error with respect to pleadings,[11] with respect to the admission or rejection of evidence,[12] with respect to the giving or refusal of instructions,[13] and with respect to the validity, operation, and effect of verdicts, findings, and judgments.[14] It may also be stated that the general rules as to the disposition of

Where complaining party brings about the matter complained of he cannot complain, as where plaintiff declared on a joint demise from three persons, and on motion of defendant the names of two were stricken out. Seabury *v.* Doe, 22 Ala. 207, 58 Am. Dec. 254.

Where plaintiff is compelled by erroneous admission of copies of grant to show title to himself under the same grant he is not concluded thereby so as to be deprived of his exceptions to its first admission. Norflet *v.* Nelson, Peck (Tenn.) 189. See also 3 Cyc. 246.

9. See 3 Cyc. 266. See also Morrill *v.* Chapman, 35 Cal. 85; Swearengen *v.* Gulick, 67 Ill. 208; Doe *v.* Bowen, 8 Ind. 197, 65 Am. Dec. 758; Bustard *v.* Gates, 4 Dana (Ky.) 429; Ely *v.* Tallman, 14 Wis. 28.

It is presumed: That the court found such possession as would support the judgment (Tubbs *v.* Ghirardelli, 45 Cal. 231); that the costs were paid before granting a new trial (Vanduyn *v.* Hepner, 45 Ind. 589); that the ruling on a motion for a new trial was correct (Starry *v.* Winning, 7 Ind. 311); that plaintiff's recovery was limited to the part allotted to him (Ball *v.* Lively, 4 Dana (Ky.) 369); and that a bond on appeal to pay rent for occupation, marked "Filed," was approved by the court (Clapp *v.* Freeman, 16 R. I. 344, 16 Atl. 207, 17 Atl. 921). And where there is an admission by both parties on the trial of a cause that a lot was "vacant" it will be assumed on appeal to mean "vacant" when suit was commenced. Glos *v.* Patterson, 195 Ill. 530, 63 N. E. 272.

It is not presumed that the court on a trial without a jury would refuse when requested to include in the findings the facts constituting the title of the defeated party. Morrill *v.* Chapman, 35 Cal. 85.

10. See 3 Cyc. 383. See also the following cases:

Indiana.— Stackhouse *v.* Doe, 5 Blackf. 570.

Kentucky.— Holmes *v.* Herringer, 20 S. W. 225, 14 Ky. L. Rep. 286.

Mississippi.— Pintard *v.* Griffing, 32 Miss. 133.

Missouri.— Dameron *v.* Jamison, 143 Mo. 483, 45 S. W. 258; Coleman *v.* Drane, 116 Mo. 387, 22 S. W. 801; Sutton *v.* Casseleggi, 77 Mo. 397.

New York.— Church *v.* Hempstead, 27 N. Y. App. Div. 412, 50 N. Y. Suppl. 325, 27 N. Y. Civ. Proc. 230.

North Carolina.— Patterson *v.* Galliher, 122 N. C. 511, 29 S. E. 773; Fry *v.* Currie, 91 N. C. 436.

See 17 Cent. Dig. tit. "Ejectment," § 414.

11. Newsome *v.* Guy, 109 Ala. 305, 19 So. 448; Day *v.* Case, 78 Ga. 58; Gaff *v.* Greer, 88 Ind. 122, 45 Am. Rep. 449; Poffenberger *v.* Blackstone, 57 Ind. 288.

Erroneously overruling demurrer for failure to aver that plaintiff was entitled to possession justifies reversal. Simmons *v.* Lindley, 108 Ind. 297, 9 N. E. 360.

12. *Alabama.*— Dunton *v.* Keel, 95 Ala. 159, 10 So. 333; Seabury *v.* Doe, 22 Ala. 207, 58 Am. Dec. 254.

California.—Clink *v.* Thurston, 47 Cal. 21.

Iowa.— Chandler *v.* Chandler, 76 Iowa 574, 41 N. W. 319.

Kansas.—West *v.* Cameron, (1888) 19 Pac. 616.

Michigan.— Wisner *v.* Herring, 49 Mich. 626, 14 N. W. 572; Crooks *v.* Whitford, 47 Mich. 283, 11 N. W. 159; Wright *v.* Wilson, 17 Mich. 192.

Mississippi.— Rothschild *v.* Hatch, 54 Miss. 554. See McGehee *v.* Martin, 53 Miss. 519.

Missouri.— Hope *v.* Blair, 105 Mo. 85, 16 S. W. 595, 24 Am. St. Rep. 366; Hill *v.* Groom, 5 Mo. 58.

New Jersey.— Osborne *v.* Tunis, 25 N. J. L. 633.

New Mexico.—Salazar *v.* Longwill, 5 N. M. 548, 25 Pac. 927.

South Carolina.— Hammett *v.* Farmer, 26 S. C. 566, 2 S. E. 507.

Texas.— Horton *v.* Garrison, 1 Tex. Civ. App. 31, 20 S. W. 773.

Vermont.— Hall *v.* Hall, 5 Vt. 304.

Error in admitting statements of defendant's vendor after the sale as to facts affecting defendant's title is not cured by the explanation of the court that the statements were not evidence against defendant, but merely against the vendor. Gridley *v.* Bingham, 51 Ill. 153.

13. Hames *v.* Harris, 50 Ark. 68, 6 S. W. 233; Graham *v.* Mitchell, 78 Ga. 310.

If an instruction is prejudicial a new trial will be awarded, as where the jury were misled by a charge that, although plaintiff at the trial disclaimed title to a part of the land in dispute, the jury might render a general verdict, and plaintiff would take out his writ of possession at his peril. Davis *v.* Higgins, 87 N. C. 298.

14. The rule applies to verdict, findings, and judgment; as where verdict failed to assess the value of land, but before judgment plaintiff paid into court the damages assessed (Gager *v.* Doe, 29 Ala. 341); to a joint verdict where no damages are claimed (Hicks *v.* Coleman, 25 Cal. 122, 85 Am. Dec. 103); to a finding of a payment of taxes where a judgment is sufficient on other grounds than adverse possession (Beattie *v.* Crewdson, 124 Cal. 577, 57 Pac. 463); to a small excess in judgment for nominal damages (Hill *v.* Forkner, 76 Ind. 115); where judgment did not

the cause upon appeal and error[15] govern in ejectment so far as they are applicable, having constantly in view the fact that each case rests upon and must be determined by the factors peculiar thereto.

2. JUDGMENTS OR ORDERS APPEALABLE. Appellate jurisdiction rests primarily upon the constitution and then upon the statutes,[16] therefore it may be generally stated, subject to certain other general rules,[17] that in determining what judgments and orders are appealable reference must be had to such provisions. Thus appeal lies from a final judgment or decree,[18] also from a final judgment on a cross petition;[19] and a judgment in the second trial of ejectment may be reviewed like other final judgments;[20] so an order granting a second trial is appealable as an

fully describe the land (Pierce *v.* Hilton, 102 Cal. 276, 36 Pac. 595); to judgment for the whole land (Camarillo *v.* Fenlon, 49 Cal. 202; Vallejo *v.* Fay, 10 Cal. 377; Paine *v.* Fork, 10 Humphr. (Tenn.) 340); to judgment for a wider strip than was occupied (Bird *v.* New Jersey, etc., R. Co., 3 N. Y. App. Div. 344, 38 N. Y. Suppl. 281); to verdict covering the price of the land to which defendant had no claim and of which he had no possession (Burnell *v.* Maloney, 39 Vt. 574, 94 Am. Dec. 358); to irregularity as to form of judgment (Chever *v.* Horner, 11 Colo. 68, 17 Pac. 495, 7 Am. St. Rep. 217); to judgment not awarding all the premises to which plaintiff was entitled under the verdict (Colorado Cent. Consol. Min. Co. *v.* Turck, 50 Fed. 888, 2 C. C. A. 67); to a finding of dedication and a further finding as to designation of land on maps (Napa *v.* Howland, 87 Cal. 84, 25 Pac. 247); to a failure to find as to effect on title, of record of judgment (Spotts *v.* Hanley, 85 Cal. 155, 24 Pac. 738); to error in rendering conditional and not absolute judgment, giving defendants the right to redeem the land to which they are not entitled (Murphy *v.* Nathans, 46 Pa. St. 508); and to a verdict in favor of all the parties having title, where the name of an heir was omitted of record (Lynch *v.* Cox, 23 Pa. St. 265).

15. See 3 Cyc. 403 *et seq.*

Affirmance.— Where judgments are distinct as to the land and rents the court may affirm one and modify the other. Shean *v.* Cunningham, 6 Bush (Ky.) 123. So the court may affirm as to one and modify as to the other judgment, where it is entered jointly as to two tracts of land and plaintiff had title to one and not to the other. Herd *v.* Dew, 8 Humphr. (Tenn.) 501.

Award of possession.— If plaintiff is not awarded possession of the land the supreme court may award on appeal. Hadlock *v.* Hadlock, 22 Ill. 384.

Judgment may be amended on error, by inserting an omitted date for payment upon which a conditional verdict was to be released. Kensinger *v.* Smith, 94 Pa. St. 384.

New trial may be granted on appeal where it appears from the evidence that plaintiff has failed to establish a cause of action. Ames *v.* Harper, 48 Barb. (N. Y.) 56.

Remand.— The case may be remanded to allow defendant to introduce evidence, where he reconvenes as to expenditures for repairs, but is prevented from bringing testimony. Huyghe *v.* Brinckman, 37 La. Ann. 240. A cause will also be remanded for proof of the interests of several plaintiffs, with directions that a writ of possession issue according to their several interests. Hughes *v.* Woodward, (Tenn. Ch. App. 1900) 63 S. W. 191.

Reversal.— Judgment may be reversed where the evidence fails to sustain the defense of entry with knowledge of the defendant's equitable interest. Widdicombe *v.* Mercer, 72 Mo. 588. Judgment will also be reversed where the jury are charged that if they believe the evidence they will find for plaintiff, and there is no proof, so far as the record discloses, that defendant was in possession at the date of the writ. Costly *v.* Tarver, 38 Ala. 107. So there will be a reversal where there is nothing in the record to show that there was any such finding by the court or jury as under the statute providing therefor justifies a judgment of dismissal. Geisinger *v.* Beyl, 71 Wis. 358, 37 N. W. 423; Laws (1874), c. 270. Judgment may also be reversed as to plaintiff, a judgment entered for one of the defendants, and the cause remanded for further proceedings. Martin *v.* Platt, 64 Mich. 629, 31 N. W. 552.

Verdict and judgment may be set aside where the boundaries of the land are not indicated and such judgment is not therefore capable of intelligent execution. Franklin *v.* Haynes, 139 Mo. 311, 40 S. W. 945.

Where cause has been remanded with direction to enter a certain judgment, the rule is that the jurisdiction of the trial court is limited to the precise action authorized by the mandate, yet where a cause has been remanded with direction to enter a judgment for plaintiff for the premises, the trial court may include damages, rents, and profits, as found by a jury, as incidental steps to carry the mandate into execution. Fanning *v.* Doan, 146 Mo. 98, 47 S. W. 896.

Writ of possession may be ordered for that part only of the land to which plaintiff is entitled where the judgment awards him the whole. Bledsoe *v.* Doe, 4 How. (Miss.) 13.

16. See 11 Cyc. 710, 801; 2 Cyc. 507, 520.

17. See, generally, APPEAL AND ERROR, 3 Cyc. 1 *et seq.*; 2 Cyc. 474 *et seq.*

18. Simmons *v.* Spratt, 22 Fla. 370.

Necessity of formal judgment or order see 2 Cyc. 614.

19. Dodsworth *v.* Hopple, 33 Ohio St. 16.

20. Baze *v.* Arper, 6 Minn. 220.

order granting a new trial;[21] and the exercise of a discretion to set aside a second judgment is subject to review.[22]

3. BONDS AND RECOGNIZANCES.[23] It has been held that the amount of security should be fixed, whether defendant is in possession or not, when he appeals and is ready to furnish security for stay of execution, he having been adjudged to be in wrongful possession;[24] and that where bail on a writ of error are excepted to in ejectment they must justify in double the annual value of the lands.[25]

4. SUPERSEDEAS.[26] A writ of error without bond also operates as a supersedeas of the writ of possession, although not of the execution of mesne profits.[27] In case there exists valid defensive matter which constitutes an equitable defense of the judgment the execution is intended to enforce, it may be inquired into on supersedeas.[28]

5. RECORD GENERALLY. The general rules of appeal and error apply in determining the necessity, contents, and sufficiency of the record for the review of ejectment proceedings.[29] A judgment will not be reversed for want of proof of possession because the record does not show possession in the adverse party, where there is no bill of exceptions setting out the testimony, and it does not appear that objection was made at the trial.[30] Nor will the court reverse for matter of form as to a plea of not guilty, where the parties have appeared and investigated the case upon its merits;[31] nor will the court on appeal go back of a finding as to ownership and possession which is unchallenged;[32] nor will the sufficiency of a verdict, finding a fee in plaintiff, be affected by evidence in the bill of exceptions showing an undivided interest only in plaintiff;[33] nor can proceedings by way of processioning, commenced after the verdict by the losing party, and still pending in the superior court, avail for the purpose of showing that the verdict was erroneous.[34]

H. Restitution[35] — 1. JURISDICTION.[36] If the circumstances of the case require it,[37] the court will order a writ of restitution to be issued in order to restore the

21. Howes *v.* Gillett, 10 Minn. 397.

22. Keeler *v.* Dennis, 39 Hun (N. Y.) 18.

Review of discretion of lower court generally see 3 Cyc. 325.

23. **Bonds and recognizances on appeal and error** generally see 2 Cyc. 818 *et seq.*

Rents and profits which accrue pending proceedings in error to the supreme court are covered by a supersedeas bond in an ejectment case. St. Louis Smelting, etc., Co. *v.* Wyman, 22 Fed. 184.

24. State *v.* Second Judicial Dist. Ct., 24 Mont. 330, 61 Pac. 882.

25. Laurence *v.* Lippencott, 6 N. J. L. 473.

26. **Operation of appeal or writ of error as a supersedeas** generally see 2 Cyc. 889.

Supersedeas bonds on appeal, etc., generally, see 2 Cyc. 895 *et seq.*

27. Lum *v.* Reed, 53 Miss. 71.

If a bond is executed on appeal for the purpose of superseding the judgment, on a motion made by plaintiff for rents accruing after judgment, on an affirmance by the appellate court, defendant cannot be heard to say that the bond did not operate as a supersedeas. Kirkland *v.* Trott, 75 Ala. 321.

28. Miller *v.* Vaughan, 73 Ala. 312.

29. See, generally, APPEAL AND ERROR, 2 Cyc. 1025 *et seq.*

A plat is part of the record and a copy should be annexed to the transcript to make it evidence as a complete record. Orndorff *v.* Mumma, 3 Harr. & J. (Md.) 70. See also 3 Cyc. 166, 167; 2 Cyc. 1064.

Mere declaration that a judgment is rendered is insufficient, as a judgment should, in order to support an appeal, be complete and certain in itself. Bell *v.* Otis, 101 Ala. 186, 13 So. 43, 46 Am. St. Rep. 117. See also 2 Cyc. 1031.

The omission of assignee's deed, an order *nunc pro tunc,* correcting the description of the land, and the petition on which it was made may be fatal. McEachin *v.* Warren, 92 Ala. 554, 9 So. 197. See also 2 Cyc. 1039, 1053, 1061.

An abstract of title in full, it has been held, should be furnished. Bonnett *v.* Murdoch, 193 Pa. St. 527, 45 Atl. 317.

30. Kane *v.* Doe, 9 Sm. & M. (Miss.) 387.

31. Huddleston *v.* Garrott, 3 Humphr. (Tenn.) 629. See also 3 Cyc. 291.

32. Gilbert *v.* Kelly, 138 Cal. 689, 72 Pac. 344. See also 3 Cyc. 360.

33. Williams *v.* Ewart, 29 W. Va. 659, 2 S. E. 881.

34. Johnson *v.* Duncan, 90 Ga. 1, 16 S. E. 88.

35. **Restitution** generally see APPEAL AND ERROR, 3 Cyc. 462 *et seq.*

Form of writ of restitution see Adams Ejectm. 366.

36. **By what court restitution compelled** generally see APPEAL AND ERROR, 3 Cyc. 464.

37. See *infra,* VIII, H, 2.

party to the possession of premises of which he has been improperly deprived.[38] So the appellate court has power to order a writ of restitution.[39] Again courts of equity, in exercising their equity jurisdiction over the executions of writs of possession, sometimes award a writ of restitution[40] where a defendant, or even a stranger, has been wrongfully evicted under a writ. The court may also correct the execution of a writ of restitution.[41]

2. GROUNDS. Except as limited or qualified by statute[42] the party aggrieved[43] is entitled to have his possession restored or a writ of restitution awarded,[44] where a habere facias has been executed and quashed;[45] where there has been a wrongful eviction[46] or an eviction by mistake;[47] where possession has been forcibly retaken;[48] where more or other land than that recovered has been delivered to plaintiff;[49] where there is a reversal,[50] or vacation of the judgment, by virtue of

38. Adams Ejectm. 282.

Writ may be ordered at expense of defendant and the consent rule ordered to be entered into with modifications to suit the case, where defendant refused to enter into the consent rule, and pending negotiations between the parties, with which plaintiff was dissatisfied, he entered up judgment against the casual ejector and possession was taken. Saxton *v.* Keen, 17 N. J. L. 313.

39. Hall *v.* Wells, 54 Miss. 289.

Where a judgment in ejectment has been reversed by the supreme court the writ of restitution must be sued out from the lower court. Vroman *v.* Dewey, 23 Wis. 626.

40. Skinner *v.* Hannan, 81 Hun (N. Y.) 376, 30 N. Y. Suppl. 987.

Court will not restore defendant in a summary way where the sheriff delivered to plaintiff the proportion which he had recovered in ejectment, and plaintiff after return-day of the writ ousted defendant of the whole, although it might be otherwise in case of actual ouster before return-day. Gardiner *v.* Schuylkill Bridge Co., 2 Binn. (Pa.) 450. *Compare* Oetgen *v.* Ross, 47 Ill. 142, 95 Am. Dec. 468. Although defendant may be entitled to possession, after delivery thereof to plaintiff, the court will leave him to his remedy in equity instead of interfering in a summary way. Camac *v.* Allwine, 4 Fed. Cas. No. 2,328, 1 Wash. 466.

Where a court of equity directs a judgment at law in ejectment to be set aside and the possession restored its jurisdiction is ended, and the parties should be left to a court of law for adjudication of their rights. How *v.* Mortell, 28 Ill. 478.

41. Den *v.* O'Hanlin, 18 N. J. L. 127.

Error in delivering other land than that recovered in an action may be corrected by the court below on habere facias. Shaw *v.* Bayard, 4 Pa. St. 257.

42. See Wallace *v.* Berdell, 101 N. Y. 13, 3 N. E. 769, 8 N. Y. Civ. Proc. 363; Conger *v.* Duryee, 34 Hun (N. Y.) 560; Jackson *v.* Hasbrouck, 5 Johns. (N. Y.) 366; *Ex p.* Reynolds, 1 Cai. (N. Y.) 500.

43. A party wrongfully removed by a writ of restitution may also have his possession restored to him. Mayo *v.* Sprout, 45 Cal. 99.

On reversal of order for a writ of restitution on judgment for recovery of the land, one previously evicted under the writ is entitled to the removal from possession of all who entered under the writ, and of all who subsequently entered under them. Hyde *v.* Boyle, 105 Cal. 102, 38 Pac. 643.

Upon mere irregularity of procedure in issuance in favor of deceased plaintiff, when in fact issued for the benefit and at the instance of his successor in interest, the court will not for that reason alone restore defendant to possession. Franklin *v.* Merida, 50 Cal. 289.

44. See APPEAL AND ERROR, 3 Cyc. 462 *et seq.*

45. Lowry *v.* Jenkins, 3 Bibb (Ky.) 314.

It is no ground for restitution and quashing a writ of possession that the latter is voidable because issued after the time of issuing it, without reviving the judgment, has expired. Bowar *v.* Chicago West Div. R. Co., 136 Ill. 101, 26 N. E. 702, 12 L. R. A. 81.

46. Smith *v.* Pretty, 22 Wis. 655; Smith *v.* Trabue, 22 Fed. Cas. No. 13,116, 1 McLean 87. See also Edwards *v.* Phillips, 91 N. C. 355.

Where the judgment against a husband does not decide the question of title in the wife, and after execution of habere facias, she was upon a claim of title in herself awarded restitution, the writ was held irregular, although it was not reversed. Johnson *v.* Fullerton, 44 Pa. St. 466.

47. *Ex p.* Reynolds, 1 Cai (N. Y.) 500.

48. Doe *v.* Roe, 9 Dowl. P. C. 971.

49. Lively *v.* Ball, 8 Dana (Ky.) 312; McAndrews *v.* O'Hanlin, 18 N. J. L. 127; Hicks *v.* Johnson, 12 N. J. L. 275; Jackson *v.* Stiles, 5 Cow. (N. Y.) 418; Jackson *v.* Hasbrouck, 5 Johns. (N. Y.) 366; Shaw *v.* Bayard, 4 Pa. St. 257. See also Hickman *v.* Dale, 7 Yerg. (Tenn.) 149; Blair *v.* Pathkiller, 5 Yerg. (Tenn.) 230. And *compare* Natchez *v.* Vanderveide, 31 Miss. 706, 66 Am. Dec. 581.

In ejectment for five eighths of a cottage, the sheriff gave possession of the whole. It was held that the tenant should be restored to his possession of three eighths of the premises. Roe *v.* Dawson, 3 Wils. C. P. 49.

Where judgment awards an undivided interest and the execution directs possession of the whole, restitution may be awarded. Skinner *v.* Odenbach, 81 Hun (N. Y.) 315, 30 N. Y. Suppl. 624.

50. *Kentucky.*— Smith *v.* Robinson, 1 T. B. Mon. 14.

Mississippi.— Hall *v.* Wells, 54 Miss. 289.

which he has been deprived of his possession;[51] or where judgment is set aside by agreement between the parties;[52] and there may be a restoration until determination of a controversy between plaintiff and an interpleading defendant.[53] Where, however, an injunction against the judgment is dissolved, and after execution issued thereon the injunction is reinstated, a party dispossessed in the meantime is not entitled to a writ of restitution in the court below.[54] The order of restitution should be made without prejudice to the rights, if any, of a purchaser pending suit.[55]

3. Proceedings — a. Mode of Obtaining Restitution.[56] Restitution may be by scire facias;[57] by order of attachment for contempt or by writ of restitution;[58] by motion for such writ and not to set aside the judgment;[59] or by an order granted on the hearing of an order to show cause why possession should not be restored.[60]

b. Evidence and Matters Considered. One who moves to be restored to possession on the ground that he was not a party to the action must make out a clear case free from ambiguity.[61] And the court will not consider whether plaintiff has acquired an outstanding title, legal or equitable, besides that involved in the ejectment action.[62]

New Jersey.— Heileman *v.* Frey, 54 N. J. L. 284, 23 Atl. 943.

New York.— Costar *v.* Peters, 4 Abb. Pr. N. S. 53.

Pennsylvania.—Breading *v.* Blocher, 29 Pa. St. 347.

West Virginia.— Brown *v.* Cunningham, 23 W. Va. 109.

See 17 Cent. Dig. tit. "Ejectment," § 421.

Where a judgment plaintiff by threat of execution secures the payment of money on the judgment, and also the proceeds of a sale representing the equity of redemption in the land, defendant on securing a reversal is entitled to summary restitution and is not relegated to a separate suit. Colburn *v.* Yantis, 176 Mo. 670, 75 S. W. 653.

Where a receiver sells the property in his character of trustee in a deed of trust, which is paramount to the title of either party, and the purchaser is not a party to the ejectment suit, restitution to defendant on his securing a reversal of plaintiff's judgment cannot be ordered, especially where such defendant is present and objects to the sale only on the ground that the obligation secured by the deed of trust is not due; nor, where such sale is made without presenting the deed to the court or securing an order for the sale, can the regularity of the receiver's act be determined on appeal by defendant from the refusal of a writ of restitution, after reversal of plaintiff's judgment. Colburn *v.* Yantis, 176 Mo. 670, 75 S. W. 653.

Writ will not be awarded on reversal of judgment, where, although the tenant appears to be out of possession, the record does not show that any habere facias issued, or that he was evicted by writ. Frank *v.* Hickman, 7 J. J. Marsh. (Ky.) 635.

51. Ely *v.* Fen, 12 N. J. L. 321; Perry *v.* Tupper, 70 N. C. 538; Walsh *v.* Sykes, 1 Lack. Leg. Rec. (Pa.) 429.

Judgment by default is within the rule. Sheppard *v.* ——, 7 N. J. L. 161. But see Den *v.* Ferin, 6 N. J. L. 431.

52. Greer *v.* McClelland, 1 Phila. (Pa.) 128.

It is no bar to restitution after reversal that defendant had, after execution of the writ of possession, compromised his claim for improvements for a term in the premises, and agreed to restore them at the end of the lease, and was thereby in actual possession. Smith *v.* Robinson, 1 T. B. Mon. (Ky.) 14.

Where cause is dismissed by stipulation after order for a new trial is taken by defendant, a judgment for defendant with restitution is authorized. Wakeley *v.* Delaplaine, 15 Wis. 554.

53. Rollins *v.* Bishop, 76 N. C. 268.

54. Young *v.* Davis, 1 T. B. Mon. (Ky.) 152, holding also that where complainant obtained possession by collusion with the tenant, against whom the ejectment had been brought, and obtained the reinstatement of the injunction by presenting to the judge an incorrect transcript of the record, he was not entitled to restitution.

55. Costar *v.* Paters, 4 Abb. Pr. N. S. (N. Y.) 53. See also Colburn *v.* Yantis, 176 Mo. 670, 75 S. W. 653.

56. **Mode of obtaining restitution** generally see Appeal and Error, 3 Cyc. 467.

57. Smith *v.* Mitchell, 1 J. J. Marsh. (Ky.) 270.

Parties.— On scire facias for restitution all persons who have been evicted should be made plaintiffs. Smith *v.* Mitchell, 1 J. J. Marsh. (Ky.) 270.

58. Greer *v.* McClelland, 1 Phila. (Pa.) 128.

59. Smith *v.* Pretty, 22 Wis. 655.

60. But the order should not include an injunction clause restraining plaintiff from entering into or interfering with the possession. Dawley *v.* Brown, 43 How. Pr. (N. Y.) 17. See also Martin *v.* Rector, 11 Abb. N. Cas. (N. Y.) 362, 63 How. Pr. (N. Y.) 362, holding that a formal judgment of restitution cannot be entered without an order allowing it.

61. California Quicksilver Min. Co. *v.* Redington, 50 Cal. 160.

62. Heileman *v.* Frey, 54 N. J. L. 284, 23 Atl. 943.

4. Extent,[63] Operation, and Effect. Where a judgment of reversal in ejectment is final, the restitution to which a party is entitled under the reversal is everything specifically which he has lost, or which is still in the possession of his adversary. This rule has been qualified where the sale is to a stranger *bona fide* or where a third person has *bona fide* acquired some collateral right before the reversal. In the former case it is held that defendant whose property has been sold is entitled to the fruits of the sale. If the property itself is in the hands of the sheriff or has been transferred through the instrumentality of the execution he is entitled to be restored to that.[64] The recovery may also include the value of the crops,[65] and the proceeds of a receiver's sale paid to plaintiff and representing the equity of redemption in the land.[66] Execution of the writ and restitution to the party dispossessed restores the seizin.[67] On the other hand the quashal of a writ of restitution and a restoration of possession given under it places the parties in respect to their legal rights as they stood before the emanation of the writ.[68]

I. Costs[69] — 1. Who Entitled to Costs — a. In General. As a general rule a successful plaintiff in ejectment is entitled to costs;[70] and he may proceed therefor, although his title becomes divested pending suit.[71]

b. Each Party Successful in Part.[72] One who sues to recover possession of an undivided part of real estate and recovers an undivided part, but a less interest than he sued for, is entitled to full costs, even if the answer concedes his right to

63. Extent of restitution generally see Appeal and Error, 3 Cyc. 469.

64. Colburn *v.* Yantis, 176 Mo. 670, 75 S. W. 653, in which case it was also held that where a party has been wronged by the erroneous judgment of a court which is reversed on appeal, it is not necessary for the party seeking restitution for what he has lost to bring a separate action, but all the parties being in court the court will right the wrong with all possible speed. See also Gott *v.* Powell, 41 Mo. 417. Defendant in the lower court, in whose favor the judgment is finally reversed, would undoubtedly under the rule of the text be entitled to be restored to possession, and also to the rents and profits which he has lost while out of possession. Crispen *v.* Hannovan, 86 Mo. 160 [as *explained* in Colburn *v.* Yantis, 176 Mo. 670, 75 S. W. 653]. In Gould *v.* Sternberg, 128 Ill. 510, 515, 21 N. E. 628, 15 Am. St. Rep. 138, an action in ejectment wherein the effect of reversal of a judgment upon the question of title was discussed, and the principle of the text being involved, the court said: "It is well settled in this State, that when property of a defendant has been sold on a judgment, afterward reversed, to a party to such judgment, the defendant can recover it back. If the purchaser be a third party, he can recover from the plaintiff the value thereof, but the title to the property, in that case, is unaffected by the reversal." *Compare* Lewis *v.* Scott, 59 S. W. 1130, 22 Ky. L. Rep. 1043.

Rents accruing subsequent to receiver's possession paid to plaintiff to avoid execution may be recovered on reversal of judgment. Colburn *v.* Yantis, 176 Mo. 670, 75 S. W. 653, in which case it was also held that where a party has been wronged by the erroneous judgment of a court which is reversed on appeal, it is not necessary for the party seeking restitution for what he has lost to bring a separate action, but all the parties being in court the court will right the wrong with all possible speed.

65. Breading *v.* Blocher, 29 Pa. St. 347.

66. Colburn *v.* Yantis, 176 Mo. 670, 75 S. W. 653.

67. Smith *v.* Robinson, 1 T. B. Mon. (Ky.) 14.

68. Breeding *v.* Taylor, 6 B. Mon. (Ky.) 62.

On motion to quash writ of restitution, the return of a habere facias having been quashed and restitution ordered, the decisions cannot be questioned. Tribble *v.* Frame, 3 T. B. Mon. (Ky.) 13.

69. Costs generally see Costs, 11 Cyc. 1 *et seq.*

70. Cythe *v.* La Fontain, 51 Barb. (N. Y.) 186; Bachman *v.* Gross, 150 Pa. St. 516, 24 Atl. 712; Gill *v.* Gill, 37 Pa. St. 312; Cadwalader *v.* Berkheiser, 32 Pa. St. 43; Zeigler *v.* Fisher, 3 Pa. St. 365; Allen *v.* Flock, 2 Penr. & W. (Pa.) 159; Dunn *v.* Games, 8 Fed. Cas. No. 4,177, 2 McLean 344. See also 11 Cyc. 27, 32, 85.

Although a referee's report for plaintiff does not allow costs they may be awarded him. Harvey *v.* Snow, 1 Yeates (Pa.) 156.

Judgment for plaintiff on a conditional verdict is for costs as well as for the land. Bradley *v.* O'Donnell, 40 Pa. St. 479.

Plaintiff cannot have costs where the evidence does not show any wrongful act done by defendant, even though it establishes plaintiff's title. Clarke *v.* Wagner, 78 N. C. 367.

71. Rugan *v.* Philips, 4 Yeates (Pa.) 382; Murray *v.* Garretson, 4 Serg. & R. (Pa.) 130, as by conveyance. But *compare* Freedly *v.* Mitchell, 2 Pa. St. 100, where it is held that his costs in such case are nominal.

72. See also *infra*, VIII, I, 1, c.

Costs where each party successful in part generally see Costs, 11 Cyc. 28.

the interest recovered, but raises an issue on the question of the ouster for the part recovered.[73] But where defendant prevails in the principal subject of the litigation costs may be awarded against plaintiff in the court's discretion, even though he obtain judgment for the land.[74]

c. On Disclaimer.[75] A disclaimer by defendant operates as a denial of both title and possession,[76] and if made before pleading entitles him to costs if true,[77] unless for special reasons, the court decides otherwise.[78] Plaintiff is entitled to costs where, notwithstanding the disclaimer, defendant is shown to be in possession.[79] Plaintiff is also entitled to costs prior to a disclaimer made after a plea of not guilty.[80] But there should be no judgment against defendant for costs incurred subsequent to the disclaimer.[81]

d. Where Action Is Not Defended. No judgment can be given for costs where the action is undefended and judgment is rendered against the casual ejector.[82] And on default without a jury having been called costs cannot be assessed against defendant unless it is affirmatively proven that he was in possession at the commencement of the action.[83] But costs will be allowed on judgment by default against a tenant in possession on whom process is served.[84]

e. Recovery in Another Ejectment Suit. Plaintiff may proceed for his costs after the premises have been recovered against him by an adversary plaintiff in another ejectment.[85]

2. Who Liable For Costs — a. In General. According to the English practice if defendant is successful judgment for costs is awarded against plaintiff's lessee,[86] and this rule has been adopted in some of the earlier American decisions.[87] In

73. Lawton *v.* Gordan, 37 Cal. 202.

74. Hays *v.* Tilson, 18 Tex. Civ. App. 610, 45 S. W. 479.

75. Disclaimer as affecting costs generally see Costs, 11 Cyc. 82.

76. Tripner *v.* Abrahams, 47 Pa. St. 220.

77. Kansas Pac. R. Co. *v.* McBratney, 10 Kan. 415; Tripner *v.* Abrahams, 47 Pa. St. 220; Mabie *v.* Tuellhart, 23 Pa. Co. Ct. 241; Caldwell *v.* Lowden, 3 Brewst. (Pa.) 63; Jones *v.* Webber, 1 D. Chipm. (Vt.) 215.

Upon disclaimer by defendant as to part of the land and a plea of not guilty as to the remainder, and judgment for defendant therefor and for plaintiff only as to the part to which the disclaimer is applicable, plaintiff is liable for the costs. Quincy *v.* Chicago, etc., R. Co., 94 Ill. 537.

Where a defendant pleads a disclaimer to a part of the land and the general issue as to the other part, and a verdict is returned for defendant on the general issue and against him on the other issue, jury finding that he was in possession, plaintiff has costs. Wells *v.* Osborn, 2 Mass. 446.

Sufficiency of disclaimer.— An answer alleging possession in a third person and disclaiming all interest in or title to the premises is a disclaimer entitling defendant to costs. McCarnan *v.* Cochran, 57 Ind. 166. But where plaintiff's lessor in ejectment did not authorize the suit, but knowing of it did not repudiate it except by a letter to plaintiff's attorney disclaiming it, the court refused a motion to vacate the judgment for costs against him, and tax them against the moving parties, it not appearing that the latter were solvent or residents. Hallett *v.* Hastie, 35 Ala. 164.

On the rendition of a judgment on an agreed statement of facts for a tenant, as on a disclaimer, the tenant is not entitled to costs, since Mass. Gen. St. c. 134, §§ 8, 12, provide that when a tenant disclaims he "shall be allowed such costs only as accrue after the filing of the plea." Esty *v.* Currier, 98 Mass. 500.

78. Kansas Pac. R. Co. *v.* McBratney, 10 Kan. 415, decided under special statute.

79. Swayne *v.* Taylor, 2 Chest. Co. Rep. (Pa.) 84.

80. Lane *v.* Harrold, 66 Pa. St. 319. See also Byersdorfer *v.* Schultz, 2 S. W. 492, 8 Ky. L. Rep. 601.

If defendant does not disclaim or surrender till trial, plaintiff is entitled to costs, although he recovers only part of the land in dispute. Kirkpatrick *v.* Vanhorn, 32 Pa. St. 131.

Disclaimer by a part of defendants.— In ejectment for land of which the several defendants had taken possession, each claiming a certain portion where some of the defendants enter a disclaimer and others, with plaintiff's consent, agree to a judgment against them without costs or damages, the remaining defendants who only plead the general issue are on a general verdict against them liable for all the costs and damages. Bell *v.* Foxen, 42 Fed. 755.

81. Fisher *v.* Camp, 26 W. Va. 576. And see Lane *v.* Harrold, 66 Pa. St. 319, holding that defendant is entitled to costs accruing subsequent to the disclaimer.

82. Tate *v.* Doe, 24 Miss. 465.

83. Sims *v.* Thompson, 30 Ala. 158.

84. Huff *v.* Lake, 9 Humphr. (Tenn.) 137.

85. Kennedy *v.* Holman, 19 Ala. 734.

86. See Hopkins *v.* Godbehire, 2 Yerg. (Tenn.) 241.

87. Doe *v.* Owen, 2 Blackf. (Ind.) 452, rule subsequently changed by statute.

others, however, either because of statute,[88] or independently of statute,[89] costs may be taxed against the lessor, and that too although his name has been used without his authority.[90] So one of several lessors who has his name stricken from the declaration is liable to his co-lessors for his proportion of the costs.[91] There is a conflict of authority as to whether plaintiff's lessor will be ruled to pay costs on a judgment of nonsuit against him for refusing to join in the consent rule.[92] A trustee who pleads not guilty in ejectment against him by his *cestui que trust* is liable for costs if plaintiff recovers judgment.[93] If an attorney prosecute ejectment in the name of a party without authority and fails plaintiff is liable for the costs. Defendant has a right to presume a retainer.[94] And one reviving the action in plaintiff's name after his death is liable for costs, where he is not entitled to be substituted.[95] Tenants in possession are not liable for costs until admitted to defend.[96] Nor are such tenants, who were served with notice to defend, taxable with costs, where they refused to enter into the consent rule, and were turned out of possession after return of the execution.[97]

b. Party Obtaining New Trial. Where a statute gives a new trial in ejectment as a matter of right on payment of all costs by the party asking it, the payment of costs[98] by him is a final disposition of the question of costs for the former proceedings, and the court has no power to order costs to abide the event of a new trial.[99]

3. Right as Affected by Tender of Money. Where plaintiff brings ejectment on his legal title and defendant sets up a contract for the purchase of the land and tenders the balance unpaid of the purchase-money, plaintiff is entitled to judgment for nominal judgment and costs.[1]

4. Amount and Items Allowable. Where all the defendants in ejectment prevail, each is entitled to costs of travel and attendance, unless some special cause be shown to the contrary.[2] If the statute fixes a certain sum as costs to be taxed that will be the sum recoverable.[3] Attorney's fees are not recoverable in the absence of statute or stipulation authorizing them;[4] nor will costs for attendance

88. Hopkins *v.* Godbehire, 2 Yerg. (Tenn.) 241.

89. Blount *v.* Wright, 60 N. C. 89; Scott *v.* Sears, 31 N. C. 87.

Reason for rule.— Inasmuch as the courts permit plaintiff's lessor to take all the benefits of a recovery in the action, a judgment should be rendered against him for the costs in case defendant is successful. Blount *v.* Wright, 60 N. C. 89.

Plaintiff's lessor is liable where he enters during pendency of suit. Gubbs *v.* Ellis, 4 N. C. 415.

90. Hopkins *v.* Godbehire, 2 Yerg. (Tenn.) 241. Especially is this so where he permits the action to proceed to judgment and execution against himself without taking any steps to relieve himself other than merely to disclaim the suit in a letter to plaintiff's attorney. Hallett *v.* Hastie, 35 Ala. 164.

91. Scott *v.* Sears, 31 N. C. 87, holding further that if plaintiff ultimately succeeded, such lessor will be entitled to recover back the costs so paid out of those collected from defendant.

92. **That lessor will not be ruled to pay costs** see Anonymous, 8 N. J. L. 268; Den *v.* Hayne, 21 N. J. L. 245; Goodright *v.* Badtitle, 2 W. Bl. 763.

That lessor will be ruled to pay costs see Jackson *v.* Stiles, 1 Cow. (N. Y.) 166. See also to the same effect Smith *v.* Barnardiston, 2 W. Bl. 904.

93. Caldwell *v.* Lowden, 3 Brewst. (Pa.) 63.

94. Hamilton *v.* Wright, 37 N. Y. 502.

95. Hamilton *v.* Homer, 46 Miss. 378.

96. Myers *v.* Smith, 5 B. Mon. (Ky.) 279.

97. Den *v.* Fen, 24 N. J. L. 544.

98. **The costs so required to be paid include** an additional allowance (Wing *v.* De la Rionda, 13 N. Y. Suppl. 793, 20 N. Y. Civ. Proc. 183), but not the costs of a suggestion for mesne profits. Payment only of the costs of the principal suit can be required. Shaw *v.* McMaren, 2 Hill (N. Y.) 417.

99. Zimmerman *v.* Marchland, 23 Ind. 474; Carnes *v.* Platt, 40 N. Y. Super. Ct. 205.

1. Cadwalader *v.* Berkheiser, 32 Pa. St. 43, in which it was further said that if defendant had tendered or offered payment before suit brought and kept it up by bringing the money into court, plaintiff would not have been entitled to a judgment of any kind.

2. Boynton *v.* King, 1 Tyler (Vt.) 30.

3. McAlister *v.* Brents, 9 B. Mon. (Ky.) 483.

4. Smith *v.* Bell, 25 S. W. 752, 9 Ky. L. Rep. 1, 3 Ky. L. Rep. 626; Hegar *v.* De Groat, 3 N. D. 354, 56 N. W. 150.

Ejectment is a mixed action within a statute authorizing five dollars to be taxed as attorney's fees in mixed actions. McAlister *v.* Brents, 9 B. Mon. (Ky.) 483.

Allowance of attorney's fees generally see Costs, 11 Cyc. 104.

of a surveyor after the first session of court be allowed where he is not subpœnaed.[5] So if plaintiff in ejectment count upon demises by persons who are dead, defendant, after entering into the consent rule, may apply to have their names struck out of the declaration and that without costs, the necessity of the application arising from plaintiff.[6]

5. SECURITY.[7] Ejectment is within a statute requiring security for costs in all cases where plaintiff or the person for whose use the action is commenced is a non-resident.[8] Security may also be required where plaintiff's lessor is an infant.[9] Defendant cannot be required to give security on the ground of removal from the state after entering into the common rule.[10] Defendants giving security need not sign the bond and it may be filed at a term subsequent to filing the answer.[11] Plaintiff may also give security at a term subsequent to the return-term, especially where no appearance has been entered by the tenants in possession.[12] Where a statute exempting defendant from giving security on affidavit by him that he is unable to give security and certificate of counsel that plaintiff is not entitled to recover is complied with it is error to require security for costs.[13]

6. WAIVER OF RIGHT TO COSTS. Where a jury in ejectment find for plaintiff, and that he pay defendant a specified compensation for improvements, and make that a condition of the recovery, the waiver of a writ of error by plaintiff is a waiver of costs.[14]

7. REMISSION ON REVERSAL. There may be a reversal on the merits and a retaxation of costs ordered, unless the respondent remits the amount improperly taxed.[15]

8. COLLECTION.[16] A separate fieri facias may issue;[17] and a demand for costs under the rule *nisi* for judgment as in case of nonsuit may be of any or every one of the lessors of plaintiff or of plaintiff's attorney.[18] So the court will on attachment against the lessor for costs stay proceedings to enable him to bring action against his attorney, where there are contradictory affidavits upon the question whether or not he consented to the use of his name as a lessor.[19]

IX. MESNE PROFITS AND DAMAGES.

A. Methods of Procedure to Recover. On the first introduction of the action of ejectment and while the ancient practice prevailed, the measure of damages was the profits of the land accruing during the tortious holding of defendant; but when the proceedings became fictitious and plaintiff nominal the damages became nominal also. The courts made no new provisions and no new fictions to enable the jury to inquire into the actual damage and include in their verdict the real injury sustained by the wrongful holding.[20] To meet this difficulty the remedy sanctioned by the courts was an action of trespass *vi et armis*, usually termed an action for mesne profits,[21] the same being a continuation of the

5. Nicklin *v.* Morrow, 3 Brev. (S. C.) 405.
6. Jackson *v.* Reynolds, 1 Cai. Cas. (N. Y.) 20, Col. Cas. (N. Y.) 155, Col. & C. Cas. (N. Y.) 91.
7. Security for costs generally see COSTS, 11 Cyc. 170.
8. Farnsworth *v.* Agnew, 27 Ill. 42; Trenton State Bank *v.* Evans, 14 N. J. L. 298.
Statute requiring tenants to give bonds before pleading in ejectment is not applicable to the case of a vendee who enters into possession under a contract of purchase and fails to pay. Cox *v.* Gray, 61 N. C. 488.
9. Trenton State Bank *v.* Evans, 14 N. J. L. 298.
10. Den *v.* Inslee, 6 N. J. L. 475.
11. Wall *v.* Fairly, 66 N. C. 385.
12. Moyers *v.* Brown, 10 Humphr. (Tenn.) 77.
13. Jones *v.* Fortune, 69 N. C. 322.
14. Allen *v.* Flock, 2 Penr. & W. (Pa.) 159.
15. Hoyt *v.* Jones, 31 Wis. 389.
16. Enforcement of payment of costs generally see COSTS, 11 Cyc. 253.
17. Jackson *v.* Gale, 3 Cow. (N. Y.) 24.
18. Jackson *v.* Thompson, 7 Cow. (N. Y.) 426.
19. People *v.* Bradt, 7 Johns. (N. Y.) 539.
20. Adams Ejectm. 445; Davis *v.* Delpit, 25 Miss. 445.
21. Adams Ejectm. 445; 3 Blackstone Comm. 199, 205. And to the same effect see the following cases:

action of ejectment,[22] and supplemental thereto.[23] Nevertheless in a number of American states it has been held without statutory authorization that mesne profits[24] and damages for waste[25] are recoverable in an action of ejectment; and in many other jurisdictions either because of statutes expressly authorizing it or because of the more liberal practice authorized by the codes of procedure, plaintiff may unite in one action a cause of action to recover possession of land and a claim for rent or mesne profits and damages.[26] Notwithstanding the fact that damages and rents and profits are recoverable in ejectment, it is held in some jurisdictions where this practice is permissible, either because of or independently of statute, that this does not prevent the maintenance of a separate action therefor,[27] but this has been denied in others.[28] So in some jurisdictions the statutes have substituted in place of trespass for mesne profits a suggestion of such claim and direct that it be in the form in use for a declaration in an action for use and occupation,[29] or in

Alabama.— White *v.* St. Guirons, Minor 331, 12 Am. Dec. 56.

California.— See Miller *v.* Myers, 46 Cal. 535.

Illinois.— Ringhouse *v.* Keener, 63 Ill. 230.

Mississippi.—Dean *v.* Tucker, 58 Miss. 487; Davis *v.* Delpit, 25 Miss. 445.

New York.— Wallace *v.* Berdell, 101 N. Y. 13, 3 N. E. 769; Vandervoort *v.* Gould, 36 N. Y. 639.

North Carolina.— Brothers *v.* Hurdle, 32 N. C. 490, 51 Am. Dec. 400.

Pennsylvania.— Osbourn *v.* Osbourn, 11 Serg. & R. 55.

Tennessee.— Avent *v.* Hurd, 3 Head 458; Poindexter *v.* Cherry, 4 Yerg. 305. *Compare* Nelson *v.* Allen, 1 Yerg. 360, holding that the owner of land may call on the disseizor in equity to account for the mesne profits.

See 17 Cent. Dig. tit. "Ejectment," § 436.

Account render will not lie to recover mesne profits. Harker *v.* Whitaker, 5 Watts (Pa.) 474.

Assumpsit for use and occupation does not lie. Dean *v.* Tucker, 58 Miss. 487; Avene *v.* Hord, 3 Head (Tenn.) 458; Poindexter *v.* Cherry, 4 Yerg. (Tenn.) 305.

Produce of land not recoverable.— A plaintiff who has recovered in an action of ejectment has no right to seize upon the produce of the land which has been severed before the writ of possession executed. His remedy is by an action for the mesne profits. Brothers *v.* Hurdle, 32 N. C. 490, 51 Am. Dec. 400.

22. Brothers *v.* Hurdle, 32 N. C. 490, 51 Am. Dec. 400; Camp *v.* Holmesley, 32 N. C. 211.

23. Brown *v.* McCloud, 3 Head (Tenn.) 280.

24. Alsop *v.* Peck, 2 Root (Conn.) 224; Miller *v.* Melchor, 35 N. C. 439. And see Hodgkins *v.* Price, 137 Mass. 13.

In New Jersey and Pennsylvania it has been held that mesne profits are recoverable in an action of ejectment (Boyd *v.* Cowan, 4 Dall. (Pa.) 130, 1 L. ed. 774; Denn *v.* Chubb, 1 N. J. L. 466) provided notice of the claim therefor has previously been given (Cook *v.* Nicholas, 2 Watts & S. (Pa.) 27; Batten *v.* Bigelow, 2 Fed. Cas. No. 1,108, Pet. C. C. 452).

25. Alsop *v.* Peck, 2 Root (Conn.) 224.

26. *Arkansas.*— Jacks *v.* Dyer, 31 Ark. 334.

California.— Sullivan *v.* Davis, 4 Cal. 291.

Florida.— Duncan *v.* Jackson, 16 Fla. 338.

Indiana.— Bottorff *v.* Wise, 53 Ind. 32.

Iowa.— Dunn *v.* Starkweather, 6 Iowa 466.

Kansas.— Knox *v.* Dunn, 22 Kan. 683.

Kentucky.—Walker *v.* Mitchell, 18 B. Mon. 541.

Maryland.— Hecht *v.* Colquhoun, 57 Md. 563.

Minnesota.— Lord *v.* Dearing, 24 Minn. 110; Armstrong *v.* Hinds, 8 Minn. 254.

Mississippi.— Emrich *v.* Ireland, 55 Miss. 390; Garner *v.* Jones, 34 Miss. 505.

Missouri.— Sieferer *v.* St. Louis, 141 Mo. 586, 43 S. W. 163; Jones *v.* Manly, 58 Mo. 559; Lee *v.* Bowman, 55 Mo. 400.

Nebraska.— Fletcher *v.* Brown, 35 Nebr. 660, 53 N. W. 557; Harrall *v.* Gray, 12 Nebr. 543, 11 N. W. 851.

New York.—Vandervoort *v.* Gould, 36 N. Y. 639; Holmes *v.* Davis, 19 N. Y. 488 [*reversing* 21 Barb. 265]; Livingston *v.* Tanner, 12 Barb. 481; People *v.* New York, 17 How. Pr. 57; Tompkins *v.* White, 8 How. Pr. 520.

Vermont.— Lippett *v.* Kelley, 46 Vt. 516.

Wisconsin.— Ashland M. E. Church *v.* Northern Pac. R. Co., 78 Wis. 131, 47 N. W. 190.

See 17 Cent. Dig. tit. "Ejectment," §§ 436, 436½.

In Louisiana it has been held that under the liberal system of practice that obtains in that state damages are recoverable in an action for the possession of land. Chinn *v.* Blanchard, 6 La. Ann. 66.

27. Huncheon *v.* Long, 25 Ind. App. 530, 58 N. E. 563; Miller *v.* Lancaster Nat. Bank, 9 Ky. L. Rep. 649; Emrich *v.* Ireland, 55 Miss. 390; Field *v.* Columbet, 9 Fed. Cas. No. 4,764, 4 Sawy. 523.

28. Walker *v.* Hitchcock, 19 Vt. 634; Strong *v.* Garfield, 10 Vt. 502. And see Vascocu *v.* Pavie, 14 La. 135, holding that damages which might have been given under a prayer for general relief by defendant in eviction and which were not given will be presumed not proved and cannot be afterward recovered as it is *res adjudicata*.

29. Wallace *v.* Berdell, 101 N. Y. 13, 3 N. E. 769; Vandevoort *v.* Gould, 36 N. Y. 639. And see Noble *v.* Fairs, 58 Mich. 637, 640, 26 N. W. 157, 158.

Form of suggestion for the recovery of damages in ejectment see Adams Ejectm. 498.

Form of plea to a suggestion see Adams Ejectm. 499.

the form of a declaration in assumpsit.[30] And it has been held that the right to recover mesne profits by this procedure is not taken away by a statute authorizing the joinder in one action of a cause of action for the recovery of the possession of land and a claim for mesne profits.[31]

B. Effect of Recovery in Ejectment on Subsequent Action. If the statute require a claim for mesne profits to be adjudicated in the action of ejectment the judgment in such action is a bar to any subsequent action for mesne profits.[32] So if the statute permit mesne profits to be recovered in an action of ejectment without requiring claim therefor to be set up in such action, and plaintiff claims mesne profits in such action, the judgment in ejectment operates as a bar to a subsequent action for mesne profits.[33] Where a separate action for mesne profits and damages may be brought no defense can be set up in such action which might have been set up as a bar to the action of ejectment.[34] For the purpose of the recovery of mesne profits and damages in a subsequent action the record of the judgment in ejectment is conclusive evidence of plaintiff's title as between the parties;[35] and of his right to possession[36] from the time of the demise[37] to

30. Ringhouse *v.* Keener, 63 Ill. 230, in which it was said that there is no substantial difference between the action of trespass for mesne profits as it existed under the common law and the suggestion required by the Illinois statute.

Writ of inquiry.— On a suggestion of damages on a default in an action of ejectment the proper practice is to have issued a writ of inquiry to assess the damages. Such writ is required before the damages can be assessed. Tucker *v.* Hamilton, 108 Ill. 464.

Statute is not applicable in actions against persons not defendants in ejectment. The statute makes the suggestion and the proceedings thereon a continuance of an ejectment suit which could only be when the damages were claimed from defendant therein or from some successor substituted in place of defendant if such procedure were authorized by the statute. Snow *v.* McCormick, 43 Ill. App. 537.

31. Vandervoort *v.* Gould, 36 N. Y. 639; Livingston *v.* Tanner, 12 Barb. (N. Y.) 481. And see People *v.* New York, 17 How. Pr. (N. Y.) 57.

32. Stewart *v.* Dent, 24 Mo. 111. See also Gillum *v.* Case, 71 Miss. 848, 16 So. 236.

33. Bell *v.* Medford, 57 Miss. 31.

34. Langendyck *v.* Burhans, 11 Johns. (N. Y.) 461; Baron *v.* Abeel, 3 Johns. (N. Y.) 481, 3 Am. Dec. 515; Jackson *v.* Combs, 7 Cow. (N. Y.) 36; Man *v.* Drexel, 2 Pa. St. 202. See also Douglass *v.* Haldeman, 2 Watts (Pa.) 81.

Title cannot be set up by defendant, even though he has a better title. Jackson *v.* Randall, 11 Johns. (N. Y.) 405; Benson *v.* Matsdorf, 2 Johns. (N. Y.) 369.

A recital in a judgment of a withdrawal of all claim for use and occupation against defendants shows that the right to damages therefor was not adjudicated in that action. Welles *v.* Newsom, 76 Iowa 81, 40 N. W. 105.

Where plaintiffs were made parties subsequent to the commencement of the suit and the original plaintiffs were nonsuited, the judgment in favor of them is conclusive only from the time they were made parties. Kille *v.* Ege, 82 Pa. St. 102.

35. *Alabama.*— Shumake *v.* Nelm, 25 Ala. 126.

California.— Avery *v.* Contra Costa County Super. Ct., 57 Cal. 247; Byers *v.* Neal, 43 Cal. 210.

District of Columbia.— Meloy *v.* Johnston, 2 MacArthur 202.

Kentucky.— Myers *v.* Sanders, 8 Dana 65.

Maryland.— West *v.* Hughes, 1 Harr. & J. 574, 2 Am. Dec. 539.

Mississippi.— Brewer *v.* Beckwith, 35 Miss. 467.

New Jersey.— Den *v.* McShane, 13 N. J. L. 35.

New York.— Morgan *v.* Varick, 8 Wend. 587; Graves *v.* Joice, 5 Cow. 261; Hopkins *v.* McLaren, 4 Cow. 667; Jackson *v.* Stone, 13 Johns. 447; Baron *v.* Abeel, 3 Johns. 481, 3 Am. Dec. 515; Benson *v.* Matsdorf, 2 Johns. 369.

North Carolina.— Poston *v.* Jones, 19 N. C. 294.

Pennsylvania.— Chambers *v.* Lapsley, 7 Pa. St. 24; Lloyd *v.* Nourse, 2 Rawle 49; McCready *v.* Guardians of Poor, 9 Serg. & R. 94, 11 Am. Dec. 667; Jeffries *v.* Zane, 1 Miles 287.

Virginia.— Whittington *v.* Christian, 2 Rand. 353.

Canada.—See Wightman *v.* Fields, 19 Grant Ch. (U. C.) 559, holding the judgment to be evidence of title, but declaring that it has not been determined whether it is conclusive.

See 17 Cent. Dig. tit. "Ejectment," § 439.

36. Craig *v.* Watson, 68 Ga. 114; Shaeffer *v.* Eichert, 10 Pa. Co. Ct. 360.

37. *Indiana.*—Buntin *v.* Duchane, 1 Blackf. 56.

Maryland.— West *v.* Hughes, 1 Harr. & J. 574, 2 Am. Dec. 539.

New York.— Lion *v.* Burtis, 5 Cow. 408; Dewey *v.* Osborn, 4 Cow. 329.

North Carolina.— Poston *v.* Jones, 19 N. C. 294.

Pennsylvania.— Lloyd *v.* Nourse, 2 Rawle 49.

Virginia.— Whittington *v.* Christian, 2 Rand. 353.

See 17 Cent. Dig. tit. "Ejectment," § 439.

the time of the judgment and execution;[38] and according to some decisions it is immaterial whether such judgment is founded on a verdict or on a judgment obtained by default against the casual ejector.[39] Nevertheless such judgment concludes the parties only as to the subject-matter of it,[40] and therefore it furnishes no proof of title in plaintiff prior to the demise,[41] and if third persons are sued in an action for mesne profits, which is substantially an action against them as trespassers, they may controvert plaintiff's title at large. In such a suit the record of the ejectment is not evidence to establish plaintiff's title but is admissible to show plaintiff's possession.[42] So the judgment in ejectment is conclusive of plaintiff's right to mesne profits from the time of the demise laid in the declaration,[43] until delivery of possession under execution.[44] But it is in no case conclusive of plaintiff's right to profits, prior to the bringing of the action in ejectment. Such judgments settle the right to recovery of mesne profits no further back than the date of the demise in the declaration, beyond which time the title again comes in question, unless proof of it is waived.[45] The judgment is also conclusive of defendant's possession at the time the suit was commenced,[46] but it is not conclusive as to the length of time during which defendant was in possession.[47] While the judgment is *prima facie* evidence that defendant continued in possession until delivery of the premises to plaintiff,[48] defendant is entitled to show that his possession terminated earlier than at that time.[49]

38. West *v.* Hughes, 1 Harr. & J. (Md.) 574, 2 Am. Dec. 539. And see cases cited in the two preceding notes.

39. Chirac *v.* Reinicker, 11 Wheat. (U. S.) 280, 6 L. ed. 474; Aslin *v.* Parkin, 2 Burr. 665, 2 Ld. Ken. 376; Goodtitle *v.* Tombs, 3 Wils. C. P. 118; Adams Ejectm. 456. *Contra*, Stewart *v.* Camden, etc., R. Co., 33 N. J. L. 115; Brown *v.* Galloway, 4 Fed. Cas. No. 2,006, Pet. C. C. 291.

The reason is the tenant in possession in the first case is the real party on the record; in the last, he is considered as substantially defendant, and the judgment by default, as a confession of the title set up in the ejectment. Chirac *v.* Reinicker, 11 Wheat. (U. S.) 280, 6 L. ed. 474.

The confession of entry by defendant in ejectment is sufficient evidence of possession to enable plaintiff to recover damages and mesne profits. Brown *v.* Galloway, 4 Fed. Cas. No. 2,006, Pet. C. C. 291.

40. Aslin *v.* Parkin, 2 Burr. 665, 2 Ld. Ken. 376.

41. Leland *v.* Tousey, 6 Hill (N. Y.) 328; Poston *v.* Jones, 19 N. C. 294; Aslin *v.* Parkin, 2 Burr. 665, 2 Ld. Ken. 376; Buller N. P. 87; Sanders Pl. & Ev. 669.

To recover mesne profits for any time anterior to the date of the demise plaintiff must prove both his title then and defendant's possession. The judgment in ejectment is proof of neither. West *v.* Hughes, 1 Harr. & J. (Md.) 574, 2 Am. Dec. 539.

42. Leland *v.* Tousey, 6 Hill (N. Y.) 328; Chirac *v.* Reinicker, 11 Wheat. (U. S.) 280, 6 L. ed. 474.

43. *New Jersey.*— Den *v.* McShane, 13 N. J. L. 35.

New York.— Benson *v.* Matsdorf, 2 Johns. 369; Van Alen *v.* Rogers, 1 Johns. Cas. 281, 1 Am. Dec. 113.

North Carolina.— Poston *v.* Jones, 19 N. C. 294.

Pennsylvania.— Kuhns *v.* Bowman, 91 Pa. St. 504; Kille *v.* Ege, 82 Pa. St. 102; Drexel *v.* Man, 2 Pa. St. 267; Man *v.* Drexel, 2 Pa. St. 202.

Tennessee.— Avent *v.* Hord, 3 Head 458.

See 17 Cent. Dig. tit. "Ejectment," § 439.

44. West *v.* Hughes, 1 Harr. & J. (Md.) 574, 2 Am. Dec. 539; Kuhns *v.* Bowman, 91 Pa. St. 504; Kille *v.* Ege, 82 Pa. St. 102; Sopp *v.* Winpenny, 68 Pa. St. 78; Drexel *v.* Man, 2 Pa. St. 271, 44 Am. Dec. 195; Man *v.* Drexel, 2 Pa. St. 202; Postens *v.* Postens, 3 Watts & S. (Pa.) 182, 38 Am. Dec. 752; Huston *v.* Wickersham, 2 Watts & S. (Pa.) 308; Osbourn *v.* Osbourn, 11 Serg. & R. (Pa.) 55.

45. Dewey *v.* Osborn, 4 Cow. (N. Y.) 329; Benson *v.* Matsdorf, 2 Johns. (N. Y.) 369; Kille *v.* Ege, 82 Pa. St. 102; Huston *v.* Wickersham, 2 Watts & S. (Pa.) 308; Avent *v.* Hord, 3 Head (Tenn.) 458; 2 Archbold N. P. 431.

46. *Maryland.*— West *v.* Hughes, 1 Harr. & J. 574, 2 Am. Dec. 539.

New Jersey.— Bray *v.* McShane, 13 N. J. L. 35.

New York.— Jackson *v.* Combs, 7 Cow. 36; Baron *v.* Abeel, 3 Johns. 481, 3 Am. Dec. 515.

Pennsylvania.— Miller *v.* Henry, 84 Pa. St. 33; Sopp *v.* Winpenny, 68 Pa. St. 78; Postens *v.* Postens, 3 Watts & S. 182, 38 Am. Dec. 752.

England.— Aslin *v.* Parkin, 2 Burr. 665, 2 Ld. Ken. 376.

See 17 Cent. Dig. tit. "Ejectment," § 439.

47. West *v.* Hughes, 1 Harr. & J. (Md.) 574, 2 Am. Dec. 539; Bray *v.* McShane, 13 N. J. L. 35; Poston *v.* Jones, 19 N. C. 294; Miller *v.* Henry, 84 Pa. St. 33; Sopp *v.* Winpenny, 68 Pa. St. 78; Mitchell *v.* Freedley, 10 Pa. St. 198; Bailey *v.* Fairplay, 6 Binn. (Pa.) 450, 6 Am. Dec. 486.

48. Poston *v.* Jones, 19 N. C. 294; Sopp *v.* Winpenny, 68 Pa. St. 78.

49. Poston *v.* Jones, 19 N. C. 294; Sopp *v.* Winpenny, 68 Pa. St. 78; Bailey *v.* Fairplay, 6 Binn. (Pa.) 450, 6 Am. Dec. 486. See also

C. Persons Entitled to Recover. An action of trespass for mesne profits may be maintained by a disseizee who has recovered possession.[50] So mesne profits may be recovered by the lessor of plaintiff after a recovery in ejectment by default against the casual ejector.[51] And the right to such profits inures from the institution of the suit as to all persons entitled thereto on the demise of plaintiff.[52] Rents and profits may also be recovered by a plaintiff who has transferred the premises pending the action;[53] whose title or estate has terminated before the trial of the cause;[54] who has come into the possession of the premises after the commencement of his action;[55] or who has acquired the right to possession after such time, obtained judgment for possession, and made actual entry;[56] so mesne profits may be recovered by an Indian nation to recover land of an intruder.[57] And the right of a plaintiff to recover his share of the mesne profits collected by defendants as coheirs is not postponed until his share of the land is allotted to him in partition.[58] Again if an action against a disseizor cannot be maintained on purely equitable grounds, it can be under the rule of the civil law in Louisiana that creditors may exercise all the rights and actions of their debtor except those that are exclusively attached to the person.[59] But where a husband is entitled to the possession of his wife's property during coverture and the rents and profits therefrom, the widow in ejectment only becomes entitled thereto from the time of his death.[60]

D. Persons Liable. Liability for mesne profits rests upon the disseizor,[61]

Hare *v.* Fury, 3 Yeates (Pa.) 13, 2 Am. Dec. 358.

50. Morgan *v.* Varick, 8 Wend. (N. Y.) 587.

51. Baron *v.* Abeel, 3 Johns. (N. Y.) 481, 3 Am. Dec. 515.

52. Karns *v.* Tanner, 74 Pa. St. 339, holding that a wife who succeeds to her husband's, plaintiff's, rights both as devisee and executrix may recover both as legatee and sheriff's vendee, she having bought the land at sheriff's sale under an execution against plaintiff and having recovered in ejectment as sheriff's alienee.

An executor may recover mesne profits. Blight *v.* Ewing, 26 Pa. St. 135.

53. Moss *v.* Shear, 30 Cal. 467 (so holding where the court ordered the action continued in name of original plaintiff); Wood *v.* McGuire, 21 Ga. 576 (holding that one of several plaintiffs so parting with his title might recover mesne profits up to the time he parted with it); Dunstan *v.* Northern Pac. R. Co., 2 N. D. 46, 49 N. W. 426; Fenn *v.* Stille, 1 Yeates (Pa.) 154. *Compare* Mackall *v.* Richards, 1 Mackey (D. C.) 444, holding that an action commenced by a *cestui que trust* in the name of the trustee cannot be maintained where the former having the entire control and power of disposition over the property conveys his interest before judgment.

54. *Alabama.*— Hairston *v.* Dobbs, 80 Ala. 589, 2 So. 147.

Kentucky.— Robertson *v.* Morgan, 2 Bibb 148.

New York.— Jackson *v.* Davenport, 18 Johns. 295.

Pennsylvania.— Rugan *v.* Philips, 4 Yeates 382. And see Freedly *v.* Mitchell, 2 Pa. St. 100.

Tennessee.—Gordon *v.* Overton, 8 Yerg. 121.

United States.— Brown *v.* Galloway, 4 Fed. Cas. No. 2,006, Pet. C. C. 291.

Compare Hilliker *v.* Simpson, 92 Me. 590, 43 Atl. 495; Orr *v.* Broad, 52 Nebr. 490, 72 N. W. 850; Doe *v.* Blakier, (East T.) 2 Vict.

Mich. Comp. Laws, § 6232, which so provide in case plaintiff's title expires between the commencement of the action and the time of trial does not apply where the right or title is transferred. Michigan Cent. R. Co. *v.* McNaughton, 45 Mich. 87, 7 N. W. 712.

55. Crispen *v.* Hannovan, 86 Mo. 160. And see Beach *v.* Beach, 20 Vt. 83.

56. Scheffel *v.* Weiler, 41 Ill. App. 85.

57. Brought *v.* Cherokee Nation, (Indian Terr. 1902) 69 S. W. 937.

58. Clarke *v.* Seay, 51 S. W. 589, 21 Ky. L. Rep. 394.

59. New Orleans *v.* Christmas, 131 U. S. 191, 9 S. Ct. 745, 33 L. ed. 99. See also New Orleans *v.* U. S., 131 U. S. 220, 9 S. Ct. 755, 33 L. ed. 110.

60. Smith *v.* White, 165 Mo. 590, 65 S. W. 1013.

61. Snell *v.* Harrison, 131 Mo. 495, 32 S. W. 37, 52 Am. St. Rep. 642 (a tenant in common in an action by a cotenant); Phillips *v.* Stewart, 87 Mo. App. 486; Morgan *v.* Varick, 8 Wend (N. Y.) 587; Storch *v.* Carr, 28 Pa. St. 135 (holding that one who put a party in possession, having no right to do so, and afterward leased to other parties, is liable together with his lessees).

Where there are several defendants in possession each claiming a certain portion of the premises, and some of them enter a disclaimer, and others with plaintiff's consent agree to a judgment against them without costs or damages, the remaining defendants, who only plead the general issue, are on a general verdict against them liable for all damages. Bell *v.* Foxen, 42 Fed. 755. See also Greer *v.* Mezes, 24 How. (U. S.) 268, 16 L. ed. 661.

receiving the rents and profits,[62] his tenant,[63] one acquiring title from the disseizor,[64] or a third person to whom possession is delivered by a defendant in ejectment after the commencement of the action.[65] In Louisiana the possessor only is liable for profits accruing during his possession.[66] But a personal representative of a deceased defendant in ejectment is not liable for mesne profits accruing during the pendency of the action[67] or after the recovery of the land.[68]

E. Elements and Measure of Damages — 1. In General. In trespass for mesne profits compensation is the proper measure of damages;[69] which is generally defined to be the fair rental value of the land for the time defendant was in wrongful possession, not exceeding the period fixed by the statute of limitations before the action is brought.[70] By statute in some jurisdictions the same rule

One claiming lands to which a judgment in ejectment had passed against his tenant is liable for the mesne profits. Van Alstine *v.* McCarty, 51 Barb. (N. Y.) 326.

62. Doe *v.* Harlow, 12 A. & E. 40, 40 E. C. L. 31, holding that one who, although never actually in possession during the time of the trespass, held it lawfully before such time, underlet it to another from whom he continued to receive rent and declared him to be his tenant when plaintiff demanded possession is liable for the mesne profits. See Newport *v.* Hardy, 10 Jur. 333.

63. Trubee *v.* Miller, 48 Conn. 347, 40 Am. Rep. 177 (although ignorant of the disseizee's claim of title and has paid rent to the disseizor in good faith); Bradley *v.* McDaniel, 48 N. C. 128 (party coming in as underlessee to defendant during the pendency of the action); Lamson *v.* Sutherland, 13 Vt. 309; Holcomb *v.* Rawlyns, Cro. Eliz. 540. But see Fletcher *v.* McFarlane, 12 Mass. 43 (holding that a lessee of the disseizor is not liable); Liford's Case, 11 Coke 46*b*.

64. Morgan *v.* Varick, 8 Wend. (N. Y.) 587.

An heir of the disseizor is liable for mesne profits accruing after the commencement of the writ of entry but not for those accruing between the descent cast and their entry. Emerson *v.* Thompson. 2 Pick. (Mass.) 473.

65. Jackson *v.* Stone, 13 Johns. (N. Y.) 447; Bradley *v.* McDaniel, 48 N. C. 128.

66. Burney *v.* Ludeling, 47 La. Ann. 1434, 17 So. 877; Gillaspie *v.* Citizens' Bank, 35 La. Ann. 779; New Orleans *v.* Christmas, 131 U. S. 191, 9 S. Ct. 745, 33 L. ed. 99, in which it was said it was even made a question in Doe *v.* Harlow, 12 A. & E. 40, 40 E. C. L. 31, and in Doe *v.* Challis, 17 Q. B. 166, 79 E. C. L. 166, whether the landlord of a tenant in possession was liable for mesne profits. After argument it was decided that he was. But the reason of this is obvious; the tenant's possession is the possession of his landlord.

67. Bard *v.* Nevin, 9 Watts (Pa.) 328.

68. Means *v.* Associate Reformed Presb. Church, 3 Pa. St. 93. But see Haldane *v.* Fisher, 1 Yeates (Pa.) 121.

69. Morrison *v.* Robinson, 31 Pa. St. 456.

In Kentucky it has been held that a city cannot recover mesne profits from a squatter on vacant land belonging to the city who used it for agricultural purposes; and it is said that it is not sufficient in an action for damages to show that defendant has made something by his unlawful act, but it must be shown that plaintiff has lost something. Uniontown *v.* Berry, 72 S. W. 295, 24 Ky. L. Rep. 1692.

But in Iowa it has been held that the owner is entitled to rents and profits according to the value of the land for the purpose to which it was devoted by the occupant, who is to pay what the use of the land is worth to him. Wolcott *v.* Townsend, 49 Iowa 456; Dungan *v.* Von Puhl, 8 Iowa 263.

Unenclosed prairie land.— Where it was shown that defendant was not in actual possession of the land in dispute and received no profits therefrom and that it was unenclosed and unimproved prairie land it was held that no damages could be awarded for use and occupation. Griffey *v.* Kennard, 24 Nebr. 174, 38 N. W. 791.

Ore mines.— In trespass for mesne profits arising from ore lands the measure of damages is the value of the ore in place, which is to be ascertained by deducting the cost of mining, cleansing, and delivering the ore in the market from its market value thus delivered. Ege *v.* Kille, 84 Pa. St. 333; Coleman's Appeal, 62 Pa. St. 252.

Coal mines.— In the case of coal mines the measure of damages is the fair value of the coal in place and such injury to the land as the mining may have caused. Forsyth *v.* Wells, 41 Pa. St. 291, 80 Am. Dec. 617. In Maryland it has been held that the proper estimate of damages in such case is the value of the coal per ton after it is severed from its native bed and before it is put upon the mine cars without deducting the expense of severing. Barton Coal Co. *v.* Cox, 39 Md. 1, 17 Am. Rep. 525.

Ferries.— In trespass for mesne profit for a ferry landing, the measure of damages is the net profits of the ferry, that is the proceeds after deducting the expense of operating it. Averett *v.* Brady, 20 Ga. 523; Dunlap *v.* Yoakum, 18 Tex. 582.

70. *Arkansas.*— Fears *v.* Merrill, 9 Ark. 559, 50 Am. Dec. 226.

Iowa.— Bradley *v.* Brown, 86 Iowa 359, 53 N. W. 268.

Maryland.— Worthington *v.* Hiss, 70 Md. 172, 16 Atl. 534, 17 Atl. 1026; Baltimore, etc., R. Co. *v.* Boyd, 67 Md. 32, 10 Atl. 315, 1 Am. St. Rep. 362; Tongue *v.* Nutwell, 31 Md. 302; Dugan *v.* Gittings, 3 Gill 138, 43 Am. Dec. 306.

applies in this class of cases as to the measure of damages as would prevail in assumpsit for use and occupation; although no contractual relation exists between the parties, yet by force of the statute the compensation is to be adjusted as upon contract and not upon the footing of a tort.[71] According to the English rule the jury are not confined in their verdict to the mere rent of the premises, although the action is said to be brought to recover the rents and profits of the estate, but may give such extra damages as they may think the particular circumstances of the case demand.[72] Plaintiff can recover only the rents and profits of such portion of the premises as is shown to have been in possession of the defendant or held under his authority.[73]

2. WHETHER CONFINED TO RENTS AND PROFITS ACTUALLY RECEIVED. The owner of the property withheld is not confined to the rents actually received by the party required to make restitution; he should have either these or the rental value as may be just under the circumstances.[74] But in cases where the title was in doubt and defendant was not a mere trespasser, courts of equity have sometimes awarded the rents and profits actually received and not the rental value of the land.[75] So also a tenant in common who has the use of the whole estate without any actual ouster of his cotenants is liable to account only for the rents and profits actually received.[76] But if one tenant in common actually ousts his cotenants and forcibly keeps them out of possession then he is liable as a trespasser for the actual rental value of their respective interests in the estate.[77] A tenant in common as against a stranger may recover in ejectment the entire premises, but he

Minnesota.— Nash *v.* Sullivan, 32 Minn. 189, 20 N. W. 144.

Missouri.— Cutter *v.* Waddingham, 33 Mo. 269; Phillips *v.* Stewart, 87 Mo. App. 486.

New York.— Syracuse Gas-Light Co. *v.* Rome, etc., R. Co., 51 Hun 119, 5 N. Y. Suppl. 459.

Pennsylvania.— Hanna *v.* Phillips, 1 Grant 253.

United States.— New Orleans *v.* Gaines, 15 Wall. 624, 21 L. ed. 215; Larwell *v.* Stevens, 12 Fed. 559, 2 McCrary 311.

Question of fact for the jury.—The amount of damages to be recovered as mesne profits is a question of fact for the jury and not for the court. Horkan *v.* Benning, 111 Ga. 126, 36 S. E. 432.

71. Prestwood *v.* Watson, 111 Ala. 604, 20 So. 600; Turnipseed *v.* Fitzpatrick, 75 Ala. 297; Morris *v.* Beebe, 54 Ala. 300; Page *v.* Fowler, 39 Cal. 412, 2 Am. Rep. 462; Holmes *v.* Davis, 19 N. Y. 488; Low *v.* Purdy, 2 Lans. (N. Y.) 422; Seaton *v.* Davis, 1 Thomps. & C. (N. Y.) 91; Schradsky *v.* Stimson, 76 Fed. 730, 22 C. C. A. 515.

Where there are no rents or profits the measure of damages is the value of the use and occupation of the land during the unlawful possession. Syracuse Gas Light Co. *v.* Rome, etc., R. Co., 11 N. Y. Civ. Proc. 239.

72. Adams Ejectm. 391. In Goodtitle *v.* Tombs, 3 Wils. C. P. 118, 121, Gould, J., said: "The plaintiff in this case is not confined to the very mesne profits only, but he may recover for his trouble, etc. I have known four times the value of the mesne profits given by a jury in this sort of action of trespass; if it were not to be so sometimes, complete justice could not be done to the party injured."

73. Ellis *v.* Jeans, 26 Cal. 272; Ainslie *v.* New York, 1 Barb. (N. Y.) 168.

74. Wallace *v.* Berdell, 101 N. Y. 13, 3 N. E. 769; Maner *v.* Wilson, 16 S. C. 469.

Not what defendant actually gathered from the land but the actual rental value is the true measure of damages. Credle *v.* Ayers, 126 N. C. 11, 35 S. E. 128, 48 L. R. A. 751.

Possession taken under a void deed.—Where a mortgagee entered into possession of the mortgaged premises under a void tax deed it was held that he was liable to the mortgagor for the rental value of the land during the time he was in possession under the deed, although his possession was in good faith and he was unable by diligence to lease the land for its full rental value. Bradley *v.* Brown, 86 Iowa 359, 53 N. W. 268.

75. Rabb *v.* Patterson, 42 S. C. 528, 20 S. E. 540, 46 Am. St. Rep. 743; Bradford *v.* Buchanan, 39 S. C. 237, 17 S. E. 501; Garlington *v.* Copeland, 32 S. C. 57, 10 S. E. 616; Johnson *v.* Lewis, 2 Strobh. Eq. (S. C.) 157; Lawrence *v.* Rector, 137 U. S. 139, 11 S. Ct. 33, 34 L. ed. 600.

Where the bad faith of the possessor is technical merely and the opposition to the real owner's title has been made in good faith and the property is an unimproved waste, the possessor should not be charged with rents and revenues which he might have obtained, based upon what was obtained by others from improved property. New Orleans *v.* Christmas, 131 U. S. 191, 9 S. Ct. 745, 33 L. ed. 99 [*reversing* 17 Fed. 16, 4 Woods 213].

76. Thomson *v.* Peake, 38 S. C. 440, 17 S. E. 45, 725; Jones *v.* Massey, 14 S. C. 292.

77. *Alabama.*— Kirkland *v.* Trott, 75 Ala. 321.

California.—Carpentier *v.* Mitchell, 29 Cal. 330.

Maryland.—Tongue *v.* Nutwell, 31 Md. 302.

Missouri.— Cutter *v.* Waddingham, 33 Mo. 269. Where in ejectment by a cotenant de-

can recover as mesne profits only his proportionate share, for defendant still remains liable to an action by plaintiff's cotenant.[78]

3. INCREASED RENTAL BY REASON OF IMPROVEMENTS. A *bona fide* occupant holding possession of land under color of title is not liable for the increased rental value of the land caused by improvements put upon it by himself. In such case the estimate of rent should be made with reference to the condition of the land at the time when he entered upon it,[79] unless the occupant has been allowed full compensation for improvements,[80] or the owner is required to pay interest on the value of the improvements.[81]

4. COSTS AND ATTORNEY'S FEES. If plaintiff has not already recovered his costs in the ejectment suit, he may prove them and have them assessed as a part of his damages in trespass for mesne profits.[82] But if the action of ejectment was defended and the costs were taxed therein they cannot be retaxed in trespass for mesne profits.[83] But plaintiff in ejectment is in no better position than other plaintiffs, and therefore in trespass for mesne profits he cannot recover his

fendant denies plaintiff's right of possession, the latter, on judgment in his favor for a part of the land, is entitled to recover also the rents and profits which accrued from such part during the unlawful possession. Roberts *v.* St. Louis Merchants' Land Imp. Co., 126 Mo. 460, 29 S. W. 584.

Pennsylvania.— Lane *v.* Harrold, 72 Pa. St. 267; Critchfield *v.* Humbert, 39 Pa. St. 427, 80 Am. Dec. 533.

South Carolina.— Maner *v.* Wilson, 16 S. C. 469; Jones *v.* Massey, 14 S. C. 292.

See 17 Cent. Dig. tit. "Ejectment," § 445 *et seq.*

78. McGuire *v.* Lynch, 126 Cal. 576, 59 Pac. 27; Clark *v.* Huber, 20 Cal. 196; Holdfast *v.* Shepard, 31 N. C. 222.

79. *Alabama.*— McCarver *v.* Doe, 135 Ala. 542, 33 So. 486; Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13; Southern Cotton Oil Co. *v.* Henshaw, 89 Ala. 448, 7 So. 760; Dozier *v.* Mitchell, 65 Ala. 511.

Arkansas.— Rector *v.* Gaines, 19 Ark. 70. See also Butler *v.* Gaines, 19 Ark. 95.

Georgia.— Averett *v.* Brady, 20 Ga. 523.

Indiana.— Adkins *v.* Hudson, 19 Ind. 392; Elliott *v.* Armstrong, 4 Blackf. 421.

Iowa.— Wolcott *v.* Townsend, 49 Iowa 456; Dungan *v.* Von Puhl, 8 Iowa 263.

Kansas.— Deitzler *v.* Wilhite, 55 Kan. 200, 40 Pac. 272.

Kentucky.— Haskins *v.* Spiller, 3 Dana 573.

Massachusetts.— Hodgkins *v.* Price, 141 Mass. 162, 5 N. E. 502.

Minnesota.— Curry *v.* Sandusky Fish Co., 88 Minn. 485, 93 N. W. 896.

Mississippi.— Evans *v.* Holmes County, (1892) 11 So. 652; Tatum *v.* McLellan, 56 Miss. 352.

New York.—Jackson *v.* Loomis, 4 Cow. 168, 15 Am. Dec. 347.

Wisconsin.— Davis *v.* Louk, 30 Wis. 308; Blodgett *v.* Hitt, 29 Wis. 169.

See 17 Cent. Dig. tit. "Ejectment," § 446.

Where the improvements have been destroyed by casualty before the trial and defendant is thereby deprived of his right to compensation for them, plaintiff will not be entitled to recover as mesne profits or rents during any portion of the time of defendant's possession anything more than the reasonable value of the rent of the premises without such improvements. Nixon *v.* Porter, 38 Miss. 401. *Contra,* Evetts *v.* Tendick, 44 Tex. 570, where the court held defendant liable for rents upon the premises recovered, including as well the improvements placed upon the land by him as the rent of the land itself, following former decisions in that state, but admitting that the contrary rule is more equitable.

80. State *v.* Passmore, 61 Ark. 363, 33 S. W. 214; Barnett *v.* Higgins, 4 Dana (Ky.) 565; Bell *v.* Barnet, 2 J. J. Marsh. (Ky.) 516; Miller *v.* Ingram, 56 Miss. 510; Hardeman *v.* Turner, 112 Fed. 41, 50 C. C. A. 110.

81. Childs *v.* Shower, 18 Iowa 261.

82. *New Hampshire.*— Fowler *v.* Owen, 68 N. H. 270, 39 Atl. 329, 73 Am. St. Rep. 588.

New York.— Baron *v.* Abeel, 3 Johns. 481, 3 Am. Dec. 515.

North Dakota.—Hegar *v.* De Groat, 3 N. D. 354, 56 N. W. 150.

Tennessee.— White *v.* Clack, 2 Swan 230.

England.— Nowell *v.* Roake, 7 B. & C. 404, 6 L. J. K. B. O. S. 26, 1 M. & R. 170, 14 E. C. L. 184; Aslin *v.* Parkin, 2 Burr. 665, 2 Ld. Ken. 376; Doe *v.* Huddart, 2 C. M. & R. 316, 4 Dowl. P. C. 437, 1 Gale 260, 5 Tyrw. 846; Symonds *v.* Page, 1 Cromp. & J. 29; Doe *v.* Hare, 2 Dowl. P. C. 245; Doe *v.* Filliter, 13 M. & W. 47.

Canada.— Patterson *v.* Reardon, 7 U. C. Q. B. 326.

Affidavit that defendant was in possession. — A plaintiff is entitled to have his costs awarded to him in the ejectment suit on a judgment by default, only where it appears by the affidavit of service of the summons that defendant was at the time of the service in actual possession of the premises claimed or some part thereof. If it does not so appear plaintiff must recover his costs in the ejectment suit in an action for mesne profits. Hunt *v.* O'Neill, 44 N. J. L. 564.

83. Doe *v.* Davis, 1 Esp. 358; Brooke *v.* Bridges, 1 L. J. C. P. O. S. 11, 7 Moore C. P. 471, 17 E. C. L. 522.

attorney's fees or expenses paid out in the action of ejectment other than the taxable costs.[84]

5. INTEREST ON MESNE PROFITS. The allowance of interest on the fair annual rental value of the premises during the period they were wrongfully withheld is a proper subject for the consideration of the jury in determining the amount of damages plaintiff is entitled to recover. Less than this would not give plaintiff full and complete indemnity for the injury to his rights.[85] It has been held that where rents are payable quarterly, interest may be computed upon the rent from the expiration of the quarter days instead of the expiration of the year.[86] But on the other hand it has been held that plaintiff is not entitled to have the interest computed by making quarterly rests, although by the terms of the lease under which he held the rent was payable quarterly.[87]

6. WASTE AND INJURY TO FREEHOLD. Plaintiff, if he properly alleges them, may recover not only the mesne profits, but also damages for waste and injuries to the freehold, the measure of which is the diminished value of the land.[88] But where the statute in express terms limits the damages to compensation for use and occupation, no damages for waste can be recovered.[89]

7. CROPS. While the owner may recover for the use and occupation of the land, he can in no case be held to be the owner of the crops grown and actually harvested on the land by defendant while in possession;[90] nor can he recover the fruits of the land from one who has purchased them from defendant while in adverse possession.[91]

8. PUNITIVE DAMAGES. In trespass for mesne profits punitive damages are allowed only when defendant has shown malice or bad faith.[92]

84. *District of Columbia.*— Meloy v. Johnston, 2 MacArthur 202.

New Jersey.— Pike v. Daly, 54 N. J. L. 4, 20 Atl. 7 [*overruling* Denn v. Chubb, 1 N. J. L. 533].

North Dakota.—Hegar v. De Groat, 3 N. D. 354, 56 N. W. 150.

Pennsylvania.— Alexander v. Herr, 11 Pa. St. 537.

Rhode Island.— Herreshoff v. Tripp, 15 R. I. 92, 23 Atl. 104.

Tennessee.— White v. Clack, 2 Swan 230.

England.— Doe v. Filliter, 13 M. & W. 47.

See 17 Cent. Dig. tit. "Ejectment," § 444.

But see Doe v. Perkins, 8 B. Mon. (Ky.) 198, holding that plaintiff in an action for mesne profits after a recovery in ejectment is entitled to be reimbursed in such amount as he has in good faith been compelled to pay in obtaining by legal means the restoration of the property which defendant has wrongfully taken or withheld from him.

85. *Massachusetts.*—Hodgkins v. Price, 141 Mass. 162, 5 N. E. 502.

New York.— Vandevoort v. Gould, 36 N. Y. 639; Walrath v. Redfield, 18 N. Y. 457; Dana v. Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; Low v. Purdy, 2 Lans. 422.

North Dakota.—Hegar v. De Groat, 3 N. D. 354, 56 N. W. 150.

Pennsylvania.— Sopp v. Winpenny, 68 Pa. St. 78; Drexel v. Man, 2 Pa. St. 271, 44 Am. Dec. 195.

United States.— New Orleans v. Gaines, 15 Wall. 624, 21 L. ed. 215.

See 17 Cent. Dig. tit. "Ejectment," § 448.

View that statutory authority is necessary. — In some jurisdictions it has been held that interest is not allowable in the absence of statutory authority. Allen v. Smith, 63 Mo. 103; Garlington v. Copeland, 32 S. C. 57, 10 S. E. 1016; Hepburn v. Dundas, 13 Gratt. (Va.) 219. See also Bolling v. Lersner, 26 Gratt. (Va.) 36. But now interest is allowable by statute in Virginia. Early v. Friend, 16 Gratt. (Va.) 21, 78 Am. Dec. 649.

86. Jackson v. Wood, 24 Wend. (N. Y.) 443.

87. Hodgkins v. Price, 141 Mass. 162, 5 N. E. 502.

88. *Connecticut.*— Alsop v. Peck, 2 Root 224.

Delaware.— Cooch v. Geery, 3 Harr. 423.

Georgia.— Cunningham v. Morris, 19 Ga. 583, 65 Am. Dec. 611.

Kentucky.— Barnett v. Higgins, 4 Dana 565; Lewis v. Singleton, 2 A. K. Marsh. 214.

Missouri.— Beal v. Harmon, 38 Mo. 435.

New York.— Morgan v. Varick, 8 Wend. 587.

Pennsylvania.— Huston v. Wickersham, 2 Watts & S. 308.

Vermont.— Lippett v. Kelley, 46 Vt. 516.

See 17 Cent. Dig. tit. "Ejectment," § 447.

Removing timber from land.— The measure of damages for waste by removing timber from land is the diminished value of the land caused by such removal, not the value of the timber in its manufactured state. Nelson v. Churchill, 117 Wis. 10, 93 N. W. 799.

89. Prestwood v. Watson, 111 Ala. 604, 20 So. 600.

90. Page v. Fowler, 39 Cal. 412, 2 Am. Rep. 462; Nash v. Sullivan, 32 Minn. 189, 20 N. W. 144; Stockwell v. Phelps, 34 N. Y. 363, 90 Am. Dec. 710; Brothers v. Hurdle, 32 N. C. 490, 51 Am. Dec. 400.

91. Johnston v. Fish, 105 Cal. 420, 38 Pac. 979, 45 Am. St. Rep. 53.

92. Herreshoff v. Tripp, 15 R. I. 92, 23 Atl. 104.

9. Nominal Damages. Where possession of real property is wrongfully withheld from the owner he is entitled to recover nominal damages without other proof. Such damages are given to vindicate the violated right of plaintiff to possession.[93] But nominal damages only are recoverable unless it is proved that defendant had possession of the premises or received the rents;[94] where there is no evidence of defendant being in possession at a period previous to the commencement of the action;[95] where no evidence as to the value of the use of the premises is introduced;[96] where suit is brought immediately on notice to the grantee of adverse holding by the grantor who was permitted by the former to remain in possession until he needed the property;[97] and where the landlord is made a party in ejectment against defendants occupying the land only nominal damages can be recovered from him.[98] Where a plaintiff aliens after suit brought he is entitled to nominal damages.[99]

10. Period of Computation — a. In General. According to the English textbooks, in actions for mesne profits, if plaintiff declare against defendant for having taken mesne profits for a longer period than six years before action brought (the statutory limitation for actions of trespass) defendant may plead the statute of limitations, thereby protecting himself from all but six years.[1] So with the exception of a few jurisdictions,[2] it is very generally held in this country (whether mesne profits are sought to be recovered in the action of ejectment, or by an independent action of trespass, or by filing a suggestion claiming them) that if the statute of limitations governing actions for trespass on real estate is pleaded plaintiff can recover mesne profits only for the number of years next preceding the commencement of the action fixed by the statute as a limitation for bringing

93. Hahn *v.* Cotton, 136 Mo. 216, 37 S. W. 919; Jones *v.* Hannovan, 55 Mo. 462; Cotterill *v.* Hobby, 4 B. & C. 465, 6 D. & R. 551, 3 L. J. K. B. O. S. 276, 10 E. C. L. 662.

94. Dobbins *v.* Baker, 80 Ind. 52.

95. Mora *v.* Foster 17 Fed. Cas. No. 9,784, 3 Sawy. 469 [*affirmed* in 98 U. S. 425, 25 L. ed. 191].

96. Nash *v.* Sullivan, 32 Minn. 189, 20 N. W. 144.

97. Graham *v.* St. Louis, etc., R. Co., 69 Ark. 562, 65 S. W. 1048, 66 S. W. 344.

98. Sutton *v.* Casseleggi, 77 Mo. 397.

99. Freedly *v.* Mitchell, 2 Pa. St. 100.

1. Adams Ejectm. 452; Buller N. P. 88; 1 Chitty Pl. 225.

2. In Arkansas plaintiff's right to recover for mesne profits is not limited by the three years statute of limitations, but rents and profits may be recovered for a period, commencing with the time when defendant took possession and ending with the time when the receiver took possession of the premises. Teaver *v.* Akin, 47 Ark. 528, 1 S. W. 772.

In Kentucky it has been held that at law the entry of the person who has title to the possession of land, and in chancery notice of such title to the occupancy, are in general the points at which the charge for rents and profits is to commence in case not provided for by statute. Hart *v.* Baylor, Hard. 597. It has also been held that an occupant deriving claim under the same patent with the successful claimant should not be charged with rents until the successful claimant asserts his claim by suit. Lewis *v.* Singleton, 2 A. K. Marsh. 214; Fox *v.* Longly, 1 A. K. Marsh. 388.

In Louisiana rents and revenues cannot be recovered from a possessor in good faith except from judicial demand when evicted. Miller *v.* Shumaker, 42 La. Ann. 398, 7 So. 456.

In North Carolina it has been held that an action for mesne profits does not accrue until possession is given after judgment in the action of ejectment and that plaintiff is entitled to recover for the whole time from the commencement of the demise to the taking of possession after judgment in ejectment and is not limited until three years before bringing the action. Murphy *v.* Guion, 6 N. C. 238. The rule has been modified by statute to the extent that plaintiff is not entitled to recover for rents and damages for a longer period than three years preceding commencement of suit unless defendant sets up a claim for improvements. Jones *v.* Coffey, 109 N. C. 515, 14 S. E. 84.

In South Carolina one who is wrongfully in possession of land and receives the rents and profits is liable for all the time that rents were so received by him, and not only for the time since the right of the claimant had been declared. Rabb *v.* Patterson, 42 S. C. 528, 20 S. E. 540, 46 Am. St. Rep. 743.

In Tennessee if trespass for mesne profits is brought within the period fixed by statute for that class of actions, plaintiff may, although the statute is pleaded, recover them from the date of the demise laid in the declaration until possession is surrendered, irrespective of the length of defendant's possession. The recovery is not confined to the period of limitations from the institution of the suit. Avent *v.* Hord, 3 Head 458 [*citing*

it, and that for mesne profits accruing prior thereto the statute is a bar.[3] If the statute is not pleaded plaintiff may recover for such length of time as he proves defendant to have been in possession,[4] unless there is some statutory provision to the contrary.[5] As regards the time at which the period during which mesne profits recoverable terminates, the greatest lack of harmony exists and decisions even in the same jurisdiction are frequently conflicting. Thus it has been variously held that the period terminates with the expiration of the lease mentioned in the declaration;[6] at the commencement of the action of ejectment;[7] on the filing of the suggestion for mesne profits, where defendant remains in possession;[8] at the trial;[9] on rendition of the verdict;[10] on rendition of judgment;[11] on recovery of the land;[12] on surrender of possession after judgment in eject-

with approval Murphy v. Guion, 6 N. C. 238, and disapproving the rule laid down by the English text-books]. The rule announced in this case is approved in Rhodes v. Crutchfield, 7 Lea 518, but it is held that if the tort is waived and an action of contract brought (which the court thinks permissible), it is not necessary to wait for a recovery in ejectment, and the recovery must be limited to the period of six years next before bringing the action, the time fixed for bringing actions for rent.

3. *California.*— Love v. Shartzer, 31 Cal. 487; Carpentier v. Mitchell, 29 Cal. 330.

District of Columbia.— Meloy v. Johnston, 2 MacArthur 202.

Georgia.— Taylor v. James, 109 Ga. 327, 34 S. E. 674; Lopez v. Downing, 46 Ga. 120.

Illinois.— Ringhouse v. Keener, 63 Ill. 230.

Kansas.— Knox v. Dunn, 22 Kan. 683.

Maryland.—Tongue v. Nutwell, 31 Md. 302.

Nebraska.— Fletcher v. Brown, 35 Nebr. 660, 53 N. W. 577.

New York.— Willis v. McKinnon, 79 N. Y. App. Div. 249, 79 N. Y. Suppl. 936; Syracuse Gas-Light Co. v. Rome, etc., R. Co., 51 Hun 119, 5 N. Y. Suppl. 459; Grout v. Cooper, 9 Hun 326; Budd v. Walker, 9 Barb. 493; Jackson v. Wood, 24 Wend. 443.

Pennsylvania.— Hill v. Meyers, 46 Pa. St. 15; Lynch v. Cox, 23 Pa. St. 265; Hare v. Fury, 3 Yeates 13, 2 Am. Dec. 358.

Vermont.— McFarland v. Stone, 17 Vt. 165, 44 Am. Dec. 325.

See 17 Cent. Dig. tit. "Ejectment," § 449 *et seq.*

If the statute of limitations by express words bars all action of trespass to land after a designated period, it bars them by its technical denomination and not by its description or by an inquiry into the particular causes for which it is brought. The bar is generic and not specific and applies to it as an action of trespass and not as an action to value mesne profits. Hill v. Meyers, 46 Pa. St. 15.

In Alabama persons holding under color of title in good faith are not responsible for damages or rents for more than one year before the commencement of the suit in actions for recovery of real property (Allen v. Kellam, 69 Ala. 442); except where defendant seeks to obtain the benefit of permanent improvements erected on the premises by him on the suggestion of adverse possession for three years. In such case defendant is allowed full value for his improvements and plaintiff full rent for the land (Turnipseed v. Fitzpatrick, 75 Ala. 297).

Effect of amending declaration.— The amendment of a declaration in ejectment by striking out the name of one of the several original plaintiffs, where the amendment asserts the same title and the same recovery, is not equivalent to the commencement of a new suit, so as to restrict the recovery of mesne profits for a period of three years before the filing of the amended declaration. Morris v. Wheat, 11 App. Cas. (D. C.) 201.

Mesne profits which accrued during the minority of plaintiff may be recovered by him. McCrubb v. Bray, 36 Wis. 333. See Drury v. Conner, 1 Harr. & G. (Md.) 220.

Where a defendant is evicted and afterward restored to possession by an order quashing the habere facias and awarding a writ of restitution, which writ is subsequently quashed, it is decided that he is liable for mesne profits. Trabue v. Keller, 3 A. K. Marsh. (Ky.) 517.

4. Gardner v. Granniss, 57 Ga. 539; Hill v. Meyers, 46 Pa. St. 15; Hare v. Fury, 3 Yeates (Pa.) 13, 2 Am. Dec. 358; Field v. Columbet, 9 Fed. Cas. No. 4,764, 4 Sawy. 523.

5. **The New York statute** provides that in no case can plaintiff recover for more than six years' occupancy; hence it is not necessary to plead the statute. Grout v. Cooper, 9 Hun (N. Y.) 326; Budd v. Walker, 9 Barb. (N. Y.) 493; Jackson v. Wood, 24 Wend. (N. Y.) 443.

6. Shotwell v. Boehm, 1 Dall. (Pa.) 172, 1 L. ed. 86.

7. Starr v. Pease, 8 Conn. 541; Chace v. Lamphere, 67 Hun (N. Y.) 599, 22 N. Y. Suppl. 404.

8. Ringhouse v. Keener, 63 Ill. 230.

9. *Indiana.*— Hays v. Wilstach, 82 Ind. 13; Pendergast v. McCaslin, 2 Ind. 87.

Mississippi.— Dean v. Tucker, 58 Miss. 487.

Nebraska.— Harrall v. Gray, 12 Nebr. 543, 11 N. W. 851.

New York.— Vandevoort v. Gould, 36 N. Y. 639.

North Carolina.— Reed v. Exum, 86 N. C. 726; Whissenhunt v. Jones, 78 N. C. 361.

Wisconsin.— McCrubb v. Bray, 36 Wis. 333. See 17 Cent. Dig. tit. "Ejectment," § 451.

10. Dawson v. McGill, 4 Whart. (Pa.) 230.

11. Love v. Shartzer, 31 Cal. 487; Adkins v. Hudson, 19 Ind. 392.

12. Danziger v. Boyd, 120 N. Y. 628, 24 N. E. 482 [*affirming* 54 N. Y. Super. Ct. 365].

ment;[13] and it has been held that if the occupant enjoin or supersede the judgment and eventually fail, he is chargeable with the rent accruing after the date of the judgment.[14]

b. As Affected by Possession or Want of It by Defendant. Rents and profits are only recoverable during the time defendant is in possession.[15] Accordingly defendant on quitting possession pending the action is not liable for mesne profits after that time,[16] or after surrender to plaintiff on judgment in his favor;[17] nor is he liable for rents and profits enjoyed by his predecessors in title, but only for those accruing after he took possession.[18]

c. As Affected by Title of Possession in Plaintiff or Absence Thereof. Plaintiff is entitled to recover mesne profits and damages only from the time his right of possession accrues.[19] Accordingly heirs at law cannot recover damages which accrue previous to the death of the ancestor;[20] and where plaintiff's right depends upon a sheriff's deed, he cannot recover mesne profits for the time intervening the sale and the execution of the deed.[21]

11. Matters in Mitigation[22] — a. Allowance For Taxes Paid. The weight of authority is to the effect that taxes paid by the occupant while in possession should be deducted from the rents and profits with which he is chargeable.[23] But cases are to be found which hold that such payments are purely voluntary and hence not recoverable.[24]

b. Allowance For Ground-Rent Paid. So where defendant has been compelled to pay ground-rent which had become a charge on his personal property the sum should be deducted from the mesne profits with which he is chargeable.[25]

13. Murphy *v.* Guion, 6 N. C. 238; Avent *v.* Hord, 3 Head (Tenn.) 458. And see Gilman *v.* Gilman, 111 N. Y. 265, 18 N. E. 849; Zimmerman *v.* Eshbach, 15 Pa. St. 417.

14. Cole *v.* Damron, 7 J. J. Marsh. (Ky.) 595. And see Thompson *v.* Thompson, 58 S. W. 792, 22 Ky. L. Rep. 784.

15. Gillaspie *v.* Citizens' Bank, 35 La. Ann. 779; Ryers *v.* Wheeler, Lalor (N. Y.) 389; Mitchell *v.* Freedley, 10 Pa. St. 198; New Orleans *v.* U. S., 131 U. S. 220, 9 S. Ct. 755, 33 L. ed. 110; New Orleans *v.* Christmas, 131 U. S. 191, 9 S. Ct. 745, 33 L. ed. 99.

Where plaintiff obtains a verdict in an action of ejectment against landlord and tenant and damages for the rents and profits are assessed against the two defendants jointly he cannot include in such assessment damages for rents and profits which accrued prior to the time when the tenant entered into possession of the premises. Edgerton *v.* Clark, 20 Vt. 264.

16. Gilman *v.* Gilman, 111 N. Y. 265, 18 N. E. 849; Mitchell *v.* Freedley, 10 Pa. St. 198.

17. Murphy *v.* Guion, 6 N. C. 238.

18. Gardner *v.* Granniss, 57 Ga. 539.

19. *Alabama.*— Brewster *v.* Buckholts, 3 Ala. 20.

California.— Clark *v.* Boyreau, 14 Cal. 634.

Kentucky.— McIlvain *v.* Porter, 7 S. W. 309, 8 S. W. 705, 9 Ky. L. Rep. 899.

Minnesota.— Watson *v.* Chicago, etc., R. Co., 46 Minn. 321, 48 N. W. 1129.

New Jersey.— Denn *v.* Chubb, 1 N. J. L. 466.

New York.— Danziger *v.* Boyd, 54 N. Y. Super. Ct. 365.

United States.— Hylton *v.* Brown, 12 Fed. Cas. No. 6,983, 2 Wash. 165.

See 17 Cent. Dig. tit. "Ejectment," § 450.

Limitations of rule.— It has been held that mesne profits prior to the acquisition of title may be recovered when the right of action therefor is assigned to plaintiff by his grantor. Lord *v.* Dearing, 24 Minn. 110.

Where defendant entered upon land by license of the owner which was revoked by his death, but still retained the possession, it was held proper to allow as damages the mesne profits from the time of the death. Watson *v.* Chicago, etc., R. Co., 46 Minn. 321, 48 N. W. 1129.

20. Brewster *v.* Buckholts, 3 Ala. 320.

21. Clark *v.* Boyreau, 14 Cal. 634.

22. Allowance for improvements see *infra*, X.

23. *Illinois.*— Ringhouse *v.* Keener, 63 Ill. 230.

Kansas.— Flint *v.* Douglass, 28 Kan. 414.

Minnesota.— Madland *v.* Benland, 24 Minn. 372.

New York.— Wallace *v.* Berdell, 101 N. Y. 13, 3 N. E. 769; Duffy *v.* Donovan, 52 N. Y. 634.

Wisconsin.— Blodgett *v.* Hitt, 29 Wis. 169.

United States.— Semple *v.* British Columbia Bank, 21 Fed. Cas. No. 12,660, 5 Sawy. 374; Stark *v.* Starr, 22 Fed. Cas. No. 13,307, 1 Sawy. 15.

24. Napton *v.* Leaton, 71 Mo. 358; Iowa Homestead Co. *v.* Des Moines Nav., etc., R. Co., 17 Wall. (U. S.) 153, 21 L. ed. 622.

In Massachusetts "taxes paid and the interest charged on the expenditures made by the tenant constitute no improvement of the land, and give no increase to its value, and therefore they are not items for which the tenant, under the statute, is entitled to be allowed." Curtis *v.* Gay, 15 Gray (Mass.) 36, 37.

25. Carter *v.* Carter, 5 Bing. 406, 15 E. C. L. 643; Doe *v.* Hare, 2 Cromp. & M. 145, 3 L. J. Exch. 17, 4 Tyrw. 29.

F. Defenses. An action for damages, rents, or profits is not barred by a recovery of nominal damages in ejectment;[26] by the expiration of plaintiff's title during the suit;[27] by a conveyance of the premises pending litigation;[28] by a reasonable delay in taking possession after judgment in ejectment;[29] by a plea that defendant is tenant of another;[30] by defendants permitting a third person to remain in actual possession;[31] by an appeal by defendant from a judgment of eviction;[32] or by any matter of defense admissible in the original action.[33] Nor is defendant who claims title to the land in dispute released from liability for mesne profits by the fact that he has rented the land to a tenant who has received the income arising therefrom.[34] So it has been held that a possessor in bad faith cannot claim the benefit of prescription with regard to rents and profits.[35] And where possession under a judgment in ejectment has been taken by the lessor, who brings an action for the mesne profits, a verdict obtained by defendant in an action of ejectment brought in the meantime for the same premises cannot be set up in bar of the action for mesne profits.[36] Nor in such an action after recovery in ejectment is it any answer to the action that a *remittitur damna* has been entered on the record in ejectment.[37] It has been held, however, that any equitable defense is admissible in trespass for mesne profits,[38] and therefore it is a good defense that defendant was entitled to possession during the time that the rents and profits accrued.[39] And that in order to prevent a recovery of profits which accrued before service of the declaration in ejectment defendant may show that he had not occupied the premises before such service.[40] So one is not responsible in equity for mesne profits to the owner of an estate which he has merely rented out as agent of another for whose use he has received the rent and to whom he was bound to pay over such rent and has in fact so paid it and has

26. Limberg *v.* Higgenbotham, 11 Colo. 156, 17 Pac. 481; Fletcher *v.* Brown, 35 Nebr. 660, 53 N. W. 577; Van Alen *v.* Rogers, 1 Johns. Cas. (N. Y.) 281, 1 Am. Dec. 113. And see White *v.* St. Guirons, Minor (Ala.) 331, 12 Am. Dec. 56.

27. See *supra*, IX, C.

28. See *supra*, IX, C.

29. Chambers *v.* Lapsley, 7 Pa. St. 24.

30. Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13; Keane *v.* Cannovan, 21 Cal. 291, 82 Am. Dec. 738. *Compare* Illinois, etc., R., etc., Co. *v.* Cobb, 94 Ill. 55.

That defendant occupied the premises with another under a joint lease to both is no defense. Ryers *v.* Wheeler, Lalor (N. Y.) 389.

31. Myers *v.* Sanders, 8 Dana (Ky.) 65; Vicksburg, etc., R. Co. *v.* Lewis, 68 Miss. 29, 10 So. 32.

The fact that the property was in the possession of a receiver as the property of a third person will not prevent a recovery by plaintiff of the mesne profits for the time the receiver held it, if plaintiff in the absence of the receivership would have been entitled to recover profits accruing during such period, defendant having claimed under such third person, relied upon its possession under color of title, and claimed credit for all improvements placed on the land by itself and those under whom it claimed. Acme Brewing Co. *v.* Central R., etc., Co., 115 Ga. 494, 42 S. E. 8.

32. Lairamore *v.* Scott, 32 S. W. 213, 17 Ky. L. Rep. 601. See also Webb *v.* Galloway, 2 A. K. Marsh. (Ky.) 483; Jackson *v.* Delancy, 5 Cow. (N. Y.) 33.

33. Jackson *v.* Combs, 7 Cow. (N. Y.) 36.

34. Williamson *v.* Heyser, 74 Ga. 271.

35. Gaines *v.* New Orleans, 9 Fed. Cas. No. 5,177, 1 Woods 104.

The possession and good faith necessary for the acquisition of ownership through prescription for the statutory period differs from that requisite to insure protection against claims for damages. Leathem, etc., Lumber Co. *v.* Nalty, 109 La. 325, 33 So. 354.

36. Benson *v.* Matsdorf, 2 Johns. (N. Y.) 369.

37. Harper *v.* Eyles, 3 Dougl. 399, 26 E. C. L. 263.

38. Ross *v.* Evans, 65 Cal. 439, 4 Pac. 443; Davis *v.* Doe, 2 Ind. 599; Murray *v.* Gouverneur, 2 Johns. Cas. (N. Y.) 438, 1 Am. Dec. 177; Ewalt *v.* Gray, 6 Watts (Pa.) 427. See also Jackson *v.* Loomis, 4 Cow. (N. Y.) 168, 15 Am. Dec. 347.

Division of rents and profits by agreement. — Mesne profits cannot be recovered by a plaintiff, where both he and defendant each claimed an interest in the land under a will, and with full knowledge of all the facts voluntarily divided the rents and profits. White *v.* Rowland, 67 Ga. 546, 44 Am. Rep. 731.

39. Ross *v.* Evans, 65 Cal. 439, 4 Pac. 443; Rich *v.* Maples, 33 Cal. 102; Corr *v.* Porter, 33 Gratt. (Va.) 278.

One who is induced by a gift of land to settle thereon and improve the same and who is afterward evicted by the grantor is not liable for rent. James *v.* McKinsey, 4 J. J. Marsh. (Ky.) 625.

40. Vance *v.* Congressional Tp., 7 Blackf. (Ind.) 241.

not at any time occupied the premises or derived any advantage from such possession.[41]

G. Recovery Back of Profits Paid. Where a party has been compelled to pay mesne profits to another under a judgment in an action at law to recover possession of the land, he may recover back such profits on obtaining a decree in equity declaring him to be the equitable owner of the land, holding title as trustee.[42]

H. Actions and Proceedings to Determine Right to Mesne Profits and Damages — 1. Conditions Precedent. It is essential to the maintenance of an action of trespass for mesne profits that there should be a recovery in ejectment,[43] and that plaintiff has regained possession of the premises.[44] Nor can a plaintiff, where there is a statutory provision prescribing the manner in which mesne profits shall be ascertained, which has not been complied with, maintain an action on an agreement by defendant to let judgment go by default and to pay "all legal costs and legal rents in such suit."[45]

2. Parties — a. Plaintiffs. An action for mesne profits or a count for mesne profits in an action of ejectment may be either in the name of the nominal plaintiff in ejectment or of his lessor,[46] but not in the name of both.[47] But a joint action may be brought by two tenants in common against a third cotenant,[48] or by several lessors, although their demises were separate.[49]

b. Defendants. The proper defendant in such action is the disseizor,[50] his

41. Drury *v.* Conner, 1 Harr. & G. (Md.) 220.

42. Starr *v.* Stark, 7 Oreg. 500.

43. *California.*— Locke *v.* Peters, 65 Cal. 161, 3 Pac. 657.

District of Columbia.— Meloy *v.* Johnston, 2 MacArthur 202.

Maryland.— Mitchell *v.* Mitchell, 1 Md. 55.

New York.— Syracuse Gas-Light Co. *v.* Rome, etc., R. Co., 51 Hun 119, 5 N. Y. Suppl. 459; Morgan *v.* Varick, 8 Wend. 587; Baron *v.* Abeel, 3 Johns. 481, 3 Am. Dec. 515.

Vermont.— Smith *v.* Benson, 9 Vt. 138, 31 Am. Dec. 614; Burton *v.* Austin, 4 Vt. 105.

See 17 Cent. Dig. tit. "Ejectment," § 454; and Adams Ejectm. 383.

Compare Stephenson *v.* McCombs, (Mich. T.) 4 Vict., holding that if evidence of title is given in an action for mesne profits it is not necessary to show the judgment in ejectment.

44. *Massachusetts.*— Allen *v.* Thayer, 17 Mass. 299.

Missouri.—Phillips *v.* Stewart, 87 Mo. App. 486.

New York.— Alt *v.* Gray, 55 N. Y. App. Div. 563, 67 N. Y. Suppl. 411; Ainslie *v.* New York, 1 Barb. 168; Holmes *v.* Seely, 19 Wend. 507; Morgan *v.* Varick, 8 Wend. 587; Case *v.* Shepherd, 2 Johns. Cas. 27.

North Carolina.— Stancill *v.* Calvert, 63 N. C. 616; Carson *v.* Smith, 46 N. C. 106; Miller *v.* Melchor, 35 N. C. 439; Poston *v.* Henry, 33 N. C. 301; Murphy *v.* Guion, 3 N. C. 162, 2 Am. Dec. 623.

Pennsylvania.— Caldwell *v.* Walters, 22 Pa. St. 378; Reid *v.* Stanley, 6 Watts & S. 369.

See 17 Cent. Dig. tit. "Ejectment," § 454.

But see Shipley *v.* Alexander, 3 Harr. & J. (Md.) 84, 5 Am. Dec. 421; Brewer *v.* Beckwith, 35 Miss. 467.

Possession gained by the owner's entry is sufficient without the necessity of an ejectment. Reid *v.* Stanley, 6 Watts & S. (Pa.) 369.

It is not necessary to execute a habere to entitle a party to maintain an action for mesne profits, if plaintiff has been let into possession by defendant. Calvart *v.* Horsfall, 4 Esp. 167.

A plaintiff who after ouster and before reentry has brought an action for trespass cannot, until after he has reëntered, maintain a second action for damages for a continuance of the wrongful possession by defendant. Illinois, etc., R., etc., Co. *v.* Cobb, 82 Ill. 183.

45. McCann *v.* Righter, 34 W. Va. 186, 12 S. E. 497.

46. Shadwick *v.* McDonald, 15 Ga. 392; Lion *v.* Burtis, 5 Cow. (N. Y.) 408; Baron *v.* Abeel, 3 Johns. (N. Y.) 481, 3 Am. Dec. 515; Den *v.* Lunsford, 44 N. C. 401; Aslin *v.* Parkin, 2 Burr. 665, 2 Ld. Ken. 376; Goodtitle *v.* Tombs, 3 Wils. C. P. 118. But see Masterson *v.* Hagan, 17 B. Mon. (Ky.) 325, holding that since the adoption of the code of practice such action must be in the name of the real party entitled to the recovery and not in the name of the fictitious lessee.

A cestui que trust may be the plaintiff in such action. Pugh *v.* Bell, 1 J. J. Marsh. (Ky.) 398.

A municipal corporation may maintain such action for the use of its streets. Apalachicola *v.* Apalachicola Land Co., 9 Fla. 340, 74 Am. Dec. 284.

An heir or devisee cannot maintain such action for profits accruing during the life of the ancestor. Hotchkiss *v.* Auburn, etc., R. Co., 36 Barb. (N. Y.) 600.

47. Den *v.* Lumsford, 44 N. C. 401.

48. Camp *v.* Homesley, 33 N. C. 211.

49. Chamier *v.* Llingon, 2 Chit. 410, 5 M. & S. 64, 17 Rev. Rep. 276, 18 E. C. L. 710.

50. Morgan *v.* Varick, 8 Wend. (N. Y.) 587; Jackson *v.* Hills, 8 Cow. (N. Y.) 290;

servant,[51] his tenant,[52] or one acquiring title from the disseizor.[53] Upon the death of defendant pending an action of ejectment his heirs may be substituted as defendants and held liable for mesne profits accruing during the period of their possession after his death;[54] but as to profits accruing during the decedent's possession his administrator is liable.[55] Only such parties can be joined as defendants as join in committing the wrong complained of.[56]

3. PLEADINGS[57] — a. In Ejectment. In order that plaintiff may recover damages in an action of ejectment for the withholding or the use of the lands, the declaration or complaint should allege such damages,[58] and contain a prayer therefor,[59] and plaintiff can recover only such damages as are claimed in the declaration or complaint.[60] This is true in some jurisdictions in reference to a recovery of mesne profits in such action.[61] It is not necessary, however, to aver the receipt

McCready *v.* Guardians of Poor, 9 Serg. & R. (Pa.) 94, 11 Am. Dec. 667 note, a corporation or corporate body.

Infants in possession and receiving rents and profits through their guardian may be made defendants to such action. Molton *v.* Momford, 10 N. C. 483.

Landlord.—An action for mesne profits may be maintained against the landlord in fact who received the rents and profits and resisted recovery in the ejectment suit, although he was not a party to that suit and did not take upon himself the defense thereto upon the record. Chirac *v.* Reinicker, 11 Wheat. (U. S.) 280, 6 L. ed. 474.

51. Morgan *v.* Varick, 8 Wend. (N. Y.) 587.

52. Trubee *v.* Miller, 48 Conn. 347, 40 Am. Rep. 177, although he was ignorant of the disseizee's claim of title and had in good faith paid rent to the disseizor.

One coming in possession during the pendency of the action in ejectment is liable to an action for mesne profits. Willingham *v.* Long, 47 Ga. 540; Bradley *v.* McDaniel, 48 N. C. 128; Jeffries *v.* Zane, 1 Miles (Pa.) 287; Doe *v.* Whitcomb, 8 Bing. 46, 1 L. J. C. P. 9, 1 Moore & S. 107, 21 E. C. L. 438.

53. Morgan *v.* Varick, 8 Wend. (N. Y.) 587.

54. Cavender *v.* Smith, 8 Iowa 360.

55. Cavender *v.* Smith, 8 Iowa 360.

56. Morris *v.* Beebe, 54 Ala. 300 (holding that defendant, against whom only a judgment for damages and mesne profits could be rendered, cannot be joined with defendants against whom judgment can be rendered both for possession and damages); Eastwick *v.* Saylor, 85 Pa. St. 15 (holding one not jointly liable with defendant for mesne profits, when he could not prevent the trespass or did not aid, abet, or encourage its commission).

Parties intermeddling with real estate by putting another in possession are liable with the parties in possession for mesne profits. Storch *v.* Carr, 28 Pa. St. 135.

57. **Pleadings** generally see PLEADING.

58. Martin *v.* Durand, 63 Cal. 39; Dimick *v.* Campbell, 31 Cal. 238; Arnold *v.* Woodward, 14 Colo. 164, 23 Pac. 444; Pfeffer *v.* Kling, 58 N. Y. App. Div. 179, 68 N. Y. Suppl. 641 [*affirmed* in 171 N. Y. 668, 64 N. E. 1125]; Lippett *v.* Kelley, 46 Vt. 516.

A refusal to allow an amendment claiming special damages in ejectment is immaterial where it appears that there was no right of possession in plaintiff at the time of bringing the action. Horner *v.* Marietta, 135 Pa. St. 418, 19 Atl. 1029.

59. Martin *v.* Durand, 63 Cal. 39 (a general averment and prayer are sufficient in the absence of a special demurrer or objection to the evidence); Hope *v.* Blair, 105 Mo. 85, 16 S. W. 595, 24 Am. St. Rep. 366 (sufficient under the statute to state in the petition the value of rents and profits).

Under a New York statute entitling plaintiff, in an action of ejectment to recover possession of land, to demand damages for withholding it, damages need not be pleaded as a separate cause of action. Clason *v.* Baldwin, 129 N. Y. 183, 29 N. E. 226; Deering *v.* Riley, 38 N. Y. App. Div. 164, 56 N. Y. Suppl. 704.

Under an Oregon statute the right to damages is equivalent to an action of trespass for mesne profits at common law, and while it may be joined with a claim for possession, it should be separately stated. Wythe *v.* Myers, 30 Fed. Cas. No. 18,119, 3 Sawy. 595.

Under a West Virginia statute a statement claiming profits or damages may be filed after the declaration is filed and before trial, but not after the commencement of the action, if in so doing it might operate as a surprise or fraud upon defendant. Witten *v.* St. Clair, 27 W. Va. 762.

An amendment increasing damages may be allowed in an action to recover land and damages for withholding, where an amendment is allowed which adds an averment of an illegal and tortious disseizin with intent to convert the lands. Chamberlain *v.* Mensing, 51 Fed. 511.

60. Armstrong *v.* St. Louis, 69 Mo. 309 [*affirming* 3 Mo. App. 100], damages for injury to freehold.

61. Kline *v.* Williams, (N. J. Sup. 1903) 54 Atl. 556; Bayard *v.* Inglis, 5 Watts & S. (Pa.) 465.

In New York, under the former statute, a claim for damages in an action of ejectment included only damages for withholding possession, and in order to recover for rents and profits or for use and occupation a separate pleading and demand was required to be made therefor. Larned *v.* Hudson, 57 N. Y. 151; Livingston *v.* Tanner, 12 Barb. 481; Seaton *v.* Davis, 1 Thomps. & C. 91. Under the present statute (Code Civ. Proc. §§ 484, 1496, 1497), this requirement is dispensed with and

by defendant of such rents and profits,[62] or to include the prayer in every count of the declaration.[63] Where damages are claimed for a period preceding the commencement of the action the declaration should also allege title in plaintiff at some prior date and as continuing to the time of bringing the action, and entry of defendant at some intervening date.[64]

b. In Trespass For Mesne Profits. The declaration or complaint in an action of trespass for mesne profits should allege plaintiff's expulsion,[65] the length of time during which he was deprived of possession,[66] the receipt of rents and profits by defendant,[67] and the reëntry and possession by plaintiff.[68] At common law it was also necessary for plaintiff to allege title to or possession of the land at the time of his expulsion.[69] But it is unnecessary to aver that the relation of landlord and tenant existed between the parties as in an action for use and occupation.[70] A defect in the complaint may be supplied by defendant's answer or other pleading.[71] In such action without possession as is permitted in Indiana plaintiff must allege that he was entitled to the land during the time which defendant was in wrongful possession.[72] If special damages are sought in such action they must be specially pleaded.[73]

4. Evidence — a. Presumptions and Burden of Proof. The burden of proof is on a plaintiff who claims rents and profits to establish the value of them by a

the incidental damages plaintiff is entitled to recover under his general demand include the rents and profits or value of the use and occupation from the time of the commencement of the action. Clason *v.* Baldwin, 129 N. Y. 183, 29 N. E. 226; Frazier *v.* Dewey, 1 N. Y. App. Div. 138, 37 N. Y. Suppl. 973; Richards *v.* Crocker, 20 N. Y. Suppl. 954. But see Pfeffer *v.* Kling, 58 N. Y. App. Div. 179, 68 N. Y. Suppl. 641 [*affirmed* in 171 N. Y. 668, 64 N. E. 1125], holding that where special damages are claimed the rental value cannot be awarded as damages nor can the complaint be amended to cover such rentals.

Where in ejectment defendant is fairly apprised by the complaint that plaintiff claims to recover the value of the rents and profits of the premises it is too late on the trial to object to the form of the complaint and want of particularity. Candee *v.* Burke, 10 Hun (N. Y.) 350.

62. Johnson *v.* Visher, 96 Cal. 310, 31 Pac. 106; Patterson *v.* Ely, 19 Cal. 28.

63. Postlewaite *v.* Wise, 17 W. Va. 1, such prayer at the end of the declaration is sufficient.

64. Payne *v.* Treadwell, 16 Cal. 220.

65. Young *v.* Downey, 145 Mo. 261, 46 S. W. 962; Phillips *v.* Stewart, 87 Mo. App. 486.

Failing to allege the time when defendant ejected plaintiff is cured by the statute of jeofails. Higgins *v.* Highfield, 13 East 407.

66. Holmes *v.* Davis, 19 N. Y. 488; Higgins *v.* Highfield, 13 East 407.

67. Young *v.* Downey, 145 Mo. 261, 46 S. W. 962.

68. Young *v.* Downey, 145 Mo. 261, 46 S. W. 962; Phillips *v.* Stewart, 87 Mo. App. 486.

A judgment in ejectment is not conclusive evidence of title, in an action for mesne profits, unless it be pleaded by way of estoppel. Matthew *v.* Osborne, 13 C. B. 919, 17 Jur. 696, 22 L. J. C. P. 241, 1 Wkly. Rep. 151, 76 E. C. L. 919; Doe *v.* Huddart, 2 C. M. & R. 316, 4 Dowl. P. C. 437, 1 Gale 260, 5 Tyrw. 846; Ponton *v.* Daly, 1 U. C. Q. B. 187. See also Doe *v.* Wellsman, 6 D. & L. 179, 2 Exch. 368, 18 L. J. Exch. 277; Herr *v.* Weston, 32 U. C. Q. B. 402.

A replication by way of estoppel averring a judgment by default against defendant in an action of ejectment and entry by plaintiff by virtue of the judgment has been held good without an averment of notice of the proceedings in ejectment to defendant or that a writ of possession was issued or executed. Wilkinson *v.* Kirby, 15 C. B. 430, 2 C. L. R. 1387, 23 L. J. C. P. 224, 1 Jur. N. S. 164, 2 Wkly. Rep. 570, 80 E. C. L. 430, holding also that the estoppel was from the date of the writ and that plaintiff's title would be presumed to continue until by rejoinder it was shown to have determined.

69. See Young *v.* Downey, 145 Mo. 261, 46 S. W. 962. But see Phillips *v.* Stewart, 87 Mo. App. 486, 491, in which the court said: "The trespass by the defendant and possession on the part of the plaintiff when it was committed, as conditions of recovery, were pure fictions growing out of the common-law theories of pleading, and like other legal fictions have no place in our present system."

70. Schradsky *v.* Stimson, 76 Fed. 730, 22 C. C. A. 515. And see Young *v.* Downey, 145 Mo. 261, 46 S. W. 962.

71. Limberg *v.* Higenbotham, 11 Colo. 156, 17 Pac. 481; Hughes *v.* Carson, 90 Mo. 399, 2 S. W. 441.

72. O'Reilly *v.* Long, 25 Ind. App. 529, 58 N. E. 563.

73. In an action for mesne profits after ejectment for the recovery of a house used as an inn, plaintiff cannot recover the loss which he has sustained by defendant shutting up the inn and destroying the custom, unless such damages are especially stated in the declaration. Dunn *v.* Large, 3 Dougl. 335, 26 E. C. L. 223.

preponderance of evidence,[74] and a verdict for mesne profits cannot stand in the absence of evidence as to the amount.[75] In an action of trespass for mesne profits plaintiff must prove his title and a reëntry, defendant's liability by reason of possession, and the amount of the damages;[76] and defendant must be shown to have had knowledge of plaintiff's title in order to recover rents and profits where by statute it is essential to a recovery that defendant had such knowledge.[77]

b. Admissibility. The record of the judgment in ejectment is admissible in an action for mesne profits to show title and that defendant was in possession at the time, but it is not evidence as to the length of time of his possession.[78] It is also admissible to rebut a set-off for property taken from the premises which were the subject of the former action.[79] And if the landlord defends in ejectment against his tenant the record is admissible in evidence against him.[80] In determining the value of the rents and profits or of the use and occupation, evidence of the rental value of the premises is admissible.[81] A notice claiming mesne profits served on a defendant in ejectment is admissible in evidence at the trial.[82] A defendant may for the purpose of explaining his motives and in mitigation of damages introduce in evidence his patents or title papers in a mixed action for possession and vindictive damages.[83] And by statute defendant may show in mitigation of damages that he held in good faith under color of title,[84] but he cannot

74. Beckman *v.* Richardson, 28 Kan. 648.

75. Eaton *v.* Freeman, 58 Ga. 129; Hahn *v.* Cotton, 136 Mo. 216, 37 S. W. 919.

76. Ainslie *v.* New York, 1 Barb. (N. Y.) 168; Pearse *v.* Coaker, L. R. 4 Exch. 92, 38 L. J. Exch. 82, 20 L. T. Rep. N. S. 82.

Must show possession has been regained.— Holmes *v.* Seely, 19 Wend. (N. Y.) 507; Case *v.* Shepherd, 2 Johns. Cas. (N. Y.) 27.

If plaintiff avers sole possession and sole right to the possession of the profits in himself, it is essential to a recovery by him that the fact of an entire and sole possession in himself as well as a sole right to the possession during the period alleged be shown. Sheldon *v.* Van Slyke, 16 Barb. (N. Y.) 26.

The return of the summons in ejectment showing that the defendants were in possession is conclusive as to their possession at the time of service and presumptive as to the continuance of such possession. Thornton *v.* Britton, 144 Pa. St. 126, 22 Atl. 1048.

A right to possession at the time suit was brought must be shown by a plaintiff in ejectment, who has acquired the legal title and is in actual possession of the premises before trial, in order to recover mesne profits for the previous unlawful possession. Carman *v.* Beam, 88 Pa. St. 319.

77. Robidoux *v.* Casseleggi, 81 Mo. 459.

78. Miller *v.* Henry, 84 Pa. St. 33; Bailey *v.* Fairplay, 6 Binn. (Pa.) 450, 6 Am. Dec. 486.

79. Sergeant *v.* Ewing, 36 Pa. St. 156.

A judgment against the actual occupant in an action of ejectment is no evidence of plaintiff's title in trespass for mesne profits brought by him against those under whom defendant in ejectment claimed, they not being parties to the suit. Ainslie *v.* New York, 1 Barb. (N. Y.) 168.

80. Chambers *v.* Lapsley, 7 Pa. St. 24.

81. Cooper *v.* Robertson, 87 Ind. 222; White *v.* Wheeler, 51 Hun (N. Y.) 573, 4 N. Y. Suppl. 405.

Evidence as to rental value of adjoining farms is not admissible. Credle *v.* Ayers, 126 N. C. 11, 35 S. E. 128, 48 L. R. A. 751.

Evidence of isolated benefits disconnected with the usual course of defendant's occupancy is not admissible. Curry *v.* Sandusky Fish Co., 88 Minn. 485, 93 N. W. 896.

Evidence of rental value prior to date of plaintiff's title is admissible. Perry *v.* Jackson, 88 N. C. 103.

That rents received by defendant include the use of improvements erected by him is no ground for excluding evidence of the amount where defendant is not entitled to any set-off for improvements under the pleadings. Limberg *v.* Higenbotham, 11 Colo. 156, 17 Pac. 481.

The sum actually received for rent may be shown by defendant. More *v.* Deyoe, 22 Hun (N. Y.) 208.

The value of premises as a part necessary to the enjoyment of larger premises from which they were detached by defendant's act may be shown. Ackerman *v.* Nachbar, 3 Kulp (Pa.) 188.

The value of premises for a particular use as the result of a future expenditure of an indefinite amount of money cannot be shown. Harris *v.* Philadelphia, (Pa. 1889) 16 Atl. 740.

The yearly value of a whole storehouse built partly on plaintiff's land by defendant may be shown on the issue of mesne profits. Jenkins *v.* Means, 59 Ga. 55.

82. Hart *v.* McGrew, (Pa. 1887) 11 Atl. 617.

83. Bailey *v.* Hickman, 12 La. 415. *Compare* Tongue *v.* Nutwell, 31 Md. 302, holding that where exemplary damages are not claimed defendant cannot in trespass for mesne profits show in mitigation of damages that he entered in good faith as a purchaser for value, as a ground on which he would be entitled to be allowed for the cost of improvements.

84. Turnipseed *v.* Fitzpatrick, 75 Ala. 297.

show that he was a joint trespasser with another person as a ground for reducing damages.[85] Where plaintiff seeks to recover special damages for an injury to the freehold defendant may show that the act complained of was a beneficial improvement.[86] Defendant cannot go into matters which were litigated in the action of ejectment.[87] Nor can he show in mitigation of damages that plaintiff in ejectment brought that action to recover only a part of the premises in question where the record shows title in plaintiff to the whole.[88]

5. COURSE AND CONDUCT OF TRIAL. An action for mesne profits, although in form trespass, is really for the use and occupation, involving the statement of an account, and it is proper to permit plaintiff to send out a statement based on the evidence to aid the jury in their calculation.[89] It is too late after verdict to object to the action of the court in allowing the same jury which tried the case on its merits to fix the value of the land and the rents and profits thereof and the value of the improvements claimed by defendant.[90] It is no ground to stay an action to recover mesne profits that there is a suit pending in the federal court brought by the United States to cancel a patent under which plaintiff claimed title.[91]

6. EFFECT OF INJUNCTION STAYING EXECUTION OF JUDGMENT IN EJECTMENT. Where a defendant in ejectment brings action to recover for improvements, subsequent to a judgment against him which includes the accruing rents and profits until the delivery of possession, an injunction perpetually enjoining execution of the judgment, unless plaintiffs in ejectment pay the value of the improvements, does not prevent the accruing thereafter of the monthly rents and profits under the judgments in ejectment.[92]

7. APPOINTMENT OF RECEIVER. It has been held that the court has no power pending an action in ejectment to restrain defendant from collecting rents,[93] and according to the weight of authority the court has no power to appoint a receiver to take charge of the rents and profits pending an action of ejectment,[94] not even though defendant be insolvent,[95] as such procedure is not considered consistent with the nature of the action.[96] Some decisions, however, have taken the opposite view and hold the appointment of a receiver permissible.[97]

8. ASSESSMENT OF DAMAGES OR PROFITS.[98] Damages or profits should be assessed by the jury on rendering verdict for plaintiff,[99] but if it fails to do so they may

85. Ryers *v.* Wheeler, Lalor (N. Y.) 389.

86. Meier *v.* Portland Cable R. Co., 16 Oreg. 500, 19 Pac. 610, 1 L. R. A. 856.

87. Douglass *v.* Haldeman, 2 Watts (Pa.) 81.

88. Graves *v.* Joice, 5 Cow. (N. Y.) 261.

89. Blight *v.* Ewing, 26 Pa. St. 135.

90. Corr *v.* Porter, 33 Gratt. (Va.) 278.

91. Avery *v.* Contra Costa County Super. Ct., 57 Cal. 247.

92. Stump *v.* Hornback, 109 Mo. 272, 18 S. W. 37, decided under Mo. Rev. St. §§ 2252–2255, providing that a judgment in ejectment for plaintiff shall include the accruing rents and profits until possession is delivered.

93. France *v.* French, 2 Pa. Co. Ct. 165.

94. Oehme *v.* Rucklehaus, 50 N. J. L. 84, 11 Atl. 145; La Bau *v.* Huetwohl, 60 Hun (N. Y.) 407, 15 N. Y. Suppl. 491; Thompson *v.* Sherrard, 35 Barb. (N. Y.) 593, 12 Abb. Pr. (N. Y.) 427, 22 How. Pr. (N. Y.) 155; France *v.* French, 2 Pa. Co. Ct. 165. And see Cofer *v.* Echerson, 6 Iowa 502 (holding that a receiver should not be appointed where it appears doubtful that plaintiff can recover); People *v.* New York, 10 Abb. Pr. (N. Y.) 111 [*reversing* 8 Abb. Pr. 7] (holding that unless some equitable grounds are made to appear entitling plaintiff to the rents and profits as such, or unless their sequestration is necessary to his protection, a receiver cannot be appointed in an action to recover real property).

A receiver cannot be appointed in ejectment before judgment. Burdell *v.* Burdell, 54 How. Pr. (N. Y.) 91.

A receiver is improperly appointed on a showing by plaintiff that there is a deed of trust on the property on which interest is unpaid, that the taxes are delinquent, and that the holder of the trust deed is threatening to foreclose. Colburn *v.* Yantis, 176 Mo. 670, 75 S. W. 653.

95. Davis *v.* Taylor, 86 Ga. 506, 12 S. E. 881; Cofer *v.* Echerson, 6 Iowa 502.

96. La Bau *v.* Huetwohl, 60 Hun (N. Y.) 407, 15 N. Y. Suppl. 491.

97. Ireland *v.* Nichols, 1 Sweeny (N. Y.) 208, 37 How. Pr. (N. Y.) 222; Kron *v.* Dennis, 90 N. C. 327. And see Ellis *v.* Jeans, 26 Cal. 272.

98. Writ of inquiry upon judgment in ejectment. Jackson *v.* Rathbone, 2 Cow. (N. Y.) 602, 603 note.

99. Porter *v.* Doe, 10 Ark. 186; Jenkins *v.* Means, 59 Ga. 55; Johnson *v.* Futch, 57 Miss. 73.

be assessed on a writ of inquiry after verdict.[1] Joint damages may be assessed against several persons joined as defendants.[2]

9. Verdict and Findings. Ordinarily the verdict of the jury is conclusive as to the amount of damages, and a different sum cannot be allowed by the court on a finding made by it.[3] But where the case warrants nominal damages only and a verdict for substantial damages is rendered the sum so awarded may be struck out by the court and judgment for plaintiff entered for the land.[4] Where there is no finding as to the value of the use and occupation plaintiff is not entitled to mesne profits.[5]

10. Judgment and Enforcement Thereof. A judgment awarding rents or substantial damages should be based on testimony as to their value;[6] should be restricted to the amount alleged,[7] and proven,[8] and should be awarded only to a person showing title or a sufficient interest in the land.[9] If there are several defendants there may be a joint judgment against both,[10] or there may be a judgment against one and *nolle prosequi* as to the other.[11]

X. Improvements and Taxes.[12]

A. In General — 1. In the Absence of Statute. By the common law the true owner recovered his land in ejectment without any liability to pay for improvements made upon it by an occupant without title, it being considered that every occupant made improvements at his peril, even though he acted under a *bona fide* belief of ownership.[13] Courts of equity, however, borrowing from the civil

1. Porter *v.* Doe, 10 Ark. 186; Joan *v.* Shields, 3 Harr. & M. (Md.) 7 (holding that after a verdict for plaintiff in ejectment and judgment for possession a writ of inquiry for damages lies); Brendle *v.* Herren, 97 N. C. 257, 2 S. E. 158 (holding that the proper time to institute an inquiry as to the rents and profits is after verdict and before final judgment).

2. Rood *v.* Willard, Brayt. (Vt.) 67, holding that they may be assessed against joint defendants holding property in severalty unless they disclaim severally.

3. Mills *v.* Fletcher, 100 Cal. 142, 34 Pac. 637.

4. Cope *v.* Kidney, 115 Pa. St. 228, 8 Atl. 836.

5. Camarillo *v.* Fenlon, 49 Cal. 202.

6. Hahn *v.* Cotton, 136 Mo. 216, 37 S. W. 919.

In the absence of testimony it is error to render a judgment for rents and profits. Franklin *v.* Haynes, 119 Mo. 566, 25 S. W. 223. But see Patterson *v.* Ely, 19 Cal. 28, holding that an allegation as to the amount of damages where not controverted will be taken as true and a verdict and judgment rendered on the pleadings for that amount will stand.

7. McKinlay *v.* Tuttle, 42 Cal. 570.

8. Means *v.* Hyde, 19 La. Ann. 478.

9. Donohoo *v.* Howard, (Indian Terr. 1902) 69 S. W. 927, holding that where a third party intervened in an action of ejectment and a receiver for rents and profits was appointed, but plaintiff failed to show title and the third party failed to allege a sufficient interest to permit it to intervene, the money derived from the receivership was held to be properly ordered to be paid to defendant.

10. Ellis *v.* Jeans, 26 Cal. 272, although the several defendants are in exclusive possession of different parts of the premises but no request for a several judgment is made.

But where one defendant enters subsequent to another it is error in a joint action of ejectment and for mesne profits to render a joint judgment against both from the time of the entry of the latter. Ashmead *v.* Wilson, 22 Fla. 255.

11. Chambers *v.* Lapsley, 7 Pa. St. 24, where defendants plead jointly in trespass for mesne profits but separate verdicts are found.

12. Recovery for improvements see, generally, Improvements, and the cross-references under that title.

13. *Alabama.*— Gordon *v.* Tweedy, 74 Ala. 232, 49 Am. Rep. 813.

California.— Ford *v.* Holton, 5 Cal. 319.

District of Columbia.—Anderson *v.* Reid, 14 App. Cas. 54.

Indiana.— Chesround *v.* Cunningham, 3 Blackf. 82.

Iowa.— Lunquest *v.* Ten Eyck, 40 Iowa 213; Parsons *v.* Moses, 16 Iowa 440 (where the history and origin of the right to recover for improvements is shown at some length); Webster *v.* Stewart, 6 Iowa 401.

Kansas.— Barton *v.* National Land Co., 27 Kan. 634.

Massachusetts.— Russell *v.* Blake, 2 Pick. 505.

Nebraska.— Carter *v.* Brown, 35 Nebr. 670, 53 N. W. 580.

Pennsylvania.— Putnam *v.* Tyler, 117 Pa. St. 570, 12 Atl. 43; Gregg *v.* Patterson, 9 Watts & S. 197; Skiles *v.* Nauman, 2 Lanc. L. Rev. 145.

Vermont.— Winslow *v.* Newell, 19 Vt. 164.

United States.— Griswold *v.* Bragg, 48 Fed. 519, 18 Blatchf. 202; Jones *v.* Steam Stone-

law, departed from the common-law doctrine, and at length held that when an occupant of land makes beneficial improvements upon it in good faith and under an honest belief of ownership, and the real owner is for any reason compelled to come into a court of equity, that court, applying the maxim that he who seeks equity must do equity, and adopting the civil-law rule of natural equity, will compel him to pay for such improvements;[14] and some of the courts have held that a *bona fide* occupant who is entitled to compensation for improvements may himself file a bill in equity to enforce his claim after a recovery against him in an action at law, or file a cross bill or complaint in the nature of a cross bill to enforce his claim when he is sued at law for possession.[15] Courts of law next modified the strict rule of the common law to the extent of holding that where the owner of land brings his action for mesne profits, which courts of law treated as an equitable action, the *bona fide* occupant may set off or recoup the value of his permanent improvements to the extent of the rents and profits demanded, but no further, and such is now the law unless it is changed by statute.[16] In the absence of a statute the *bona fide* but wrongful occupant is not entitled to be secured the value of his improvements before being obliged to surrender in an action of ejectment,[17] although, as we have seen, it has been held otherwise in equity,[18] and under statutes allowing an equitable defense to be set up in ejectment.[19]

2. UNDER STATUTORY PROVISIONS. In most jurisdictions at the present time the right of a defendant in ejectment to recover for improvements made on the premises is given and the remedy therefor regulated by express statutory provisions, some of which are merely declaratory of the common law, while others allow recovery in a direct action therefor, or otherwise enlarge the common-law right and remedy.[20] The constitutionality of these statutes has generally been

Cutter Co., 20 Fed. 477; Albee *v.* May, 1 Fed. Cas. No. 134, 2 Paine 74.

See 17 Cent. Dig. tit. "Ejectment," § 438.

14. Anderson *v.* Reid, 14 App. Cas. (D. C.) 54; Parsons *v.* Moses, 16 Iowa 440; Foley *v.* Kirk, 33 N. J. Eq. 170; Putnam *v.* Ritchie, 6 Paige (N. Y.) 390. And see IMPROVEMENTS.

15. Thomas *v.* Thomas, 16 B. Mon. (Ky.) 420; Hatcher *v.* Briggs, 6 Oreg. 31; Bright *v.* Boyd, 4 Fed. Cas. No. 1,876, 2 Story 605. *Contra*, Anderson *v.* Reid, 14 App. Cas. (D. C.) 54; Putnam *v.* Ritchie, 6 Paige (N. Y.) 390. See also IMPROVEMENTS.

16. *Alabama.*— Kerr *v.* Nicholas, 88 Ala. 346, 6 So. 698; Gordon *v.* Tweedy, 74 Ala. 232, 49 Am. Rep. 813.

Arkansas.— McCoy *v.* Arnett, 47 Ark. 445, 2 S. W. 71; Porter *v.* Doe, 10 Ark. 186.

California.— Welch *v.* Sullivan, 8 Cal. 165, 511.

Delaware.— Doe *v.* Roe, 2 Houst. 321.

District of Columbia.—Anderson *v.* Reid, 14 App. Cas. 54.

Georgia.— Davis *v.* Smith, 5 Ga. 274, 47 Am. Dec. 279. And see Thomas *v.* Malcom, 39 Ga. 328, 99 Am. Dec. 459.

Iowa.— Parsons *v.* Moses, 16 Iowa 440.

Kansas.— Crawford *v.* Shaft, 46 Kan. 704, 27 Pac. 156.

Kentucky.—Taylor *v.* Whiting, 9 Dana 399; Parker *v.* Stephens, 3 A. K. Marsh. 197.

Maryland.—Tongue *v.* Nutwell, 31 Md. 302.

Missouri.— Shroyer *v.* Nickell, 55 Mo. 264; Pierce *v.* Rollins, 60 Mo. App. 497.

Nebraska.— Carter *v.* Brown, 35 Nebr. 670, 53 N. W. 580.

New York.— Woodhull *v.* Rosenthal, 61 N. Y. 382; Jackson *v.* Loomis, 4 Cow. 168, 15 Am. Dec. 347; Murray *v.* Gouverneur, 2 Johns. Cas. 438, 1 Am. Dec. 177; Putnam *v.* Ritchie, 6 Paige 390.

Pennsylvania.— Putnam *v.* Tyler, 117 Pa. St. 570, 12 Atl. 43; Ege *v.* Kille, 84 Pa. St. 333; Kille *v.* Ege, 82 Pa. St. 102; Walker *v.* Humbert, 55 Pa. St. 407; Morrison *v.* Robinson, 31 Pa. St. 456.

Texas.— Garner *v.* Black, (Sup. 1901) 65 S. W. 876 [*affirming* (Civ. App. 1901) 63 S. W. 918].

United States.— Green *v.* Biddle, 8 Wheat. 1, 5 L. ed. 547; Hylton *v.* Brown, 12 Fed. Cas. No. 6,983, 2 Wash. 165; Semple *v.* British Columbia Bank, 21 Fed. Cas. No. 12,660, 5 Sawy. 394.

Canada.— Lindsay *v.* McFarling, Draper (U. C.) 6.

See 17 Cent. Dig. tit. "Ejectment," § 468 *et seq.*

17. Putnam *v.* Tyler, 117 Pa. St. 570, 12 Atl. 43.

18. Hatcher *v.* Briggs, 6 Oreg. 31; Bright *v.* Boyd, 4 Fed. Cas. No. 1,876, 2 Story 605.

Lien or charge for improvements see *infra*, X, A, 9.

19. Hannibal, etc., R. Co. *v.* Shortridge, 86 Mo. 662; Bond *v.* Wilson, 129 N. C. 325, 40 S. E. 179.

20. See statutes of various states and the following cases construing particular statutes:

Alabama.—Southern Cotton Oil Co. *v.* Henshaw, 89 Ala. 448, 7 So. 760, defendant not entitled to benefit of statute allowing full recovery for permanent improvements, where he takes advantage of statute limiting liability for mesne profits to one year.

upheld.[21] To entitle one to recover under such a statute he must bring himself strictly within its terms.[22]

3. PERSONS ENTITLED TO RECOVER FOR IMPROVEMENTS — a. In General. Aside from the question of assignment,[23] a defendant in ejectment is not entitled to recover for improvements which were not made by himself or by one from or through whom his claim of title is derived,[24] or which he does not own at the time he seeks to recover therefor.[25] As will presently be shown one cannot recover for improvements made while in the wrongful occupancy of another's land, either in equity or at common law or under the statutes, unless his occupancy was in good faith;[26] and it is generally required that the occupancy shall have been under color of title.[27] A claim for improvements made in good faith runs with the land and an heir may recover for improvements made by his ancestors.[28] One who is induced by the owner to settle on and improve lands is entitled to recover for the improvements;[29] and where an heir has occupied lands for many years without objection by the coheirs, in an action by the latter to recover the land he may be allowed what he has paid for taxes, for improvements, and for protecting it from the claims of strangers.[30] The sum recovered from

Connecticut.— O'Brien *v.* Flint, 74 Conn. 502, 51 Atl. 547, statute operates on pending actions.

Indiana.— Chesround *v.* Cunningham, 3 Blackf. 83.

Iowa.— Parsons *v.* Moses, 16 Iowa 440; Dungan *v.* Von Puhl, 8 Iowa 263.

Kansas.— Stephens *v.* Ballou, 27 Kan. 594.

Kentucky.— Fowler *v.* Halbert, 4 Bibb 52, statute operates on cases pending.

Louisiana.— Eldridge *v.* Tibbitts, 5 La. Ann. 380; Laizer *v.* Generes, 10 Rob. 178.

Maine.— Fisk *v.* Briggs, 12 Me. 373.

Michigan.— Burkle *v.* Ingham Cir. Judge, 42 Mich. 513, 4 N. W. 192; King *v.* Potter, 18 Mich. 134, lands must be same as those claimed and described in plaintiff's declaration.

Mississippi.— Pass *v.* McLendon, 62 Miss. 580 (statute only applies where plaintiff demands or might demand mesne profits); Wilson *v.* Williams, 52 Miss. 487.

Missouri.— Lee *v.* Bowman, 55 Mo. 400.

New Hampshire.— Bellows *v.* McCartee, 20 N. H. 515.

South Carolina.— Salinas *v.* Aultman, 45 S. C. 283, 22 S. E. 889.

South Dakota.— Parker *v.* Vinson, 11 S. D. 381, 77 N. W. 1023.

Vermont.— Rutland R. Co. *v.* Chaffee, 72 Vt. 404, 48 Atl. 700; Walker *v.* Arnold, 71 Vt. 263, 44 Atl. 351.

Wisconsin.— Zwietusch *v.* Watkins, 61 Wis. 615, 21 N. W. 821; Oberich *v.* Gilman, 31 Wis. 495; Huebschmann *v.* McHenry, 29 Wis. 655, remedy must be strictly followed.

Canada.— Queen Victoria Niagara Falls Park *v.* Colt, 22 Ont. App. 1; McCarthy *v.* Arbuckle, 31 U. C. C. P. 405.

See 17 Cent. Dig. tit. "Ejectment," §§ 468, 469.

Repeal of a statute allowing compensation for improvements after the filing of notice as provided by the statute does not affect defendant's rights thereunder. Porter *v.* Doe, 10 Ark. 186.

21. See CONSTITUTIONAL LAW, 8 Cyc. 896 *et seq.*; IMPROVEMENTS.

22. Lunquest *v.* Ten Eyck, 40 Iowa 213; King *v.* Harrington, 18 Mich. 213; Wheeler *v.* Merriman, 30 Minn. 372, 15 N. W. 665.

Right of plaintiff in ejectment to compensation for improvements.— Under a statute authorizing an allowance for the value of improvements to be made to an unsuccessful defendant in ejectment, a plaintiff in ejectment cannot maintain a claim for improvements made by him while occupying the premises after a purchase under a void decree. His remedy, if any, is in equity. Finch *v.* Strickland, 132 N. C. 103, 43 S. E. 552.

23. Assignment of claim for improvements see *infra*, X, A, 3, b.

24. *Arkansas.*— Burks *v.* Vaughan, (1892) 19 S. W. 754.

Georgia.— Jenkins *v.* Means, 59 Ga. 55.

Kentucky.— Parker *v.* Stephens, 3 A. K. Marsh. 197.

Minnesota.— McLellan *v.* Omodt, 37 Minn. 157, 33 N. W. 326.

Oregon.— Schetter *v.* Southern Oregon Co., 19 Oreg. 192, 24 Pac. 25.

Recovery for improvements made by predecessor see *infra*, X, A, 4.

25. There can be no recovery by a defendant whose entire interest in the improvements has been divested by judicial sale prior to the request for the jury to assess the value thereof under the occupying claimant act. La Bonty *v.* Lundgren, 58 Nebr. 648, 79 N. W. 551.

26. Occupancy in good faith see *infra*, X, B, 3.

27. Title and possession to support claim for improvements see *infra*, X, B.

28. Stump *v.* Hornbeck, 15 Mo. App. 367 [*reversed* on other grounds in 94 Mo. 26, 26 S. W. 356].

29. James *v.* McKinsey, 4 J. J. Marsh. (Ky.) 625; Hannibal, etc., R. Co. *v.* Shortridge, 86 Mo. 662; Bond *v.* Wilson, 129 N. C. 325, 40 S. E. 179; Hedgepeth *v.* Rose, 95 N. C. 41. See also IMPROVEMENTS. One who makes improvements under promise of future gift of the land may recover therefor. Ridley *v.* McNairy, 2 Humphr. (Tenn.) 174.

30. Litton *v.* Litton, 36 La. Ann. 348.

plaintiff for improvements should be apportioned between defendant and his vendor called in warranty according to the estimated value of the improvements made by each.[31]

b. Assignee of Claim. The right to compensation for improvements made by an occupying claimant in good faith under color of title may be assigned.[32] If, however, the person making the improvements could not recover therefor neither can one who has purchased the improvements from him.[33]

4. Improvements For Which Compensation May Be Claimed. The right of an unsuccessful defendant in ejectment to recover for improvements is limited, not only to such as are made in good faith,[34] but also to such as are permanent[35] and enhance the value of the land.[36] A *bona fide* occupant is entitled to compensation for permanent improvements which were made by one from whom he purchased the land,[37] as well as for those made by himself,[38] provided the person making such improvements would himself have been able to recover for them,[39] and provided the statute does not in terms limit the recovery to such improvements as were made by defendant himself.[40] As a rule an occupant cannot recover for improvements made after a decision against him.[41]

5. Right to Recover as Affected by Time of Making. As a general rule the right of defendant in ejectment to recover for improvements is limited to those made prior to the commencement of the suit,[42] and according to some decisions

31. Lejeune *v.* Barrow, 11 La. Ann. 501.

32. Parsons *v.* Moses, 16 Iowa 440; Craton *v.* Wright, 16 Iowa 133; Wright *v.* Stevens, 3 Greene (Iowa) 63.

Recovery for improvements made by predecessor see *infra*, X, A, 4.

33. Curd *v.* Harman, 5 Litt. (Ky.) 20; Hart *v.* Bodley, Hard. (Ky.) 98.

34. Hunt *v.* Pond, 67 Ga. 578; and *infra*, X, B, 3.

35. Hunt *v.* Pond, 67 Ga. 578; Noble *v.* Biddle, 81* Pa. St. 430; Effinger *v.* Kenney, 92 Va. 245, 23 S. E. 742; Stark *v.* Starr, 22 Fed. Cas. No. 13,307, 1 Sawy. 15. See Improvements.

Estoppel.—A plaintiff in ejectment who insists upon his recovery of a building upon the land as a part thereof cannot assert that such building is not a fixture and a permanent improvement for the value of which he is liable to defendant. Zwietusch *v.* Watkins, 61 Wis. 615, 21 N. W. 821.

36. Reynolds *v.* Reynolds, 55 Ark. 369, 18 S. W. 377; Nixon *v.* Porter, 38 Miss. 401; Noble *v.* Biddle, 81* Pa. St. 430. And see Improvements.

37. *Alabama.*— See Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13.

Georgia.— Dean *v.* Feely, 69 Ga. 804: Jenkins *v.* Means, 59 Ga. 55; Gardner *v.* Granniss, 57 Ga. 539; Willingham *v.* Long, 47 Ga. 540. And see Mills *v.* Geer, 111 Ga. 275, 36 S. E. 673, 52 L. R. A. 934.

Iowa.— Parsons *v.* Moses, 16 Iowa 440; Craton *v.* Wright, 16 Iowa 133; Wright *v.* Stevens, 3 Greene 63.

Kentucky.—Haskins *v.* Spiller, 3 Dana 573; Pugh *v.* Bell, 2 T. B. Mon. 125, 15 Am. Dec. 142.

Minnesota.— McLellan *v.* Omodt, 37 Minn. 157, 33 N. W. 326.

Pennsylvania.— Morrison *v.* Robinson, 31 Pa. St. 456.

South Carolina.— Salinas *v.* Aultman, 45 S. C. 283, 22 S. E. 889; Tumbleston *v.* Rumph, 43 S. C. 275, 21 S. E. 84; McKnight *v.* Cooper, 27 S. C. 92, 2 S. E. 842. *Compare* the cases cited *infra*, note 40.

One claiming value of improvements made by his predecessor is liable for all mesne profits chargeable to the latter. Mills *v.* Geer, 111 Ga. 275, 36 S. E. 673, 52 L. R. A. 934; Gardner *v.* Granniss, 57 Ga. 539; Willingham *v.* Long, 47 Ga. 540.

No recovery for improvements made by strangers see *supra*, X, A, 3, a.

Assignment of claim for improvements see *supra*, X, A, 3, b.

38. Haskins *v.* Spiller, 3 Dana (Ky.) 573.

39. Curd *v.* Harman, 5 Litt. (Ky.) 20; Hart *v.* Bodley, Hard. (Ky.) 98; McLellan *v.* Omodt, 37 Minn. 157, 33 N. W. 326; Wheeler *v.* Merriman, 30 Minn. 372, 15 N. W. 665; Citizens' Bank *v.* Costanera, 62 Miss. 825.

40. Aultman *v.* Utsey, 41 S. C. 304, 19 S. E. 617; Gadsden *v.* Desportes, 39 S. C. 131, 17 S. E. 706. *Compare* cases cited *supra*, note 37.

41. Bell *v.* Barnet, 2 J. J. Marsh. (Ky.) 516; and *infra*, X, B, 3.

42. *Arkansas.*— Porter *v.* Doe, 10 Ark. 186.

Illinois.— Haslett *v.* Crain, 85 Ill. 129, no recovery for improvements after commencement of suit, although made under a contract previously entered into.

Iowa.— Welles *v.* Newsom, 76 Iowa 81, 40 N. W. 105, after service of notice of suit.

Mississippi.— Gaines *v.* Kennedy, 53 Miss. 103.

South Carolina.— Johnson *v.* Harrelson, 18 S. C. 604.

See 17 Cent. Dig. tit. "Ejectment," § 479.

Contra.— Taylor *v.* Whiting, 9 Dana (Ky.) 399; Dorer *v.* Hood, 113 Wis. 607, 88 N. W. 1009.

before notice of plaintiff's superior adverse claim.[43] There can be no recovery for improvements made by an occupying claimant after a judgment against him in favor of the true owner,[44] except, according to a Louisiana decision, in the case of necessary improvements.[45] Under some statutes there can be no recovery for improvements made before acquiring color of title.[46] A tenant cannot be allowed to prove in an action of ejectment that valuable improvements have been made by him since the termination of a former unsuccessful action between the same parties for the same premises.[47]

6. Waiver or Forfeiture of Right to Compensation For Improvements. Defendant waives or forfeits the right to compensation for improvements by forfeiting the land and improvements to the state for failure to make payment in the case of lands purchased from the state,[48] or by failure to set up his claim at the proper time.[49]

7. Measure of Compensation. The general rule, in the absence of a statute to the contrary, is that the measure of compensation to which an occupant is entitled for improvements is not the cost of the improvements, but the amount which they have actually augmented the value of the property;[50] or the difference in the present value of the land with them and without them.[51] In some cases, however, the value of the improvements is declared to be the proper measure of compensation and not the increased value of the land.[52] And it has been held

43. Porter *v.* Doe, 10 Ark. 186; Scroggs *v.* Bodley, 1 A. K. Marsh. (Ky.) 605. And see Gaines *v.* Kennedy, 53 Miss. 103. But see Templeton *v.* Lowry, 22 S. C. 389; Whitney *v.* Richardson, 31 Vt. 300.

Time of making improvements as affecting good faith see *infra*, X, B, 3.

44. Craton *v.* Wright, 16 Iowa 133; Bell *v.* Barnet, 2 J. J. Marsh. (Ky.) 516.

Improvements made pending an appeal by defendant cannot be allowed for where the judgment was affirmed. Norton *v.* Davis, 13 Tex. Civ. App. 90, 35 S. W. 181.

Improvements made subsequent to date of sheriff's sale to plaintiff under a decree of foreclosure cannot be proved. Osborn *v.* Storms, 65 Ind. 321.

45. Beard *v.* Morancy, 2 La. Ann. 347.

46. See *infra*, X, B, 1.

47. Wilkinson *v.* Pearson, 23 Pa. St. 117.

48. Newland *v.* Baker, 26 Kan. 341.

49. Moody *v.* Harper, 38 Miss. 599; Paull *v.* Eldred, 29 Pa. St. 415. *Compare* Counts *v.* Kitchen, 87 Ky. 47, 7 S. W. 538, 9 Ky. L. Rep. 909.

50. *Arkansas.*— Reynolds *v.* Reynolds, 55 Ark. 369, 18 S. W. 377. And see McCloy *v.* Arnett, 47 Ark. 445, 2 S. W. 71.

Iowa.— Childs *v.* Shower, 18 Iowa 261.

Kansas.— Hentig *v.* Redden, 1 Kan. App. 163, 41 Pac. 1054.

Kentucky.— Proctor *v.* Smith, 8 Bush 81; Hall *v.* Brummal, 7 Bush 43; Bell *v.* Barnet, 2 J. J. Marsh. 516; Bourne *v.* Odam, 32 S. W. 398, 17 Ky. L. Rep. 696.

Louisiana.— Bank *v.* Miller, 44 La. Ann. 199, 10 So. 779; Pearce *v.* Frantum, 16 La. 414; Elliott *v.* Labarre, 3 La. 541; Lamoureau *v.* Fowler, 2 La. 174; Daquin *v.* Coiron, 8 Mart. N. S. 608.

Michigan.— Petit *v.* Flint, etc., R. Co., 119 Mich. 492, 78 N. W. 554, 75 Am. St. Rep. 417.

Mississippi.— Hicks *v.* Blakeman, 74 Miss. 459, 21 So. 7, 400.

Nebraska.— Lothrop *v.* Michaelson, 44 Nebr. 633, 63 N. W. 28; Fletcher *v.* Brown, 35 Nebr. 660, 53 N. W. 577.

North Carolina.— Carolina Cent. R. Co. *v.* McCaskill, 98 N. C. 526, 4 S. E. 468.

Pennsylvania.—Noble *v.* Biddle, 81* Pa. St. 430.

South Carolina.— Harman *v.* Harman, 54 S. C. 100, 31 S. E. 881; Gadsden *v.* Desportes, 39 S. C. 131, 17 S. E. 706.

Tennessee.— Fisher *v.* Edington, 85 Tenn. 23, 1 S. W. 499.

Utah.— Bacon *v.* Thornton, 16 Utah 138, 51 Pac. 153.

Virginia.— Hollingsworth *v.* Funkhouser, 85 Va. 448, 8 S. E. 592.

United States.—Young *v.* Mahoning County, 53 Fed. 895; Van Bibber *v.* Williamson, 37 Fed. 756.

See 15 Cent. Dig. tit. "Ejectment," § 478; and *supra*, X, A, 4.

51. Haskins *v.* Spiller, 3 Dana (Ky.) 573; Petit *v.* Flint, etc., R. Co., 119 Mich. 492, 78 N. W. 554, 75 Am. St. Rep. 417 (holding that the test is not what the improvements cost defendant or are worth to him, nor what the owner intends to do with the land, but the difference in the market values before and after making them); Bacon *v.* Thornton, 16 Utah 138, 51 Pac. 153.

52. Patrick *v.* Woods, 3 Bibb (Ky.) 29; Hart *v.* Baylor, Hard. (Ky.) 597; Wendell *v.* Moulton, 26 N. H. 41.

Under the Georgia code, where improvements of a permanent character are made in good faith by one who has no claim of right to the possession but is a tenant by sufferance merely, the value of the improvements may be allowed to the extent of the rent found due for the use of the land but no further; but where the premises are held *bona fide* under independent and adversary claims of title, the party making the improvements is entitled to

that a successful claimant who elects to pay for the improvements is entitled to the crop growing on the premises when possession is taken.[53] The recovery for improvements is subject to a deduction for waste or deterioration of the soil, if any, that may have happened during the occupancy,[54] and to deduction of rents and profits.[55]

8. TAXES. There is some conflict of authority as to the right of an unsuccessful defendant in ejectment to reimbursement for taxes paid by him before plaintiff is let into possession. Without express statutory provision on the subject, it has been held that where one occupying land under color of title and in good faith is ejected therefrom he is entitled to an allowance for taxes paid by him.[56] Other decisions are to the contrary,[57] some going upon the ground that the payment of such taxes is not "improvements,"[58] and others upon the ground that no action can be maintained for money paid for another unless there has been a previous request, express or implied, or subsequent ratification.[59] Some decisions hold that an allowance for taxes paid is improper in an ejectment suit,[60] but recognize the right of the holder of a tax-title adjudged void in ejectment to enforce reimbursement for taxes paid in supplementary proceedings in chancery.[61] In Nebraska by express statutory provision, a defendant in ejectment cannot be turned out of possession until he has been reimbursed for taxes,[62] and in Kansas the holder of a tax deed when defeated in ejectment may by statutory authorization recover taxes which he has paid.[63]

their full value. Dean *v.* Feely, 69 Ga. 804. The value at the time of recovery and not at the time of their erection should control. Taylor *v.* James, 109 Ga. 327, 34 S. E. 674.

Value with reference to the utility and durability of the improvements should be allowed. Patrick *v.* Woods, 3 Bibb (Ky.) 29.

One who in good faith converts a forest into a farm at his own expense may be allowed such sum as will reimburse him for such portion of the expenditure as passes to the owner with the land. Hart *v.* Baylor, Hard. (Ky.) 597. *Compare* Dungan *v.* Von Puhl, 8 Iowa 263.

53. Strode *v.* Swim, 1 A. K. Marsh. (Ky.) 366.

54. Haskins *v.* Spiller, 3 Dana (Ky.) 573; Parker *v.* Stephens, 3 A. K. Marsh. (Ky.) 197.

55. Parsons *v.* Moses, 16 Iowa 440; McCarthy *v.* Arbuckle, 31 U. C. C. P. 405. And see Southern Cotton Oil Co. *v.* Henshaw, 89 Ala. 448, 7 So. 760; Hollingsworth *v.* Funkhouser, 85 Va. 448, 8 S. E. 592. See also *supra*, IX.

56. McInerney *v.* Beck, 10 Wash. 515, 39 Pac. 130. See also Ringhouse *v.* Keener, 63 Ill. 230, holding that taxes paid by defendant while in possession may be set off against the rents and profits for which he is chargeable.

57. Garrigan *v.* Knight, 47 Iowa 525; Curtiss *v.* Gay, 15 Gray (Mass.) 36; Napton *v.* Leaton, 71 Mo. 358. And see Glos *v.* Patterson, 195 Ill. 530, 63 N. E. 272; Riverside Co. *v.* Townshend, 120 Ill. 9, 9 N. E. 65, holding that in ejectment against the holder of tax deeds on vacant property a judgment for plaintiff need not be conditioned on the repayment of taxes to the holder of such deeds; that a statute providing that any judgment or decree setting aside a tax deed shall provide that the claimant pay the party holding the tax deed or taxes before obtaining the benefit of the judgment or decree applies not to ejectment suits but only to proceedings which have for their object the setting aside of tax deeds. See also Croskery *v.* Busch, 116 Mich. 288, 74 N. W. 464.

Where the taxes were not imposed or paid for any of the period for which damages were awarded, and defendant was under no obligation to pay them, he is not entitled to an allowance therefor. Clason *v.* Baldwin, 68 Hun (N. Y.) 404, 23 N. Y. Suppl. 50.

58. Curtiss *v.* Gay, 15 Gray (Mass.) 36.

59. Napton *v.* Leaton, 71 Mo. 358.

60. Ellsworth *v.* Freeman, 43 Mich. 488, 5 N. W. 675; Weimer *v.* Porter, 42 Mich. 569, 4 N. W. 306.

61. Weimer *v.* Porter, 42 Mich. 569, 4 N. W. 306, express statutory provision. See, however, Croskery *v.* Busch, 116 Mich. 288, 74 N. W. 464.

Rights and remedies of purchasers at tax-sales see, generally, TAXATION.

62. Lothrop *v.* Michaelson, 44 Nebr. 633, 63 N. W. 28; Dworak *v.* More, 25 Nebr. 735, 741, 41 N. W. 777, 778. And see TAXATION.

Taxes paid by third persons cannot be allowed defendant in ejectment where it does not appear that he is in privity with them or that they have assigned their claims to him. Fletcher *v.* Brown, 35 Nebr. 660, 53 N. W. 577.

The statute of limitations relating to the foreclosure of tax liens is no bar to recovery of taxes under the provisions of the Nebraska statute providing that defendant in ejectment shall not be turned out of possession until he has been reimbursed for taxes paid by him upon the land in controversy. Lothrop *v.* Michaelson, 44 Nebr. 633, 63 Pac. 28.

63. Ritchie *v.* Mulvane, 39 Kan. 241, 17 Pac. 830; Belz *v.* Bird, 31 Kan. 139, 1 Pac.

9. Lien or Charge For Improvements or Taxes. In the absence of a statute a *bona fide* occupant has no such lien at law as entitles him to be secured the value of his improvements before being compelled to surrender possession in an action of ejectment,[64] but in equity it has been held that a lien or charge upon the land may be decreed for improvements,[65] and for taxes and street assessments paid;[66] and in some states a lien is given by statute.[67]

10. Effect of Recovery in Ejectment. Where the verdict in ejectment has found that there was fraud in defendant's deed, he cannot show that such deed was not fraudulent or that plaintiff had no title to the premises.[68]

B. Title and Possession to Support Claim — 1. In General. As a general rule to entitle a *bona fide* occupant to compensation for improvements on being ousted in ejectment he must have been in full and actual possession of the land at the time the improvements were made,[69] either personally or by his tenant;[70] his possession must have been adverse to the title of the true owner;[71] and it must

246; Hentig *v.* Redden, 1 Kan. App. 163, 41 Pac. 1054. And see Taxation.

64. Putnam *v.* Tyler, 117 Pa. St. 570, 12 Atl. 43.

65. *Maryland.*— Union Hall Assoc. *v.* Morrison, 39 Md. 281.

Missouri.— Hannibal, etc., R. Co. *v.* Shortridge, 86 Mo. 662.

North Carolina.— Bond *v.* Wilson, 129 N. C. 325, 40 S. E. 179; Fields *v.* Moody, 111 N. C. 353, 16 S. E. 239.

Ohio.— Preston *v.* Brown, 35 Ohio St. 18.

Oregon.— Hatcher *v.* Briggs, 6 Oreg. 31.

Virginia.— Southall *v.* McKeand, 1 Wash. 336.

United States.— Bright *v.* Boyd, 4 Fed. Cas. No. 1,876, 2 Story 605.

Compare Hayden *v.* Delay, Litt. Sel. Cas. (Ky.) 278.

See 17 Cent. Dig. tit. "Ejectment," § 482.

66. McInerney *v.* Beck, 10 Wash. 515, 39 Pac. 130.

67. See Dungan *v.* Von Puhl, 8 Iowa 263; Clark *v.* Green, 62 Mich. 355, 28 N. W. 894; Guild *v.* Kidd, 48 Mich. 307, 12 N. W. 158; Craig *v.* Dunn, 47 Minn. 59, 49 N. W. 396.

One who sells the land and receives for it a bond with sureties loses his lien thereon. Webb *v.* Bowman, 3 J. J. Marsh. (Ky.) 70.

The Kentucky statute (Ky. St. § 3728) giving a lien for improvements to one the foundation of whose claim is a "public record" applies only to one who claims to derive title from the commonwealth. Wintersmith *v.* Price, 66 S. W. 2, 23 Ky. L. Rep. 2005.

68. Thompson *v.* Gilman, 17 Vt. 109.

69. Coonradt *v.* Myers, 31 Kan. 30, 2 Pac. 858. See Bass *v.* Dinwiddie, 2 Fed. Cas. No. 1092, Brunn. Col. Cas. 190, Cooke (Tenn.) 130, holding actual settlement on the land necessary under the Tennessee act of 1806. See also Stevens *v.* Tracey, 3 Yeates (Pa.) 77.

One may be an "occupant," although not actually living on the property. Jones *v.* Merrill, 113 Mich. 433, 71 N. W. 838, 67 Am. St. Rep. 475.

70. Although the statute may require that a person be an occupant in order to recover for improvements, possession by a tenant may be sufficient to enable the landlord to recover. Parsons *v.* Moses, 16 Iowa 440. See also Bellows *v.* McCartee, 20 N. H. 515.

A tenant occupying under defendants who are evicted has no claim for improvements against those who hold the better title. Parker *v.* Bullock, 2 Litt. (Ky.) 196.

71. *Alabama.*— Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13; Pickett *v.* Doe, 74 Ala. 122.

California.— Hannan *v.* McNickle, 82 Cal. 122, 23 Pac. 271; Carpentier *v.* Small, 35 Cal. 346; Bay *v.* Pope, 18 Cal. 694.

Georgia.— Dean *v.* Feely, 69 Ga. 804. And see Barnes *v.* Shinholster, 14 Ga. 131.

Iowa.— Snell *v.* Mechan, 80 Iowa 53, 45 N. W. 398; Keas *v.* Burns, 23 Iowa 235.

Maine.— Tyler *v.* Fickett, 75 Me. 211; Treat *v.* Strickland, 23 Me. 234.

Massachusetts.— Wales *v.* Coffin, 100 Mass. 177; Mason *v.* Richards, 15 Pick. 141; Knox *v.* Hook, 12 Mass. 329.

Michigan.— Wolf *v.* Holton, 92 Mich. 136, 52 N. W. 459 (holding that one entering and occupying as a tenant was not entitled to compensation for improvements); Paldi *v.* Paldi, 84 Mich. 346, 47 N. W. 510 (grantor remaining in possession after conveyance, although during such occupancy he purchased an outstanding tax-title); State *v.* Lake St. Clair Fishing, etc., Club, 127 Mich. 580, 87 N. W. 117 (where it was held that there was not adverse possession of swamp lands as against the state); Sleight *v.* Roe, 125 Mich. 585, 85 N. W. 10.

Mississippi.— Thomas *v.* Thomas, 69 Miss. 564, 13 So. 666.

Missouri.—Stump *v.* Hornbeck, 15 Mo. App. 367 [*reversed* on other grounds in 94 Mo. 26, 6 S. W. 356].

New York.— Barley *v.* Roosa, 13 N. Y. Suppl. 209.

Ohio.— Preston *v.* Brown, 35 Ohio St. 18. And see Allen *v.* Russell, 59 Ohio St. 137, 52 N. E. 121.

South Dakota.— Coleman *v.* Stalnacke, 15 S. D. 242, 88 N. W. 107; Seymour *v.* Cleveland, 9 S. D. 94, 68 N. W. 171.

Texas.— Baker *v.* Millman, 77 Tex. 46, 13 S. W. 618.

Wisconsin.— Falck *v.* Marsh, 88 Wis. 680,

have been, not as a mere naked trespasser, but under color of title,[72] or under some statutes under claim of title.[73] It is very generally held that mere color of title is

61 N. W. 287; Barrett *v.* Stradl, 73 Wis. 385, 41 N. W. 439, 9 Am. St. Rep. 795.

United States.— Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,085, 3 Sawy. 495.

See 17 Cent. Dig. tit. "Ejectment," § 491, 504; and, generally, IMPROVEMENTS.

Life-estate only in grantor.— Some of the courts have held that one who in good faith purchases and takes a conveyance in fee from one having a life-estate only, believing he is obtaining the fee, holds adversely to the remainder-man within the meaning of the law relating to improvements. Stump *v.* Hornbeck, 15 Mo. App. 367 [*reversed* on other grounds in 94 Mo. 26, 6 S. W. 356]. See also Fee *v.* Cowdry, 45 Ark. 410, 55 Am. Rep. 560; Whitney *v.* Richardson, 31 Vt. 300. Other courts, however, have held the contrary, at least during the life of the life-tenant. Pickett *v.* Doe, 74 Ala. 122; Sleight *v.* Roe, 125 Mich. 585, 85 N. W. 10; Barrett *v.* Stradl, 73 Wis. 385, 41 N. W. 439, 9 Am. St. Rep. 795. If the conveyance from the life-tenant purports to convey the fee and the grantee supposed he was getting the fee, his possession becomes adverse to the remainder-man immediately on the death of the life-tenant. Barrett *v.* Stradl, 73 Wis. 385, 41 N. W. 439, 9 Am. St. Rep. 795. *Contra*, in the case of a mere quitclaim deed from the life-tenant. Falck *v.* Marsh, 88 Wis. 680, 61 N. W. 287.

Continuance of adverse possession presumed.— Barrett *v.* Stradl, 73 Wis. 385, 41 N. W. 439, 9 Am. St. Rep. 795. And see ADVERSE POSSESSION.

What constitutes adverse possession see, generally, ADVERSE POSSESSION.

72. *Alabama.*— Pickett *v.* Doe, 74 Ala. 122.

Arkansas.— Bloom *v.* Strauss, 70 Ark. 483, 69 S. W. 548, 72 S. W. 563; Anderson *v.* Williams, 59 Ark. 144, 26 S. W. 818; Beard *v.* Dansby, 48 Ark. 183, 2 S. W. 701; Teaver *v.* Akin, 47 Ark. 528, 1 S. W. 772; Kemp *v.* Cossart, 47 Ark. 62, 14 S. W. 465.

California.— Hannan *v.* McNickle, 82 Cal. 122, 23 Pac. 271; Carpentier *v.* Small, 35 Cal. 346; Love *v.* Shartzer, 31 Cal. 487.

Georgia.— Tripp *v.* Fausett, 94 Ga. 330, 21 S. E. 572.

Iowa.— Snell *v.* Mechan, 80 Iowa 53, 45 N. W. 398; Welles *v.* Newsom, 76 Iowa 81, 40 N. W. 105; Finnegan *v.* Campbell, 74 Iowa 158, 37 N. W. 127; Lunquest *v.* Ten Eyck, 40 Iowa 213.

Kentucky.— Chiles *v.* Patterson, 1 A. K. Marsh. 444. And see Stamper *v.* Brodley, 53 S. W. 16, 21 Ky. L. Rep. 806.

Michigan.— Petit *v.* Flint, etc., R. Co., 119 Mich. 492, 78 N. W. 554, 75 Am. St. Rep. 417.

Minnesota.— Wheeler *v.* Merriman, 30 Minn. 372, 15 N. W. 665. And see McLellan *v.* Omodt, 37 Minn. 157, 33 N. W. 326.

Mississippi.— Thomas *v.* Thomas, 69 Miss. 564, 13 So. 666.

Nebraska.— Carter *v.* Brown, 35 Nebr. 670, 53 N. W. 580.

New Mexico.— Maxwell Land Grant Co. *v.* Santistevan, 7 N. M. 1, 32 Pac. 44.

New York.— Barley *v.* Roosa, 13 N. Y. Suppl. 209.

North Carolina.— Brown *v.* Davis, 109 N. C. 23, 13 S. E. 703.

Oklahoma.— Woodruff *v.* Wallace, 3 Okla. 355, 41 Pac. 357.

South Dakota.— Coleman *v.* Stalnacke, 15 S. D. 242, 88 N. W. 107; Seymour *v.* Cleveland, 9 S. D. 94, 68 N. W. 171; Wood *v.* Conrad, 2 S. D. 334, 50 N. W. 95.

Tennessee.— See Wilson *v.* Scruggs, 7 Lea 635.

Texas.— Simpson *v.* Johnson, 92 Tex. 159, 46 S. W. 628; Powell *v.* Davis, 19 Tex. 380, holding it insufficient for defendant to allege that he entered on the land in good faith, believing it to be vacant, as it did not show entry under title or claim of title or right.

Washington.— Brygger *v.* Schweitzer, 5 Wash. 564, 32 Pac. 462, 33 Pac. 388.

Wisconsin.— Whitcomb *v.* Provost, 102 Wis. 278, 78 N. W. 432; Falck *v.* Marsh, 88 Wis. 680, 61 N. W. 287.

United States.— Deffenbach *v.* Hawke, 115 U. S. 392, 6 S. Ct. 95, 29 L. ed. 423; Field *v.* Columbet, 9 Fed. Cas. No. 4,764, 4 Sawy. 523; Litchfield *v.* Johnson, 15 Fed. Cas. No. 8,387, 4 Dill. 551; Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,085, 3 Sawy. 495; Stark *v.* Starr, 22 Fed. Cas. No. 13,307, 1 Sawy. 15.

See 17 Cent. Dig. tit. "Ejectment," § 483 *et seq.*

Purchase of a claim after suit brought by the owner cannot entitle a naked trespasser to recover. Chiles *v.* Patterson, 1 A. K. Marsh. (Ky.) 444.

A mere squatter cannot recover for improvements. Maxwell Land Grant Co. *v.* Santistevan, 7 N. M. 1, 32 Pac. 44.

One holding under a parol transfer of land cannot recover for improvements. Citizens' Bank *v.* Costanera, 62 Miss. 825.

Without paper or record title.— In some states, by statute, possession in good faith for a certain period in the claimant's own right is color of title, and record or paper title is not necessary. See Finnegan *v.* Campbell, 74 Iowa 158, 37 N. W. 127; Lunquest *v.* Ten Eyck, 40 Iowa 213. In order that mere possession may constitute color of title under the statute it must have been continuous for the time (five years) fixed by the statute. Welles *v.* Newsom, 76 Iowa 81, 40 N. W. 105.

What constitutes color of title see, generally, ADVERSE POSSESSION; IMPROVEMENTS.

73. Adverse possession under mere claim of title, without color of title, is sufficient under some statutes. Holt *v.* Adams, 121 Ala. 664, 25 So. 716; Turnipseed *v.* Fitzpatrick, 75 Ala. 297; Dothage *v.* Stuart, 35 Mo. 251; Thompson *v.* Jones, 77 Tex. 626, 14 S. W. 222; Dorn *v.* Dunham, 24 Tex. 366. See *infra*, X, B, 2.

Under the Vermont statute it was held

sufficient.[74] Under some statutes there must have been color of title at the time the improvements were made,[75] while under others it is sufficient if there is color of title at the time compensation is claimed.[76] Subject to some conflict in the decisions, it has been held that there is sufficient color of title to entitle one to recover where he holds under a deed apparently conveying title;[77] under a void deed or other instrument;[78] under a void will;[79] under a quitclaim deed from one having color of title;[80] under a bond for title or written contract of sale from one having

that the sole test of the right of a defeated defendant in an action of ejectment to recover for improvements was the fact that he purchased supposing that he thereby acquired a good title in fee, and that the right did not depend upon the nature or kind of title which the real owner might have. Whitney *v.* Richardson, 31 Vt. 300.

74. Lamar *v.* Minter, 13 Ala. 31; Stump *v.* Hornbeck, 15 Mo. App. 367 [*reversed* on other grounds in 94 Mo. 26, 6 S. W. 356]; Carolina Cent. R. Co. *v.* McCaskill, 98 N. C. 526, 4 S. E. 468; Wood *v.* Conrad, 2 S. D. 334, 50 N. W. 95.

75. *Arkansas.*— Anderson *v.* Williams, 59 Ark. 144, 26 S. W. 818; Jacks *v.* Dyer, 31 Ark. 334.

California.— Carpentier *v.* Small, 35 Cal. 346.

Iowa.— Snell *v.* Mechan, 80 Iowa 53, 45 N. W. 398.

Minnesota.— McLellan *v.* Omodt, 37 Minn. 157, 33 N. W. 326; Wheeler *v.* Merriman, 30 Minn. 372, 15 N. W. 665.

Tennessee.— Townsend *v.* Shipps, Cooke 294.

See 17 Cent. Dig. tit. "Ejectment," § 479.

Deed executed in compliance with prior contract.— Where an unsuccessful defendant in ejectment has made improvements while occupying under a contract for a deed, which is afterward executed, the deed relates back to his occupancy under the contract, rendering that under color of title. Dorer *v.* Hood, 113 Wis. 607, 88 N. W. 1009.

76. Stebbins *v.* Guthrie, 4 Kan. 353; Davis *v.* Powell, 13 Ohio 308; Shaler *v.* Magin, 2 Ohio 235; Litchfield *v.* Johnson, 15 Fed. Cas. No. 8,387, 4 Dill. 551, Ohio statute.

If the occupant knows that he has no color of title at the time he makes improvements, he cannot recover therefor on subsequently acquiring color of title, since the element of good faith is wanting. Snell *v.* Mechan, 80 Iowa 53, 45 N. W. 398. See *infra*, X, B, 3.

77. *Alabama.*— Lamar *v.* Minter, 13 Ala. 31, deed which by mistake in the description omits the land in controversy.

Arkansas.— Beard *v.* Dansby, 48 Ark. 183, 2 S. W. 701; Fee *v.* Cowdry, 45 Ark. 410, 55 Am. Rep. 560, deed from life-tenant purporting to convey the fee.

Kansas.— Krause *v.* Means, 12 Kan. 335.

Michigan.— Petit *v.* Flint, etc., R. Co., 119 Mich. 492, 78 N. W. 554, 75 Am. St. Rep. 417 (although the deed limits the premises to a particular use); Miller *v.* Clark, 56 Mich. 337, 23 N. W. 35.

Missouri.—Stump *v.* Hornbeck, 15 Mo. App. 367 [*reversed* on other grounds in 94 Mo. 26, 6 S. W. 356], deed in fee from life-tenant.

South Dakota.— Wood *v.* Conrad, 2 S. D. 334, 50 N. W. 95.

Tennessee.— Garth *v.* Fort, 15 Lea 683, deed from husband of wife's land.

Wisconsin.— Dorer *v.* Hood, 113 Wis. 607, 88 N. W. 1009 (deed by executor under order of court pursuant to a contract to convey a fee and purporting to convey all of deceased's "right, title, and interest"); Barrett *v.* Stradl, 73 Wis. 385, 41 N. W. 439, 9 Am. St. Rep. 795 (deed in fee from a life-tenant only).

United States.— Stark *v.* Starr, 22 Fed. Cas. No. 13,307, 1 Sawy. 15.

A creditor put in possession of land of a debtor in satisfaction of his debt may, where the deed transferring such possession is not effective, show that he was compelled to make substantial improvements on the property. Page *v.* Blackshear, 78 Ga. 597, 3 S. E. 423.

Deed from one without color of title.— One who enters upon land under a conveyance from one not in possession and so far as appears not having any color of title enters and improves the premises at his peril. Tripp *v.* Fausett, 94 Ga. 330, 21 S. E. 572.

78. Beard *v.* Dansby, 48 Ark. 183, 187, 2 S. W. 701 (where it is said that "any instrument having a grantor and grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title"); Shroyer *v.* Nickell, 55 Mo. 264 (defective deed of married woman); Jones *v.* Perry, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430; Stewart *v.* Stewart, 90 Wis. 516, 63 N. W. 886, 48 Am. St. Rep. 949 (holding that possession under a deed which was afterward set aside as void on the ground that there was no delivery thereof was under color of title up to the time of the judgment).

Contra.— Stillman *v.* Young, 16 Ill. 318 (void execution sale); Mettler *v.* Craft, 39 Ill. App. 193 (deed of married woman invalid for want of proper certificate of acknowledgment); Cook *v.* Bertram, 86 Mich. 356, 49 N. W. 42; Miller *v.* Clark, 56 Mich. 337, 23 N. W. 35; Hatchett *v.* Conner, 30 Tex. 104; Deffenbach *v.* Hawke, 115 U. S. 392, 6 S. Ct. 95, 29 L. ed. 423.

Void deed in chain of title.— There may be color of title, although a deed in the chain of title is void. Krause *v.* Means, 12 Kan. 335.

79. Bloom *v.* Strauss, 70 Ark. 483, 69 S. W. 548, 72 S. W. 563, holding that a will is color of title, although void under a statute because of its failure to mention children.

80. Cleland *v.* Clark, 123 Mich. 179, 81 N. W. 1086, 81 Am. St. Rep. 161; Wheeler *v.*

color of title;[81] under a void or voidable tax deed or under the grantee therein;[82] under a judicial sale,[83] or execution sale;[84] under a void or voidable patent from the state or the United States,[85] or by virtue of an entry on public lands;[86] under

Merriman, 30 Minn. 372, 15 N. W. 665; Griswold *v.* Bragg, 6 Fed. 342, 19 Blatchf. 94.

It is otherwise in the case of one holding under a quitclaim deed from a mere trespasser (Jay *v.* Granby Min. Co., 15 Kan. 171), or from one who has a life-estate only (Falck *v.* Marsh, 88 Wis. 680, 61 N. W. 287).

81. White *v.* Stokes, 67 Ark. 184, 53 S. W. 1060; Hall *v.* Torrens, 32 Minn. 527, 21 N. W. 717. And see Krause *v.* Means, 12 Kan. 335. But not where the vendor had no color of title (Teaver *v.* Akin, 47 Ark. 528, 1 S. W. 772), or where he did not take possession by virtue of the bond and make the improvements in reliance thereon (Carter *v.* Brown, 35 Nebr. 670, 53 N. W. 580).

Contra.— In many of the cases, however, it has been held that an executory contract for the sale of land, oral or written, gives no right to the one holding thereunder to an allowance for improvements in ejectment, as against the vendor or his subsequent grantee; his remedy, if any, being in equity. Hannan *v.* McNickle, 82 Cal. 122, 23 Pac. 271; Buell *v.* Irwin, 24 Mich. 145; Preston *v.* Brown, 35 Ohio St. 18; Coleman *v.* Stalnacke, 15 S. D. 242, 88 N. W. 107; Seymour *v.* Cleveland, 9 S. D. 94, 68 N. W. 171.

Subsequent execution of deed.— If a deed is executed in pursuance of a contract of purchase it will relate back to the occupation of the vendee under the contract so as to render that occupation under color of title. Dorer *v.* Hood, 113 Wis. 607, 88 N. W. 1009.

In Vermont, where the defendant in ejectment can recover for improvements only where he supposes his title to be good in fee and it proves to have been defective, one who has contracted to purchase land and make certain payments therefor, and who is to have a deed when they are made, and who is ousted in ejectment by the vendor on his failure to make a payment, cannot recover for his improvements. Walker *v.* Arnold, 71 Vt. 263, 44 Atl. 351.

Vendee's right to recover for improvements see IMPROVEMENTS; VENDOR AND PURCHASER.

82. *Michigan.*— Thomas *v.* Wagner, 131 Mich. 601, 92 N. W. 106. But see Cook *v.* Bertram, 86 Mich. 356, 49 N. W. 42.

Minnesota.— Wheeler *v.* Merriman, 30 Minn. 372, 15 N. W. 665. But see McLellan *v.* Omodt, 37 Minn. 157, 33 N. W. 326, holding that a certificate of sale at a tax judgment sale passes neither title nor right of possession until the time for redemption expires and that improvements made before such time should not be compensated for.

Nebraska.—Page *v.* Davis, 26 Nebr. 670, 24 N. W. 875.

South Dakota.— Parker *v.* Vinson, 11 S. D. 381, 77 N. W. 1023.

Wisconsin.—Zweitusch *v.* Watkins, 61 Wis. 615, 21 N. W. 821.

See 17 Cent. Dig. tit. "Ejectment," § 488.

Improvements by purchasers of tax-titles see TAXATION.

83. Occupant under a deed from a guardian, administrator, etc., of land sold by him under an order of the probate court, although the deed was void because the sale was not reported to or confirmed by the court, or because of other defects or irregularities apparent on the record. Hicks *v.* Blakeman, 74 Miss. 459, 21 So. 7, 400; Cole *v.* Johnson, 53 Miss. 94 [*overruling* in part Learned *v.* Corley, 43 Miss. 687]. *Compare* Jefferson *v.* Edrington, 53 Ark. 545, 14 S. W. 99, 903, where the occupant knew proceedings were pending to annul the sale.

There is no equity to recover for improvements, however, in favor of a purchaser of land sold under an invalid decree procured by himself. Finch *v.* Strickland, 132 N. C. 103, 43 S. E. 552.

Recovery for improvements by purchasers at judicial sales see JUDICIAL SALES.

84. Dworak *v.* More, 25 Nebr. 735, 41 N. W. 777. *Contra,* in case of void execution sale. Stillman *v.* Young, 16 Ill. 318. See also EXECUTION.

85. Lewis *v.* Singleton, 2 A. K. Marsh. (Ky.) 214 (occupant deriving claim under the same patent with the successful parties); McCastle *v.* Chaney, 28 La. Ann. 720 (holding that the rule that prescription does not run against the government does not prevent recovery for improvements made by one during an occupation under color of title from one claiming through the government).

Contra, in the case of a void patent.— Deffebach *v.* Hawke, 115 U. S. 392, 6 S. Ct. 95, 29 L. ed. 423. And see Jackson *v.* Seaman, 3 Johns. (N. Y.) 495.

Relief of patentees of public lands see PUBLIC LANDS.

86. Pulliam *v.* Robinson, 1 T. B. Mon. (Ky.) 228 (so holding in case of an entry and survey, although the patent was not issued until after judgment in ejectment); Russell *v.* Defrance, 39 Mo. 506 (so holding in the case of one who had made an entry with the register and receiver of the land-office, paid his money and received his certificate, as against one who with knowledge of the facts made a subsequent entry and received a patent); Chinn *v.* Darnell, 5 Fed. Cas. No. 2,684, 4 McLean 440 (holding that one who made a void entry on lands inhabited or claimed by Indians and obtained a patent was entitled to his improvements under the occupying claimant law of Ohio). But see Central Branch Union Pac. R. Co. *v.* Hardenbrook, 21 Kan. 440.

Contra, in case of homestead entry.— Calhoun *v.* McCornack, 7 Okla. 347, 54 Pac. 493 (entry canceled for fraud); Woodruff *v.* Wallace, 3 Okla. 355, 41 Pac. 357; Brygger *v.* Schweitzer, 5 Wash. 564, 32 Pac. 462, 33 Pac. 388; Whitcomb *v.* Provost, 102 Wis. 278, 78 N. W. 432.

a conveyance by the state after confiscation under a statute;[87] as tenant in common or adversely to other tenants in common.[88] An unsuccessful defendant cannot recover in ejectment for improvements made by him under a mistake as to the identity or boundaries of the land, unless by statute, but his remedy, if any, is in equity.[89]

2. UNDER SPECIAL STATUTES. The statutes sometimes allow recovery for improvements by persons in possession under a particular kind of title or claim, and to entitle one to recover under such a statute he must come within its terms.[90] Thus there have been special statutes allowing compensation for improvements when the possession is under color of title in fee;[91] under title founded on a public record;[92] when the occupant holds by deed, devise, descent, contract, bond, or agreement from and under a person claiming title from the records of some public office,[93] or by deed duly authenticated and recorded;[94] when the color of

Improvements by purchasers of or settlers on public lands see PUBLIC LANDS.

87. Borland *v.* Dean, 3 Fed. Cas. No. 1,660, 4 Mason 174.

88. Where plaintiff recovers an undivided portion of land, there may be an assessment of a divisional share of betterments thereon. Chandler *v.* Shaw, 77 Me. 84; Backus *v.* Chapman, 111 Mass. 386; Phœnix Lead Min., etc., Co. *v.* Sydnor, 39 Wis. 600, holding that on a recovery of an undivided interest by a cotenant the expense of the improvements may be apportioned according to the respective interests of the parties. And see Jackson *v.* Creal, 13 Johns. (N. Y.) 116, under a special statute. One who has obtained a deed covering the share of one tenant in common supposing that he was acquiring a good title thereto and who enters into possession of the whole tract and makes improvements is entitled, upon a recovery by the other tenant in ejectment for his share, to the amount which the share of the land thus recovered has been enhanced by the improvements on the whole tract. Strong *v.* Hunt, 20 Vt. 614.

In ejectment by one tenant in common against his cotenant who had been in possession of the entire premises, holding adversely by color of title asserted in good faith, founded on a deed which was adjudged to be void because never delivered, it was held that defendant was properly allowed to be reimbursed for one half of the moneys paid by him while so in possession to discharge a mortgage on the land, and for taxes, and interest thereon, and also for one half the value of repairs and improvements made by him. Stewart *v.* Stewart, 90 Wis. 516, 63 N. W. 886, 48 Am. St. Rep. 949. See also Thompson *v.* Jones, 77 Tex. 626, 14 S. W. 222.

The Michigan statute giving compensation for improvements to a defendant in ejectment who had been in actual possession for six successive years was held not to apply where defendant was one of several tenants in common, since, if it did, he might recover from each the full value of the improvements. Martin *v.* O'Conner, 37 Mich. 440. See also Morris *v.* McKay, 40 Mich. 326; Sands *v.* Davis, 40 Mich. 14.

Rights of and against tenants in common as to improvements see TENANCY IN COMMON.

89. Anderson *v.* Williams, 59 Ark. 144, 26 S. W. 818; King *v.* Potter, 18 Mich. 134; Waldron *v.* Woodcock, 15 Ohio 13. And see Stevens *v.* Tracey, 3 Yeates (Pa.) 77. See also IMPROVEMENTS.

90. Lunquest *v.* Ten Eyck, 40 Iowa 213; Burkle *v.* Ingham Cir. Judge, 42 Mich. 513, 4 N. W. 192; King *v.* Harrington, 18 Mich. 213 (holding that a statute allowing compensation for improvements to one claiming title by virtue of a sale for taxes does not allow compensation to one claiming both under a tax deed and under a sheriff's deed on a sale under execution); Wheeler *v.* Merriman, 30 Minn. 372, 15 N. W. 665; Province *v.* Lovi, 4 Okla. 672, 47 Pac. 476. See also IMPROVEMENTS.

91. Hall *v.* Torrens, 32 Minn. 527, 21 N. W. 717 (holding that the statute applies where there is color of title in fee either in the occupying claimant himself or in the person under whom he claims); Wheeler *v.* Merriman, 30 Minn. 372, 15 N. W. 665 (holding quitclaim deed sufficient).

92. Fairbairn *v.* Means, 4 Metc. (Ky.) 323; Pulliam *v.* Robinson, 1 T. B. Mon. (Ky.) 228; Clay *v.* Miller, 4 Bibb (Ky.) 461. See also IMPROVEMENTS.

93. Page *v.* Davis, 26 Nebr. 670, 42 N. W. 875, tax title. And see IMPROVEMENTS.

94. Krause *v.* Means, 12 Kan. 335; Beardsley *v.* Chapman, 1 Ohio St. 118. The words "deed duly authenticated and recorded" do not refer to a deed to the occupant, but to the person under whom the occupant derives title. Krause *v.* Means, 12 Kan. 335 (one holding under bond for title from one claiming title by deed duly authenticated and recorded); Beardsley *v.* Chapman, 1 Ohio St. 118 [*overruling* Glick *v.* Gregg, 19 Ohio 57] (holding that the deed must be one apparently conveying an estate which, when transmitted to the occupant, will justify making lasting improvements and demanding payment therefor before surrendering possession, and that a deed conveying a life-estate only is not sufficient as against the remainderman); Young *v.* Mahoning County, 63 Fed. 895 (holding under the Ohio statute that the deed to the occupant and the deed to his grantor must both convey a title in fee). The statute allows recovery by one claiming as legal representative of a person who had a deed duly authenticated and recorded.

title is founded upon descent or a written instrument;[95] when the occupant has a plain and connected title, in law or equity, derived from the records of some public office;[96] when the occupant holds under the official deed of any person or officer empowered by law, or by any court of competent jurisdiction, to sell land;[97] when he holds under a sale for taxes;[98] or when he has been in actual and peaceable possession for a certain length of time, or in such possession for a less time under either color or claim of title.[99]

3. GOOD FAITH AS AFFECTING RIGHT. To authorize a recovery for improvements they must have been made by defendant in good faith as a *bona fide* occupant, and in the belief that the land was his own.[1] As a rule no allowance should be

Avery *v.* Royer, 4 Ohio Dec. (Reprint) 464, 2 Clev. L. Rep. 201, 4 Cinc. L. Bul. 441. See also IMPROVEMENTS.

95. Whitcomb *v.* Provost, 102 Wis. 278, 78 N. W. 432 (holding an invalid certificate of homestead entry insufficient); Stewart *v.* Stewart, 90 Wis. 516, 63 N. W. 886, 48 Am. St. Rep. 949 (holding sufficient a deed adjudged void for want of delivery); Falck *v.* Marsh, 88 Wis. 680, 61 N. W. 287 (holding insufficient as against remainder-man a quitclaim deed from life-tenant); Zweitusch *v.* Watkins, 61 Wis. 615, 21 N. W. 821 (holding void tax deed sufficient); Vilas *v.* Prince, 88 Fed. 682 (holding that a receiver's receipt for fees paid on the entry of supposed public land as a homestead is not a sufficient written instrument within the Wisconsin statute). See also IMPROVEMENTS.

96. This "means a title connected with the legal and unquestioned title by a succession of conveyances apparently regular and legal, but really passing no title." Jay *v.* Granby Min. Co., 15 Kan. 171, 173. Such a statute entitles to compensation one holding under a bond for title where there is duly recorded a regular succession of conveyances, but no title has passed by reason of personal disability to convey in some grantor (Krause *v.* Means, 12 Kan. 335); one claiming through duly recorded conveyances, although some of them may contain material alterations or be forgeries (Montag *v.* Linn, 27 Ill. 328); one claiming under a tax-title (Page *v.* Davis, 26 Nebr. 670, 42 N. W. 875); but not one who holds under a quitclaim deed from a mere trespasser (Jay *v.* Granby Min. Co., 15 Kan. 171); or one who fails to show even an apparent title (Central Branch Union Pac. R. Co. *v.* Hardenbrook, 21 Kan. 440). See also Province *v.* Lovi, 4 Okla. 672, 47 Pac. 476. And see IMPROVEMENTS.

97. An assignment executed by the county auditor, and issued to the purchaser of land at a tax-sale, is an "official deed" within the meaning of the statute. Pfefferle *v.* Wieland, 55 Minn. 202, 56 N. W. 824; Everett *v.* Boyington, 29 Minn. 264, 13 N. W. 45, holding also that a *bona fide* occupant under such an instrument is not bound to establish the validity of the tax judgment and prior proceedings. But see McLellan *v.* Omodt, 37 Minn. 157, 33 N. W. 326, holding that as a certificate of sale passes no title or right of possession until expiration of the time for redemption, there can be no recovery for improvements made before that time. See also IMPROVEMENTS; TAXATION.

98. Stebbins *v.* Guthrie, 4 Kan. 353; King *v.* Harrington, 18 Mich. 213; Lynch *v.* Brudie, 63 Pa. St. 206; Zwietusch *v.* Watkins, 61 Wis. 615, 21 N. W. 821. See TAXATION.

99. Turnipseed *v.* Fitzpatrick, 75 Ala. 297; Jones *v.* Merrill, 113 Mich. 433, 71 N. W. 838, 67 Am. St. Rep. 475 (sufficiency of occupancy); Miller *v.* Clark, 56 Mich. 337, 23 N. W. 35; Burkle *v.* Ingham Cir. Judge, 42 Mich. 513, 4 N. W. 192. And see Treat *v.* Strickland, 23 Me. 234; Wales *v.* Coffin, 100 Mass. 177; Bellows *v.* McCartee, 20 N. H. 515; Baker *v.* Millman, 77 Tex. 46, 13 S. W. 618. See also ENTRY, WRIT OF; IMPROVEMENTS.

The possession must be adverse.— Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13 (holding that improvements made during a permissive holding are not within the statute); Pickett *v.* Doe, 74 Ala. 122 (holding that the possession required is of the same character of hostile possession as will put in operation the statute of limitations except that it must be *bona fide* under color or claim of title); State *v.* Lake St. Clair Fishing, etc., Club, 127 Mich. 580, 87 N. W. 117; Sleight *v.* Roe, 125 Mich. 585, 85 N. W. 10; Wolf *v.* Holton, 92 Mich. 136, 52 N. W. 459; Paldi *v.* Paldi, 84 Mich. 346, 47 N. W. 510; and other cases cited *supra*, X, B, 1, note 71. See also Treat *v.* Strickland, 23 Me. 234; Wales *v.* Coffin, 100 Mass. 177; and IMPROVEMENTS.

Mere trespassers.— The statute does not apply to mere trespassers but there must be either color or claim of title. New Orleans, etc., R. Co. *v.* Jones, 68 Ala. 48.

Possession under claim of title in good faith, without color of title, is sufficient. Holt *v.* Adams, 121 Ala. 664, 25 So. 716; Turnipseed *v.* Fitzpatrick, 75 Ala. 297.

The possession of defendant and his vendor may be tacked so as to make out three years of continuous adverse possession next preceding ejectment by the owner of the land, and allow a recovery by defendant of the value of his improvements on the land. Holt *v.* Adams, 121 Ala. 664, 25 So. 716.

1. *Alabama.*— Holt *v.* Adams, 121 Ala. 664, 25 So. 716; Humes *v.* Bernstein, 72 Ala. 546.

Arkansas.— Jefferson *v.* Edrington, 53 Ark. 545, 14 S. W. 99, 903; Porter *v.* Doe, 10 Ark. 186.

made for improvements made with notice or knowledge of an adverse title,[2] or

California.— Wise *v.* Burton, 73 Cal. 174, 14 Pac. 683; Carpentier *v.* Small, 35 Cal. 346.

Georgia.— Munn *v.* Burger, 76 Ga. 705; Hunt *v.* Pond, 67 Ga. 578; Thomas *v.* Malcom, 39 Ga. 328, 99 Am. Dec. 459.

Indiana.— Bran *v.* Uland, 101 Ind. 477, 1 N. E. 52.

Iowa.— Snell *v.* Mechan, 80 Iowa 53, 45 N. W. 398; Welles *v.* Newsom, 76 Iowa 81, 40 N. W. 105.

Kentucky.— Hawkins *v.* Lowry, 6 J. J. Marsh. 55; Bell *v.* Barnet, 2 J. J. Marsh. 516; Scroggs *v.* Bodley, 1 A. K. Marsh. 605; Chiles *v.* Patterson, 1 A. K. Marsh. 444; Barlow *v.* Bell, 1 A. K. Marsh. 246, 10 Am. Dec. 731; Hawkins *v.* King, 1 T. B. Mon. 161; Harrison *v.* Baker, 5 Litt. 250.

Louisiana.— Montgomery *v.* Whitfield, 41 La. Ann. 649, 6 So. 224; Eldridge *v.* Tibbitts, 5 La. Ann. 380.

Maine.— Kennebec Purchase *v.* Kavanagh, 1 Me. 348.

Maryland.— Union Hall Assoc. *v.* Morrison, 39 Md. 281.

Michigan.— Petit *v.* Flint, etc., R. Co., 119 Mich. 492, 78 N. W. 554, 75 Am. St. Rep. 417; Miller *v.* Clark, 56 Mich. 337, 23 N. W. 35.

Mississippi.— Thomas *v.* Thomas, 69 Miss. 564, 13 So. 666; Citizens' Bank *v.* Costanera, 62 Miss. 825.

Nebraska.— Carter *v.* Brown, 35 Nebr. 670, 53 N. W. 580.

New Hampshire.— Bellows *v.* Copp, 20 N. H. 492.

New Jersey.— Foley *v.* Kirk, 33 N. J. Eq. 170.

North Carolina.— Browne *v.* Davis, 109 N. C. 23, 13 S. E. 703; Carolina Cent. R. Co. *v.* McCaskill, 98 N. C. 526, 4 S. E. 468.

Ohio.— Beardsley *v.* Chapman, 1 Ohio St. 118.

Oregon.— Schetter *v.* Southern Oregon Co., 19 Oreg. 192, 24 Pac. 25; Hatcher *v.* Briggs, 6 Oreg. 31.

South Dakota.— Meadows *v.* Osterkamp, 13 S. D. 571, 83 N. W. 624; Wood *v.* Conrad, 2 S. D. 334, 50 N. W. 95.

Texas.— Baker *v.* Millman, 77 Tex. 46, 13 S. W. 618; Powell *v.* Davis, 19 Tex. 380; Houston *v.* Sneed, 15 Tex. 307.

Vermont.— Rutland R. Co. *v.* Chaffee, 72 Vt. 404, 48 Atl. 700; Kendall *v.* Tracy, 64 Vt. 522, 24 Atl. 1118; Winslow *v.* Newell, 19 Vt. 164; Brown *v.* Storm, 4 Vt. 37.

West Virginia.— Hall *v.* Hall, 30 W. Va. 779, 5 S. E. 260; Cain *v.* Cox, 29 W. Va. 258, 1 S. E. 298.

Wisconsin.— Zwietusch *v.* Watkins, 61 Wis. 615, 21 N. W. 821.

United States.— Vilas *v.* Prince, 88 Fed. 682 (construing a Wisconsin statute); Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,085, 3 Sawy. 495.

Canada.— Queen Victoria Niagara Falls Park *v.* Colt, 22 Ont. App. 1; McCarthy *v.* Arbuckle, 31 U. C. C. P. 405.

See 17 Cent. Dig. tit. "Ejectment," § 500; and, generally, IMPROVEMENTS.

Improvements made after decision against title of occupant should not be considered. Bell *v.* Barnet, 2 J. J. Marsh. (Ky.) 516.

Knowledge of purchaser that title is defective will prevent a recovery. Walker *v.* Quigg, 6 Watts (Pa.) 87, 31 Am. Dec. 452, and other cases above cited.

2. *Alabama.*— Gordon *v.* Tweedy, 74 Ala. 232, 49 Am. Rep. 813.

Arkansas.— Jefferson *v.* Edrington, 53 Ark. 545, 14 S. W. 99, 903, knowledge of pendency of proceeding to annul judicial sale.

Illinois.— Montag *v.* Linn, 27 Ill. 328.

Indiana.— Bryan *v.* Uland, 101 Ind. 477, 1 N. E. 52.

Kentucky.— Barlow *v.* Bell, 1 A. K. Marsh. 246, 10 Am. Dec. 731; Leavison *v.* Harris, 14 S. W. 343, 12 Ky. L. Rep. 488. And see Harrison *v.* Fleming, 7 T. B. Mon. 537.

Mississippi.— Holmes *v.* McGee, 64 Miss. 129, 8 So. 169.

Missouri.— Brown *v.* Baldwin, 121 Mo. 106, 25 S. W. 858; Fenwick *v.* Gill, 38 Mo. 510; Dothage *v.* Stuart, 35 Mo. 251.

New Jersey.— Baldwin *v.* Richman, 9 N. J. Eq. 394.

New York.— Willis *v.* McKinnon, 79 N. Y. App. Div. 249, 79 N. Y. Suppl. 936.

North Carolina.— Southerland *v.* Merritt, 120 N. C. 318, 26 S. E. 814.

Ohio.—Robinson *v.* Ward, 1 Ohio Dec. (Reprint) 252, 2 West. L. J. 465.

South Carolina.—Dellet *v.* Whitner, Cheves Eq. 213. Knowledge that the title is in dispute will preclude one taking possession under color of title from recovering for improvements not clearly for the benefit of the owner. Belton *v.* Briggs, 4 Desauss. (S. C.) 465.

Tennessee.— McKinly *v.* Holliday, 10 Yerg. 477.

Virginia.— McKim *v.* Moody, 1 Rand. 58.

United States.— Jones *v.* Steam Stone-Cutter Co., 20 Fed. 477.

See 17 Cent. Dig. tit. "Ejectment," §§ 500, 501; and, generally, IMPROVEMENTS.

Contra.— Some cases hold that notice of an adverse claim is not necessarily inconsistent with a *bona fide* claim of title which will entitle an occupant to recover.

Alabama.— Holt *v.* Adams, 121 Ala. 664, 25 So. 716.

Michigan.— Thomas *v.* Wagner, 131 Mich. 601, 92 N. W. 106.

Ohio.— Harrison *v.* Castner, 11 Ohio St. 339.

South Carolina.— Templeton *v.* Lowry, 22 S. C. 389.

Texas.— Stevenson *v.* Roberts, (Civ. App. 1901) 64 S. W. 230.

Vermont.— Whitney *v.* Richardson, 31 Vt. 300, holding that notice to a grantee after purchase that his title is doubtful does not prevent a recovery for improvements made thereafter.

Wisconsin.—Barrett *v.* Stradl, 73 Wis. 385,

for those made by one who has acquired the land *mala fide*.[3] By the weight of authority the notice of defects in the claimant's title must be actual, and mere constructive notice from the records is not sufficient.[4] In some states the claimant must have had reason to believe his title good.[5] One who is in possession of land and makes improvements thereon is presumed to act in good faith until the contrary is shown.[6]

C. Set-Off of Improvements and Taxes Against Damages or Mesne Profits — 1. In General. Although under the common law, as has been shown, the right of an occupant to recover for improvements made by him was not originally recognized, this strict rule has been modified by the courts by the application of equitable principles, so that an occupant may now as a general rule set off improvements against the damages or mesne profits claimed by plaintiff.[7] This

41 N. W. 439, 9 Am. St. Rep. 795. See also Dorer *v.* Hood, 113 Wis. 607, 88 N. W. 1009; Zwietusch *v.* Watkins, 61 Wis. 615, 21 N. W. 821, in both of which cases the improvements were made after commencement of the ejectment suit.

United States.— Griswold *v.* Bragg, 6 Fed. 342, 19 Blatchf. 94.

To constitute notice either knowledge of an outstanding title must be brought home to the occupant or some circumstance from which it may fairly be inferred that he had cause to suspect the invalidity of his own title. Cole *v.* Johnson, 53 Miss. 94.

A recital in a quitclaim deed that the title conveyed was only a tax-title is not sufficient to charge the grantee with actual notice of infirmities in such title so as to exclude him from the benefit of the statute. Wheeler *v.* Merriman, 30 Minn. 372, 15 N. W. 665.

The "actual notice" of a paramount title under a statute giving compensation for improvements prior thereto has been held to be the commencement of suit for the recovery of the land, or the giving to the adverse possessor a copy of the entry or patent from which the proprietor derives title. Ross *v.* Irving, 14 Ill. 171.

The notice in writing provided for by Mo. Rev. St. (1899) § 3080, to an occupying claim as a bar to compensation for improvements is not preclusive of evidence of facts tending to show notice. Marlow *v.* Liter, 87 Mo. App. 584.

3. *Kentucky.*—Wilkinson *v.* Nichols, 1 T. B. Mon. 36; Singleton *v.* Jackson, 2 Litt. 208; Chiles *v.* Patterson, 1 A. K. Marsh. 444; Patrick *v.* Marshall, 2 Bibb 40, 4 Am. Dec. 670.

Louisiana.— Stille *v.* Shull, 41 La. Ann. 816, 6 So. 634. But see Pearce *v.* Frantum, 16 La. 414.

New York.— Vanhorn *v.* Fonda, 5 Johns. Ch. 388.

North Carolina.— Hallyburton *v.* Slagle, 132 N. C. 957, 44 S. E. 659.

Vermont.— Thompson *v.* Gilman, 17 Vt. 109.

Compare Rabb *v.* Flenniken, 32 S. C. 189, 10 S. E. 943; Withers *v.* Yeadon, 1 Rich. Eq. (S. C.) 324.

See 17 Cent. Dig. tit. "Ejectment," §§ 500, 501; and, generally, Improvements.

4. *Arkansas.*— Shepherd *v.* Jernigan, 51 Ark. 275, 10 S. W. 765, 14 Am. St. Rep. 50; Beard *v.* Dansby, 48 Ark. 183, 2 S. W. 701.

Mississippi.— Cole *v.* Johnson, 53 Miss. 94 [*overruling* to this extent Learned *v.* Corley, 43 Miss. 687].

Missouri.— Kugel *v.* Knuckles, 95 Mo. App. 670, 69 S. W. 595; Pierce *v.* Rollins, 60 Mo. App. 497; Stump *v.* Hornbeck, 15 Mo. App. 367 [*reversed* on other grounds in 94 Mo. 26, 6 S. W. 356].

Vermont.— Rutland R. Co. *v.* Chaffee, 72 Vt. 404, 48 Atl. 700; Whitney *v.* Richardson, 31 Vt. 300.

United States.—See Canal Bank *v.* Hudson, 111 U. S. 66, 4 S. Ct. 303, 28 L. ed. 354.

Compare Dawson *v.* Grow, 29 W. Va. 333, 1 S. E. 564.

See 17 Cent. Dig. tit. "Ejectment," § 501; and, generally, Improvements.

Defects or recitals in deeds prior to deed to defendant's grantor are not presumed to be known to the former. Beardsley *v.* Chapman, 1 Ohio St. 118; Whitney *v.* Richardson, 31 Vt. 300; Young *v.* Mahoning County, 53 Fed. 895.

5. Carolina Cent. R. Co. *v.* McCaskill, 98 N. C. 526, 4 S. E. 468; Wood *v.* Conrad, 2 S. D. 334, 50 N. W. 95 (holding that an exception in defendant's deed notifying him that the property is subject to redemption from sheriff's sale is sufficient to put a reasonably prudent man on inquiry as to the nature of his possession before making improvements); Brown *v.* Bedinger, 72 Tex. 247, 10 S. W. 90 (holding that if by the use of reasonable caution a defendant would have discovered that there was no vacancy between his survey and plaintiff's he cannot assert a claim for improvements as made in good faith on the ground that he supposed the premises were vacant); Dawson *v.* Grow, 29 W. Va. 333, 1 S. E. 564 (holding that the validity of a claim is tested under West Virginia statute, not by the claimant's belief, but his reason therefor). And see Nunn *v.* Burger, 76 Ga. 705. *Compare*, however, Petit *v.* Flint, etc., R. Co., 119 Mich. 492, 78 N. W. 554, 75 Am. St. Rep. 417.

6. Fish *v.* Blasser, 146 Ind. 186, 45 N. E. 63; Hilgenberg *v.* Northup, 134 Ind. 92, 33 N. E. 786; Stark *v.* Starr, 22 Fed. Cas. No. 13,307, 1 Sawy. 15.

7. See *supra*, X, A, 1.

right is now very generally controlled by statute.[8] So also in a proper case the amount paid for taxes may be recouped or set off against the rental value of the property.[9] The right to a set-off or counter-claim for improvements as against plaintiff's right to recover damages or mesne profits depends of course upon the rules as to possession, color of title, and good faith which have already been considered.[10]

2. Extent of Set-Off. The general rule in the absence of a statute providing otherwise is that the value of improvements can only be allowed by way of set-off and in mitigation of damages and that if the value of the improvements exceed the amount due plaintiff by way of mesne profits, and damages, defendant is not entitled to an allowance for the excess.[11] And as a corollary to this proposition it may be stated that if plaintiff in ejectment does not demand mesne profits and damages in his declaration or proof, defendant cannot introduce proof of his improvements upon the land in controversy.[12] By express statutory provision in some jurisdictions defendant is entitled to a judgment in his favor for the excess.[13] The right of set-off is generally limited, as we have seen, to the amount which the improvements have added to the value of the land.[14]

D. Proceedings to Obtain Allowance — 1. Nature and Scope of Proceeding. The statutory right to claim the value of improvements is available only where the party proceeds in the manner which the statute provides[15] and brings himself clearly within its provisions.[16] The claim cannot be presented or heard in the action of ejectment proper, unless there is statutory authority therefor;[17] but its determination is a separate and distinct proceeding,[18] although the judgment in the ejectment case cannot be carried into execution until the proceeding is closed.[19]

8. See Nunnally *v.* Owens, 90 Ga. 220, 15 S. E. 765. If by statute a particular mode of recovery for improvements is prescribed, exclusive of a right of set-off, that mode must be followed. Duncan *v.* Jackson, 16 Fla. 338

If defendant does not ask that improvements be set off against the damages the court in an action to recover lands cannot set them off. Carpentier *v.* Gardiner, 29 Cal. 160.

9. Haight *v.* Pine, 10 N. Y. App. Div. 470, 42 N. Y. Suppl. 303; Vaughn *v.* Vaughn, 100 Tenn. 282, 45 S. W. 677.

10. Love *v.* Shartzer, 31 Cal. 487; Bay *v.* Pope, 18 Cal. 694; Seymour *v.* Cleveland, 9 S. D. 94, 68 N. W. 171. And see the other cases cited *supra*, X, B.

11. *Arkansas.*—Pulaski County *v.* State, 42 Ark. 118; West *v.* Williams, 15 Ark. 682.

California.— Yount *v.* Howell, 14 Cal. 465.

Georgia.— Dudley *v.* Johnson, 102 Ga. 1, 29 S. E. 50.

Kentucky.— Taylor *v.* Bate, 4 Dana (Ky.) 198; Pope *v.* Lemaster, 5 Litt. (Ky.) 76; Samuels *v.* Simmons, 60 S. W. 937, 22 Ky. L. Rep. 1586.

New York.— Wood *v.* Wood, 83 N. Y. 575; Woodhull *v.* Rosenthal, 61 N. Y. 382.

North Carolina.— Merritt *v.* Scott, 81 N. C. 385.

Pennsylvania.— Putnam *v.* Tyler, 117 Pa. St. 570, 12 Atl. 43.

Tennessee.— McKinly *v.* Holliday, 10 Yerg. 477.

Washington.— Sengfelder *v.* Hill, 21 Wash. 371, 58 Pac. 250.

Wisconsin.— Davis *v.* Louk, 30 Wis. 308.

See 17 Cent. Dig. tit. "Ejectment," § 506.

12. Ford *v.* Holton, 5 Cal. 319; Learned *v.* Corley, 43 Miss. 687.

13. Mills *v.* Geer, 111 Ga. 275, 36 S. E. 673, 52 L. R. A. 934; Johnson *v.* Futch, 57 Miss. 73; Abbey *v.* Doe, 27 Miss. 320.

14. See McCloy *v.* Arnett, 47 Ark. 445, 2 S. W. 71. And see *supra*, X, A, 7.

15. *Iowa.*—Webster *v.* Stewart, 6 Iowa 401.

Missouri.— Jasper County *v.* Wadlow, 82 Mo. 172; McClannahan *v.* Smith, 76 Mo. 428; Henderson *v.* Langley, 76 Mo. 226.

North Carolina.— Condry *v.* Cheshire, 83 N. C. 375.

Ohio.— Lieby *v.* Ludlow, 4 Ohio 469.

South Carolina.— Godfrey *v.* Fielding, 21 S. C. 313.

Vermont.— Ford *v.* Flint, 40 Vt. 382.

See 17 Cent. Dig. tit. "Ejectment," § 509.

16. Claussen *v.* Rayburn, 14 Iowa 136; Webster *v.* Stewart, 6 Iowa 401; Vanden Brooks *v.* Correon, 48 Mich. 283, 12 N. W. 206.

17. McClannahan *v.* Smith, 76 Mo. 428; Henderson *v.* Langley, 76 Mo. 226; Ford *v.* Flint, 40 Vt. 382.

18. Henderson *v.* Langley, 76 Mo. 226; Koch *v.* Hawkins, 40 Mo. App. 680; Buchanan *v.* Dorsey, 11 Nebr. 373, 9 N. W. 546; Patterson *v.* Prather, 11 Ohio 35; Ford *v.* Flint, 40 Vt. 382.

19. Patterson *v.* Prather, 11 Ohio 35.

A provision that the court "may" suspend execution is mandatory, and if application is regularly made within the proper time the court cannot deny to defendant the benefit of the statute. Johnston *v.* Pate, 95 N. C. 68.

The filing of the claim is a matter of absolute right and cannot be denied by the court where the application is properly made.[20]

2. TIME FOR INSTITUTING PROCEEDING. In most of the states proceedings to recover for the value of improvements can be instituted only after a judgment is rendered in favor of plaintiff in the action of ejectment,[21] and before the judgment is carried into execution.[22] If an appeal is taken from the judgment in ejectment the application may be made at the first term after the judgment is affirmed or the case remanded to the lower court.[23] In other states the claim must be made before trial,[24] or before the end of the term in which the judgment in ejectment is rendered.[25] In Wisconsin the application must be not only made but determined before the rendition of judgment in an action of ejectment and only one judgment rendered in the case.[26]

3. NOTICE OF APPLICATION. In some of the states statutes expressly require that a notice of the application shall be filed[27] or served upon the adverse party.[28] Notice is always necessary where the application is made at a term subsequent to that in which the judgment in ejectment is rendered and the adverse party is not in court.[29]

4. RECORD OF APPLICATION. Where the statute requires a journal entry of the application to be made, if the record fails to show such entry the proceedings are without jurisdiction and void unless a waiver of jurisdiction is established.[30]

20. Hazen *v.* Rounsaville, 35 Kan. 405, 11 Pac. 150; Gaige *v.* Ladd, 5 Vt. 266.

21. *Florida.*— Asia *v.* Hiser, 22 Fla. 378.

Indiana.— Wernke *v.* Hazen, 32 Ind. 431.

Iowa.— Walton *v.* Gray, 29 Iowa 440.

Missouri.— Jasper County *v.* Wadlow, 82 Mo. 172; McClannahan *v.* Smith, 76 Mo. 428; Henderson *v.* Langley, 76 Mo. 226.

Nebraska.— Buchanan *v.* Dorsey, 11 Nebr. 373, 9 N. W. 546.

North Carolina.— Condry *v.* Cheshire, 88 N. C. 375.

See 17 Cent. Dig. tit. "Ejectment," § 518.

"After final judgment" refers to the determination of the rights of the parties and not to entry of the judgment in the clerk's office. Godfrey *v.* Fielding, 21 S. C. 313.

22. Malone *v.* Stretch, 69 Mo. 25; Boyer *v.* Garner, 116 N. C. 125, 21 S. E. 180. See also Koch *v.* Hawkins, 40 Mo. App. 680.

The judgment is executed within the meaning of the statute whenever plaintiff is placed in possession, notwithstanding the judgment for damages received in the action is not satisfied. Boyer *v.* Garner, 116 N. C. 125, 21 S. E. 180.

A purchaser pendente lite from defendant in an action of ejectment is bound by the judgment and must make his claim for improvements before the writ of possession is issued. Blanchard *v.* Ware, 43 Iowa 530.

23. Montag *v.* Lynn, 25 Ill. 154; Burlington, etc., R. Co. *v.* Dobson, 17 Nebr. 450, 455, 23 N. W. 353, 511. See also Page *v.* Davis, 26 Nebr. 670, 42 N. W. 875.

In South Carolina the requirement of the statute that the application must be filed within forty-eight hours after rendition of judgment refers to the judgment in the lower court and applies notwithstanding the judgment is appealed from. Garrison *v.* Dougherty, 18 S. C. 486.

24. Rawson *v.* Parsons, 6 Mich. 401.

Where a new trial is granted the claim cannot be filed for the first time on the second trial. Vanden Brooks *v.* Correon, 48 Mich. 283, 12 N. W. 206.

Permitting the application to be filed nunc pro tunc is not error, where the record fails to show whether an application had been previously filed, and plaintiff does not claim that he will be prejudiced thereby or ask for a continuance. Brooks *v.* Fairchild, 36 Mich. 231.

Where the application is insufficient in form but is made at the proper time it may be thereafter amended to conform to the requirements of the statute. Baldwin *v.* Cullen, 51 Mich. 33, 16 N. W. 191.

In New Hampshire the statute provides that defendant may file with his plea in the action of ejectment a "brief statement" setting up his claim for improvements. Corbett *v.* Norcross, 20 N. H. 366, holding, however, that it is within the discretion of the court to permit it to be filed later upon payment of all costs occasioned by the delay.

25. Klever *v.* Seawall, 65 Fed. 373, 12 C. C. A. 653, decided under the laws of Ohio.

26. Hills *v.* Laporte, 40 Wis. 113; Scott *v.* Reese, 38 Wis. 636. See also Thomas *v.* Rewey, 36 Wis. 328.

Where the trial is by the court without a jury an issue on the question of improvements must be made up after the court's findings of fact on the question of title and before the entry of final judgment. Fowler *v.* Schafer, 69 Wis. 23, 32 N. W. 292.

27. Porter *v.* Doe, 10 Ark. 186.

28. Vanden Brooks *v.* Correon, 48 Mich. 283, 12 N. W. 206.

29. Smith *v.* Hornback, 1 Litt. (Ky.) 272; Koch *v.* Hawkins, 40 Mo. App. 680.

If plaintiff in ejectment is a non-resident notice may be given by publication. Koch *v.* Hawkins, 40 Mo. App. 680.

30. Hentig *v.* Redden, 38 Kan. 496, 16 Pac. 820.

And where plaintiff files an application for an assessment of the value of the premises without the improvements, this also is an essential part of the record.[31]

5. NOTICE OF ASSESSMENT. After defendant in an action of ejectment has procured the drawing of a jury or the appointment of commissioners to assess the value of improvements, a formal notice of the time and place for making the assessment must be given to the adverse party or his attorney,[32] and the failure to give such notice is sufficient ground for quashing the return of the commissioners,[33] or reversing the judgment of the court entered thereon.[34] If, however, the party appears and participates in the proceedings without objection he waives the right to object to want of notice or its sufficiency.[35]

6. SCOPE OF INQUIRY ON ASSESSMENT. In a proceeding to assess the value of improvements the scope of the inquiry is limited to the question of improvements and the question of title cannot be relitigated.[36]

7. BOND TO PAY FOR IMPROVEMENTS. Where a suit brought for the value of improvements to which a defeated defendant in ejectment is entitled does not come within the provisions of the occupying claimant laws, it is improper to compel complainant to accept bonds for the payment of the amount recovered according to the provisions of the act.[37]

8. PLEADINGS.[38] If an allowance for improvements is sought by way of set-off or counter-claim, in an action of ejectment or in an action of trespass for mesne profits, the right must be asserted by proper averments in the answer.[39] The value of the improvements must be stated,[40] and it must also be shown that they are permanent,[41] and improve the condition of the property;[42] and that they were made by the claimant or those under whom he claims while holding under color of title adversely to the claim of plaintiff and in good faith, if this is required by statute.[43] If in an action to recover rents and profits defendant sets up a claim for improvements and also a defense inconsistent therewith he will be required to

31. Rawson *v.* Parsons, 6 Mich. 401.

32. Bauder *v.* Bryan, 20 Kan. 367; Bell *v.* Barnet, 7 J. J. Marsh. (Ky.) 379; Bodley *v.* Craig, 1 Bibb (Ky.) 1; Patterson *v.* Prather, 11 Ohio 35.

A notice in writing is necessary. Bauder *v.* Bryan, 20 Kan. 367.

Notice to the attorney of record is sufficient. North *v.* Moore, 8 Kan. 143.

Notice to an agent of the adverse party is sufficient (Fowler *v.* Halbert, 4 Bibb (Ky.) 52), provided that at the time of the notice he is a duly authorized agent for the management of the property (Bell *v.* Barnet, 7 J. J. Marsh. (Ky.) 379).

The fact that the adverse party has knowledge of the meeting of the commissioners will not cure the failure to give a formal notice. Bauder *v.* Bryan, 20 Kan. 367.

Where notice is not expressly required by statute the court has power to order that it shall be given. Patterson *v.* Prather, 11 Ohio 35.

33. Bell *v.* Barnet, 7 J. J. Marsh. (Ky.) 379.

34. Bodley *v.* Craig, 1 Bibb (Ky.) 1.

35. North *v.* Moore, 8 Kan. 143.

36. Brown *v.* Baldwin, 121 Mo. 106, 25 S. W. 858.

37. Clay *v.* Miller, 2 Litt. (Ky.) 279.

38. **Pleading** generally see PLEADING.

39. Moss *v.* Shear, 25 Cal. 38, 85 Am. Dec. 94.

Under a plea of not guilty in trespass for mesne profits evidence that defendant made valuable improvements is not admissible. Myers *v.* Sanders, 8 Dana (Ky.) 65.

A right given by statute to a defendant in ejectment to file with his plea a brief statement claiming betterments is not in conflict with another statute providing that no special plea shall ever be required in any civil action except the plea of title to real estate before justices of the peace. Corbett *v.* Norcross, 20 N. H. 366.

40. Moore *v.* Carey, 116 Ga. 28, 42 S. E. 258; Clewis *v.* Hartman, 71 Ga. 810; Wythe *v.* Myers, 30 Fed. Cas. No. 18,119, 3 Sawy. 595.

41. Clewis *v.* Hartman, 71 Ga. 810; Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,085, 3 Sawy. 495.

42. Clewis *v.* Hartman, 71 Ga. 810; Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,085, 3 Sawy. 495; Wythe *v.* Myers, 30 Fed. Cas. No. 18,119, 3 Sawy. 595.

43. Fitch *v.* Cornell, 9 Fed. Cas. No. 4,834, 1 Sawy. 156; Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,085, 3 Sawy. 495.

Amendment.— It has been held that where the answer sets up a claim for improvements, the same may be amended so as to show that at the time of erecting the improvements defendant believed his title to be good in fee. McKnight *v.* Cooper, 27 S. C. 92, 2 S. E. 842.

elect between the two defenses.[44] But in an action to recover land an order sustaining a demurrer to a cross petition for not stating facts constituting a defense will not preclude the court, after verdict for plaintiff, from treating the cross petition as properly in the case so as to award compensation to defendants for improvements.[45] If an action is brought to recover for improvements, substantially the same allegations are required as in an answer claiming an allowance therefor by way of set-off or counter-claim.[46]

9. **Evidence**[47] — a. **Burden of Proof.** In order to successfully assert the right as an occupying claimant the party must bring himself within the statutory provisions applicable thereto. In the absence of such showing he will be regarded as a trespasser without any right to recover for improvements.[48] The burden of proof is also on the claimant to show the value of the improvements, and the land without the improvements,[49] and that they were beneficial.[50]

b. **Admissibility.** One who has occupied land beyond the limits described by his deed may show on the question of compensation for his improvements that it was the intention of the parties to convey such land and that it was omitted from the deed by mistake.[51] Where a suggestion for adverse possession for three years is made under the Alabama code by defendant in ejectment he may introduce evidence relating to permanent improvements made by him or those whose estate he has and having reference to the enhanced value by reason thereof.[52] Evidence of the value of improvements is admissible where defendant sets up as an equitable defense that his grantor, plaintiff, and himself all believed that the grantor held the legal title in trust for plaintiff, that the purchase-money was paid to the latter, and that defendant entered and made improvements with his consent.[53] So a lease made by the predecessor of defendant may be admitted in evidence to show an improvement made and known to plaintiff before he purchased.[54] The extent of improvements made by a defendant may also be shown by him in rebuttal of plaintiff's evidence on the same subject.[55] On the question of the amount which improvements have added to the value of the land, evidence is admissible of the value of the land with the improvements and without them and of all facts tending to prove what its value would have been if the improvements had not been made.[56] And a void tax deed under which defendant's grantor claimed to hold the land may be admitted in evidence, being the only evidence of the payment of taxes for which an allowance is claimed.[57] Again one sued for improvements may show by the record in a previous action in ejectment between the parties that there was fraud in connection with plaintiff's chain of title to which he was a party.[58] Evidence as to the costs of improvements is not admissi-

44. Hairston *v.* Dobbs, 80 Ala. 589, 2 So. 147.

45. Preston *v.* Brown, 35 Ohio St. 18.

46. Thus, if the statute makes it a requisite of the right to recover for improvements that the claimant at the time of making them believed his title to be good in fee, this fact must be alleged, and an allegation that at the time the claimant made improvements he believed himself to be the owner in fee is insufficient. Tumblestone *v.* Rumph, 43 S. C. 275, 21 S. E. 84.

Form of complaint in action for recovery of improvements see Lumb *v.* Pinckney, 21 S. C. 471.

Place of filing declarations.— When judgment against defendants in ejectment becomes final in the county court, their declaration for betterments must be filed in that court; but it has been decided that if the ejectment cause passes to the supreme court, the better practice is to await the decision of that court before filing the declaration. Rutland R. Co. *v.* Chaffee, 72 Vt. 404, 48 Atl. 700.

47. **Evidence** generally see Evidence.

48. Province *v.* Lovi, 4 Okla. 672, 47 Pac. 476.

49. Kerr *v.* Nicholas, 88 Ala. 346, 6 So. 698.

50. Bacon *v.* Thornton, 16 Utah 138, 15 Pac. 153.

51. Lamar *v.* Minter, 13 Ala. 31.

52. Barrett *v.* Kelly, 131 Ala. 378, 30 So. 824.

53. Daniel *v.* Crumpler, 75 N. C. 184.

54. Maus *v.* Montgomery, 15 Serg. & R. (Pa.) 221.

55. Morris *v.* Travis, 7 Serg. & R. (Pa.) 220.

56. Pacquette *v.* Pickness, 19 Wis. 219.

57. Wise *v.* Newatney, 26 Nebr. 88, 42 N. W. 339.

58. Thompson *v.* Gilman, 17 Vt. 109.

ble, since the question is what the improvements are worth.[59] Nor can the value of improvements be shown if the claim therefor is not filed as required by statute.[60] One against whom an action for mesne profits is brought and judgment obtained on demurrer after a recovery in ejectment cannot show in mitigation of damages, on plaintiff's executing his writ of inquiry, a subsequent judgment in ejectment in his favor against plaintiff, the record not showing the date of the demise or that his title had commenced before plaintiff's cause of action.[61] So an offer to prove in a general way, after the close of the evidence and the case has been partially argued, that defendant made improvements equal to if not exceeding in value the amount of mesne profits proved has been held properly denied in the absence of specific proof of what the improvements consisted and the value of each item thereof.[62]

c. Weight and Sufficiency. Evidence in support of a defendant's plea for improvements, in an action of ejectment, is insufficient to warrant a submission to the jury where it fails to show the value of the improvements at the time of the trial or the enhanced value of the land by reason thereof or the value of the land without them.[63] And if color of title in the claimant is, by statute, made essential to a recovery for improvements, the question of the value of the improvements should not be submitted to the jury in the absence of any showing or color of title.[64] The mere fact that the claimant for improvements had notice of a claim to the land which was successfully asserted is not conclusive of bad faith on his part in making the improvements; he may show that notwithstanding such notice he made his improvements in the honest belief that the land was his own.[65] Where improvements are made by one while in possession under a judgment rendered in a former action in ejectment he is not entitled to compensation therefor in the absence of evidence showing whether they were made prior to or subsequent to the entry of such judgment.[66]

10. Questions For Court and Jury. The question whether there can be a recovery under a statute giving a right of recovery for improvements can only be determined on trial before the jury.[67] Permanency of the improvements,[68] their value,[69] and the good faith of the claimant in making them[70] are questions for the jury. The question whether one has a clear record title without notice of a paramount title so as to be entitled to compensation for improvements is one for the court.[71]

11. Issues and Instructions. Where a defendant in an action to recover land pleads a contract by parol and plaintiff denies any agreement, the only issue is the amount of the purchase-money paid by defendant and the value of rents, profits, and betterments.[72] If the issue submitted in substance and effect embraces the issue as to how much the value of the land has been enhanced by

59. Welles v. Newsom, 76 Iowa 81, 40 N. W. 105.

60. Newaygo County Mfg. Co. v. Echtinaw, 81 Mich. 416, 45 N. W. 1010.

61. Buntin v. Duchane, 1 Blackf. (Ind.) 255.

62. McDowell v. Sutlive, 78 Ga. 142, 2 S. E. 937.

63. Western Union Beef Co. v. Thurman, 70 Fed. 960, 17 C. C. A. 542.

Controlling weight should be given to the testimony of those who testified in reference to the location of the improvements in preference to those who did not take the location into consideration and to the testimony of witnesses who spoke of the enhancement of value of the land in preference to those who spoke of the value of the improvements merely. Fisher v. Edington, 85 Tenn. 23, 1 S. W. 499.

64. Welles v. Newsom, 76 Iowa 81, 40 N. W. 105.

65. Harrison v. Castner, 11 Ohio St. 339.

66. Gahre v. Berry, 82 Minn. 200, 84 N. W. 733.

67. Beckley v. Willard, 13 Vt. 533.

68. Parker v. Vinson, 11 S. D. 381, 77 N. W. 1023; Powell v. Davis, 19 Tex. 380; Morton v. Lewis, 16 U. C. C. P. 485.

69. Carolina Cent. R. Co. v. McCaskill, 98 N. C. 526, 4 S. E. 468; Powell v. Davis, 19 Tex. 380; Morton v. Lewis, 16 U. C. C. P. 485.

70. Seigneuret v. Fahey, 27 Minn. 60, 6 N. W. 403; Powell v. Davis, 19 Tex. 380; Rutland R. Co. v. Chaffee, 72 Vt. 404, 48 Atl. 700.

71. Ross v. Irving, 14 Ill. 171.

72. Fortesque v. Crawford, 105 N. C. 29, 10 S. E. 910.

the improvements a refusal to submit the latter inquiry is not error.[73] But where the only issue in a suit to recover for improvements is the value of the improvements made by plaintiff in good faith, an instruction submitting a question of damages to the jury is erroneous.[74]

12. VERDICT, FINDINGS, AND COMMISSIONERS' REPORTS — a. In General. The report of commissioners appointed by the court to estimate the value of improvements after judgment has been rendered for plaintiff in ejectment is not conclusive.[75] Where in ejectment the trial is without a jury the decision of the judge as to the value of the improvements has been declared to be in the nature of a special verdict which must be filed before any judgment can be rendered.[76] If defendant is allowed for certain improvements in equity but not under the occupying claimant's act it is error to direct that plaintiff should give bonds for such improvements as allowed by such act, and not direct a payment in money.[77]

b. Confirmation, Amendment, and Quashal. The court will not refuse to confirm the report of commissioners or referees as to the value of the improvements except upon satisfactory evidence that the estimate therein is correct.[78] So where an assessment is made in defendant's favor for improvements it will be presumed on appeal that it was properly and legally made unless the record shows the contrary.[79] And a finding of actual knowledge of adverse title is held to be justified where defendant in ejectment possessed the means of knowledge.[80] If, however, the evidence does not show the value of improvements to be in excess of the rental value, a verdict assessing them in excess thereof will be set aside.[81] And a report allowing rents for a longer period than is warranted by the case may be corrected by the court as to the excess and confirmed as to the balance.[82] The court may also extend the time fixed by the jury in action of ejectment for the payment of the value of the improvements.[83]

13. JUDGMENT[84] — a. In General. The form, sufficiency, and effect of the judgment is to a great extent dependent upon statutory provisions.[85] Where the value

73. Carolina Cent. R. Co. *v.* McCaskill, 98 N. C. 526, 4 S. E. 468.

74. Marlow *v.* Liter, 87 Mo. App. 584.

75. Haslett *v.* Crain, 85 Ill. 129.

The amount awarded will not be set aside unless its unjustness be made to appear by exceptions taken in the court below. Hart *v.* Baylor, Hard. (Ky.) 597.

Commissioner's report should contain a separate finding as to the value of each species of improvement (Estill *v.* Willhite, Hard. (Ky.) 528); explain the principles by which they ascertained the amount of improvements made before notice (Bodley *v.* Craig, 1 Bibb (Ky.) 1); and where two occupants join in defense in ejectment it should state the separate value of the respective parcels held by each (Payne *v.* Conner, 3 Bibb (Ky.) 180).

That the report made, conformable to law, varies from the order of the court which was erroneous is no ground for objection. Fisher *v.* Cockerill, 5 T. B. Mon. (Ky.) 129.

The report of commissioners is prima facie evidence that the improvements were made on the land in controversy. Fowler *v.* Halbert, 4 Bibb (Ky.) 52.

Objections to commissioners' report will be considered waived where the party was present when such report was returned and made no objection thereto. Patrick *v.* McClure, 1 Bibb (Ky.) 52.

76. Rawson *v.* Parsons, 6 Mich. 401.

77. Clay *v.* Miller, 2 Litt. (Ky.) 279.

78. Carrol *v.* Moss, 4 Bibb (Ky.) 395. See also Dunn *v.* Starkweather, 6 Iowa 466.

A mere difference of opinion between the witnesses and the commissioners as to the valuation is not a sufficient ground for quashing the report. White *v.* Ogden, 1 A. K. Marsh. (Ky.) 42.

That a return of an assessment neither assesses for waste nor returns that there was no waste is no ground for setting it aside, as it will be presumed from the absence of any assessment under this head that there was no waste. Dunn *v.* Games, 8 Fed. Cas. No. 4,177, 2 McLean 344.

79. Guild *v.* Kidd, 48 Mich. 307, 12 N. W. 158.

80. Kugel *v.* Knuckles, 95 Mo. App. 670, 69 S. W. 595.

81. Hollingsworth *v.* Funkhouser, 85 Va. 448, 8 S. E. 592.

82. Smith *v.* Nowell, 2 Litt. (Ky.) 165.

83. Pendleton *v.* Richey, 32 Pa. St. 58.

84. Judgment generally see JUDGMENTS.

85. *Indiana.*— Hollingsworth *v.* Stumph, 131 Ind. 546, 30 N. E. 525, holding that under Rev. St. 1881, §§ 1074–1078, a judgment for possession and damages in ejectment is independent of the judgment recoverable by an occupant under the occupying claimant act, and that the latter judgment does not merge a judgment for damages in the principal action.

of the improvements is determined by commissioners under the occupying claimant law the judgment therefor should show that plaintiff was present or had notice of the time and place of the meeting of the commissioners.[86] And judgment for plaintiff in ejectment should not be entered, where an issue has been raised upon a claim for improvements filed by defendant, until such issue has been tried.[87] So only one judgment should be rendered in ejectment determining the amount assessed in defendant's favor, awarding plaintiff possession of the land on condition of his paying such assessment within statutory time, and barring his right to recover in case he fails to pay.[88] To sustain a peremptory judgment against one for improvements, it has been decided that the record should show that he elected to pay for the improvements and take the land.[89]

b. Enforcement. Neither the land nor the improvements can be sold to pay for the improvements, under a statute providing that if plaintiff fails to make payment in the time fixed by court of the appraised value of the improvements, the owner thereof may pay the appraised value of the land and keep both.[90] So the fact that a successful claimant in ejectment has lost not only the land but other property by an execution issued on a judgment for improvements is no ground for compelling a surrender by plaintiff in execution of any part of the property acquired thereby;[91] and where a successful claimant surrenders land to the occupant and gives a refunding bond under the occupying claimant act, the occupant must pay for the land and look to the bond unless insolvency is alleged.[92] It has also been held that a bond is necessary to supersede execution for mesne profits where a judgment for money may be executed, although a writ of error be prosecuted, unless plaintiff in error gives bond in double the amount of the judgment;[93] that in an action to enjoin the enforcement of a judgment for plaintiff in ejectment until compensation can be made for improvements judgment for the value of the improvements cannot be entered and enforced;[94] that the execution of a judgment in ejectment will not be enjoined on the ground that the judgment plaintiff refuses to pay for permanent valuable improvements made by defendant, where they were made after commencement of the ejectment suit;[95] that an occupant may in some cases be allowed a reasonable time in which to remove his improvements;[96] that an undertaking for rent given by defendant may be amended by the court in case of a mutual mistake and enforced as amended;[97] and that the period for paying for improvements begins to run from the date of final judgment under a statute providing that plaintiff shall, within one year from the rendition of judgment, pay into court the amount of the improvements.[98]

Iowa.— Dungan *v.* Von Puhl, 8 Iowa 263, holding that under Code, §§ 1236–1238, a personal judgment for the value of the improvements cannot be rendered.

Michigan.— Guild *v.* Kidd, 48 Mich. 307, 12 N. W. 158, holding a judgment in ejectment sufficient under the statute where it is in the ordinary form providing that plaintiff's default to pay the assessment for the improvements shall be deemed equivalent to an abandonment.

Missouri.— Stump *v.* Hornback, 94 Mo. 26, 6 S. W. 356, holding that under Rev. St. §§ 2262, 2263, the court can only give judgment that the occupant shall take the land and pay its value, where plaintiff elects to relinquish the land and recover the value without improvements.

Ohio.— Beardsley *v.* Chapman, 1 Ohio St. 118, holding that a defendant under the occupying claimant act may be entitled to a judgment for costs but not for any balance due, the statute containing no provision therefor.

See 17 Cent. Dig. tit. "Ejectment," § 527.

86. Estill *v.* Willhite, Hard. (Ky.) 528.

87. Hills *v.* Laporte, 40 Wis. 113.

88. Scott *v.* Reese, 38 Wis. 636, holding that there should not be one judgment in favor of plaintiff for possession and another in favor of defendant for the value of the improvements.

89. Cole *v.* Damron, 7 J. J. Marsh. (Ky.) 595.

90. Dungan *v.* Von Puhl, 8 Iowa 263.

91. Belshe *v.* Barrett, 5 T. B. Mon. (Ky.) 590.

92. Webb *v.* Bowman, 3 J. J. Marsh. (Ky.) 70.

93. Lum *v.* Reed, 53 Miss. 71.

94. Russell *v.* Defrance, 39 Mo. 506.

95. Gaines *v.* Kennedy, 53 Miss. 103.

96. Maxwell Land Grant Co. *v.* Santistevan, 7 N. M. 1, 32 Pac. 44.

97. Clute *v.* Knies, 102 N. Y. 377, 7 N. E. 181, holding that the word "plaintiff" may be changed to "defendant."

98. Clark *v.* Green, 62 Mich. 355, 28 N. W. 894.

14. Election to Take Value of Premises. A plaintiff who has recovered in ejectment and under the occupying claimant law, and who elects to receive the assessed value of the land without improvements, waives all errors occurring prior to such election,[99] and will not be allowed to elect a second time.[1] The election should be made by answer and before trial of the action to recover for improvements under the Missouri statute.[2] On making election he should tender a deed with a covenant of warranty.[3] And where plaintiff so elects and the court orders payment to be made in instalments, a writ of possession issued on default of the first instalment will be quashed on motion.[4]

15. Effect of Failure to Pay Amount Awarded For Improvements. A failure on the part of plaintiff to pay within a certain time the amount assessed for improvements made by defendant operates under the statutes of some jurisdictions as an extinguishment of the former's title to the premises.[5] Under the statutes of another jurisdiction, where neither is willing to compensate the other in accordance with the provisions of the act, a sale may be decreed by the court on the motion of either party and the proceeds distributed in such proportion.[6]

16. Enforcement of Judgment in Ejectment Restrained to Compel Payment For Improvements. In a number of jurisdictions payment for improvements may be enforced by enjoining plaintiff in ejectment from taking possession until such payment has been made.[7]

17. Costs.[8] The costs of the commissioners appointed to assess the value of improvements may be recovered, in a suit to recover for improvements.[9] And where defendant in an ejectment bill loses the land, but recovers for improvements, and sales of a portion of the land are made to satisfy a decree therefor, the complainant may be properly charged with the costs of such sales.[10]

18. Appeal and Error.[11] In at least one state the statutes make no provision for a review of proceedings to recover for improvements.[12] And in another it has been held that if the allowance for improvements is manifestly too great the trial court may and should set the verdict aside but the award is not reviewable on appeal.[13] So error will not lie from a ruling of the trial court allowing an

99. Price *v.* Allen, 39 Kan. 476, 18 Pac. 609.

1. Miller *v.* Clark, 60 Mich. 162, 26 N. W. 872; Rawson *v.* Parsons, 6 Mich. 401. *Compare* Clay *v.* Miller, 2 Litt. (Ky.) 279.

2. Cox *v.* McDivit, 125 Mo. 358, 28 S. W. 597.

3. Wilkins *v.* Huse, 15 Ohio 285, holding that the deed need not be by himself provided that it convey title.

If there are several successful claimants they should unite in the conveyance. Moss *v.* Carrol, 1 A. K. Marsh. (Ky.) 381.

4. Gurshwa *v.* Infield, 1 Ohio Dec. (Reprint) 75, 1 West. L. J. 515.

5. Guild *v.* Kidd, 48 Mich. 307, 12 N. W. 158; Rawson *v.* Parsons, 6 Mich. 401; Craig *v.* Dunn, 47 Minn. 59, 49 N. W. 396; Neeves *v.* Eron, 73 Wis. 542, 41 N. W. 725. *Compare* Douglass *v.* Sharp, 64 Ark. 645, 44 S. W. 221.

6. Leighton *v.* Young, 52 Fed. 439, 3 C. C. A. 176, 18 L. R. A. 266.

7. Russell *v.* Defrance, 39 Mo. 506; Marlow *v.* Liter, 87 Mo. App. 584; Jackson *v.* Munson, 1 Johns. (N. Y.) 277. And see Allen *v.* Mansfield, 82 Mo. 688; Hedgepeth *v.* Rose, 95 N. C. 41.

Tenants in common may join as parties plaintiff to enjoin the enforcement of a judgment in ejectment, until compensation be made for improvements under the statute, although they were not all made defendants in the ejectment, the reason for this being that the possession of one tenant in common is the possession of all. Russell *v.* Defrance, 39 Mo. 506.

A railroad company may be enjoined from occupying the land involved, although a judgment for improvements cannot be recovered against it because of the fact that execution could not be levied on the right of way. Rutland R. Co. *v.* Chaffee, 72 Vt. 404, 48 Atl. 700.

8. Costs generally see Costs.

9. Clay *v.* Miller, 2 Litt. (Ky.) 279. See also Martin's Case, 1 Ohio 156.

10. Fisher *v.* Edington, 85 Tenn. 23, 1 S. W. 499.

11. Appeal generally see Appeal and Error.

12. In Vermont a declaration for improvements filed in an action of ejectment after a final judgment in the cause is not a cause or suit within the statute giving the right of review to either party in all civil actions tried before the county court, and neither party is entitled to a review of the proceedings had thereon. Allen *v.* Taylor, 26 Vt. 599; Gage *v.* Ladd, 6 Vt. 174.

13. Carolina Cent. R. Co. *v.* McCaskill, 98 N. C. 526, 4 S. E. 468.

investigation of a claim for improvements to a defeated occupant where the statute entitles him thereto on mere request.[14] And in no event has the reviewing court power to order a reference to ascertain the value of rents and profits accruing during the pendency of the proceedings before it, as it is limited to questions of review.[15] Unless the contrary be made to appear it will be presumed that the appointment by the trial court of commissioners to value improvements was authorized by the facts.[16] Where a judgment for defendant in ejectment is reversed because not supported by the facts found, but is complicated with valuations demanded by the parties, judgment will not be entered for plaintiff but the cause will be remitted with instructions to award the judgment which should have been given under the finding, saving, however, the statutory right to proceed for new trial.[17]

XI. EQUITABLE EJECTMENT.[18]

A. In General. In Pennsylvania ejectment is an equitable action and wherever chancery would execute a trust or decree a conveyance the courts of this state by the instrumentality of a jury[19] may direct a recovery in an ejectment and are governed by the same rules as a court of chancery.[20]

14. Hasen *v.* Rounsaville, 35 Kan. 405, 11 Pac. 150.

15. Burlington, etc., R. Co. *v.* Dobson, 19 Nebr. 451, 27 N. W. 442.

16. Haslett *v.* Crain, 85 Ill. 129 (holding that, nothing appearing to the contrary, it would be presumed that defendant's title was such as to authorize the appointment); Fowler *v.* Halbert, 4 Bibb (Ky.) 52.

17. Yelverton *v.* Hilliard, 38 Mich. 355.

18. See also, generally, EQUITY; SPECIFIC PERFORMANCE; TRUSTS; VENDOR AND PURCHASER.

An act in regard to an equitable remedy for ejectment has been declared unconstitutional in so far as it undertakes or has the effect of converting the remedy at law into an action cognizable in equity. Trustees Internal Imp. Fund Co. *v.* Gleason, 39 Fla. 771, 23 So. 539. See also Hughes *v.* Hannah, 39 Fla. 365, 22 So. 613.

What was substantially an ejectment bill was dismissed where plaintiff failed to establish the allegations of the bill and the proof failed to show any title adverse or otherwise. Scott *v.* Taylor, (Tenn. Ch. App. 1898) 46 S. W. 358. *Compare* Crane *v.* Conklin, 1 N. J. Eq. 346, 22 Am. Dec. 519.

19. **The court are the judges,** whether plaintiff is entitled to relief, and of the extent and mode of the relief; the jury are merely to ascertain the facts. Peebles *v.* Reading, 8 Serg. & R. (Pa.) 484. See Elbert *v.* O'Neil, 102 Pa. St. 302, 305; Hawthorn *v.* Bronson, 16 Serg. & R. (Pa.) 269, 278. And *compare* Dougan *v.* Blocher, 24 Pa. St. 28.

20. Peebles *v.* Reading, 8 Serg. & R. (Pa.) 484. See also Chamberlain *v.* Maynes, 180 Pa. St. 39, 36 Atl. 410; Evans *v.* Maury, 112 Pa. St. 300, 3 Atl. 850; Eberly *v.* Lehman, 100 Pa. St. 542, 545; Church *v.* Ruland, 64 Pa. St. 432; Rife *v.* Geyer, 59 Pa. St. 393, 98 Am. Dec. 351; Eckels *v.* Stewart, 53 Pa. St. 460; Corson *v.* Mulvany, 49 Pa. St. 88, 88 Am. Dec. 485; Strimpfler *v.* Roberts, 18 Pa. St. 283, 57 Am. Dec. 606; Anderson L. Dict. In Cope *v.* Smith, 8 Serg. & R. (Pa.) 110, 115, 11 Am. Dec. 582 [*quoted* in Martzell *v.* Stauffer, 3 Penr. & W. (Pa.) 398, 401], Tilghman, C. J., said: "In Pennsylvania, the court hold themselves bound to administer equity, in all cases where the forms of law do not restrain them. They cannot compel the specific performance of an agreement, because they cannot take cognizance of a bill in equity. But they come as near it as they can. In the action of ejectment, for instance, which is very little trammelled by form, they consider that as actually done, which a court of equity would decree to be done. They will permit a purchaser of land to recover it from the seller, when he has paid all the purchase-money according to the contract, or tendered it and brings it into court."

By the grant of equity powers to the courts of common pleas this remedy was not taken away. Corson *v.* Mulvany, 49 Pa. St. 88, 88 Am. Dec. 485.

Ejectment on an equitable title is in substance bill for specific performance and is governed by general principles of equity. Deitzler *v.* Mishler, 37 Pa. St. 82. See also Riel *v.* Gannon, 161 Pa. St. 289, 29 Atl. 55; Carmalt *v.* Platt, 7 Watts (Pa.) 318; Anderson L. Dict.

Specific performance of a contract for the sale or purchase of land may be compelled by ejectment or the enforcement of a trust in regard to it. Church *v.* Ruland, 64 Pa. St. 432; Larison *v.* Burt, 4 Watts & S. (Pa.) 27; Dickey *v.* McCullough, 2 Watts & S. (Pa.) 88; Hawn *v.* Norris, 4 Binn. (Pa.) 77. And see Carmalt *v.* Platt, 7 Watts (Pa.) 318; Mitchell *v.* De Roche, 1 Yeates (Pa.) 12. So payment of the purchase-money due under the contract may be thus enforced. Daubert *v.* Pennsylvania R. Co., 155 Pa. St. 178, 26 Atl. 108; Brown *v.* Divitt, 131 Pa. St. 455, 19 Atl. 80; Eichelberger *v.* Gitt, 104 Pa. St. 64. Ejectment, however, to compel the specific performance of an entire contract will not lie against the occupant of a single room or field. Davidson *v.* Barclay, 63 Pa. St.

B. Grounds and Defenses. In equitable ejectments the same rule and measure of justice is to be applied whether the proceeding is at law or in equity.[21] To authorize a verdict equivalent to a decree of specific performance the equity of the case should be clearly with plaintiff.[22] Defendant may in such an action to compel the payment of purchase-money set up a valid defense to his vendor's title.[23] But a claim for unliquidated damages cannot be urged as a set-off or as an equitable defense.[24] Again negligence[25] or laches or remissness[26] may affect

406. And where a vendee under articles of agreement purchases the vendor's remaining interest in the land at a sheriff's sale payment of the unpaid purchase-money cannot be thus enforced. Garrard *v.* Lantz, 12 Pa. St. 186. See also Thompson *v.* Adams, 55 Pa. St. 479. And where plaintiff cannot enforce a specific execution of his contract against defendant he cannot recover in ejectment. Vincent *v.* Huff, 4 Serg. & R. (Pa.) 298. Nor will ejectment lie to enforce the execution of articles of agreement on the part of a vendee who has never been in possession. Aberly *v.* Lehman, 100 Pa. St. 542. And one who has delivered a deed cannot maintain ejectment for purchase-money payable in future. Zentmyer *v.* Mittower, 5 Pa. St. 403.

Ejectment to enforce the payment of interest lies by the vendor of land, under articles of agreement, who has not parted with his legal title, interest being a part of the principal. Moyer *v.* Garrett, 96 Pa. St. 376. And that interest was not overdue may be shown. Davidson *v.* Barclay, 63 Pa. St. 406.

The question whether plaintiff has a complete legal title is not controlling of his right to maintain ejectment at law in Pennsylvania. Henninger *v.* Boyer, 10 Pa. Co. Ct. 506. *Compare* Thompson *v.* Adams, 55 Pa. St. 479. But a vendor who has parted with the legal title by the execution and delivery of a deed cannot maintain ejectment to enforce the payment of the purchase-money. Wheeling, etc., R. Co. *v.* Gourley, 99 Pa. St. 171; Garver *v.* McNulty, 39 Pa. St. 473; Myers *v.* Myers, 25 Pa. St. 100; Megargel *v.* Saul, 3 Whart. (Pa.) 19; Vaughan *v.* Ledyard, 14 Phila. (Pa.) 176.

An equitable right of redemption in a mortgagor may be enforced in an action of equitable ejectment. Mellon *v.* Lemmon, 111 Pa. St. 56, 2 Atl. 56.

Mortgagee, advancing money on land standing in the husband's name with the consent of the wife to whom it actually belonged, may recover as against the wife's heirs. Fretz *v.* Gilham, 16 Pa. Co. Ct. 586.

Where the intention to make the land chargeable with money is clearly manifest, ejectment will lie to compel payment from the proceeds of the land. Galbraith *v.* Fenton, 3 Serg. & R. (Pa.) 359.

Wife may recover land which is her separate estate, even though possession is delivered and the purchase-money paid under an agreement for sale not acknowledged in due form of law, and repayment by her of the purchase-money is unnecessary. Rumfelt *v.* Clemens, 46 Pa. St. 455. See Kirk *v.* Clark, 59 Pa. St. 479; Glidden *v.* Strupler, 52 Pa. St. 400.

Ejectment is not properly brought against an administrator to compel specific performance of his decedent's contract, it being declared that the interest of the purchaser is realty and represented by his heir and not by his administrator. Thompson *v.* Adams, 55 Pa. St. 479.

Ejectment does not lie by an insolvent debtor, after assigning his estate, and after his person is freed from arrests, to recover of lands invested in him previous to his discharge, his debts remaining unpaid. Willis *v.* Row, 3 Yeates (Pa.) 520.

Payment of ground-rent cannot be enforced by ejectment where no right of reëntry is reserved. Kenege *v.* Elliot, 9 Watts (Pa.) 258.

Performance of the consideration in a deed which is secured by a bond cannot be so enforced. Krebs *v.* Stroub, 116 Pa. St. 405, 9 Atl. 469.

21. Sower *v.* Weaver, 78 Pa. St. 443.

If ejectment is substituted for a bill in equity to enforce a land contract it should be determined on equitable grounds. Dwyer *v.* Wright, 14 Pa. Co. Ct. 406.

It is held no defense to an action of ejectment against a purchaser under a contract for the sale of land, which is void under the statute of frauds, that improvements and expenditures have been made on the land by him on the faith thereof, with the knowledge of the owner and for which he has not been indemnified. Harden *v.* Hays, 9 Pa. St. 151.

22. Elbert *v.* O'Neil, 102 Pa. St. 302.

A decree to enforce an equitable ejectment is a matter of discretion to be determined by what may appear equitable under all the facts and circumstances. Dwyer *v.* Wright, 14 Pa. Co. Ct. 406.

23. Richardson *v.* Kuhn, 6 Watts (Pa.) 299.

24. Cornell *v.* Green, 10 Serg. & R. (Pa.) 14.

25. **In ejectment by one who has been guilty of negligence** claiming an equitable title under an agreement not recorded against one to whom a sale of the land was subsequently made under articles of agreement with one holding the legal title, and in possession, it has been held that there can be no recovery against such subsequent vendee until he has been reimbursed the money which he had paid before receiving notice. Youst *v.* Martin, 3 Serg. & R. (Pa.) 423.

26. Strimpfler *v.* Roberts, 18 Pa. St. 283, 57 Am. Dec. 606.

Delay and remissness in making inquiry as to the true foundation of a party's possession and right to expend money upon im-

the remedy or right to recover. But one who has gone into possession under a parol contract and has paid the purchase-money is declared not guilty of laches, although he takes no steps to enforce a conveyance.[27]

C. Separate Actions. Separate actions for each tract may be maintained by an owner under a contract for the sale of two tracts of land at a specified sum per acre.[28]

D. Tender of Conveyance or Purchase-Money.[29] The terms of the contract often control in determining whether a deed should be tendered;[30] and it is not necessary to tender a deed before suit brought where defendant sets up an agreement to purchase.[31] Nevertheless it has been held in several decisions that when plaintiff relies upon an equitable title, tender of money due must precede the action.[32] This rule is, however, subject to exceptions,[33] and has also been to

provements is a ground of equity and may operate to obligate the negligent party to make good the expenditures which have benefited the property, even though it may not estop the party entitled thereto to recover the land. Davidson *v.* Barclay, 63 Pa. St. 406.

27. Richards *v.* Elwell, 48 Pa. St. 361.

28. Roddy *v.* Harah, 62 Pa. St. 129.

29. Tender generally see TENDER.

30. Dixon *v.* Oliver, 5 Watts (Pa.) 509.

As to distinction between executed and executory contract with reference to tender and performance as conditions precedent see Williams *v.* Bentley, 27 Pa. St. 294.

31. Devling *v.* Williamson, 9 Watts (Pa.) 311.

Tender of deed may be made at the trial or before execution on the judgment. Hall *v.* Holmes, 4 Pa. St. 251. A tender of deed may also be made on trial where plaintiff, the vendor, claims a conditional verdict, it not being necessary to tender before suit brought. Markley *v.* Swartzlander, 8 Watts & S. (Pa.) 172.

32. Dwyer *v.* Knight, 162 Pa. St. 405, 29 Atl. 754; Chahoon *v.* Hollenback, 16 Serg. & R. (Pa.) 425, 16 Am. Dec. 587; Gore *v.* Kinney, 10 Watts (Pa.) 139. See Dougan *v.* Blocher, 24 Pa. St. 28; Vincent *v.* Huff, 4 Serg. & R. (Pa.) 298.

Sufficiency of tender of balance due see Heft *v.* McGill, 3 Pa. St. 256 (tender of more than amount due before action brought, and also into court at the trial sufficient); Inman *v.* Kutz, 10 Watts (Pa.) 90 (tender of amount due before suit brought and also by bringing into court on trial sufficient); Minsker *v.* Morrison, 2 Yeates (Pa.) 344 (must bring money into court); Merrell *v.* Merrell, 5 Kulp (Pa.) 125 (tender of balance due before suit brought followed by payment into court).

The distinction has been settled between the case of an ejectment brought on a legal title and on an equitable title. In the case of a legal title the rule is that plaintiff has a right to commence his action before tendering the money due to defendant on his equitable claims. But in the case of an action of ejectment, founded on an equitable title, plaintiff must not only tender the money before suit brought, but he must also have it in court ready to be paid to defendant in case of a verdict for plaintiff. Gore *v.* Kinney, 10 Watts (Pa.) 139. See Thomas *v.* Wright, 9 Serg. & R. (Pa.) 87.

Where possession of vendor is lawful, as where he has taken possession peaceably after the expiration of the time fixed for payment under the articles of sale, vendee cannot maintain ejectment against him without proof of a previous tender of the purchase-money, and he must also maintain that tender by producing the money in court. Bell *v.* Clark, 111 Pa. St. 92, 2 Atl. 80.

33. An exception to the rule, that tender of the money due must generally precede the action, exists where the vendor before payment has put the vendee into possession under the contract and induced him to make valuable improvements, and afterward by collusion or unfair practice regains the possession. Eberly *v.* Lehman, 100 Pa. St. 542. See Harris *v.* Bell, 10 Serg. & R. (Pa.) 39. There may also be an exception to the rule that tender or previous payment of the purchase-money due is necessary to enable plaintiff to recover in ejectment founded on an equity only, as where specific performance is sought, and this rule applies to vendee out of possession who is the holder of a merely equitable title and to his assignee. Orne *v.* Kittanning Coal Co., 114 Pa. St. 172, 6 Atl. 358.

When recovery may be had without tendering or paying purchase-money or bringing it into court see Davidson *v.* Barclay, 63 Pa. St. 406; Stewart *v.* Freeman, 22 Pa. St. 120; Gore *v.* Kinney, 10 Watts (Pa.) 139; Gregg *v.* Patterson, 9 Watts & S. (Pa.) 197; Stub *v.* Leis, 7 Watts (Pa.) 43 (when proof of tender immaterial); Gilbert *v.* Hoffman, 2 Watts (Pa.) 66, 26 Am. Dec. 103.

Where one is guilty of fraud in the purchase of land the owner need not tender back the amount paid by such purchaser (Seylar *v.* Carson, 69 Pa. St. 81; McCaskey *v.* Graff, 23 Pa. St. 321, 62 Am. Dec. 336; Smull *v.* Jones, 1 Watts & S. (Pa.) 128; McKennan *v.* Pry, 6 Watts (Pa.) 137; Gilbert *v.* Hoffman, 2 Watts (Pa.) 66, 26 Am. Dec. 103; Riddle *v.* Murphy, 7 Serg. & R. (Pa.) 230. See also Cleavinger *v.* Reimar, 3 Watts & S. (Pa.) 486), or the value of his improvements (Riddle *v.* Murphy, 7 Serg. & R. (Pa.) 230).

Upon tendering repayment of purchase-money recovery may be had in ejectment of land obtained by the misrepresentations of a

some extent qualified.[34] A vendee once fairly in possession of land under articles of purchase but ousted by illegal means is also entitled to recover in an action of ejectment without bringing into court the balance of purchase-money due upon the articles.[35] Again a plaintiff may be entitled to a conditional judgment for the balance of purchase-money due, although he neither made a demand for such balance nor tendered a deed before bringing suit.[36]

E. Parties.[37] Trustees or *cestuis que trustent* may be parties,[38] and an executor of a vendor is entitled to be substituted plaintiff in equitable ejectment for the purchase-price brought by the heirs against the vendee.[39] And in an action for the purchase-money against the original vendee, the owner of an equitable title who claims under him may come in and defend notwithstanding confession of judgment by the original vendee, who is out of possession and has no interest.[40] To command a verdict against the equity of the purchaser the action should be against him or someone representing his title and be brought by the holder of the legal title.[41] And all persons found in possession of the land described in the writ have been held defendants.[42]

F. Process.[43] Under the act of 1851, to justify a judgment against a defendant not served, it must always appear that the action is one of the class for which the provisions of the act were made, and that the course prescribed has been strictly pursued.[44]

G. Evidence.[45] One who seeks to establish title under a parol contract must clearly and distinctly prove the contract with all its terms and conditions.[46] In

person who had solicited and obtained confidence from the owner. Rankin *v.* Porter, 7 Watts (Pa.) 387.

34. **Qualification of rule.**— At least only a conditional verdict can be rendered, as a tender of balance of unpaid purchase-money is necessary to enable the party owning an equity by reason of such balance to defend. Chadwick *v.* Felt, 35 Pa. St. 305.

35. D'Arras *v.* Keyser, 26 Pa. St. 249.

36. Lauer *v.* Lee, 42 Pa. St. 165.

37. **Parties** generally see PARTIES.

Parties in ordinary ejectment suit see *supra*, IV, C.

38. Cable *v.* Cable, 146 Pa. St. 451, 23 Atl. 223; Campbell *v.* Galbreath, 5 Watts (Pa.) 423; Ross *v.* McJunkin, 14 Serg. & R. (Pa.) 364.

A cestui que trust may maintain the action. Kennedy *v.* Fury, 1 Dall. (Pa.) 72, 1 L. ed. 42.

Trustees of property of minors who hold as purchasers under sale which did not divest his beneficial interest are liable in ejectment. Johns *v.* Tiers, 19 Wkly. Notes Cas. (Pa.) 13.

Compensation to faithless trustees in equitable ejectment to enforce a trust is not allowable. Fellows *v.* Loomis, 204 Pa. St. 227, 53 Atl. 999.

39. Bender *v.* Luckenbach, 162 Pa. St. 18, 29 Atl. 295, 296.

40. Price *v.* Howells, 3 L. T. N. S. (Pa.) 41.

41. Thompson *v.* Adams, 55 Pa. St. 479.

A creditor of the holder of an equitable title cannot appear in an action for specific performance, brought by the holder of the legal title, so as to protect his creditor's lien. Phinney *v.* Timmins, 1 C. Pl. (Pa.) 2.

Where the original vendee has sold his interest and is out of possession the action should be against those in possession, or if there be no one in possession, then the proceedings should be under the act of April 14, 1851. Price *v.* Howells, 3 L. T. N. S. (Pa.) 41.

42. Grant *v.* Barton, 2 L. T. N. S. (Pa.) 197.

43. **Process** generally see PROCESS.

Process in ordinary ejectment suit see *supra*, VIII, F.

44. The procedure authorized by this act is entirely out of the course of the common law, and the judgment allowed is a departure from common right. For this **reason it must always appear not only that the ejectment** is one of the class for which the provisions were made, but that the course prescribed has been strictly followed. Roberts *v.* Orr, 56 Pa. St. 176, 180, holding that a judgment cannot be entered under this act against a party who has had no service of the writ upon him, where there is no description of the premises in the rule to appear and plead, nor any mention that the pending action was ejectment.

As to notice of sale under such act see Haslett *v.* Foster, 46 Pa. St. 471.

45. **Evidence** generally see EVIDENCE.

Evidence in ordinary ejectment suit see *supra*, VII.

46. Greenlee *v.* Greenlee, 22 Pa. St. 225.

Plaintiff should be held to strict proof. Wetherill *v.* Wetherill, 1 Am. L. Reg. (Pa.) 637.

Where there are controverted facts it is error to withdraw the case from the jury. Williams *v.* Bently, 29 Pa. St. 272.

Less proof is required on the part of the vendor seeking to rescind a contract for the sale of land than on the part of a vendee seeking specific performance. Hawk *v.* Greensweig, 2 Pa. St. 295.

such an action defendant may show non-performance of the contract.[47] It has been held that evidence is admissible to show the manner in which defendant came into possession;[48] to show whose money paid for the land in question;[49] and to show that defendant had damaged the property by bad usage after entry in an action to enforce payment of the purchase-price.[50] But evidence is not admissible of other claims arising out of transactions foreign to the sale of the lands;[51] nor is evidence of improvements made by defendant.[52] The value of the land may, however, be shown.[53]

H. Hearing or Trial.[54] Ejectment on an equitable title is in effect a bill for specific performance, and the same rules concerning the submission of questions of fact to a jury and the right of the chancellor to disregard its findings, if in his opinion the evidence is insufficient to sustain them, are applicable.[55] So it is declared that the jury merely ascertain the facts and the court judges whether plaintiff is entitled to relief and determines the extent, mode, and manner of relief.[56] And it is decided that a plaintiff in ejectment will not be granted a new trial, where it appears that the contract was such that a court of equity would not enforce it.[57]

I. Conditional Verdict[58] **or Judgment.** A conditional verdict may in some cases be entered in ejectment.[59] The fact that by reason of encumbrances plain-

47. Driesbach *v.* Serfass, 126 Pa. St. 32, 17 Atl. 513, 3 L. R. A. 836.

A different application of a payment with the knowledge and consent of the purchaser may be shown. Lauer *v.* Lee, 42 Pa. St. 165.

Non-performance by the purchaser under whom plaintiff claims may be shown. Deitzler *v.* Mishler, 37 Pa. St. 82.

48. Moody *v.* Fulmer, 3 Grant (Pa.) 17, holding that a deed of an administrator is admissible, irrespective of the legal effect of the power of the administrator to sell. See also Mulliken *v.* Graham, 72 Pa. St. 484; Bratton *v.* Mitchell, 3 Pa. St. 44.

In equitable ejectment against a person other than the vendee to enforce the payment of purchase-money it must be shown by plaintiff that such person entered into possession under the vendee. Williams *v.* Irwin, 99 Pa. St. 37.

49. Beck *v.* Uhrich, 16 Pa. St. 499, so holding in an action against an administrator and his grantee to recover land purchased by the former party with trust funds and partly with his own.

Where ejectment is brought to enforce payment of certain purchase-money bonds, the agreement of the sale of the lands is admissible to show that the bonds were stipulated for and given for the purchase-money. Eichelberger *v.* Gitt, 104 Pa. St. 64.

50. Erwin *v.* Myers, 46 Pa. St. 96.

51. Erwin *v.* Myers, 46 Pa. St. 96.

52. Carmalt *v.* Platt, 7 Watts (Pa.) 318.

53. **Evidence of the value of the land is** pertinent to the issue when plaintiff seeks to compel specific performance. Dauchy *v.* Pond, 9 Watts (Pa.) 49.

54. Trial generally see TRIAL.

Trial in ordinary ejectment suit see *supra*, VIII.

55. Reno *v.* Moss, 120 Pa. St. 49, 13 Atl. 716; Brawdy *v.* Brawdy, 7 Pa. St. 157. *Compare* Hess *v.* Calender, 120 Pa. St. 138, 13 Atl. 720 (as to submission of case to jury where evidence is conflicting); Nicolls *v.* McDonald, 101 Pa. St. 514 (holding that the court must consider and weigh the facts for himself, and if such a case is not made out as would justify a chancellor in decreeing a conveyance, he should give the jury binding instructions to that effect); Ballentine *v.* White, 77 Pa. St. 20 (holding that the judge acts as chancellor with the assistance of the jury to determine the credibility of witnesses and questions of fact on conflicting evidence).

56. Peebles *v.* Reading, 8 Serg. & R. (Pa.) 484.

57. Galloway *v.* Horne, 2 Del. Co. (Pa.) 515.

58. **Verdict** generally see TRIAL.

Verdict in ordinary ejectment suit see *supra*, VIII, C.

59. Riel *v.* Gannon, 161 Pa. St. 289, 29 Atl. 55; Erwin *v.* Myers, 46 Pa. St. 96; Hauberger *v.* Root, 5 Pa. St. 108; Coolbaugh *v.* Pierce, 8 Serg. & R. (Pa.) 418.

A condition annexed to a verdict is in the nature of an injunction to stay proceedings at law. Henry *v.* Raiman, 25 Pa. St. 354, 64 Am. Dec. 703; Harmar *v.* Holton, 25 Pa. St. 245.

A verdict conditioned on plaintiff's filing a deed within a certain time should be strictly complied with. Gordonier *v.* Billings, 77 Pa. St. 498.

A conditional verdict should fix the time for payment of the money (Thompson *v.* McKinley, 47 Pa. St. 353), which should be complied with (Waters *v.* Bates, 44 Pa. St. 473; Waters *v.* Waters, 32 Pa. St. 307), although the court may extend the time (Connolly *v.* Miller, 95 Pa. St. 513).

The amount to be paid should be ascertained and stated on the record before the time begins to run. Harmar *v.* Holton, 25 Pa. St. 245.

An uncertainty in the condition will not vitiate the judgment as the court may reduce

tiff could not make a clear title is no objection to his recovery of a conditional judgment, where the defense is a parol contract of purchase and part payment, as it may be provided in the judgment that it shall not be enforced until plaintiff can execute and file a proper deed.[60] So a conditional verdict in ejectment may be recovered, where suit is brought on the legal title and defendant is in a position to set up an equity to prevent recovery on such legal title.[61]

J. Relief Awarded. In equitable ejectment the verdict should be so modeled as to give the relief which a court of equity would give under similar circumstances.[62] The court has power to modify the condition of the verdict of the jury or the report of a referee in order more effectually to do equity.[63] Where a conditional recovery comprises the whole of the purchase-money, the court will upon the payment by virtue of its equity power interfere and compel plaintiff to convey the title according to the contract.[64]

K. Judgment and Its Enforcement.[65] In ejectment on an equitable title

the condition to a certainty. Henry *v.* Raiman, 25 Pa. St. 354, 64 Am. Dec. 703.

It is proper to render a conditional verdict where a defendant sets up a contract for the land with the ancestor of plaintiff, a partial payment of the purchase-money, and long-continued possession. Webster *v.* Webster, 53 Pa. St. 161.

By means of a conditional verdict payment of purchase-money may be enforced, and also of certain debts of the vendor and vendee who were partners, the payment of which was a part of the consideration. Biddle *v.* Moore, 3 Pa. St. 161.

Where conditional judgment is confessed in ejectment to enforce the payment of purchase-money, it may be valid as against a purchaser at sheriff's sale of the equitable owner's interest, there being no fraud between the legal and equitable owner. Damon *v.* Bache, 55 Pa. St. 67, 93 Am. Dec. 730. *Compare* Kraft *v.* Smith, 117 Pa. St. 183, 11 Atl. 370, as to evidence of fraud in ejectment to recover on the ground that defendant, having purchased land at sheriff's sale, is a trustee *ex maleficio* for plaintiff as whose property the land was sold.

A vendee is not entitled to a conditional verdict for plaintiff to be released on payment of the balance of purchase-money due, where there has been a forfeiture by the vendee under the articles for the purchase of the land, and the vendor has performed the equivalent of a reëntry by selling the land to another in accordance with the express provisions of the agreement of sale. Emery *v.* De Golier, 117 Pa. St. 153, 12 Atl. 152.

Although a verdict is conditioned as a rule for release of the land on payment of the balance due within a certain time, otherwise the title to become absolute in the vendor, yet it is recommended that the verdict contain the alternative of a decree of sale by the sheriff or master under the directions of the court for the benefit of the vendor and vendee, and all other persons having an interest in the proceeds. Hewitt *v.* Huling, 11 Pa. St. 27.

A receiver may file a report in ejectment for purchase-money, having the same effect as a conditional verdict. Heath *v.* Gardner, 10 Wkly. Notes Cas. (Pa.) 495.

In case of a contract for the sale of two tracts of land for which the owner brings separate actions of ejectment, a payment of the entire purchase-money under a conditional verdict in one ejectment amounts to a payment of the purchase-money in the other. Roddy *v.* Harah, 62 Pa. St. 129.

When conditional verdict is erroneous see Thompson *v.* Rogers, 67 Pa. St. 39; Peters *v.* Florence, 38 Pa. St. 194; Gill *v.* Gill, 37 Pa. St. 312; Patterson *v.* Wilson, 19 Pa. St. 380.

60. Lauer *v.* Lee, 42 Pa. St. 165.

61. Lauer *v.* Lee, 42 Pa. St. 165. See also Daubert *v.* Pennsylvania R. Co., 155 Pa. St. 178, 26 Atl. 108.

When land has been contracted to be sold the heirs of the vendor may maintain ejectment against the vendee who asserts the contract, and a conditional verdict may be entered, notwithstanding the fact that the purchase-money is assets for the payment of decedent's debts. Defendant can protect himself by paying the amount of the conditional verdict into court. Myers *v.* Pringle, 3 Lack. Leg. N. (Pa.) 130.

62. Hawk *v.* Greensweig, 2 Pa. St. 295. See also Snyder *v.* Beidleman, 8 Luz. Leg. Reg. (Pa.) 261.

The validity of both the legal and the equitable title is determined where plaintiff seeks to enforce his legal title by a common-law action, and defendant his equitable title as a defense, which is treated as to the latter as a bill for specific performance. Dutton's Estate, 208 Pa. St. 350, 57 Atl. 719.

As to relief in particular cases and also as supporting in a general way the proposition in the text see McCullough *v.* Staver, 119 Pa. St. 432, 13 Atl. 440; Zane *v.* Kennedy, 73 Pa. St. 182; Napier *v.* Darlington, 70 Pa. St. 64; Waters *v.* Waters, 32 Pa. St. 307; Beck *v.* Uhrich, 16 Pa. St. 499; Hawk *v.* Greensweig, 2 Pa. St. 295.

63. Moore *v.* Habel, 3 Kulp (Pa.) 310. See also Connolly *v.* Miller, 95 Pa. St. 513, holding that the court may supply reasonable conditions omitted in the verdict.

64. Hamm *v.* Beaver, 1 Grant (Pa.) 448.

65. Judgment generally see JUDGMENTS.

Judgment in ordinary ejectment suit see *supra*, VIII, E.

Effect of judgment in ordinary ejectment suit see *supra*, VIII, E, 4.

the verdict and judgment have the conclusive effects of a decree.[66] If the verdict is conditional a writ of habere facias possessionem is not of course as in ordinary cases of ejectment but can only be issued by leave of court.[67] And to compel performance of the condition of the verdict a bill in equity is held to be the proper remedy.[68] As the condition is extinguished by the payment to plaintiff of the amount of the judgment upon a conditional verdict, and the judgment for possession expires with the condition, one cannot by advancing a portion of the money and taking an assignment of the judgment obtain possession of the land.[69]

L. Damages.[70] Damages for waste done by defendant may be set off in a proper case.[71]

M. Appeal and Error.[72] On appeal from the action of the court in confirming the sale of property made in pursuance of an order founded on the provisions of the original decree, the power of the court to make such decree cannot be inquired into.[73]

N. Costs.[74] A plaintiff may under the terms of a conditional verdict be entitled to a fieri facias for costs.[75]

EJECTMENT BILL. In law, a bill brought simply for the recovery of real property, together with an account of the rents and profits, without setting out

Former adjudication generally see JUDGMENTS.

Writ of habere facias possessionem generally see *supra*, VIII, F.

66. Winpenny *v.* Winpenny, 92 Pa. St. 440; Treftz *v.* Pitts, 74 Pa. St. 343; Amick *v.* Oyler, 25 Pa. St. 506; Stevens *v.* Church, 8 Phila. (Pa.) 642. See also Bolin *v.* Connelly, 73 Pa. St. 336.

A judgment by confession in ejectment to enforce a land contract to be released on payment of a certain sum on a certain day is conclusive between the parties and a bar to a second action. Dwyer *v.* Wright, 14 Pa. Co. Ct. 406.

In order that the judgment may be conclusive it should be shown that the equitable title was in issue and decided upon. Meyers *v.* Hill, 46 Pa. St. 9.

Where time is of the essence, as in the case of a judgment to be released on payment of a certain sum, if payment is not made by the day fixed the judgment becomes absolute and indefeasible. Beatty *v.* Hamilton, 127 Pa. St. 71, 17 Atl. 755.

One judgment is conclusive only in cases (under Pa. Act, April 21, 1846) "wherein time becomes of the essence in the finding of the jury, or in judgment by confession, by fixing a time for such a payment." Lykens *v.* Tower, 27 Pa. St. 462.

First judgment in equitable ejectment is conclusive where the equitable title was clearly in issue therein. Rosenberg *v.* Mencke, 208 Pa. St. 331, 57 Atl. 716. See Baker *v.* Bailey, 204 Pa. St. 524, 54 Atl. 326.

Where decree is final and includes a person as party he cannot go behind such final judgment and prove matters concerning which he has had his day in court. Fellows *v.* Loomis, 204 Pa. St. 225, 53 Atl. 998.

67. Connolly *v.* Miller, 95 Pa. St. 513; Mawhinney *v.* Shallcross, 2 Pa. Co. Ct. 164. *Compare* Lanning *v.* Davies, 3 Kulp (Pa.) 319.

Upon the expiration of the time specified in a conditional judgment a final judgment establishing the forfeiture of the condition may be entered and execution issued. Allen *v.* Woods, 24 Pa. St. 76. *Compare* Bradley *v.* O'Donnell, 40 Pa. St. 479.

The writ should not issue until the court are satisfied that the verdict has not been complied with. Shaw *v.* Bayard, 4 Pa. St. 257.

68. Riel *v.* Gannon, 161 Pa. St. 289, 29 Atl. 55. See also Treftz *v.* King, 74 Pa. St. 350.

69. Riffle's Appeal, 3 Brewst. (Pa.) 94.

70. **Damages** generally see DAMAGES.

Damages in ordinary ejectment suit see *supra*, IX.

71. As where ejectment is brought to enforce payment of purchase-money and a verdict is rendered for plaintiff, who can make title to one half the premises only, on condition that he repays the purchase-money and compensates the defendant for improvements. Erwin *v.* Myers, 46 Pa. St. 96.

72. **Appeal and error** generally see APPEAL AND ERROR.

Appeal and error in ordinary ejectment suit see *supra*, VIII, G.

73. Heath *v.* Gardner, 10 Wkly. Notes Cas. (Pa.) 495.

74. **Costs** generally see COSTS.

Costs in ordinary ejectment suit see *supra*, VIII, I.

75. Bradley *v.* O'Donnell, 40 Pa. St. 479, so holding where by a conditional verdict it was agreed that on failure to make payment on the time fixed the land should be sold under the direction of the court and the money raised applied to the payment of the amount due and the land was so sold for less than the balance due to plaintiff who still held the legal title.

any distinct and substantive ground of equity jurisdiction.[1] (See, generally, EJECTMENT; EQUITY.)

EJECTUM. That which is thrown up by the sea.[2]

EJIDOS. In Spanish law, a term used to designate lands located within the limits of a city, pueblo, or town, and used in common by the inhabitants for pasture, wood, threshing-ground, etc.[3] (See, generally, COMMON LANDS.)

EJUSDEM. Literally "The like."[4]

EJUSDEM GENERIS. Literally "Of the same kind or species."[5] A well-known maxim of construction.[6] (Ejusdem Generis: As a Rule of Construction — Of Statute, see STATUTES; Of Will, see WILLS.)

EJUS EST INTERPRETARI CUJUS EST CONDERE. A maxim meaning "It belongs to him to interpret (or explain) who enacts; the right of interpreting belong to him who enacts."[7]

EJUS EST NON NOLLE QUI POTEST VELLE. A maxim meaning "He may consent tacitly who may consent expressly."[8]

EJUS EST PERICULUM CUJUS EST DOMINUM AUT COMMODUM. A maxim meaning "He who has the dominion or advantage has the risk."[9]

EJUS NULLA CULPA EST CUI PARERE NECESSE SIT. A maxim meaning "He is not guilty of fault who necessarily obeys; that is, no one incurs fault or blame through the performance of an act which he is under the necessity of performing."[10]

ELASTIC. In its primary meaning, having a power or inherent property of returning to the form from which a substance is bent, drawn, pressed, or twisted.[11] In its secondary meaning, admitting of extension, capable of expanding or con-

1. Crane *v.* Conklin, 1 N. J. Eq. 346, 353, 22 Am. Dec. 519.

2. Bouvier L. Dict. [*citing* 1 Peters Adm. App. 43].

3. Hart *v.* Burnett, 15 Cal. 530, 554 [*citing* Escriche Dict.], where the word is distinguished from "*Solares*" and "*Suertes.*"

4. Ware *v.* Cann, 8 L. J. K. B. 164, 165 [*citing* Coke Litt. 361].

5. *Ex p.* Leland, 1 Nott & M. (S. C.) 460, 462.

6. Com. *v.* Rice, 9 Metc. (Mass.) 253, 258.

Applied in the following cases:

Illinois.— Spalding *v.* People, 172 Ill. 40, 49, 49 N. E. 993.

Massachusetts.— Swift *v.* Union Mut. Mar. Ins. Co., 122 Mass. 573, 575 [*citing* Ellery *v.* New England Ins. Co., 8 Pick. 14; Devaux *v.* J'Anson, 2 Arn. 82, 5 Bing. N. Cas. 519, 3 Jur. 678, 8 L. J. C. P. 284, 7 Scott 507, 35 E. C. L. 280]; Com. *v.* Rice, 9 Metc. 253, 258; Bartlett *v.* Munroe, 21 Pick. (Mass.) 98, 100.

Missouri.— State *v.* Schuchmann, 133 Mo. 111, 121, 33 S. W. 35, 34 S. W. 842 [*citing* Bucher *v.* Com., 103 Pa. St. 528]; State *v.* Broderick, 7 Mo. App. 19, 20.

New Hampshire.— Bills *v.* Putnam, 64 N. H. 554, 561, 15 Atl. 138; Benton *v.* Benton, 63 N. H. 289, 295, 56 Am. Rep. 512; Sumner *v.* Blakslee, 59 N. H. 242, 243, 47 Am. Rep. 196.

New York.— People *v.* White, 64 N. Y. App. Div. 390, 392, 72 N. Y. Suppl. 91 [*citing* Hickey *v.* Taaffe, 99 N. Y. 204, 1 N. E. 685, 52 Am. Rep. 19; Hermance *v.* Ulster County, 71 N. Y. 481].

Pennsylvania.— Golz's Estate, 16 Montg. Co. Rep. 47, 49.

South Carolina.— *Ex p.* Leland, 1 Nott & M. 460, 462.

Tennessee.— Fry *v.* Shipley, 94 Tenn. 252, 259, 29 S. W. 6; Williams *v.* Williams, 10 Yerg. 20, 27 [*cited* in Jarnagin *v.* Conway, 2 Humphr. 50, 52]; Edmondson *v.* Edmondson, 1 Tenn. Ch. 563, 568.

England.— Powell *v.* Kempton Park Racecourse Co., [1897] 2 Q. B. 242, 247, 61 J. P. 548, 66 L. J. Q. B. 601, 77 L. T. Rep. N. S. 2, 46 Wkly. Rep. 8; Ware *v.* Cann, 8 L. J. K. B. 164, 165.

Canada.— Severn *v.* Reg., 2 Can. Supreme Ct. 70, 98, 1 Cartw. Cas. 414; Macfie *v.* Hutchinson, 12 Ont. Pr. 167, 180.

"Contents of a house" construed under this term see 9 Cyc. 70 note 4.

Illustrates the maxim noscuntur a sociis.— "By the application of the maxim *ejusdem generis*, which is only an illustration or specific application of the broader maxim *noscuntur a sociis*, general and specific words which are capable of an analogous meaning being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general." Misch *v.* Russell, 136 Ill. 22, 25, 26 N. E. 528, 12 L. R. A. 125 [*citing* State *v.* Williams, 2 Strobh. (S. C.) 474; Endlich Interp. St. 400].

7. Trayner Leg. Max.

8. Bouvier L. Dict. [*citing* Dig. 50, 17, 3].

9. Black L. Dict.

Applied in Chase *v.* Washburn, 1 Ohio St. 244, 247, 59 Am. Dec. 623; Oliver *v.* Newhouse, 32 U. C. C. P. 90, 94 [*quoting* Story Bailm. (9th ed.) § 47].

10. Trayner Leg. Max.

11. Webster Dict. [*quoted* in Globe-Wernicke Co. *v.* Brown, 121 Fed. 185, 187, where it is said: "This is the common acceptation of the word"].

tracting according to circumstances.[12] (See, generally, TRADE-MARKS AND TRADE-NAMES.)

ELATERIUM. The residue deposited by the juice of the fruit of echallium elaterium, which is a little fruit resembling somewhat the cucumber, with a hollow interior filled with juice.[13]

EL CANON. In Spanish law, the annual charge or rent which is paid in recognition of the *dominium utile* by the person who holds the *dominium utile*.[14]

ELDER. A deacon or member of the governing board of a religious society.[15] (See, generally, RELIGIOUS SOCIETIES.)

ELDER TITLE. That of two titles coming simultaneously into conflict which is of earlier date.[16]

ELDEST.[17] In its primary meaning, oldest, that has the right of primogeniture;[18] oldest; most old, most aged;[19] surpassing in years; having the privileges of primogeniture.[20] In its secondary meaning, the person that has lived the most years;[21] the eldest born of one family.[22] (See, generally, DESCENT AND DISTRIBUTION; WILLS.)

ELDEST MALE LINE. The male line which has existed the greatest number of years.[23]

ELDEST MALE LINEAL DESCENDANT. First male lineal descendant.[24]

ELDEST MAN. The one who has existed for the greatest number of years.[25]

ELDEST PARENT. Eldest in age, or eldest *quâ* parent.[26]

ELDEST SON. First-born son.[27]

ELECT. To choose;[28] to pick out; to select; to select from a number, or to make a choice of. And the term is also used as meaning to prefer;[29] to take by

12. Century Dict. [*quoted* in Globe-Wernicke Co. *v.* Brown, 121 Fed. 185, 187].

Not applicable to bookcases.— In Globe-Wernicke Co. *v.* Brown, 121 Fed. 185, 187, the court said: "Certainly a sectional bookcase or other like article of furniture does not have the capability of spontaneously returning to a former size or shape. In no true sense is such an article elastic. The Century Dictionary and other authorities, indeed, give to the word 'elastic' the secondary meaning of 'admitting of extension,' 'capable of expanding or contracting according to circumstances,' but such use of the word is figurative, the illustrations being 'elastic consciences,' 'elastic principles,' 'elastic spirits,' etc. The most that can be said correctly is that the term 'elastic' as applied to sectional bookcases and similar furniture is somewhat suggestive of one of their characteristics."

13. U. S. *v.* Merck, 66 Fed. 251, 252, 13 C. C. A. 432.

14. Hart *v.* Burnett, 15 Cal. 530, 557 [*citing* Escriche Dict.].

15. People *v.* Peck, 11 Wend. (N. Y.) 604, 610, 27 Am. Dec. 104, distinguishing "elder" from "preacher."

16. Cyclopedic L. Dict.

17. "'Eldest' is an adjective; it describes a quality; it must belong to some substantive." Thellusson *v.* Rendlesham, 7 H. L. Cas. 429, 455, per Bramwell, B.

"The word 'eldest' is certainly capable of more meanings than one, as the term 'elder' is. In Dr. Johnson's Dictionary this word is said to be the comparative of old, changed to eld." Thellusson *v.* Rendlesham, 7 H. L. Cas. 429, 520, per Lord Wensleydale [*quoting* Johnson Dict.].

18. Johnson Dict. [*quoted* in Thellusson *v.* Rendlesham, 7 H. L. Cas. 429, 450, per Byles, J.].

19. Thellusson *v.* Rendlesham, 7 H. L. Cas. 429, 456, per Bramwell, B. But see opinion of Byles, J. (p. 450), where it is said: "In the strict propriety of the English language, the word 'eldest' (though its etymology be the same), is not synonymous with the word 'oldest,' for the word 'oldest' does not necessarily or even primarily import eldest in personal age."

20. Thellusson *v.* Rendlesham, 7 H. L. Cas. 429, 520, per Lord Wensleydale [*quoting* Johnson Dict.].

21. Johnson Dict. [*quoted* in Thellusson *v.* Rendlesham, 7 H. L. Cas. 429, 450, per Byles, J.].

22. Hervey-Bathurst *v.* Stanley, 4 Ch. D. 251, 260, per Jessel, M. R.

23. Thellusson *v.* Rendlesham, 7 H. L. Cas. 429, 456, per Bramwell, B.

24. Thellusson *v.* Rendlesham, 7 H. L. Cas. 429, 450, 474, 486.

25. Thellusson *v.* Rendlesham, 7 H. L. Cas. 429, 456, per Bramwell, B. Lord Wensleydale said (p. 520): "When the word 'elder' or 'eldest' is used alone, or with reference simply to an individual person, the 'eldest' man, for instance it means eldest in years."

26. Thellusson *v.* Rendlesham, 7 H. L. Cas. 429, 456, per Bramwell, B.

27. Meredith *v.* Treffry, 12 Ch. D. 170, 173, 48 L. J. Ch. 337, 27 Wkly. Rep. 406; Driver *v.* Frank, 2 Moore C. P. 519, 8 Taunt. 468, 481, 4 E. C. L. 233.

28. Speed *v.* Crawford, 3 Metc. (Ky.) 207, 210; State *v.* Compson, 34 Oreg. 25, 33, 54 Pac. 349.

29. State *v.* Compson, 34 Oreg. 25, 33, 54 Pac. 349.

preference, etc.[30] Sometimes the word is used in the sense of "appoint."[31] (See, generally, ELECTIONS.)

ELECTA UNA VIA, NON DATUR RECURSUS AD ALTERAM. A maxim meaning "He who has chosen one way cannot have recourse to another."[32]

ELECTED. Chosen by a popular vote;[33] the condition of having been chosen or selected.[34] (See, generally, ELECTIONS.)

ELECTED DOMICILE. A domicile of parties fixed in a contract between them for the purposes of such contract.[35] (See, generally, DOMICILE.)

ELECTIO EST INTERNA LIBERA ET SPONTANEA SEPARATIO UNIUS REI AB ALIA, SINE COMPULSIONE, CONSISTENS IN ANIMO ET VOLUNTATE. A maxim meaning "Election is an internal, free, and spontaneous separation of one thing from another, without compulsion, consisting in intention and will."[36]

ELECTION. The act of choosing;[37] the act of electing or choosing; power of choosing;[38] a choosing or selecting;[39] a choice[40] between different things;[41] free choice; preference;[42] selection;[43] a deliberate act of choice; particularly, a choice of means for accomplishing a given end;[44] the making an act of choice between two or more courses of conduct, and implies that the act was done under such circumstances that the choice is binding;[45] the internal, free, and spontaneous separation of one thing from another, existing in the mind and will;[46] the act of

30. Speed *v.* Crawford, 3 Metc. (Ky.) 207, 210.

31. State *v.* Compson, 34 Oreg. 25, 33, 54 Pac. 349.

Distinguished from "appoint" see *post*, ELECTIONS, I, B.

32. Bouvier L. Dict.

33. State *v.* Irwin, 5 Nev. 111, 121 [*quoted* in State *v.* Torreyson, 21 Nev. 517, 523, 34 Pac. 870].

34. Anderson L. Dict. [*quoted* in Bowler *v.* Eisenhood, 1 S. D. 577, 583, 48 N. W. 136, 12 L. R. A. 705].

35. Woodworth *v.* Bank of America, 19 Johns. (N. Y.) 391, 417, 10 Am. Dec. 239.

36. Black L. Dict. [*citing* Bullock *v.* Burdett, Dyer 281*a*].

37. *Alabama.*— State *v.* Tucker, 54 Ala. 205, 210.

Indiana.— State *v.* Hirsch, 125 Ind. 207, 210, 24 N. E. 1062, 9 L. R. A. 170 [*quoting* Webster Dict.].

Iowa.— Seaman *v.* Baughman, 82 Iowa 216, 220, 47 N. W. 1091, 11 L. R. A. 354 [*quoting* Bouvier L. Dict.].

Nebraska.— State *v.* Babcock, 17 Nebr. 188, 197, 22 N. W. 372 [*quoting* Webster Dict.].

Wisconsin.—Brown *v.* Phillips, 71 Wis. 239, 253, 36 N. W. 242 [*quoting* Imperial Dict., and *citing* Webster Dict.].

38. Worcester Dict. [*quoted* in State *v.* Hirsch, 125 Ind. 207, 210, 24 N. E. 1062, 9 L. R. A. 170].

39. Anderson L. Dict. [*quoted* in Bowler *v.* Eisenhood, 1 S. D. 577, 583, 48 N. W. 136, 12 L. R. A. 705].

40. *Alabama.*— State *v.* Tucker, 54 Ala. 205, 210.

Indiana.— State *v.* Hirsch, 125 Ind. 207, 210, 24 N. E. 1062, 9 L. R. A. 170 [*quoting* Webster Dict.]; State *v.* Meyer, 60 Ind. 288, 290.

Iowa.— Seaman *v.* Baughman, 82 Iowa 216, 220, 47 N. W. 1091, 11 L. R. A. 354 [*quoting* Bouvier L. Dict.].

Nebraska.— State *v.* Babcock, 17 Nebr. 188, 197, 22 N. W. 372 [*quoting* Webster Dict.].

South Dakota.—Bowler *v.* Eisenhood, 1 S. D. 577, 583, 48 N. W. 136, 12 L. R. A. 705 [*quoting* Anderson L. Dict.; Bouvier L. Dict.].

Wisconsin.— Brown *v.* Phillips, 71 Wis. 239, 253, 36 N. W. 242 [*quoting* Imperial Dict., and *citing* Webster Dict.].

Canada.— Reg. *v.* Cowan, 24 U. C. Q. B. 606, 609.

41. Ward *v.* Ward, 134 Ill. 417, 421, 25 N. E. 1012.

"**Election, in law,** is when a man is left to his own free will to take or do one thing or another, which he pleases." Arthur *v.* Nelson, 1 Dem. Surr. (N. Y.) 337, 346 [*citing* Jacob L. Dict.].

"**In its legal sense,** . . . the choice of one of two rights or things, to each one of which the party choosing has an equal right, but both of which he cannot have." Bouvier L. Dict. [*quoted* in Bliss *v.* Geer, 7 Ill. App. 612, 617].

42. Worcester Dict. [*quoted* in State *v.* Hirsch, 125 Ind. 207, 210, 24 N. E. 1062, 9 L. R. A. 170].

43. Worcester Dict. [*quoted* in State *v.* Hirsch, 125 Ind. 207, 210, 24 N. E. 1062, 9 L. R. A. 170]. See also Bowler *v.* Eisenhood, 1 S. D. 577, 583, 48 N. W. 136, 12 L. R. A. 705 [*quoting* Anderson L. Dict.; Bouvier L. Dict.].

44. Century Dict. [*quoted* in State *v.* Hirsch, 125 Ind. 207, 210, 24 N. E. 1062, 9 L. R. A. 170; McKee *v.* Home Sav., etc., Co., 122 Iowa 731, 98 N. W. 609, 610].

45. Usher *v.* Waddingham, 62 Conn. 412, 428, 26 Atl. 538. *Compare* Carter's Appeal, 59 Conn. 576, 587, 22 Atl. 320, where it is said: "Election is the choosing between two rights by a person who derives one of them under an instrument in which a clear intention appears that he should not enjoy both."

46. Bullock *v.* Burdett, Dyer 281*a* [*quoted* in Wells *v.* Robinson, 13 Cal. 133, 144; Kentucky Standard Oil Co. *v.* Hawkins, 74 Fed. 395, 398, 20 C. C. A. 468, 33 L. R. A. 739].

selecting one or more from others;[47] a selection out of the number of those choosing;[48] the selection of one man from amongst more, to discharge the duties in a state, corporation, or society;[49] the act of choosing a person to fill an office or employment, by any manifestation of preference; as by ballot, uplifted hands, or *viva voce*;[50] a public vote upon a proposition submitted; a poll for the decision by vote of any public matter or question.[51] (Election: As Changing Character of Property, see CONVERSION. Between — Counts, see INDICTMENTS AND INFORMATIONS; PLEADING; Defenses, see PLEADING; Testamentary Provisions, see WILLS. By Beneficiary, see WILLS. By Surviving Spouse, see DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS; WILLS. Of Officer, see ELECTIONS. Of Remedy, see ELECTION OF REMEDIES. To Declare Debt Due, see MORTGAGES. To Rescind Contract, see CONTRACTS. See also ELECT; and, generally, ELECTIONS.)

ELECTION DAY. See ELECTIONS; HOLIDAYS.

ELECTION DISTRICT. See ELECTIONS.

ELECTIONES FIANT RITE ET LIBERE SINE INTERRUPTIONE ALIQUA. A maxim meaning "Elections should be made in due form, and freely, without any interruption."[52]

47. Bouvier L. Dict. [*quoted* in Seaman *v.* Baughman, 82 Iowa 216, 220, 47 N. W. 1091, 11 L. R. A. 354]; Webster Dict. [*quoted* in State *v.* Hirsch, 125 Ind. 207, 210, 24 N. E. 1062, 9 L. R. A. 170; State *v.* Babcock, 17 Nebr. 188, 197, 22 N. W. 372]; Brown *v.* Phillips, 71 Wis. 239, 253, 36 N. W. 242 [*quoting* Imperial Dict., and *citing* Webster Dict.].

48. State *v.* Meyer, 60 Ind. 288, 290.

49. Bouvier L. Dict. [*quoted* in Bowler *v.* Eisenhood, 1 S. D. 577, 583, 48 N. W. 136, 12 L. R. A. 705].

As applied to corporations, the term is used to signify the choice of officers by the directors. Wickersham *v.* Brittan, 93 Cal. 34, 38, 28 Pac. 792, 29 Pac. 51, 15 L. R. A. 106.

50. Webster Dict. [*quoted* in State *v.* Hirsch, 125 Ind. 207, 210, 24 N. E. 1062, 9 L. R. A. 170; Sneed *v.* Bullock, 80 N. C. 132, 136]. See also Brown *v.* Phillips, 71 Wis. 239, 253, 36 N. W. 242 [*quoting* Imperial Dict., and *citing* Webster Dict.].

51. "As to hold an election on a new Constitution, or on a measure referred by the Legislature to the people." Century Dict. [*quoted* in McKee *v.* Home Sav., etc., Co., 122 Iowa 731, 98 N. W. 609, 610].

52. Black L. Dict. [*citing* 2 Inst. 169].

ELECTION OF REMEDIES

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CROSS-REFERENCES

For Matters Relating to:

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To Abate Nuisance, see NUISANCES.

To Enforce Stock Subscription, see CORPORATIONS.

I. DEFINITION.

Election of remedies has been defined to be the right to choose, or the act of choosing between different actions or remedies, where plaintiff has suffered one species of wrong from the act complained of.[1] And broadly speaking, an election of remedies is the choice by a party to an action of one of two or more coexisting remedial rights,[2] where several such rights arise out of the same facts;[3] but

1. Anderson L. Dict.

Other definitions are: "The right of selecting one of several forms of action for the redress of injury or enforcement of a right." English L. Dict.

"The choice between two or more coexisting and inconsistent remedies for the same wrong." Cyclopedic L. Dict. [*citing* 2 Story Eq. Jur. § 1078].

"The selection of one of several forms of action allowed by law." Bouvier L. Dict.

"The selection of several remedies or forms of action allowed by law." Rapalje & L. L. Dict.

2. See also *infra*, III.

3. Tidd Pr. (2d Am. ed. 1807) 9, where it is said: "The plaintiff has in some cases his election, to bring one species of action or another for the same cause; as in actions upon contracts, he may bring assumpsit or debt upon a simple contract, or debt or covenant upon a specialty, for the non-payment

the term has been generally limited to a choice by a party between inconsistent remedial rights.[4]

II. RIGHT OF ELECTION.

A. Between Different Legal Remedial Rights — 1. In General. Where different remedial rights, all legal in their nature, arise out of the same facts, choice may be made of one of these rights;[5] and this is true whether the rights all arise from contract,[6] or all from tort,[7] or part from contract and part from tort.[8]

2. Arising From Contract — a. Covenant or Debt or Assumpsit.[9] Where covenants are secured by a penalty, the obligee may sue in debt for the penalty, or bring an action on the covenants;[10] and generally, where a right to money compensation accrues by reason of a breach of covenant, such compensation may be obtained either by action of covenant or by action of assumpsit.[11]

b. Action For Money Had and Received or For Damages For Breach of Executory Contract.[12] Where money is advanced upon an executory contract, which the contracting party fails to perform, it is in the election of the other party either to sue upon the agreement and recover damages for a breach, or to treat the contract as rescinded and recover back his money as paid upon a consideration which has failed.[13]

c. Assumpsit or Account.[14] Where there is a promise to account, plaintiff has his election to bring assumpsit or account.[15]

of money; Or, if the breach of a simple contract consist in mis-feazance, he may declare in assumpsit, or in case on the special circumstances; as for deceit on the sale of cattle or goods, or immoderate use of them, when lent or let to hire; and against attornies, carriers, wharfingers, innkeepers, &c. And when cattle or goods are wrongfully taken and detained, he may bring trespass, *vi et armis*, replevin, trover, or detinue; or, if they are converted into money, he may waive the tort, and bring assumpsit for money had and received. But the plaintiff, having once made his election, cannot afterwards bring another species of action for the same cause, either whilst the former is depending, or after it has been determined."

4. *Illinois.*— Stier *v.* Harms, 154 Ill. 476, 40 N. E. 296.

Massachusetts.— Snow *v.* Alley, 156 Mass. 193, 195, 30 N. E. 691 [*citing* Metcalf *v.* Williams, 144 Mass. 452, 11 N. E. 700].

Michigan.—Thompson *v.* Howard, 31 Mich. 309.

Missouri.— Hill *v.* Combs, 92 Mo. App. 242.

Nebraska.— State *v.* Bank of Commerce, 61 Nebr. 22, 84 N. W. 406.

New York.— Bowen *v.* Mandeville, 95 N. Y. 237. See also Mills *v.* Parkhurst, 126 N. Y. 89, 26 N. E. 1041, 13 L. R. A. 472.

Pennsylvania.— Patterson *v.* Swan, 9 Serg. & R. 16.

See 18 Cent. Dig. tit. "Election of Remedies," § 1. See also *infra*, III.

5. See *supra*, I.

6. See *infra*, II, A, 2.

7. See *infra*, II, A, 3.

8. As where considering a single liability in a twofold aspect the cause of action may be treated as arising either from tort or from contract. See *infra*, II, A, 4.

9. **Assumpsit** generally see ASSUMPSIT, ACTION OF.

Covenant generally see COVENANT, ACTION OF.

Debt generally see DEBT, ACTION OF.

10. McLaughlin *v.* Hutchins, 3 Ark. 207; Perkins *v.* Lyman, 11 Mass. 76, 6 Am. Dec. 158; Haggart *v.* Morgan, 5 N. Y. 422, 55 Am. Dec. 350; New Holland Turnpike Co. *v.* Lancaster County, 71 Pa. St. 442; Dick *v.* Gaskill, 2 Whart. (Pa.) 184.

11. Byrd *v.* Knighton, 7 Mo. 443; Douglass *v.* Waer, Anth. N. P. (N. Y.) 179 (where it was held that a person who has been compelled to pay money in consequence of a breach of covenant by another may recover it back by action of covenant or assumpsit); Weaver *v.* Bentley, 1 Cai. (N. Y.) 47 (holding that where defendant fails to do an act which he has covenanted to perform, and for the performance of which he has received a consideration from plaintiff, plaintiff may bring covenant for the breach or assumpsit to reclaim the consideration).

12. **Breach of contract,** action for generally, see CONTRACTS.

Money had and received see MONEY RECEIVED.

13. *Connecticut.*—Lyon *v.* Annable, 4 Conn. 350.

Massachusetts.— Brown *v.* Harris, 2 Gray 359; Hill *v.* Rewee, 11 Metc. 268.

New York.— Wheeler *v.* Board, 12 Johns. 363.

Pennsylvania.— Smethurst *v.* Woolston, 5 Watts & S. 106.

United States.— Reusens *v.* Mexican Nat. Constr. Co., 22 Fed. 522, 23 Blatchf. 19.

See 18 Cent. Dig. tit. "Election of Remedies," § 2.

14. **Assumpsit** generally see ASSUMPSIT, ACTION OF.

Book-account generally see ACCOUNTS AND ACCOUNTING.

15. Tousey *v.* Preston, 1 Conn. 175; Wetmore *v.* Woodbridge, Kirby (Conn.) 164.

3. Arising From Tort — a. Replevin, Detinue, or Trover.[16] Where chattels are wrongfully taken or detained either an action to recover the chattels or an action for conversion may be brought.[17]

b. Trespass or Case.[18] In jurisdictions where the common-law forms of actions are still in existence, either trespass or case may be brought in some instances.[19]

4. Arising Part From Contract and Part From Tort — a. In General. The principle governing this large and important class of cases has been accurately formulated by the late Professor Pomeroy as follows: "From certain acts or omissions of a party creating a liability to make compensation in damages, the law implies a promise to pay such compensation. Whenever this is so, and the acts or omissions are at the same time tortious, the twofold aspect of the single liability at once follows, and the injured party may treat it as arising from the tort, and enforce it by an action setting forth the tortious acts or defaults; or may treat it as arising from an implied contract and enforce it by an action setting forth the facts from which the promise is inferred by law."[20]

b. Breach of Contract Which Amounts to a Tort. Where a breach of contract amounts to a tort, a party may either sue for breach of the contract or sue for the tort.[21]

c. Breach of Duty Imposed by Law. It is a general rule that where there is a breach of duty which is imposed upon one by law plaintiff may at his election sue and declare upon the expressed or implied contract, or for the tort.[22] It is

16. **Detinue** generally see DETINUE.
Replevin generally see REPLEVIN.
Trover generally see TROVER AND CONVERSION.

17. Bruner *v.* Dyball, 42 Ill. 34; Moore *v.* Baker, 4 Ind. App. 115, 30 N. E. 629, 51 Am. St. Rep. 203.

18. **Case** generally see CASE, ACTION ON.
Trespass generally see TRESPASS.

19. Waterman *v.* Hall, 17 Vt. 128, 42 Am. Dec. 484, holding that where the injury consisted in driving plaintiff's beast upon a fence whereby its death was caused that either trespass or case would lie.

20. Pomeroy Rem. & Rem. Rights, §§ 568, 801. See also Cooper *v.* Cooper, 147 Mass. 370, 373, 17 N. E. 892, 9 Am. St. Rep. 721, where the court says: "The same act or transaction may constitute a cause of action both in contract and in tort, and a party may have an election to pursue either remedy. In that sense he may be said to waive the tort and sue in contract. But a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them, upon which assumpsit can be maintained." Butts *v.* Collins, 13 Wend. (N. Y.) 139, 154, it is declared that in a variety of cases plaintiff may waive the tort and sue in contract and *vice versa*; he has an election of action.

21. Sheldon *v.* The Uncle Sam, 18 Cal. 526, 534, 79 Am. Dec. 193, where Cope, J., said: "The cases in which this principle has been applied are very numerous, and the subject is . . . familiar to the profession." In Whittenton Mfg. Co. *v.* Memphis, etc., River Packet Co., 21 Fed. 896, it is held that tort is the natural and habitual foundation of the action for breach of the ordinary contract of carriage, and the declaration will be so construed, unless the facts of the case clearly show that plaintiff has elected to sue on the contract.

A mere breach of contract cannot be sued on as a tort, but for the tortious acts, independent of the contract, action lies in tort, though one of the consequences is a breach of the contract, and election lies in such cases. Stock *v.* Boston, 149 Mass. 410, 21 N. E. 871, 14 Am. St. Rep. 430.

22. Ansell *v.* Waterhouse, 2 Chit. 1, 3, 6 M. & S. 385, 18 Rev. Rep. 413, 18 E. C. L. 469. See also the following cases:

Arkansas.—St. Louis, etc., R. Co. *v.* Heath, 41 Ark. 476.

Georgia.— Caldwell *v.* Richmond, etc., R. Co., 89 Ga. 550, 15 S. E. 678.

Illinois.— Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 227, 46 Am. Rep. 688, where it is said that "it is agreed by all the authorities the gravamen of the charge in an action on the case is the tort or wrong of the defendant, notwithstanding such tort or wrong may be also a breach of an express or implied contract, whereas in an action *ex contractu* the gist of the action is the breach of the contract, without regard to the tortious character of the act of the defendant. . . . It is a familiar doctrine that case will lie for a mere nonfeasance against persons exercising certain public trades or employments, where no contractual relation exists between them and the plaintiff."

Maryland.— Baltimore, etc., R. Co. *v.* Pumphrey, 59 Md. 390.

Mississippi.— Waters *v.* Mobile, etc., R. Co., 74 Miss. 534, 21 So. 240.

Nebraska.— Hart *v.* Barnes, 24 Nebr. 782, 40 N. W. 322.

New York.— Butts *v.* Collins, 13 Wend. 139, where it is declared that not only in cases of implied but also in cases of express

decided, however, that where there is no legal duty except that arising from the contract there can be no election between an action on contract and one on tort, since in such case there is no cause of action in tort.[23]

d. Wrongful Taking, Detention, or Conversion of Goods or Things in Action. The rule is firmly established that when goods or things in action have been wrongfully taken or detained or converted and have been sold or disposed of by the wrong-doer, the owner may sue him in tort for the taking and carrying away or the conversion, or he may waive the tort and sue on the implied promise to refund the price or value as money had and received to plaintiff's use;[24] or he may pursue and recover the property itself from the transferee of the wrong-doer.[25] But when the chattels or things in action have been simply taken or converted, but not sold or disposed of by the wrong-doer, a conflict of opinion exists as to the owner's right of election to bring an action based upon the tort (trespass, replevin, detinue, or trover) or to waive the tort, treat the transaction as a sale, and bring an action based upon the implied promise to pay the value of the goods.[26]

contracts if they create a duty case will lie, and where defendant has been guilty of a tortious neglect of duty plaintiff may waive the tort and rely upon the circumstances as forming a breach of promise implied from some consideration of reward. And see Church *v.* Mumford, 11 Johns. (N. Y.) 479, 480.

North Carolina.— Fisher *v.* Greensboro Water Supply Co., 128 N. C. 375, 38 S. E. 912.

Ohio.— Pennsylvania R. Co. *v.* People, 31 Ohio St. 537.

Pennsylvania.—Pittsburgh *v.* Grier, 22 Pa. St. 54, 60 Am. Dec. 65; Hoehle *v.* Allegheny Heating Co., 5 Pa. Super. Ct. 21.

South Carolina.— Tindall *v.* McCarthy, 44 S. C. 487, 22 S. E. 734.

United States.— Emigh *v.* Pittsburgh, etc., R. Co., 8 Fed. Cas. No. 4,449, 4 Biss. 114, 115, where it is said: "The subjects proper for action on the case are of two distinct classes. First, where there is a tort committed, without force, on the person, character, or property of the plaintiff, entirely unconnected with any contract. Secondly, when there is a contract, either express or implied, from which a common law duty results, an action on the case lies for a breach of that duty; in which case the contract is laid as mere inducement, and the tort arising from the breach of duty as the gravamen of the action."

England.— Leslie *v.* Wilson, 3 B. & B. 171, 6 Moore C. P. 415, 23 Rev. Rep. 605, 7 E. C. L. 667.

Actions ex delicto for negligence see 1 Cyc. 665.

Form of action against carriers see 6 Cyc. 513.

Form of action in bailments see 5 Cyc. 213, 220.

23. Parrill *v.* Cleveland, etc., R. Co., 23 Ind. App. 638, 55 N. E. 1026.

24. Pomeroy Code Rem. (3d ed.) § 569. See also the following cases:

Alabama.— Upchurch *v.* Norsworthy, 15 Ala. 705.

Arkansas.—Chamblee *v.* McKenzie, 31 Ark. 155; Bowman *v.* Browning, 17 Ark. 599.

California.— Lataillade *v.* Orena, 91 Cal. 565, 27 Pac. 924, 25 Am. St. Rep. 219 (holding that a sale by a guardian of the personal property of his ward and conversion of the purchase-money to his own use the tort may be waived and assumpsit maintained for the purchase-money); Fratt *v.* Clark, 12 Cal. 89.

Georgia.— Cragg *v.* Arendale, 113 Ga. 181, 38 S. E. 399.

Illinois.— Staat *v.* Evans, 35 Ill. 455; Morrison *v.* Rogers, 3 Ill. 317.

Kansas.— Smith *v.* McCarthy, 39 Kan. 308, 18 Pac. 204.

Michigan.— Tolan *v.* Hodgeboom, 38 Mich. 624; Watson *v.* Stever, 25 Mich. 386.

Minnesota.— Brady *v.* Brennan, 25 Minn. 210.

New York.— Small *v.* Robinson, 9 Hun 418; Tryon *v.* Baker, 7 Lans. 511; Harpending *v.* Shoemaker, 37 Barb. 270; Berly *v.* Taylor, 5 Hill 577 (see reporter's note 584); Talbot *v.* Rochester Bank, 1 Hill 295; Putnam *v.* Wise, 1 Hill 234, 37 Am. Dec. 309 (see reporter's note 240).

North Carolina.— Brittain *v.* Payne, 118 N. C. 989, 24 S. E. 711; Timber, etc., Co. *v.* Brooks, 109 N. C. 698, 14 S. E. 315.

Virginia.—Sangster *v.* Com., 17 Gratt. 124.

See 18 Cent. Dig. tit. "Election of Remedies," § 2.

25. Jones *v.* Lincoln First Nat. Bank, (Nebr. 1902) 90 N. W. 912; Matter of Pierson, 19 N. Y. App. Div. 478, 46 N. Y. Suppl. 557; Bryan *v.* Robert, 1 Strobh. Eq. (S. C.) 334; Baker *v.* Wasson, 59 Tex. 140; Rodrigues *v.* Trevino, 54 Tex. 198.

26. The weight of authority seems to favor the right of election, at least so where the wrong-doer has had a beneficial use of the property.

California.— Lehmann *v.* Schmidt, 87 Cal. 15, 25 Pac. 161; Roberts *v.* Evans, 43 Cal. 380.

Illinois.— Shober, etc., Lithographing Co. *v.* Schedler, 63 Ill. App. 48, 49 [*citing* Elgin *v.* Joslyn, 136 Ill. 525, 26 N. E. 1090; Toledo, etc., R. Co. *v.* Chew, 67 Ill. 378; Farson *v.* Hutchins, 62 Ill. App. 439], where it is said: "It seems to be settled law in this State that, although the act of a party in obtain-

e. Liability Connected With a Claim to Land or Arising From Its Use. A choice of the same character is sometimes possible where the liability is connected with a claim to land or arises from its use.[27]

f. Sales Upon Credit Induced by Fraudulent Representations. A fraudulent purchase of goods on credit may be repudiated by the vendor, who may elect between assumpsit and tort as to the form of the action, or he may sue simply as for goods sold and delivered; and the vendor is not required to wait until the credit has expired, but may sue immediately.[28]

ing the goods of another and converting them into money, or in applying them to his own use, may be tortious, the owner may waive the tort and charge the wrong-doer in assumpsit on the common counts as for money had and received, or for goods sold and delivered."

Indiana.— Jones *v.* Gregg, 17 Ind. 84.

Massachusetts.— Brown *v.* Magorty, 156 Mass. 209, 30 N. E. 1021, holding that for breach of contract in converting personal property which is the subject thereof, election may be had between tort or contract.

Michigan.— Aldine Mfg. Co. *v.* Barnard, 84 Mich. 632, 48 N. W. 280, holding that where personal property is obtained under contract and upon breach thereof its surrender is refused on demand, this is a conversion for which tort may be waived and assumpsit brought. See Loomis *v.* O'Neal, 73 Mich. 582, 41 N. W. 701; McLaughlin *v.* Sulley, 46 Mich. 219, 6 N. W. 256; Coe *v.* Wager, 42 Mich. 49, 3 N. W. 248; Fiquet *v.* Allison, 12 Mich. 328, 86 Am. Dec. 54, holding that a tenant in common may maintain assumpsit against his cotenant for his share of the crops. Such crops are divisible, and the share of each easily ascertained, and the refusal to recognize the right of the cotenant amounts to a conversion. The tort may be waived and assumpsit brought.

Missouri.— Gordon *v.* Bruner, 49 Mo. 570; Floyd *v.* Wiley, 1 Mo. 430.

New Hampshire.— Hill *v.* Davis, 3 N. H. 384.

New York.— Terry *v.* Munger, 121 N. Y. 161, 24 N. E. 272, 18 Am. St. Rep. 803, 8 L. R. A. 216 [*affirming* 49 Hun 560, 2 N. Y. Suppl. 348]; McGoldrick *v.* Willits, 52 N. Y. 612 (especially where the party who appropriated the property received the benefit); Abbott *v.* Blossom, 66 Barb. 353 (especially where defendant has absolutely used the property for his own benefit changing its condition and character); Chambers *v.* Lewis, 2 Hilt. 591. And *compare* Tryon *v.* Baker, 7 Lans. 511.

North Carolina.— Logan *v.* Wallis, 76 N. C. 416.

Ohio.— Baird *v.* Howard, 51 Ohio St. 57, 36 N. E. 732, 46 Am. St. Rep. 550, 22 L. R. A. 846, holding that where one obtains possession wrongfully under a contract and converts it tort or contract lies.

Tennessee.— Alsbrook *v.* Hathaway, 3 Sneed 454, 456, where the court says: "If one may sue in assumpsit for goods delivered and converted, and recover the value, and for goods wrongfully taken and sold for money, we can see no good reason why the value of goods tortiously taken and converted, but not sold, may not be recovered in the same form of action."

Texas.— Pridgin *v.* Strickland, 8 Tex. 427, 58 Am. Dec. 124.

Wisconsin.— Kalckhoff *v.* Zœhrlaut, 40 Wis. 427.

United States.— Phelps *v.* Church of Our Lady Help, 99 Fed. 693, 40 C. C. A. 72, especially where the property has been applied to the beneficial use of the wrong-doer.

Against the right of election, however, see the following cases:

Alabama.— Fuller *v.* Duren, 36 Ala. 73, 76 Am. Dec. 318; Crow *v.* Boyd, 17 Ala. 51.

Arkansas.— Chamblee *v.* McKenzie, 31 Ark. 155; Bowman *v.* Browning, 17 Ark. 599.

Connecticut.— Tucker *v.* Jewett, 32 Conn. 563.

Georgia.— Barlow *v.* Stalworth, 27 Ga. 517.

Illinois.— Morrison *v.* Rogers, 3 Ill. 317.

Iowa.— Moses *v.* Arnold, 43 Iowa 187, 22 Am. Rep. 239.

Massachusetts.— Berkshire Glass Co. *v.* Wolcott, 2 Allen 227, 79 Am. Dec. 787; Jones *v.* Hoar, 5 Pick. 285.

Michigan.— Tolan *v.* Hodgeboom, 38 Mich. 624 (holding that assumpsit does not lie for the value of goods taken and used but not disposed of by defendant for money or money's worth; but the owner can bring trespass for the taking or trover for the goods); Watson *v.* Stever, 25 Mich. 386.

New Hampshire.—Smith *v.* Smith, 43 N. H. 536; Mann *v.* Locke, 11 N. H. 246.

Pennsylvania.— Willet *v.* Willet, 3 Watts 277.

Vermont.— Winchell *v.* Noyes, 23 Vt. 303.

27. *Maryland.*— Thompson *v.* Clemens, 96 Md. 196, 53 Atl. 919, 60 L. R. A. 580.

Massachusetts.— Hunt *v.* Boston, 183 Mass. 303, 67 N. E. 244.

New York.— Trull *v.* Granger, 8 N. Y. 115.

Virginia.— Shanks *v.* Edmondson, 28 Gratt. 804.

Wisconsin.— Norden *v.* Jones, 33 Wis. 600, 14 Am. Rep. 782.

28. Roth *v.* Palmer, 27 Barb. (N. Y.) 652. See also Heilbronn *v.* Herzog, 165 N. Y. 98, 58 N. E. 759 [*reversing* 33 N. Y. App. Div. 311, 53 N. Y. Suppl. 841] (holding that in such case plaintiff without waiting for the expiration of credit could either disaffirm the sale, and proceed in replevin or waive the tort and proceed in assumpsit for the purchase-price); Weigand *v.* Sichel, 4 Abb. Dec. (N. Y.) 592, 3 Keyes (N. Y.) 120, 33 How. Pr. (N. Y.) 174; Kayser *v.* Sichel, 34 Barb. (N. Y.) 84. In

B. Between Legal and Equitable Remedial Rights.[29] Election between different remedial rights may also be made, although one of these rights is legal in its nature and the other equitable.[30]

III. NECESSITY OF ELECTION.

In order that election must be made the party must have at his command different coexisting[31] remedial rights,[32] which are inconsistent,[33] and not analogous, consistent, and concurrent.[34]

IV. WHAT CONSTITUTES INCONSISTENCY BETWEEN ALTERNATIVE REMEDIAL RIGHTS.[35]

A. Between Remedial Rights All of Which Are Legal. All actions which proceed upon the theory that the title to property remains in plaintiff are

Galloway *v.* Holmes, 1 Dougl. (Mich.) 330, it is held that if goods be fraudulently obtained on credit the vendor cannot before the credit has expired maintain assumpsit. In Allen *v.* Ford, 19 Pick. (Mass.) 217, the goods were also sold on credit and the court followed an English decision holding that assumpsit could not be maintained, before the expiration of the credit, although another element entered into the decision. In Ascutney Bank *v.* Ormsby, 28 Vt. 721, a deed was fraudulently obtained, the purchase-money being unpaid, and it was held that the tort might be waived and an action brought on the contract. But *compare* Hollins *v.* Fowler, L. R. 7 H. L. 757, 44 L. J. Q. B. 169, 33 L. T. Rep. N. S. 73; Ferguson *v.* Carrington, 9 B. & C. 59, 17 E. C. L. 36, 3 C. & P. 457, 14 E. C. L. 661, 7 L. J. K. B. O. S. 139; Read *v.* Hutchinson, 3 Campb. 352; De Symons *v.* Minchwich, 1 Esp. 430; Hardman *v.* Booth, 1 H. & C. 803, 9 Jur. N. S. 81, 32 L. J. Exch. 105, 7 L. T. Rep. N. S. 638, 11 Wkly. Rep. 239. And see, generally, SALES.

29. Election between actions at law and suits in equity see *infra*, VIII.

30. As in cases where a party has the equitable right to obtain the specific performance of a contract or the legal right to secure damages for the breach. Marston *v.* Humphrey, 24 Me. 513; Slaughter *v.* La Compagnie Francaises, etc., 119 Fed. 588. So where a party has been induced to enter into a contract by fraud, he may either exercise his legal right to damages for the fraud or his equitable right to a rescission of the contract. Wheeler *v.* Dunn, 13 Colo. 428, 22 Pac. 827; Sanger *v.* Wood, 3 Johns. Ch. (N. Y.) 416.

31. Mark *v.* Schumann Piano Co., 105 Ill. App. 490.

32. *Idaho.*— Elliott *v.* Collins, 6 Ida. 266, 55 Pac. 301.

Illinois.— Mark *v.* Schumann Piano Co., 105 Ill. App. 490.

Indiana.— Parrill *v.* Cleveland, etc., R. Co., 23 Ind. App. 638, 55 N. E. 1026.

Michigan.— Sullivan *v.* Ross, 113 Mich. 311, 71 N. W. 634, 76 N. W. 309.

Nebraska.— Omaha *v.* Redick, 61 Nebr. 163, 85 N. W. 46; State *v.* Bank of Commerce, 61 Nebr. 22, 84 N. W. 406.

United States.— Thielman *v.* Reynolds, 23 Fed. Cas. No. 13,883.

See 18 Cent. Dig. tit. "Election of Remedies," § 4; and cases cited *supra*, note 4.

33. *Alabama.*— Williams *v.* Jones, 77 Ala. 294.

Illinois.—Ridgely Nat. Bank *v.* Patton, 109 Ill. 479.

Kentucky.— Thomas *v.* Maysville Gas Co., 108 Ky. 224, 56 S. W. 153, 21 Ky. L. Rep. 1690, 53 L. R. A. 147; Arthur *v.* Campbell, 13 Ky. L. Rep. 734; Jones *v.* Bryant, 10 Ky. L. Rep. 545.

Nebraska.— Clark *v.* Hall, 54 Nebr. 479, 74 N. W. 856.

New York.— *In re* Garver, 176 N. Y. 386, 68 N. E. 667; Crossman *v.* Universal Rubber Co., 127 N. Y. 34, 27 N. E. 400, 13 L. R. A. 91; Mills *v.* Parkhurst, 126 N. Y. 89, 26 N. E. 1041, 13 L. R. A. 472; Mason *v.* Mason, 4 Sandf. Ch. 623.

North Carolina.— Silvey *v.* Axley, 118 N. C. 959, 23 S. E. 933.

Ohio.— Keszler *v.* Cincinnati, 3 Ohio Cir. Ct. 223, 2 Ohio Cir. Dec. 127.

South Carolina.— Freeman *v.* Bailey, 50 S. C. 241, 27 S. E. 686.

Vermont.— White *v.* White, 68 Vt. 161, 34 Atl. 425.

Wisconsin.— Paetz *v.* Stoppleman, 75 Wis. 510, 44 N. W. 834.

See 18 Cent. Dig. tit. "Election of Remedies," § 1 *et seq.*; and cases cited *supra*, note 4.

34. Stier *v.* Harms, 154 Ill. 476, 40 N. E. 296; Bowen *v.* Mandeville, 95 N. Y. 237 (holding that a party is entitled to prosecute all the concurrent and consistent remedies that he may legally have, and the fact that one induced to purchase a bond by fraud had previously recovered two judgments against defendant for instalments of interest falling due on the bond, in actions on the guaranty of payment contained in the assignment of the bond, does not preclude him from recovering damages for the fraud, as the remedies are consistent and concurrent; both proceeding on the theory of an affirmance of the contract); Patterson *v.* Swan, 9 Serg. & R. (Pa.) 16. See also Mills *v.* Parkhurst, 126 N. Y. 89, 26 N. E. 1041, 13 L. R. A. 472.

35. Effect of election see *infra*, VII.

naturally inconsistent with those which proceed upon the theory that title has passed to defendant.[36] But there is no inconsistency between different legal remedial rights, all of which are based upon claim of title to property in plaintiff[37] or all of which are based upon the affirmance of title in defendant.[38]

B. Between Legal and Equitable Remedial Rights — 1. Where Title to Property Is Involved. Where title to property is involved the same principle is to be applied in deciding the question of inconsistency between legal and equitable remedial rights, which is applied when the remedial rights are all legal in their nature.[39]

2. Assignment For Benefit of Creditors.[40] An attempt to collect a claim against an assignee for creditors by proceeding against the funds is not inconsistent with an action to enforce the personal liability of the assignee,[41] or assignor;[42] and the commencement of an action to set aside an assignment for the benefit of creditors on the ground of fraud is not inconsistent with a creditor's right to share in the assigned estate.[43]

Necessity of election see *supra*, III.
Right of election see *supra*, II.

36. *Illinois.*— Ermeling *v.* Gibson Canning Co., 105 Ill. App. 196, holding that one who brings an action of attachment against a party accused of fraud in purchasing goods, affirms the sale to him, and cannot proceed against him for the tort.

Louisiana.— Lowenstein *v.* Glass, 48 La. Ann. 1422, 20 So. 890.

New York.— Conrow *v.* Little, 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693; Taussig *v.* Hart, 49 N. Y. 301 (holding that where a stockbroker transferred stock of a customer, in his hands for sale, to himself without authority, and sold it at an advance, the customer could not charge the broker either as purchaser or as guilty of conversion, and at the same time treat the stock as sold, and ask for an accounting); Morris *v.* Rexford, 18 N. Y. 552.

Texas.— McWilliams *v.* Thomas, (Civ. App. 1903) 74 S. W. 596.

Wisconsin.— Carroll *v.* Fethers, 102 Wis. 436, 78 N. W. 604.

United States.— Duffy *v.* Neale, 7 Fed. Cas. No. 4,119, Taney 271.

See 18 Cent. Dig. tit. "Election of Remedies," §§ 3, 17; and cases cited *supra*, note 28.

Rule that a vendor of goods reserving title until price is paid does not by bringing assumpsit for the price elect his remedy so as to bar replevin of the goods (Canadian Typograph Co. *v.* Macgurn, 119 Mich. 533, 78 N. W. 542) is not antagonistic to the rule stated in the text. The case is controlled by the express terms of the contract.

37. Simons *v.* Fagan, 62 Nebr. 287, 87 N. W. 21 (holding that a suit brought for the malicious attachment of plaintiff's property does not constitute an election of remedies so as to preclude plaintiff from subsequently bringing action on the attachment bond); Crockett *v.* Miller, 112 Fed. 729, 50 C. C. A. 447 (holding that an action for malicious trespass in seizing plaintiff's goods under an execution against another is not inconsistent with a replevin suit to recover such goods).

38. Swartz *v.* Lawrence, 12 Phila. (Pa.) 181, holding that plaintiff may sue out an attachment, under the act of Pennsylvania of March 17, 1869, authorizing attachment for fraud, although he has already sued in assumpsit for the same demand. The two remedies are not inconsistent. See Adam Roth Grocery Co. *v.* Lewis, 69 Mo. App. 463.

39. Salyers *v.* Smith, 67 Ark. 526, 55 S. W. 936 (holding that where the consideration for a deed fails because of the grantee's refusal to support the grantor, the latter must either sue at law for the amount of such support as it becomes due, or treat the deed as void, and sue in equity to cancel it); Bracken *v.* Atlantic Trust Co., 167 N. Y. 510, 60 N. E. 772, 82 Am. St. Rep. 731; Campbell Printing Press, etc., Co. *v.* Walker, 43 Hun (N. Y.) 449 (holding that one who has prevailed in a replevin suit brought to recover the possession of property sold by him under a conditional sale cannot maintain a proceeding to foreclose a lien which the buyer's assignee for the benefit of creditors may have on the property; that this would be inconsistent with the replevin suit). See also Campbell *v.* Kauffman Milling Co., 42 Fla. 328, 29 So. 435.

40. Assignment for benefit of creditors generally see Assignments For Benefit of Creditors.

41. Smith *v.* Williams, 178 Ill. 420, 53 N. E. 358.

42. Eureka Dist. Tp. *v.* Farmers' Bank, 88 Iowa 194, 55 N. W. 342.

43. *In re* Garver, 176 N. Y. 386, 68 N. E. 667 (holding that the commencement of an action by a judgment creditor to set aside an assignment for the benefit of creditors on the ground of fraud does not constitute an election by him to take in hostility to the assignment within the doctrine of election of remedies; and although he is successful as to a portion of the property transferred to the assignee, if the judgment results in no benefit to him he may take under the assignment notwithstanding his attack upon it, and the judgment constitutes no bar to such relief); Mills *v.* Parkhurst, 126 N. Y. 89, 26 N. E. 1041, 13 L. R. A. 472.

3. Mortgages.[44] There is no inconsistency between the legal and equitable remedial rights possessed by a mortgagee in case of breach, and he may exercise them all at the same time.[45]

4. Actions on Contract and For Reformation of Contract.[46] Where a mistake has been made in a contract of such a nature and under such circumstances as to give rise to the equitable right to have the contract reformed, the prosecution to judgment of an action at law for damages for breach of the contract is inconsistent with and a bar to a subsequent suit for the reformation of the contract.[47] But there is no inconsistency between an action at law on a contract and a suit in equity asking for the reformation of the contract on account of mistake, and that the prosecution of the action at law be stayed until such reformation.[48]

V. What Acts Constitute an Election Between Alternative Remedial Rights.

A. In General. Any decisive act of a party, with knowledge of his rights and of the facts, determines his election in case of conflicting and inconsistent remedies.[49]

B. Prosecution of Action or Suit to Judgment or Decree. The prosecution of one remedial right to judgment or decree, whether the judgment or decree is for or against plaintiff, is a decisive act which constitutes a conclusive election, barring the subsequent prosecution of inconsistent remedial rights.[50]

C. Commencement of Any Proceeding in Court Having Jurisdiction to Entertain the Same. By preponderance of authority the mere commencement of any proceeding to enforce one remedial right, in a court having juris-

44. **Mortgage** generally see Mortgages.

45. *Iowa.*— Bossingham *v.* Syck, 118 Iowa 192, 91 N. W. 1047, 59 L. R. A. 796, holding that the commencement of a suit to foreclose a mortgage and recover a personal judgment on the notes against a grantee of the mortgaged realty who had assumed the mortgage is not an election defeating the mortgagee's right of action against a former grantee, who had also assumed the mortgage.

Nebraska.—Mundy *v.* Whittemore, 15 Nebr. 647, 19 N. W. 694.

New York.—Dunkley *v.* Van Buren, 3 Johns. Ch. 330.

Virginia.— Priddy *v.* Hartsook, 81 Va. 67.

Wisconsin.— Carpenter *v.* Meachem, 111 Wis. 60, 86 N. W. 552.

See 18 Cent. Dig. tit. "Election of Remedies," § 1 *et seq.*

46. **Contract** generally see Contracts.

47. Thomas *v.* Joslin, 36 Minn. 1, 29 N. W. 344, 1 Am. St. Rep. 624; Steinbach *v.* Relief F. Ins. Co., 12 Hun (N. Y.) 640.

48. Lansing *v.* Commercial Union Assur. Co., (Nebr. 1903) 93 N. W. 756, holding that where plaintiff has commenced an action at law on a fire policy, and sues in equity to stay the prosecution until the contract sued on can be reformed on account of mistake, the actions are not inconsistent, but one is auxiliary to and dependent upon the other.

49. So held in an early New York case. Sanger *v.* Wood, 3 Johns. Ch. 416. Accepting this as a correct statement of the law, the question still remains, What acts are decisive? And to this question the answers of the different courts are not entirely harmonious. See *infra*, V, B *et seq.*

50. *Georgia.*— Bacon *v.* Moody, 117 Ga. 207, 43 S. E. 482; Equitable L. Assur. Soc. *v.* May, 82 Ga. 646, 9 S. E. 597. But see Bowen *v.* Frick, 75 Ga. 786.

Illinois.— Weill *v.* Fontanel, 31 Ill. App. 615.

Iowa.— Keene Five-Cents Sav. Bank *v.* Archer, 109 Iowa 419, 80 N. W. 505.

Kansas.— Santa Fé Bank *v.* Haskell County, 61 Kan. 785, 60 Pac. 1062.

Massachusetts.— Perkins *v.* Lyman, 11 Mass. 76, 6 Am. Dec. 158.

Michigan.—Sullivan *v.* Ross, 113 Mich. 311, 71 N. W. 634, 76 N. W. 309; McDonald *v.* Preston Nat. Bank, 111 Mich. 649, 70 N. W. 143.

Missouri.— Tierman *v.* Security Bldg., etc., Assoc. No. 2, 152 Mo. 135, 53 S. W. 1072; Boogher *v.* Frazier, 99 Mo. 325, 12 S. W. 885; Nanson *v.* Jacob, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531; Welsh *v.* Carder, 95 Mo. App. 41, 68 S. W. 580.

Nebraska.— Jones *v.* Lincoln First Nat. Bank, (1902) 90 N. W. 912.

New York.— Deitz *v.* Field, 10 N. Y. App. Div. 425, 41 N. Y. Suppl. 1087; Drennan *v.* Boice, 19 Misc. 641, 44 N. Y. Suppl. 394, 4 N. Y. Annot. Cas. 141. But see Shaut *v.* Schauroth, 46 N. Y. App. Div. 450, 61 N. Y. Suppl. 767.

Ohio.— Albright *v.* Meredith, 58 Ohio St. 194, 50 N. E. 719.

Texas.— Parker *v.* Panhandle Nat. Bank, 11 Tex. Civ. App. 702, 34 S. W. 196.

Washington.— Gaffney *v.* Megrath, 23 Wash. 476, 63 Pac. 520.

See 18 Cent. Dig. tit. "Election of Remedies," §§ 8, 12.

And *compare* Bent *v.* Barnes, 90 Wis. 631, 64 N. W. 428.

diction to entertain the same, is such a decisive act as constitutes a conclusive election, barring the subsequent prosecution of inconsistent remedial rights.[51] But in some of the states it is held that the mere commencement of a proceeding is not such a conclusive election as will prevent plaintiff from obtaining a dismissal thereof, and from instituting another proceeding to enforce an inconsistent remedial right.[52] And in other states the second proceeding may be maintained, although the first is still pending.[53]

D. Participation in Pending Proceedings. Any act of a party during the pendency of proceedings before a court having jurisdiction thereof, by which relief based upon one remedial right is claimed, constitutes a conclusive election which will preclude the same party from prosecuting another proceeding based upon an inconsistent remedial right;[54] but it does not preclude the prosecution of a proceeding based upon a remedial right which is consistent with the one first asserted, although both arise from the same transaction;[55] and in order to have the act constitute an election it must have been done by one who was a party to the first proceeding, and who is also a party to the second.[56]

E. Acts Prior to Commencement of Legal Proceedings. Although acts prior to the actual commencement of legal proceedings indicate an intention to rely upon one remedial right, yet they do not constitute an election which will

51. *District of Columbia.*— Smith *v.* Gilmore, 7 App. Cas. 192.

Illinois.— Daniels *v.* Smith, 15 Ill. App. 339. See Crockett First Nat. Bank *v.* George R. Barse Live Stock Commission Co., 198 Ill. 232, 64 N. E. 1097.

Iowa.— Theusen *v.* Bryan, 113 Iowa 496, 85 N. W. 802.

Louisiana.— Lowenstein *v.* Glass, 48 La. Ann. 1422, 20 So. 890.

Maine.— Bohanan *v.* Pope, 42 Me. 93; Larrabee *v.* Lumbert, 34 Me. 79.

Michigan.— Thomas *v.* Watt, 104 Mich. 201, 62 N. W. 345; Nield *v.* Burton, 49 Mich. 53, 12 N. W. 906.

New York.— Conrow *v.* Little, 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693; Powers *v.* Benedict, 88 N. Y. 605; Moller *v.* Tuska, 87 N. Y. 166; Morris *v.* Rexford, 18 N. Y. 552; Schoeneman *v.* Chamberlin, 55 N. Y. App. Div. 351, 67 N. Y. Suppl. 284. See Bach *v.* Tuch, 126 N. Y. 53, 26 N. E. 1019; Strong *v.* Strong, 102 N. Y. 69, 5 N. E. 799.

Tennessee.— Memphis First Nat. Bank *v.* Pettit, 9 Heisk. 447.

Texas.— Bauman *v.* Jaffray, 6 Tex. Civ. App. 489, 26 S. W. 260.

Wisconsin.— Ludington *v.* Patton, 111 Wis. 208, 86 N. W. 571; Clausen *v.* Head, 110 Wis. 405, 85 N. W. 1028, 84 Am. St. Rep. 933; Crook *v.* Baraboo First Nat. Bank, 83 Wis. 31, 52 N. W. 1131, 35 Am. St. Rep. 17.

The commencement and not the result of the action determines the election between remedies. *In re* Garver, 176 N. Y. 386, 68 N. E. 667.

52. Huntsville Belt Line, etc., R. Co. *v.* Corpening, 97 Ala. 681, 12 So. 295; McCoy *v.* Stockman, 146 Ind. 668, 46 N. E. 21; Hargadine-McKittrick Dry Goods Co. *v.* Warden, 151 Mo. 578, 52 S. W. 593; Johnson-Brinkman Commission Co. *v.* Kansas City Cent. Bank, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; Trimble *v.* Wollman, 71 Mo. App. 467; Hart *v.* Walter, 7 Ohio S. & C. Pl. Dec. 409, 5 Ohio N. P. 282. See also Spurr *v.* Commercial Union Assur Co., 40 Minn. 428, 42 N. W. 207; Spurr *v.* Home Ins. Co., 40 Minn. 424, 42 N. W. 206. "If a man may have an action for account or an action of debt at his pleasure and he bringeth an action of account and appeare to it, and after is nonsuite, yet he may have an action of debt afterward; because both actions charge the person." Coke Litt. 146*a*.

53. Norcross *v.* Cambridge, 166 Mass. 508, 44 N. E. 615, 33 L. R. A. 843 [*following* Moore *v.* Sanford, 151 Mass. 285, 24 N. E. 323, 7 L. R. A. 151]; Richmond Union Pass. R. Co. *v.* New York, etc., R. Co., 95 Va. 386, 28 S. E. 573. See also National Granite Bank *v.* Tyndale, 179 Mass. 390, 60 N. E. 927.

Another action pending, effect of, see generally ABATEMENT AND REVIVAL.

54. Parker *v.* Hall, 55 Me. 362; Richardson *v.* Rittenhouse, 40 N. J. L. 230; Dorrance *v.* Henderson, 92 N. Y. 406; Gilbert *v.* Platt, 12 N. Y. App. Div. 242, 42 N. Y. Suppl. 764. See also People *v.* Wood, 121 N. Y. 522, 24 N. E. 952; Parker *v.* Panhandle Nat. Bank, 11 Tex. Civ. App. 702, 34 S. W. 196.

55. Commercial Nat. Bank *v.* Kirkwood, 172 Ill. 563, 50 N. E. 219; Owen *v.* Christensen, 106 Iowa 394, 76 N. W. 1003; McMeekin *v.* Worcester, 99 Iowa 243, 68 N. W. 680; Langerberg *v.* Schmidt, 69 Mo. App. 281; Pawlet *v.* Kelly, 69 Vt. 398, 38 Atl. 92.

56. Einstein *v.* Dunn, 61 N. Y. App. Div. 195, 70 N. Y. Suppl. 520 [*affirmed* in 171 N. Y. 648, 63 N. E. 1116]. In this case plaintiff became the owner of certain goods stored in a warehouse, by the transfer to him of the warehouse receipt and the issuance of a new one in his name. Defendant, sheriff, seized the goods under an *ex parte* order made in replevin suits against the original owner of the goods, in which suits plaintiff, although not a party thereto, moved to have the *ex parte* order vacated, on which motion no order was entered. It was held in conversion for

precludе the subsequent prosecution of an action or suit based upon an inconsistent remedial right,[57] unless the acts contain the elements of an estoppel *in pais*.[58]

F. Must Be Inconsistent With Remedial Right Subsequently Asserted. No act is decisive so as to constitute a conclusive election unless the remedial right upon which such act is based is irreconcilable with the remedial right which the subsequent action or suit is brought to enforce.[59]

VI. VALIDITY AND FINALITY OF ELECTION.

A. Effect of Ignorance of Facts. In order to constitute a binding election the party must at the time the election is alleged to have been made have knowledge of the facts from which the coexisting, inconsistent remedial rights arise.[60]

the property that plaintiff was not estopped by such motion from prosecuting the action, for as he was not a party to the other action he was not confined to their remedy therein.

57. *Alabama.*— Abbott *v.* May, 50 Ala. 97.

District of Columbia.— Tyler *v.* Moses, 13 App. Cas. 428.

Iowa.— Franklin Sav. Bank *v.* Colby, 105 Iowa 424, 75 N. W. 346.

New York.— Geiler *v.* Littlefield, 148 N. Y. 603, 43 N. E. 66; Roberge *v.* Winne, 144 N. Y. 709, 39 N. E. 631; Rhinelander *v.* National City Bank, 36 N. Y. App. Div. 11, 55 N. Y. Suppl. 229; Haas *v.* Selig, 27 Misc. 504, 58 N. Y. Suppl. 328.

Pennsylvania.— Portland Lumber Co. *v.* Kiehl, 19 Pa. Co. Ct. 564.

See 18 Cent. Dig. tit. "Election of Remedies," § 1 *et seq.*

58. Homer *v.* McCormick, 8 Kan. App. 333, 56 Pac. 1124; Baumann *v.* Jefferson, 4 Misc. (N. Y.) 147, 23 N. Y. Suppl. 685; Gulf, etc., R. Co. *v.* North Texas Grain Co., (Tex. Civ. App. 1903) 74 S. W. 567.

Estoppel in pais generally see ESTOPPEL.

59. *Illinois.*— Connor *v.* Palmquist, 61 Ill. App. 551.

Indiana.—Bundy *v.* Monticello, 84 Ind. 119. See also Scherer *v.* Ingerman, 110 Ind. 428, 11 N. E. 8, 12 N. E. 304.

Kansas.— Potter *v.* Northrup Banking Co., 59 Kan. 455, 53 Pac. 520.

Minnesota.— Ironton Land Co. *v.* Butchart, 73 Minn. 39, 75 N. W. 749; Cumbey *v.* Ueland, 72 Minn. 453, 75 N. W. 727; Bell *v.* Mendenhall, 71 Minn. 331, 73 N. W. 1086.

Missouri.— Macklin *v.* Kinealy, 141 Mo. 113, 41 S. W. 893.

Nebraska.— State *v.* Home Ins. Co., 59 Nebr. 524, 81 N. W. 443.

New York.— Bowdish *v.* Page, 153 N. Y. 104, 47 N. E. 44; Walden Nat. Bank *v.* Birch, 130 N. Y. 221, 29 N. E. 127, 14 L. R. A. 211; Mills *v.* Parkhurst, 126 N. Y. 89, 26 N. E. 1041, 13 L. R. A. 472; McLaughlin *v.* Durr, 76 N. Y. App. Div. 75, 78 N. Y. Suppl. 798; Wemple *v.* Hauenstein, 19 N. Y. App. Div. 552, 46 N. Y. Suppl. 288; Matter of Pierson, 19 N. Y. App. Div. 478, 46 N. Y. Suppl. 557; Heidelbach *v.* National Park Bank, 87 Hun 117, 33 N. Y. Suppl. 794; Brooklyn First Nat. Bank *v.* Wallis, 84 Hun 376, 32 N. Y. Suppl. 382; Radman *v.* Haberstro, 49 Hun 605, 1 N. Y. Suppl. 561.

North Carolina.— Davis *v.* Terry, 114 N. C. 27, 18 S. E. 947, holding that the fact that a party to a land contract brought an action to reform it does not show such a repudiation as will defeat his right to maintain a subsequent action for its specific performance.

South Carolina.— Townsend *v.* Sparks, 50 S. C. 380, 27 S. E. 801, holding that one who replevies property seized under a warrant of foreclosure of an agricultural lien does not thereby waive his rights to move to vacate the warrant.

Tennessee.— Alabama Marble, etc., Co. *v.* Chattanooga Marble, etc., Co., (Ch. App. 1896) 37 S. W. 1004.

Virginia.— Olinger *v.* McChesney, 7 Leigh 660.

Washington.— Belt *v.* Washington Water Power Co., 24 Wash. 387, 64 Pac. 525.

United States.— Holly *v.* Domestic, etc., Missionary Soc., 85 Fed. 249. See also Robb *v.* Roelker, 66 Fed. 23; The Felice B., 40 Fed. 653.

England.— Rice *v.* Reed, [1900] 1 Q. B. 54, 69 L. J. Q. B. 33, 81 L. T. Rep. N. S. 410.

See 18 Cent. Dig. tit. "Election of Remedies," §§ 3, 17.

Necessity of inconsistency see also *supra*, I; III.

What constitutes inconsistency see *supra*, IV.

60. *Alabama.*— Louisville, etc., R. Co. *v.* Bernheim, 113 Ala. 489, 21 So. 405; Young *v.* Hawkins, 74 Ala. 370.

Arkansas.— White *v.* Beal, etc., Grocer Co., (1901) 64 S. W. 886 (evidence that the purchasers of goods bought them with little hope of being able to pay for them, and obtained credit by false representation as to their financial condition, and that immediately before failure they purchased goods with the intent not to pay for them, together with the fact that it nowhere appeared that the sellers knew or could be expected to know of the fraud or the whereabouts of the goods at the time of suing out attachment therefor, was sufficient to sustain a finding that they were not aware of the fraud at the time of attachment, so that it was not an election of remedies, but the seller might rescind, and seek recovery of the goods instead of the debt); Dudley E. Jones Co. *v.* Daniel, 67 Ark. 206, 53 S. W. 890.

California.—Wells *v.* Robinson, 13 Cal. 133.

Illinois.— Garrett *v.* John V. Farwell Co., 199 Ill. 436, 65 N. E. 361.

B. Effect of Mistake as to Remedy. A person who prosecutes an action or suit based upon a remedial right which he erroneously supposes he has, and is defeated because of the error, has not made a conclusive election, and is not precluded from prosecuting an action or suit based upon an inconsistent remedial right.[61]

VII. EFFECT OF ELECTION.

An election once made, with knowledge of the facts, between coexisting remedial rights[62] which are inconsistent is irrevocable[63] and conclusive, irrespective of intent,[64] and constitutes an absolute bar to any action, suit, or proceeding

Iowa.— Clapp *v.* Greenlee, 100 Iowa 586, 69 N. W. 1049.

Missouri.— Central Sav. Bank *v.* Danckmeyer, 70 Mo. App. 168.

Nebraska.— Pekin Plow Co. *v.* Wilson, (1902) 92 N. W. 176, holding that if in attempting and designing to make an election one puts forth an act or commences an action in ignorance of substantial facts which proffer an alternate remedy, and the knowledge of which is essential to an intelligent choice of procedure, his act or action is not binding; but he may when informed adopt a different remedy.

New York.— Hays *v.* Midas, 104 N. Y. 602, 11 N. E. 141; Equitable Co-operative Foundry Co. *v.* Hersee, 103 N. Y. 25, 9 N. E. 487. See also Bach *v.* Tuch, 126 N. Y. 53, 26 N. E. 1019; Conrow *v.* Little, 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693.

Texas.— Wilson *v.* Carroll, (Civ. App. 1899) 50 S. W. 222.

Wisconsin.— Lodi Bank *v.* Washburn Electric Light, etc., Co., 98 Wis. 547, 74 N. W. 363.

United States.— Dickson *v.* Patterson, 160 U. S. 584, 16 S. Ct. 373, 40 L. ed. 543. See also Kentucky Standard Oil Co. *v.* Hawkins, 74 Fed. 395, 20 C. C. A. 468, 33 L. R. A. 739.

See 18 Cent. Dig. tit. "Election of Remedies," § 15.

Knowledge is not to be imputed as a matter of legal obligation, as the doctrine of election is not properly a rule of positive law, but a rule of practice in equity. "In order that a person who is put to his election should be concluded by it, two things are necessary. First, a full knowledge of the nature of the inconsistent rights, and of the necessity of electing between them. Second, an intention to elect manifested, either expressly, or by acts which imply choice and acquiescence." Spread *v.* Morgan, 11 H. L. Cas. 588, 615, 11 Eng. Reprint 1461, per Lord Chelmsford.

61. *California.*— Agar *v.* Winslow, 123 Cal. 587, 56 Pac. 422, 69 Am. St. Rep. 84.

Illinois.— Gibbs *v.* Jones, 46 Ill. 319.

Indiana.— Bunch *v.* Grave, 111 Ind. 351, 12 N. E. 514.

Kansas.— See King *v.* Gleason, 6 Kan. App. 141, 51 Pac. 301.

Kentucky.— Hillerich *v.* Franklin Ins. Co., 111 Ky. 255, 63 S. W. 592, 23 Ky. L. Rep. 631.

Massachusetts.—Peters *v.* Ballistier, 3 Pick. 495. See also Snow *v.* Alley, 156 Mass. 193, 30 N. E. 691.

Michigan.— Shanahan *v.* Coburn, 128 Mich. 692, 87 N. W. 1038; Bryant *v.* Kenyon, 123 Mich. 151, 81 N. W. 1093; Chaddock *v.* Tabor, 115 Mich. 27, 72 N. W. 1093.

Missouri.— Hill *v.* Combs, 92 Mo. App. 242.

Nebraska.— Chicago, etc., R. Co. *v.* Bigley, (1901) 95 N. W. 344; Omaha *v.* Redick, 61 Nebr. 163, 85 N. W. 46; State *v.* Bank of Commerce, 61 Nebr. 22, 84 N. W. 406.

New Hampshire.— Gould *v.* Blodgett, 61 N. H. 115; Kittredge *v.* Holt, 58 N. H. 191.

New York.— McNutt *v.* Hilkins, 80 Hun 235, 29 N. Y. Suppl. 1047; White *v.* Whiting, 8 Daly 23; Dumois *v.* New York, 37 Misc. 614, 76 N. Y. Suppl. 161; People *v.* Dalton, 29 Misc. 154, 60 N. Y. Suppl. 876.

Pennsylvania.— Reap *v.* Scranton, 7 Pa. Super. Ct. 32.

Texas.— Wilson *v.* Carroll, (Civ. App. 1899) 50 S. W. 222. See also Williams *v.* Emberson, 22 Tex. Civ. App. 522, 55 S. W. 595.

Utah.— Detroit Heating, etc., Co. *v.* Stevens, 20 Utah 241, 58 Pac. 193.

Wisconsin.— Fuller-Warren Co. *v.* Harter, 110 Wis. 80, 85 N. W. 698, 84 Am. St. Rep. 867, 53 L. R. A. 603.

See 18 Cent. Dig. tit. "Election of Remedies," § 14.

Rule as to conclusiveness of election "is not inconsistent with the practice of bringing a second and different action where it appears that the plaintiff never had a right of action as first brought, and therefore could not have elected. There is a difference between an election of remedies and a mistake of remedy, and the law has not gone so far as to deprive parties of meritorious claims merely because of attempts to collect them by inappropriate actions, upon which recovery could not be had." Sullivan *v.* Ross, 113 Mich. 311, 318, 71 N. W. 634, 76 N. W. 309, per Moore, J.

62. Mark *v.* Schumann Piano Co., 105 Ill. App. 490; Thielman *v.* Reynolds, 23 Fed. Cas. No. 13,883.

63. Moller *v.* Tuska, 87 N. Y. 166. See also Chicago, etc., R. Co. *v.* Bigley, (Nebr. 1901) 95 N. W. 344; Strong *v.* Strong, 102 N. Y. 69, 5 N. E. 799.

64. Clausen *v.* Head, 110 Wis. 405, 85 N. W. 1028, 84 Am. St. Rep. 933, holding that the doctrine that intent to make an election between inconsistent remedies is essential to a choice, and that absence of such intent will relieve from the effect of the pursuit of one of the remedies, applies only where action in the first instance is taken in ignorance of the facts; and hence, where a knowledge of the facts exists, intent to make the election is

based upon a remedial right inconsistent with that asserted by the election,[65] or to the maintenance of a defense founded on such inconsistent right.[66]

presumed as matter of law, which intent is not affected by declaration or reservation of a right to pursue an inconsistent remedy at a subsequent time.

65. *Alabama.*— Godden v. Pierson, 42 Ala. 370.

Arkansas.—McLaughlin v. Hutchins, 3 Ark. 207.

Colorado.— Wheeler v. Dunn, 13 Colo. 428, 22 Pac. 827.

Georgia.— Bacon v. Moody, 117 Ga. 207, 43 S. E. 482.

Illinois.— Kapischki v. Koch, 180 Ill. 44, 54 N. E. 179; Ermeling v. Gibson Canning Co., 105 Ill. App. 196; Presson v. Worthen, 66 Ill. App. 457; Weill v. Fontanel, 31 Ill. App. 615.

Indiana.— Kitts v. Wilson, 140 Ind. 604, 39 N. E. 313.

Iowa.—Mercantile Realty Co. v. Stetson, 120 Iowa 324, 94 N. W. 859, a mortgagee of the property of a corporation commenced foreclosure, and an attachment was levied on the mortgaged property. Subsequently a receiver was appointed who took possession of the property, collected rents, and paid interest on mortgages, etc.; and thereafter an application was filed by the receiver for authority to sell the property, subject to the mortgages. Plaintiff in the attachment appeared on such application and obtained a continuance. An order of sale was subsequently made, but prior to it plaintiff in attachment had recovered judgment, which provided that the attached property should be sold as provided by law. Before the rendition of such judgment plaintiff had filed a claim with the receiver, which was disallowed, but an order was entered that plaintiff be authorized to take an appeal. No appeal was taken, but the property was sold by the receiver. It was held that plaintiff had elected to rely on his claim against the receiver, and was estopped from proceeding against the property under an execution based on his judgment.

Kansas.— Remington Paper Co. v. Hudson, 64 Kan. 43, 67 Pac. 636; Missouri Pac. R. Co. v. Henrie, 63 Kan. 330, 65 Pac. 665; Blaker v. Morse, 60 Kan. 24, 55 Pac. 274; Illinois Nat. Bank v. Emporia First Nat. Bank, 57 Kan. 115, 45 Pac. 79; Larned v. Jordan, 55 Kan. 124, 39 Pac. 1030.

Maine.— Foss v. Whitehouse, 94 Me. 491, 48 Atl. 109; Jordan v. Kaskell, 63 Me. 193; Larrabee v. Lumbert, 34 Me. 79.

Maryland.— Evans v. Iglehart, 6 Gill & J. 171.

Massachusetts.— Dennett v. Codman, 168 Mass. 428, 47 N. E. 131; Stearns v. Barrett, 1 Pick. 443, 11 Am. Dec. 223; Perkins v. Lyman, 11 Mass. 76, 6 Am. Dec. 158.

Minnesota.— Dyckman v. Sevatson, 39 Minn. 132, 39 N. W. 73; Thomas v. Joslin, 36 Minn. 1, 29 N. W. 344, 1 Am. St. Rep. 624.

Missouri.—MacMurray-Judge Architectural Iron Co. v. St. Louis, 138 Mo. 608, 39 S. W. 467.

Nebraska.— Hawver v. Omaha, 52 Nebr. 734, 73 N. W. 217.

New Jersey.— Coxe v. Robbins, 9 N. J. L. 384.

New York.— Terry v. Munger, 121 N. Y. 161, 24 N. E. 272, 18 Am. St. Rep. 803, 8 L. R. A. 216; Conrow v. Little, 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693; Fowler v. Bowery Sav. Bank, 113 N. Y. 450, 21 N. E. 172, 10 Am. St. Rep. 479, 4 L. R. A. 145; Genet v. Delaware, etc., Canal Co., 28 N. Y. App. Div. 328, 51 N. Y. Suppl. 377; Steinbach v. Relief F. Ins. Co., 12 Hun (N. Y.) 640; Benedict v. Commonwealth Nat. Bank, 4 Daly 171; Boots v. Ferguson, 10 N. Y. St. 761; Beloit Bank v. Beale, 11 Abb. Pr. 375, 20 How. Pr. 331; Weber v. Fowler, 11 How. Pr. 458. See also Seeman v. Bandler, 26 Misc. 372, 56 N. Y. Suppl. 210, holding that an action for the price of goods sold cannot be maintained after plaintiff has sued replevin for the goods, on the ground that the sale was procured by the vendee's fraud, even though plaintiff has served a notice in the replevin suit as authorized by Code Civ. Proc. § 1719, abandoning his claim to the goods not replevied, and the second action seeks a recovery for such goods only.

Ohio.— Hart v. Walter, 7 Ohio S. & C. Pl. Dec. 409, holding that a replevin suit which is founded on a title in plaintiff bars him from a later suit for conversion or breach of contract.

Oregon.— Nichols v. Gage, 10 Oreg. 82.

Pennsylvania.— New Holland Turnpike Co. v. Lancaster County, 71 Pa. St. 442; Biery v. Steckel, 19 Pa. Super. Ct. 396; Jacob v. Groff, 19 Pa. Super. Ct. 144; Garrison v. Bryant, 10 Phila. 474.

South Carolina.— Harrison v. Lynes, 36 S. C. 596, 15 S. E. 335.

Texas.— McWilliams v. Thomas, (Civ. App. 1903) 74 S. W. 596; Avery v. Texas Loan Agency, (Civ. App. 1901) 62 S. W. 793; Schneider-Davis Co. v. Brown, (Civ. App. 1898) 46 S. W. 108; Parker v. Panhandle Nat. Bank, 11 Tex. Civ. App. 702, 34 S. W. 196.

Virginia.—Sangster v. Com., 17 Gratt. 124; Hite v. Long, 6 Rand. 457, 18 Am. Dec. 719.

Washington.— Achey v. Creech, 21 Wash. 319, 58 Pac. 208.

Wisconsin.—Clausen v. Head, 110 Wis. 405, 85 N. W. 1028, 84 Am. St. Rep. 933; Limited Invest. Assoc. v. Glendale Invest. Assoc., 99 Wis. 54, 74 N. W. 633; Crook v. Baraboo First Nat. Bank, 83 Wis. 31, 52 N. W. 1131, 35 Am. St. Rep. 17; Carter v. Smith, 23 Wis. 497; Tenney v. Lenz, 16 Wis. 566.

See 18 Cent. Dig. tit. "Election of Remedies," §§ 16, 17.

66. Lyth v. Dotham Bank, 121 Ala. 215, 26 So. 6; Cameron v. Hinton, 92 Tex. 492, 49 S. W. 1047, holding that where a chattel mortgagee in foreclosure sequestered and replevied the property, he cannot set up, by way of estoppel against the mortgagor's ac-

VIII. ELECTION BETWEEN ACTIONS AT LAW AND SUITS IN EQUITY.

A. By Act of Party Without Order of Court — 1. RIGHT TO MAKE. If both a court of law and a court of equity have concurrent jurisdiction over the subject-matter, a party may elect as to the tribunal which shall determine the controversy.[67]

2. ACTS WHICH CONSTITUTE — a. Where Party Is Plaintiff at Law and Complainant in Equity. The prosecution by plaintiff of an action at law to judgment, or a suit in equity to decree, with knowledge of his rights and of the facts, is held to be a conclusive election of the tribunal in which the action or suit is prosecuted, which will bar subsequent proceedings for the same cause in the other tribunal;[68] but the mere commencement of an action at law or a suit in equity will not constitute such an election.[69]

b. Where Party Is Defendant at Law and Complainant in Equity. A party who with knowledge of the facts has availed himself in a court of law of a defense which may be properly tried in that court is held to have made a conclusive election and will be precluded from subsequently coming into a court of equity for relief in reference to the same matter.[70] But in order to constitute an election, and preclude the party from the right to file his bill and proceed in equity for relief,

tion on the replevy bond, the fact that before foreclosure the latter had agreed to waive the foreclosure, and had authorized the mortgagee to sell the property, and advised and consented to the sale, since by foreclosure and replevy the mortgagee had abandoned the agency and stood on his own rights.

67. Bently *v.* Dillard, 6 Ark. 79; Sampson *v.* Payne, 5 Munf. (Va.) 176; Burnley *v.* Lambert, 1 Wash. (Va.) 308; Miller *v.* Lake, 24 W. Va. 545.

68. *Arkansas.*— Bently *v.* Dellard, 6 Ark. 79.

Florida.— Thornton *v.* Eppes, 6 Fla. 546, holding that where a court of equity has concurrent jurisdiction with a court of law of a question which has been already tried at law, the court of equity will not entertain a suit to try the same question because of some matter of which plaintiff could have availed himself had he first sued in equity.

Illinois.— Simpson *v.* Ham, 78 Ill. 203; Buckmaster *v.* Grundy, 8 Ill. 626; Herrington *v.* Hubbard, 2 Ill. 569, 33 Am. Dec. 426.

Kentucky.— Seamore *v.* Harlan, 3 Dana 410.

Maine.— Marston *v.* Humphrey, 24 Me. 513.

Maryland.— *In re* Mitchell, 21 Md. 585, holding that one who, after recovery in ejectment, elects to proceed at law to recover the mesne profits and fails to recover a part thereof, because barred by limitations, is not entitled to relief in equity as to the part barred in the action at law.

Massachusetts.— Washburn *v.* Great Western Ins. Co., 114 Mass. 175.

Michigan.— See Cranson *v.* Smith, 47 Mich. 647, 11 N. W. 186.

New York.— Southgate *v.* Montgomery, 1 Paige 41; Sanger *v.* Wood, 3 Johns. Ch. 416.

Ohio.— Buell *v.* Cross, 4 Ohio 327; Curtis *v.* Cisna, 1 Ohio 429.

Vermont.— White *v.* White, 68 Vt. 161, 34 Atl. 425.

Virginia.— Tarpley *v.* Dobyns, 1 Wash. 185.

United States.—Slaughter *v.* La Campagnie Francaises, etc., 119 Fed. 588, holding that a party to a contract who has brought an action at law for its breach and prosecuted the same to a judgment for damages cannot thereafter maintain a suit in equity to enforce specific performance.

See 18 Cent. Dig. tit. "Election of Remedies," §§ 8, 11.

69. Smith *v.* Bricker, 86 Iowa 285, 53 N. W. 250; Thompson *v.* Graham, 1 Paige (N. Y.) 452; Kehoe *v.* Patton, 21 R. I. 223, 42 Atl. 868; Brady *v.* Daly, 175 U. S. 148, 20 S. Ct. 62, 44 L. ed. 109. See Titus *v.* Phillips, 18 N. J. Eq. 541.

70. Powell *v.* Stewart, 17 Ala. 719; Dickson *v.* Richardson, 16 Ark. 114; Arrington *v.* Washington, 14 Ark. 218; Burton *v.* Hynson, 14 Ark. 32 (holding that if a defendant in an action at law makes defense thereto, although it is of an equitable nature, if it be such as courts of law take cognizance of, and he afterward comes into chancery to seek relief in respect to the same matters he will be regarded as having elected to defend at law, and his bill will not be sustained unless unavoidable accident, ignorance of facts, surprise, or fraud, have prevented him from making his defense at law); Garvin *v.* Squires, 9 Ark. 533, 50 Am. Dec. 224 (holding that a defendant at law, entitled to a set-off, has no right to go into a court of equity for relief, after he has made his defense at law and failed; otherwise if he is precluded from making his defense at law; and that appearance by a garnishee, and filing answers to plaintiff's interrogatories are clearly an election to defend at law, and he is thereby precluded from a hearing in equity unless he has been prevented from a fair defense at law by fraud, accident, or the act of the opposite party, unmixed with negligence on his part); Hemstead *v.* Watkins, 6 Ark. 317, 42 Am. Dec. 696.

the matter upon which he bases his claim to relief in equity must have been available as a defense at law and not be solely of equitable cognizance.[71]

c. Where Party Is Plaintiff at Law and Defendant in Equity. Although defendant in equity has proceeded at law as complainant, yet the rule as to conclusiveness of election applies, under the same principle as if defendant had been complainant in both suits; the same presumption attaches and the same rule must be enforced.[72]

B. Compelling Election — 1. In What Cases Compelled. In those jurisdictions[73] where the courts of law and equity are separate, and where the distinction between actions at law and suits in equity is still recognized, if plaintiff is prosecuting an action at law and a suit in equity at the same time for the same cause, he may be compelled by the court, on application of defendant, to elect whether he will proceed with the action at law or the suit in equity.[74] Until the election is compelled, however, the pursuit of both remedies will not deprive him of either.[75]

71. *Alabama.*— McClure *v.* Colclough, 5 Ala. 65.

Arkansas.— Worthington *v.* Curd, 22 Ark. 277 (holding that a partial failure of title to land, being a matter cognizable in equity alone, may be made the foundation of a bill in equity, notwithstanding an unavailing attempt has been made to use it as a defense at law); State Bank *v.* Bozeman, 13 Ark. 631.

Maine.— Haskins *v.* Lombard, 16 Me. 140, 33 Am. Dec. 648.

New Jersey.— Simon *v.* Townsend, 27 N. J. Eq. 302.

Virginia.— Warwick *v.* Norvell, 1 Rob. 308.

West Virginia.— Knott *v.* Seamands, 25 W. Va. 99.

See 18 Cent. Dig. tit. "Election of Remedies," §§ 8, 11.

72. Jenks *v.* Smith, 14 R. I. 634.

73. A majority of the United States have adopted the reformed or code procedure by which the same court has jurisdiction both in law and equity, and the distinction between actions at law and suits in equity, and the forms of all such actions and suits existing prior to the adoption of the new system are abolished, and one form of action, known as a civil action, is used for the enforcement or protection of private rights and the redress of private wrongs, in which action, if the proper facts are alleged in the pleadings and proved on the trial, the court may grant either legal or equitable relief or both.

California.— Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423; Wiggins *v.* McDonald, 18 Cal. 126.

Colorado.— Schilling *v.* Rominger, 4 Colo. 100; Hamill *v.* Thompson, 3 Colo. 518.

Indiana.— Troost *v.* Davis, 31 Ind. 34.

Iowa.— Whiting *v.* Root, 52 Iowa 292, 3 N. W. 134; Herring *v.* Neely, 43 Iowa 157.

New York.— Hahl *v.* Sugo, 169 N. Y. 109, 62 N. E. 135, 88 Am. St. Rep. 539; Lattin *v.* McCarty, 41 N. Y. 107; Phillips *v.* Gorham, 17 N. Y. 270; Crary *v.* Goodman, 12 N. Y. 266, 64 Am. Dec. 506; Porter *v.* International Bridge Co., 45 N. Y. App. Div. 416, 60 N. Y. Suppl. 819 [*affirmed* in 163 N. Y. 79, 57 N. E. 174].

Wisconsin.— Leonard *v.* Rogan, 20 Wis. 540.

See 18 Cent. Dig. tit. "Election of Remedies," § 10; and Actions, 1 Cyc. 735 note 85.

74. *Alabama.*— Dunlap *v.* Newman, 52 Ala. 178; Planters', etc., Bank *v.* Borland, 5 Ala. 531.

Delaware.— West *v.* Evans, 1 Del. Ch. 122.

Illinois.— Smith *v.* Billings, 62 Ill. App. 77.

Kentucky.—Cleveland *v.* Lyne, 5 Bush 383; Curd *v.* Lewis, 1 Dana 351.

Maine.— Fleming *v.* Courtenay, 95 Me. 135, 49 Atl. 614.

Maryland.— Laupheimer *v.* Rosenbaum, 25 Md. 219; Gibson *v.* Finley, 4 Md. Ch. 75; Bradford *v.* Williams, 2 Md. Ch. 1.

Massachusetts.— Sandford *v.* Wright, 164 Mass. 85, 41 N. E. 120.

Mississippi.— Laraussini *v.* Carquette, 24 Miss. 151.

New Hampshire.— Eastman *v.* Amoskeag Mfg. Co., 47 N. H. 71.

New Jersey.— Way *v.* Bragaw, 16 N. J. Eq. 213, 84 Am. Dec. 147; Freeman *v.* Staats, 8 N. J. Eq. 814.

New York.— Rogers *v.* Vosburgh, 4 Johns. Ch. 84; Livingston *v.* Kane, 3 Johns. Ch. 224, both cases decided before the introduction of reformed procedure.

Rhode Island.— Quidnick Co. *v.* Chafee, 13 R. I. 367.

Tennessee.— Miller *v.* Winton, (Ch. App. 1900) 56 S. W. 1049.

Virginia.—Gibbs *v.* Perkinson, 4 Hen. & M. 415, holding that a person having a suit at law depending on an appeal, and bringing a bill for relief as to the same subject, will be compelled to elect in which court he will proceed.

See 18 Cent. Dig. tit. "Election of Remedies," § 10.

"As to a defendant in Equity (before the Jud. Acts) compelling a plaintiff to elect between proceedings at Law and in Equity, see Consol. Ord. 1806, xlii., 5 and 6. By the Judicature Act, 1873, s. 24, all parts of the Supreme Court have now equitable jurisdiction." Wharton L. Lex. 288.

75. Gibson *v.* Finley, 4 Md. Ch. 75.

2. In What Cases Not Compelled. Election between a suit in equity and an action at law will not be compelled unless both causes relate to the same subject-matter and seek substantially the same relief.[76] And although the action at law and the suit in equity have been instituted for the same cause, the court is not authorized to compel an election unless plaintiff at law is the complainant in equity.[77] But the rule compelling an election cannot be evaded by mingling other grounds of complaint in the action at law with those which are comprehended in the bill in equity, where the real grounds are the same in both courts.[78]

3. Rule Applies Only to Original Suits. The rule that a party prosecuting an action at law and a suit in equity for the same cause of action shall be required to elect in which tribunal he will proceed applies only to original suits, a recovery in one of which will be a bar to a decree in the other.[79]

4. One of Several Defendants May Compel. One of several defendants, without the concurrence of the rest, has the right to compel an election between an action at law and a suit in equity.[80]

5. What Court Has Power to Compel. Although in Alabama it has been held that the power to compel belongs to the chancery court only,[81] it is apprehended that either court has the power to compel the election and will exercise such power on proper application.[82]

6. Time of Compelling by Court of Equity. Complainant is entitled to a complete answer from defendant before he can be compelled to elect between the

76. *Alabama.*— *Ex p.* Alabama Gold L. Ins. Co., 59 Ala. 192.

Kentucky.— Peak *v.* Bull, 8 B. Mon. 428; Coleman *v.* Cross, 4 B. Mon. 268, holding that where a party proceeds both at law and in equity, although the object of the suit is to recover the same property in each, yet, if the ground relied upon for relief in each tribunal is different and a full remedy cannot be afforded by either upon the ground relied on in the other, he will not be put to his election.

Maine.— Fleming *v.* Courtenay, 95 Me. 135, 49 Atl. 614.

Massachusetts.— Weeks *v.* Edwards, 176 Mass. 453, 57 N. E. 701.

Mississippi.— Mahon *v.* Columbus, 58 Miss. 310, 38 Am. Rep. 327, holding that the obligee in a bond given for the faithful performance of a contract may sue at law on the bond for damages for breach of the contract, and at the same time proceed in equity to have the contract rescinded.

New Jersey.— Carlisle *v.* Cooper, 18 N. J. Eq. 241; Way *v.* Bragaw, 16 N. J. Eq. 213, 84 Am. Dec. 147, holding that a complainant will not be compelled to elect between legal and equitable remedies unless the suit at law is for the same cause, and the remedy afforded coextensive and equally beneficial with the remedy in equity.

United States.— Wallis *v.* Shelly, 30 Fed. 747; Graham *v.* Meyer, 10 Fed. Cas. No. 5,673, 4 Blatchf. 129.

See 18 Cent. Dig. tit. "Election of Remedies," § 10.

77. Fletcher's Eq. Pl. & Pr. 390. See also *Ex p.* Sterns, 14 Ala. 597 (holding that, to authorize the court to compel an election when suits at law and in chancery have been instituted for the same cause of action, plaintiff at law and in equity must be the same person. Consequently an election will not be ordered when one party has proceeded in the orphans' court for a partition of lands, and obtained a decree for partition, and the other is proceeding in chancery for the same object, although the latter is prosecuting a writ of error to the supreme court from the decision of the orphans' court); Soule *v.* Corning, 11 Paige (N. Y.) 412; Botts *v.* Cozine, 2 Edw. (N. Y.) 583.

78. Bradford *v.* Williams, 2 Md. Ch. 1.

79. Laraussini *v.* Carquette, 24 Miss. 151.

80. Bradford *v.* Williams, 2 Md. Ch. 1.

81. Kemp *v.* Coxe, 14 Ala. 614. See also Planters', etc., Bank *v.* Walker, 7 Ala. 926, where it is held that where a court of law in which a party has instituted an action, on the allegation that a suit pending in equity is for the same cause, makes an order that he elect whether he will proceed at law or in equity, such order will not be conclusive of the cause in equity, but the chancellor will be free to exercise his own judgment on the motion to elect; and this, although a forced election shall have been made and entered of record at law. But it has also been held in the same state that where plaintiff, under coercion of a court of law to elect whether he will proceed in that tribunal or chancery, dismisses his suit in equity for the same cause, he cannot, on error to revise the judgment in the cause against him, insist that the forced dismissal of his suit in equity was irregular. Planters', etc., Bank *v.* Willis, 5 Ala. 770.

82. In Rhode Island it has been held that when a suit in equity and an action at law are pending by the same plaintiff against the same defendant, for the same cause, defendant's remedy in the law action is by motion to compel plaintiff to elect in which one he will proceed. Kehoe *v.* Patton, 21 R. I. 223, 42 Atl. 838.

prosecution of his action at law and his suit in equity;[83] and the order should allow him a reasonable time in which to make his election.[84]

7. Penalty For Refusal to Elect. Where plaintiff sues both at law and in equity and refuses to elect between the remedies, his bill in equity will be dismissed with costs.[85]

8. Result of Election Pursuant to Order. If a party elects to proceed at law his bill will be dismissed; and if he elects to proceed in equity he will be restrained from further prosecuting his suit at law without leave of court of equity first had and obtained.[86]

83. *Alabama.*—Roman *v.* Dimmick, 123 Ala. 533, 26 So. 233; Dunlap *v.* Newman, 52 Ala. 178; Houston *v.* Sadler, 4 Stew. & P. 130.

Georgia.— Semmes *v.* Mott, 27 Ga. 92.

Kentucky.— Abel *v.* Cave, 3 B. Mon. 159.

New Jersey.— Conover *v.* Conover, 1 N. J. Eq. 403.

New York.— Soule *v.* Corning, 11 Paige 412.

North Carolina.— Dunlap *v.* Ingram, 57 N. C. 178.

Virginia.— Priddy *v.* Hartsook, 81 Va. 67.

England.— Jones *v.* Strafford, 3 P. Wms. 79, 24 Eng. Reprint 977; Tillotson *v.* Ganson, 1 Vern. Ch. 103.

See 18 Cent. Dig. tit. "Election of Remedies," § 9.

Contra.— Pennsylvania Ins. Co. *v.* Philadelphia Nat. Bank, 3 Pa. Dist. 93, 14 Pa. Co. Ct. 193.

84. Fleming *v.* Courtenay, 95 Me. 135, 49 Atl. 614 (holding that the order should allow complainant a reasonable time in which to make his election, and in the absence of special reasons justifying a different time, an order requiring him to elect within eight days, which was the time required by the early chancery practice, was proper); Bradford *v.* Williams, 2 Md. Ch. 1.

85. Bradford *v.* Williams, 2 Md. Ch. 1.

Costs generally see Costs.

86. Union Bank *v.* Kerr, 2 Md. Ch. 460. See Napier *v.* Gidiere, Cheves (S. C.) 101, where a plaintiff, who had gone into both courts upon the same demand, being put to his election, chose to proceed in equity. On motion of his attorney that his case at law might be continued the motion was denied and he was required to take a nonsuit and pay costs.

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Religious Society, see RELIGIOUS SOCIETIES.
School-District, see SCHOOLS AND SCHOOL-DISTRICTS.
Stock-Holders, see BANKS AND BANKING; CORPORATIONS.

For Matters Relating to — (*continued*)
Election by — (*continued*)
Town, see Towns.
Unincorporated Association, see Associations.
Election Day as Holiday, see Holidays.
Election of Particular Officers:
Generally, see Officers.
Bank Officer, see Banks and Banking.
City Officer, see Municipal Corporations.
Clerk of Court, see Clerks of Courts.
Constable, see Sheriffs and Constables.
Coroner, see Coroners.
Corporate Officer, see Corporations.
County Officer, see Counties.
Director, see Corporations.
Highway Officer, see Municipal Corporations; Streets and Highways; Towns.
Judge, see Judges.
Justice of the Peace, see Justices of the Peace.
Member of:
Congress, see United States.
Legislature, see States.
Municipal Officer, see Municipal Corporations.
Officer of Religious Society, see Religious Societies.
Officer of Unincorporated Association, see Associations.
School Officer, see Schools and School-Districts.
Sheriff, see Sheriffs and Constables.
State Officer, see States.
Town Officer, see Towns.
Election Records as Evidence, see Evidence.
Election to Determine Particular Question:
Abolishment of:
County, see Counties.
School-District, see Schools and School-Districts.
Adoption of:
Local Option Law, see Intoxicating Liquors.
Stock Law, see Animals.
Alteration of:
County, see Counties.
School-District, see Schools and School-Districts.
Appropriation in Aid of Corporation, see Counties.
Creation of:
County, see Counties.
School-District, see Schools and School-Districts.
Incurring Indebtedness by:
County, see Counties.
Municipality, see Municipal Corporations.
Issue of Bonds by:
County, see Counties.
Municipality, see Municipal Corporations.
Municipal Question Generally, see Counties; Municipal Corporations.
Submission of Constitution to Popular Vote, see Constitutional Law.
Submission of Question of Aid to Public Improvements, see Counties; Municipal Corporations; Towns.
Expenses of Elections, see Counties; Municipal Corporations; Towns.
Immunity From Arrest or Attachment on Election Day, see Arrest; Process.

For Matters Relating to — (*continued*)
Injunction Generally, see INJUNCTIONS.
Judicial Notice of Election, see EVIDENCE.
Mandamus Generally, see MANDAMUS.
Parol Evidence to Aid Election Records, see EVIDENCE.
Perjury by Voter, see PERJURY.
Presumption of Legality of Election, see EVIDENCE.
Prohibition Generally, see PROHIBITION.
Quo Warranto Generally, see QUO WARRANTO.
Recovery of Money Lost by Betting, see GAMING.
Sale of Liquor on Election Day, see INTOXICATING LIQUORS.
Secondary Evidence of Matters Shown by Election Records, see EVIDENCE.
Term of Office, see OFFICERS.

I. DEFINITIONS.

A. In General. An election is the embodiment of the popoular will, the expression of the sovereign power of the people.[1] In common parlance an election is the act of casting and receiving the ballots, counting them, and making the return.[2]

B. Distinguished From Appointment. The term "election" carries with it the idea of a choice in which all who are to be affected with the choice participate; whereas from the word "appointment" we understand that the duties of the appointee are for others than those by whom he is appointed.[3]

C. Primary Election. In the absence of any special statute on the subject a primary election is purely a creation of political parties and associates as a means for selecting their candidates.[4]

D. General Election. A general election is an election held to select an officer after the expiration of the full term of the former officer.[5]

E. Special Election. A special election is an election held to supply a vacancy in office occurring before the expiration of the full term for which the

1. Stinson *v.* Sweeney, 17 Nev. 309, 320, 30 Pac. 997.

Other definitions are: "The deliberate choice of a majority or plurality of the electoral body. This is evidenced by the votes of the electors." Lewis *v.* Boynton, 25 Colo. 486, 491, 55 Pac. 732 [*citing* Saunders *v.* Haynes, 13 Cal. 145, 491].

"A choice of persons for public offices." Seaman *v.* Baughman, 82 Iowa 216, 220, 47 N. W. 1091, 11 L. R. A. 354.

"The act of choosing a person to fill an office or employment, by any manifestation of preference; as by ballot, uplifted hands, or *viva voce*." Webster Dict. [*quoted* in State *v.* Hirsch, 125 Ind. 207, 210, 24 N. E. 1062, 9 L. R. A. 170; State *v.* Bullock, 80 N. C. 132, 136].

"The choice of a person or persons for office of any kind by the voting of a body of qualified or authorized electors." State *v.* Hirsch, 125 Ind. 207, 210, 24 N. E. 1062, 9 L. R. A. 170.

"The selection of one person from a specified class to discharge certain duties in a state, corporation, or society." Bouvier L. Dict.

2. State *v.* Tucker, 54 Ala. 205, 210; *Ex p.* Conley, (Tex. Cr. App. 1903) 75 S. W. 301.

3. As distinguished from an election an appointment is generally made by one person or by a limited number acting with delegated powers, while an election is the direct choice of all the members of the body from whom the choice can be made. Wickensham *v.* Brittan, 93 Cal. 34, 37, 28 Pac. 792, 29 Pac. 51, 15 L. R. A. 106; State *v.* Compson, 34 Oreg. 25, 54 Pac. 349. See also Magruder *v.* Swann, 25 Md. 173, 204; State *v.* Irwin, 5 Nev. 111, 121; State *v.* McCollister, 11 Ohio 46, 52. See also Rogers *v.* Jacob, 88 Ky. 502, 505, 11 S. W. 513, 11 Ky. L. Rep. 45 [*citing* Police Com'rs *v.* Louisville, 3 Bush (Ky.) 597; Speed *v.* Crawford, 3 Metc. (Ky.) 207]. And *compare* Conger *v.* Gilmer, 32 Cal. 75, 78.

4. People *v.* Cavanaugh, 112 Cal. 674, 44 Pac. 1057.

5. Kenfield *v.* Irwin, 52 Cal. 164.

The words "general election" used in the constitution and the statute, as applied to the office of judge of probate, can have no other meaning than the biennial election held in November, and an election at any other time to that office must be regarded as a special election. People *v.* Palmer, 91 Mich. 283, 51 N. W. 999 [*citing* People *v.* Lord, 9 Mich. 227]. See also Westinghausen *v.* People, 44 Mich. 265, 6 N. W. 641.

incumbent was elected,[6] or an election at which some question or proposition is submitted to the vote of the qualified electors.[7]

II. NATURE AND SOURCE OF THE RIGHT OF SUFFRAGE.

In all periods and in all countries it may be safely assumed that no privilege has been held to be more exclusively within the control of governmental power than the privilege of voting, each state in turn regulating the subject by sovereign political will.[8] The right of suffrage once granted may be taken away by the exercise of sovereign power, and if taken away no vested right is violated or bill of attainder passed.[9] None of the elementary writers include the right of suffrage among the rights of property or of person. It is not an absolute unqualified personal right, but is altogether conventional.[10] It is not a natural right of the citizen, but a franchise dependent upon law, by which it must be conferred to permit its exercise.[11] In England the elective franchise is not regarded as a natural right, although it has been declared to be a vested right.[12]

III. POWER TO CONFER AND REGULATE THE RIGHT OF SUFFRAGE.

A. By the States — 1. In General. Subject to the constitutional restrictions as to race, color, and previous condition of servitude,[13] the states have supreme

6. Kenfield *v.* Irwin, 52 Cal. 164.

7. People *v.* Ohio Grove Tp., 51 Ill. 191.

8. Spencer *v.* Board of Registration, 1 MacArthur (D. C.) 169, 176, 29 Am. Rep. 582.

9. State *v.* Staten, 6 Coldw. (Tenn.) 233; Ridley *v.* Sherbrook, 3 Coldw. (Tenn.) 569.

Citizenship and suffrage are by no means inseparable. Anderson *v.* Baker, 23 Md. 531; People *v.* Board of Inspectors, 31 Misc. (N. Y.) 584, 67 N. Y. Suppl. 236.

The right of suffrage has been referred to as a vested right, but it is apparent that the word "vested" was used as meaning that the right cannot be taken away except by the power which conferred it. For example those to whom the right of suffrage is guaranteed by the constitution cannot be deprived of it by any act of the legislature. White *v.* Multnomah County, 13 Oreg. 317, 10 Pac. 484, 57 Am. Rep. 20; State *v.* Baker, 38 Wis. 71.

10. Anderson *v.* Baker, 23 Md. 531.

11. *Delaware.*— Frieszleben *v.* Shallcross, 9 Houst. 1, 19 Atl. 576, 8 L. R. A. 337.

Indiana.— Gougar *v.* Timberlake, 148 Ind. 38, 46 N. E. 339, 62 Am. St. Rep. 487, 37 L. R. A. 644; Morris *v.* Powell, 125 Ind. 281, 25 N. E. 221, 9 L. R. A. 326.

New York.— People *v.* Barber, 48 Hun 198.

Tennessee.— Ridley *v.* Sherbrook, 3 Coldw. 569.

Utah.— Anderson *v.* Tyree, 12 Utah 129, 42 Pac. 201.

Nature and source of right.— The elective franchise is not a natural right, and is made to rest in the United States upon the authority of law which defines the qualifications of those citizens who may exercise it. Spencer *v.* Board of Registration, 1 MacArthur (D. C.) 169, 29 Am. Rep. 582.

The very term "elective franchise" excludes the idea of natural right, for a franchise is a privilege granted by the sovereign authority to an individual. Blair *v.* Ridgely, 41 Mo. 63, 161, 97 Am. Dec. 248.

12. In an early case it was said that the election of knights belongs to the freeholders of the counties, and it is an original right vested in, and inseparable from, the freehold, and can no more be severed from the freehold than the freehold itself can be taken away; that, as for citizens and burgesses, they depend on the same rights as the knights of shires and differ only as to the tenure, but the right and manner of their election is on the same foundation. Lord Holt, C. J., in Ashby *v.* White, 14 How. St. Tr. 695, 2 Ld. Raym. 938, 950, 3 Ld. Raym. 320, 1 Smith Lead. Cas. 231.

13. The only provision in the constitution of the United States, as originally adopted, concerning the qualifications of electors in the states is that the electors of the members of the house of representatives of the United States shall have the qualifications requisite for electors of the most numerous branch of the state legislature. And the only restriction on the power of the states to regulate the qualifications of electors is to be found in the fifteenth amendment to that instrument, which provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude. So also the fourteenth amendment of the federal constitution provides that when the right to vote at any election is denied to any of the male inhabitants of a state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state. This distinctly recognizes the right of the state to deny or abridge the right to vote of the male inhabitants who are twenty-

and exclusive power to regulate the right of suffrage and to determine the class of inhabitants who may vote.[14] Each state may define the right in its own constitution or empower its legislature to do so.[15] So also the legislative assembly of a territory has authority to regulate the exercise of the right of suffrage in such territory subject to the restrictions and limitations imposed by the federal constitution and the acts of congress.[16] A provision in a state constitution that in addition to other qualifications the voters must be able to read any section of the constitution of the state, or be able to understand the same when read to them, or give a reasonable interpretation of it, is not in contravention of the constitution of the United States.[17] All statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor.[18]

2. CONSTITUTIONAL LIMITATIONS. While the elective franchise is a privilege rather than a right and may be taken away by the power which conferred it, yet when it has been granted by the constitution it cannot be abridged by the legislature, and all laws in regulation of the same must be reasonable, uniform, and impartial.[19] Where the constitution of a state fixes the qualifications and deter-

one years of age, and it is well known that many of the states have, from time to time, by an impartial and uniform rule of prohibition, denied the right to vote to such of the male inhabitants as were thought not to possess the qualifications necessary for an independent and intelligent exercise of the right. Stone *r.* Smith, 159 Mass. 413, 34 N. E. 521. In Sproule r. Fredericks, 69 Miss. 898, 11 So. 472, it was held that no limitation upon the right of the state to prescribe the qualifications for suffrage existed, except that condition in the constitution of the United States and its amendments which prohibited discrimination on account of race, color, or previous condition of servitude, and that the sovereignty of the state in this respect was not affected by the act of congress approved Feb. 23, 1870, which, in readmitting Mississippi to representation in congress, assumed to make it conditional upon the state's preserving the then existing qualifications for suffrage.

14. *Alabama.*— Washington *v.* State, 75 Ala. 584, 51 Am. Rep. 479.

District of Columbia.— Spencer *v.* Board of Registration, 1 MacArthur 169, 29 Am. Rep. 582.

Florida.— State *v.* Dillon, 32 Fla. 545, 14 So. 383, 22 L. R. A. 124.

Illinois.— Spragins *v.* Houghton, 3 Ill. 377.

Kansas.— Anthony *v.* Halderman, 7 Kan. 50.

Maryland.— Anderson *v.* Baker, 23 Md. 531.

Massachusetts.— Kinneen *v.* Wells, 144 Mass. 497, 11 N. E. 916, 59 Am. Rep. 105.

Missouri.— Blair *v.* Ridgely, 41 Mo. 63, 97 Am. Dec. 248.

Pennsylvania.— Huber *v.* Reily, 53 Pa. St. 112.

United States.— U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588; U. S. *v.* Reese, 92 U. S. 214, 23 L. ed. 563; Corfield *v.* Coryell, 6 Fed. Cas. No. 3,230, 4 Wash. 371; U. S. *v.* Anthony, 24 Fed. Cas. No. 14,459, 11 Blatchf. 200; U. S. *v.* Crosby, 25 Fed. Cas. No. 14,893, 1 Hughes 448.

See 18 Cent. Dig. tit. "Elections," § 2 *et seq.*

15. Ridley *v.* Sherbrook, 3 Coldw. (Tenn.) 569. In Kinneen *v.* Wells, 144 Mass. 497, 498, 11 N. E. 916, 59 Am. Rep. 105, Devens, J., said: "The qualifications of voters are fixed by state legislation. The requisitions as to ownership of property, citizenship, sex, and residence, in connection with the right of voting, vary with the constitutions or laws of the several States. However unwise, unjust, or even tyrannical its regulations may be or seem to be in this regard, the right of each State to define the qualifications of its voters is complete and perfect, except so far as it is controlled by the fifteenth article of the Amendments of the Constitution of the United States, which provides that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.'"

16. Hayward *v.* Bolton, 2 Ida. (Hasb.) 452, 17 Pac. 457; Innis *v.* Bolton, 2 Ida. (Hasb.) 442, 17 Pac. 264.

17. It has been held that such a provision (Miss. Const. § 244) is not in contravention of the federal constitution providing against discrimination on the ground of race, color, or previous condition of servitude, although it may disfranchise more black than white voters. Williams *v.* Mississippi, 170 U. S. 213, 18 S. Ct. 583, 42 L. ed. 1012. See also Dixon *v.* State, 74 Miss. 271, 20 So. 839.

18. Owens *v.* State, 64 Tex. 500.

The right of suffrage is regarded with jealous solicitude by a free people, and should be so viewed by those intrusted with the mighty power of guarding and vindicating their sovereign right. Such a construction of the law as would permit the disfranchisement of large bodies of voters because of an error of a single official should never be adopted where the language in question is clearly susceptible of any other. Bowers *v.* Smith, 111 Mo. 45, 55, 20 S. W. 101, 33 Am. St. Rep. 491, 16 L. R. A. 754; Wells *v.* Stanforth, 16 Q. B. D. 244, Coltm. 451, 50 J. P. 631, 55 L. J. Q. B. 12, 54 L. T. Rep. N. S. 183.

19. Monroe *v.* Collins, 17 Ohio St. 665; *In re* Newport Charter, 14 R. I. 655; *In re* Appointment of Supervisors, 52 Fed. 254.

mines who shall be deemed qualified voters in direct, positive, and affirmative terms, these qualifications cannot be added to by legislative enactment.[20] Any provisions which would impose upon a particular class of citizens conditions and requirements not imposed upon all others are void.[21] Neither is it within the power of the legislature to dispense with any of the constitutional qualifications and confer the elective franchise upon other classes than those to whom it is given by the constitution; for the enlargement and deprivation of the right of suffrage are equally obnoxious to the constitution.[22] In short it is not within the power of the legislature to deny, abridge, or extend the constitutional right of suffrage; or in any way to change the qualifications of voters as defined by the constitution of the state.[23] But legislation may be enacted which merely regulates the exercise of the elective franchise, and does not amount to a denial of the franchise itself.[24] And if the constitution does not confer the right to vote or prescribe

20. The legislature has no power thus to disfranchise voters who are qualified by the express terms of the constitution.

Alabama.— State *v.* Adams, 2 Stew. 231.

Arkansas.— Rison *v.* Farr, 24 Ark. 161, 87 Am. Dec. 52.

Illinois.— People *v.* English, 139 Ill. 622, 29 N. E. 678, 15 L. R. A. 131.

Indiana.— Quinn *v.* State, 35 Ind. 485, 9 Am. Rep. 754.

Massachusetts.— Kinneen *v.* Wells, 144 Mass. 497, 11 N. E. 916, 59 Am. Rep. 105.

Michigan.— People *v.* Maynard, 15 Mich. 463.

Minnesota.— State *v.* Fitzgerald, 37 Minn. 26, 32 N. W. 788.

Nevada.— State *v.* Findlay, 20 Nev. 198, 19 Pac. 241, 19 Am. St. Rep. 346.

Pennsylvania.—McCafferty *v.* Guyer, 59 Pa. St. 109; Rishel *v.* Luther, 2 Pa. Dist. 769; *In re* Clothier, 2 Chest. Co. Rep. 355.

Utah.— Lyman *v.* Martin, 2 Utah 136.

Wisconsin.— State *v.* Tuttle, 53 Wis. 45, 9 N. W. 791; State *v.* Lean, 9 Wis. 279; State *v.* Williams, 5 Wis. 308, 68 Am. Dec. 65.

See 18 Cent. Dig. tit. "Elections," § 2 *et seq.*

An election held in accordance with a statute which prohibits from voting a large class of persons having a constitutional right to vote does not confer a legal title to the office upon the person elected. Allison *v.* Englewood Tp., 58 N. J. L. 140, 32 Atl. 688.

21. Lyman *v.* Martin, 2 Utah 136, where it was held that a provision of the election law requiring that all male voters should be taxpayers, without imposing the same condition upon female voters, was void.

Preparations for change of residence.— The purchasing of a lot, erecting and furnishing of a dwelling thereon, and completing every arrangement for its occupation as a home are only acts preparatory to a change of residence and do not constitute that change while the owner still occupies, of right, his former place of abode. State *v.* McGeary, 69 Vt. 461, 38 Atl. 165, 44 L. R. A. 446.

A statute requiring a voter to take what is commonly known as a test oath that he will support the constitution of the United States and that of the state, and that he has not voluntarily borne arms against the United States or the state, is unconstitutional and void in so far as it attempts to add to the constitutional qualifications of voters. Rison *v.* Farr, 24 Ark. 161, 87 Am. Dec. 52; Davies *v.* McKeeby, 5 Nev. 369; Green *v.* Shumway, 39 N. Y. 418.

A statute which makes the enjoyment of a constitutional right depend upon an impossible condition, or upon the doing of that which cannot legally be done, is equivalent to an absolute denial of the right under any condition. Davies *v.* McKeeby, 5 Nev. 369.

22. Spier *v.* Baker, 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 196; People *v.* English, 139 Ill. 622, 29 N. E. 678, 15 L. R. A. 131; State *v.* Findlay, 20 Nev. 198, 19 Pac. 241, 19 Am. St. Rep. 346; Bloomer *v.* Todd, 3 Wash. Terr. 599, 19 Pac. 135, 1 L. R. A. 111.

23. *Arkansas.*— Rison *v.* Farr, 24 Ark. 161, 87 Am. Dec. 52.

California.— Eaton *v.* Brown, 96 Cal. 371, 31 Pac. 250, 31 Am. St. Rep. 225, 17 L. R. A. 699.

Florida.— State *v.* Dillon, 32 Fla. 545, 14 So. 383, 22 L. R. A. 124.

Indiana.— Gougar *v.* Timberlake, 148 Ind. 38, 46 N. E. 339, 62 Am. St. Rep. 487, 37 L. R. A. 644; Morris *v.* Powell, 125 Ind. 281, 25 N. E. 221, 9 L. R. A. 326.

Michigan.— Coffin *v.* Board of Election Com'rs, 97 Mich. 188, 56 N. W. 567, 21 L. R. A. 662.

Nevada.— State *v.* Board of Examiners, 21 Nev. 67, 24 Pac. 614, 9 L. R. A. 385; State *v.* Findlay, 20 Nev. 198, 19 Pac. 241, 19 Am. St. Rep. 346; Clayton *v.* Harris, 7 Nev. 64; Davies *v.* McKeeby, 5 Nev. 369.

New Jersey.— Allison *v.* Blake, 57 N. J. L. 6, 29 Atl. 417, 25 L. R. A. 480.

North Carolina.— People *v.* Canaday, 73 N. C. 198, 21 Am. Rep. 465.

Ohio.— Monroe *v.* Collins, 17 Ohio St. 665.

Pennsylvania.— Cusick's Election, 136 Pa. St. 459, 20 Atl. 574, 10 L. R. A. 228; McCafferty *v.* Guyer, 59 Pa. St. 111; Page *v.* Allen, 58 Pa. St. 338, 98 Am. Dec. 272.

Rhode Island.— *In re* Newport Charter, 14 R. I. 655.

Utah.— Lyman *v.* Martin, 2 Utah 136.

Wisconsin.— State *v.* Baker, 38 Wis. 71; State *v.* Williams, 5 Wis. 308, 68 Am. Dec. 65.

See 18 Cent. Dig. tit. "Elections," § 6 *et seq.*

24. De Walt *v.* Bartley, 146 Pa. St. 529, 24 Atl. 185, 28 Am. St. Rep. 814, 15 L. R. A.

the qualifications of voters it is competent for the legislature as the representative of the law-making power to do so.[25] So if the office is not a constitutional office but one of legislative creation the legislature has power to prescribe the qualifications of voters.[26]

B. By the United States — 1. In General. The constitution of the United States gives congress no power to prescribe the qualifications of electors in the states;[27] but congress may as a penalty impose upon a criminal the forfeiture of his citizenship of the United States, and if the constitution and laws of a state allow only citizens of the United States to vote, congress may thus deprive one of the opportunity of enjoying the right belonging to him as a citizen of the state, even the right of voting, but cannot deprive him of the right itself.[28] It should be observed, however, that although congress has no power to prescribe the qualifications of electors, the right to vote for members of congress is fundamentally based upon the constitution, and was not intended to be left within the exclusive control of the states.[29] The constitution has not conferred the right of suffrage upon any one individually, nor does it secure the right of suffrage to any class of citizens. The United States have no voters of their own creation in the states. The fifteenth amendment[30] has invested the citizens of the United States with a new constitutional right, which is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. The right to vote in the states comes from the states, but the right of exemption from the prohibited discrimination comes from the United States.[31] The language of the constitution is that the house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for

771; Cusick's Election, 136 Pa. St. 459, 20 Atl. 574, 10 L. R. A. 228.

25. State *v.* Dillon, 32 Fla. 545, 14 So. 383, 22 L. R. A. 124.

26. State *v.* Dillon, 32 Fla. 545, 14 So. 383, 22 L. R. A. 124; Buckner *v.* Gordon, 81 Ky. 665.

27. *California.*—Van Valkenburg *v.* Brown, 43 Cal. 43, 13 Am. Rep. 136.

Indiana.— Gougar *v.* Timberlake, 148 Ind. 38, 46 N. E. 339, 62 Am. St. Rep. 487, 37 L. R. A. 644.

Massachusetts.— Stone *v.* Smith, 159 Mass. 413, 34 N. E. 521; Kinneen *v.* Wells, 144 Mass. 497, 11 N. E. 916, 59 Am. Rep. 105.

Mississippi.— Sproule *v.* Fredericks, 69 Miss. 898, 11 So. 472.

Pennsylvania.— Huber *v.* Reily, 53 Pa. St. 112.

Washington.— Bloomer *v.* Todd, 3 Wash. Terr. 599, 19 Pac. 135, 1 L. R. A. 111.

United States.— U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588; U. S. *v.* Reese, 92 U. S. 214, 23 L. ed. 563; Minor *v.* Happersett, 21 Wall. 162, 22 L. ed. 627; U. S. *v.* Anthony, 24 Fed. Cas. No. 14,459, 11 Blatchf. 200; U. S. *v.* Crosby, 25 Fed. Cas. No. 14,893, 1 Hughes 448.

See 18 Cent. Dig. tit. "Elections," § 8 *et seq.*

28. Huber *v.* Reily, 53 Pa. St. 112.

But under an act of congress depriving deserters from the army and navy of their citizenship of the United States, a citizen of a state whose laws require that voters shall be citizens of the United States must be tried and convicted of the offense of desertion before he can be deprived of his right to vote in a state election. State *v.* Symonds, 57 Me. 148.

29. Wiley *v.* Sinkler, 179 U. S. 58, 21 S. Ct. 17, 45 L. ed. 84; *Ex p.* Yarbrough, 110 U. S. 651, 4 S. Ct. 152, 28 L. ed. 274.

30. **The fifteenth amendment** of the federal constitution *ex proprio vigore* substantially confers upon the negro the right to vote, provided he possesses all the qualifications prescribed for white voters in the state, and congress has the power by appropriate legislation to protect and enforce that right. *Ex p.* Yarbrough, 110 U. S. 651, 4 S. Ct. 152, 28 L. ed. 274. And it follows that the adoption of this amendment rendered inoperative the provisions in the then existing state constitutions, whereby the right of suffrage was limited to the white race. Neal *v.* Delaware, 103 U. S. 370, 26 L. ed. 567. But the amendment does not give negroes the right to vote independently of the restrictions and qualifications, such as age, residence, etc., imposed by a state constitution on white voters. Anthony *v.* Halderman, 7 Kan. 50.

In adopting legislation for carrying into effect the fifteenth amendment, congress has power to provide for the punishment of a state official who refuses to perform the duties necessary to qualify all colored citizens to vote. U. S. *v.* Given, 25 Fed. Cas. No. 15,211.

Provision for separate school-boards see Porter *v.* Kingfisher County, 6 Okla. 550, 51 Pac. 741, declaring Okla. Laws (1897), art. 1, c. 34, to be unconstitutional.

31. U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588; U. S. *v.* Reese, 92 U. S. 214, 23 L. ed. 563; Minor *v.* Happersett, 21 Wall.

electors of the most numerous branch of the state legislature. The states do not prescribe the qualifications of voters for members of congress, nor can they do so *eo nomine*; they simply define who are to vote for the popular branch of their own legislature and the constitution of the United States says the same persons shall vote for members of congress in those states. It is not true therefore that the electors for members of congress owe their right to vote to the state law in any sense which makes the exercise of the right to depend exclusively on the law of the state.[32]

2. **Power of Congress to Regulate Elections.** Under the provision of the constitution relating to elections for senators and representatives,[33] with the exception of the place of choosing senators, it has been settled that congress has a supervisory power over the subject of federal elections, and may either make entirely new regulations, or add to, alter, or modify the regulations made by the states, and if it only alters them, leaving the general organization of the polls to the state, there results a necessary coöperation of the two governments in regulating the subject.[34] To this end congress has power to provide for the appointment of supervisors of elections,[35] and also to provide for the punishment of violations of state election laws at an election at which federal officers are to be chosen.[36] Thus far we have considered only the power of congress under the express grant of the federal constitution, but it seems that in the nature of things congress has implied power to provide for and protect the fairness and purity of the election of senators and representatives in congress and electors for president and vice-president.[37] It has been held that the power of congress to interfere for the protection of voters at

(U. S.) 162, 22 L. ed. 627; Lackey *v.* U. S., 107 Fed. 114, 46 C. C. A. 189, 53 L. R. A. 660; U. S. *v.* Crosby, 25 Fed. Cas. No. 14,893, 1 Hughes 448.

32. Wiley *v.* Sinkler, 179 U. S. 58, 21 S. Ct. 17, 48 L. ed. 84; *Ex p.* Yarbrough, 110 U. S. 651, 4 S. Ct. 152, 28 L. ed. 274; U. S. *v.* Goldman, 25 Fed. Cas. No. 15,225, 3 Woods 187.

33. The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but the congress may at any time by law make or alter such regulations, except as to the place of choosing senators. U. S. Const. art. I, § 4.

34. U. S. *v.* Gale, 109 U. S. 65, 3 S. Ct. 1, 27 L. ed. 857; *Ex p.* Siebold, 100 U. S. 371, 25 L. ed. 717; *Ex p.* Clarke, 100 U. S. 399, 25 L. ed. 715; U. S. *v.* Belvin, 46 Fed. 381; Brown *v.* Munford, 16 Fed. 175; *Ex p.* Geissler, 4 Fed. 188, 9 Biss. 492.

35. *In re* Appointment of Supervisors, 52 Fed. 254; *Ex p.* Geissler, 4 Fed. 188, 9 Biss. 492.

A statute which authorizes the deputy United States marshal to preserve peace at the polls is a valid exercise of the federal legislative authority. *Ex p.* Siebold, 100 U. S. 371, 25 L. ed. 717; *In re* Deputy Marshals, 22 Fed. 153; *In re* Engle, 9 Fed. Cas. No. 4,488, 1 Hughes 592.

36. *Ex p.* Coy, 127 U. S. 731, 8 S. Ct. 1263, 32 L. ed. 274 [*affirming* 31 Fed. 794]; *Ex p.* Clarke, 100 U. S. 399, 25 L. ed. 715; U. S. *v.* Bader, 16 Fed. 116, 4 Woods 189.

Illegal registration.— U. S. *v.* Quinn, 27 Fed. Cas. No. 16,110, 8 Blatchf. 48.

37. In *Ex p.* Yarbrough, 110 U. S. 651, 657, 4 S. Ct. 152, 28 L. ed. 274, Miller, J., in speaking of the general power of congress to enact laws for the regulation of federal elections, said: "That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration. If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption. If it has not this power, it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption. The proposition that it has no such power is supported by the old argument often heard, often repeated, and in this court never assented to, that when a question of the power of congress arises the advocate of the power must be able to place his finger on words which expressly grant it. . . . This principle [the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed] in its application to the Constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers,— a difficulty which the instrument itself recognizes by conferring on Congress the authority to pass all laws necessary and proper to carry into exe-

federal elections existed before the adoption of the fourteenth and fifteenth amendments;[38] but congress can legislate concerning state and municipal elections only under the fifteenth amendment, and then solely for the purpose of preventing discrimination on account of race, color, or previous condition of servitude.[39]

C. Limitation as to Number of Candidates to Be Voted For. It has been held that a statute restricting the vote of an elector to less than the whole number, where several officers are to be elected to the same office, is unconstitutional and void, inasmuch as the constitution gives each qualified elector the right to vote for one candidate for each office.[40] But on the other hand it has been held that the legislature has power to limit the vote to a less number than all the officers to be elected.[41] A statute providing that one elector for president and vice-president shall be elected by the voters of each congressional district in the state, and that two such electors shall be elected by the voters of the state at large, is no infraction of the federal constitution.[42]

D. Cumulative Voting. It has been held that a statute authorizing cumulative voting, where the electors have a right to vote for several candidates for the same office, is a valid exercise of legislative power,[43] although it would be otherwise if the statute made the cumulation of votes necessary, for then each voter would be deprived of the privilege of voting at the election for part of the officers to be elected, and to that extent would be excluded from his constitutional right. But in the absence of express constitutional warrant, it is doubtful if even a permissive statute of this character is constitutional.[44]

cution the powers expressly granted and all other powers vested in the government, or any branch of it, by the Constitution."

38. U. S. *v.* Crosby, 25 Fed. Cas. No. 14,893, 1 Hughes 448.

39. U. S. *v.* Reese, 92 U. S. 214, 23 L. ed. 563; Lackey *v.* U. S., 107 Fed. 114, 46 C. C. A. 189, 53 L. R. A. 660; U. S. *v.* Belvin, 46 Fed. 381; U. S. *v.* Munford, 16 Fed. 223; U. S. *v.* Amsden, 6 Fed. 819, 10 Biss. 283.

It has no power to interfere with purely state elections, except in the matter of such discrimination (Lackey *v.* U. S., 107 Fed. 114, 46 C. C. A. 189, 53 L. R. A. 660); and the mere fact that a representative in congress is voted for at an election of state and county officers does not authorize congress to regulate such election in matters which in no wise relate to or affect the result, so far as concerns the United States (*Ex p.* Perkins, 29 Fed. 900); for if every act in violation of the state laws is deemed equally a violation of the federal laws, it would be impossible to commit any illegal act having exclusive reference to the election of state and county officers which would not be amenable to federal jurisdiction (U. S. *v.* Reese, 92 U. S. 214, 23 L. ed. 563; *Ex p.* Perkins, 29 Fed. 900; U. S. *v.* Seaman, 23 Fed. 882, 23 Blatchf. 216; U. S. *v.* Campbell, 16 Fed. 233, 9 Sawy. 20; U. S. *v.* Munford, 16 Fed. 223; Brown *v.* Munford, 16 Fed. 175; U. S. *v.* Wright, 16 Fed. 112; U. S. *v.* Cahill, 9 Fed. 80, 3 McCrary 200; U. S. *v.* Nicholson, 27 Fed. Cas. No. 15,877, 3 Woods 215).

40. State *v.* Constantine, 42 Ohio St. 437, 51 Am. Rep. 833.

In New Jersey the constitution of New Jersey provides in substance that the general assembly shall be composed of members elected by the legal voters of the counties respectively, who shall be apportioned among the said counties according to population, and also provides that every qualified voter who shall have been a resident of the state one year, and of the county in which he claims his vote five months next before the election, shall be entitled to vote for all officers who may be elected by the people. The legislature, in 1891, passed an act providing that the populous counties should be divided into assembly districts, and restricting the right of electors to vote for the candidate in their own district, and it was held that this law was unconstitutional on the ground that the voters had a right to vote for as many candidates as were apportioned to their whole county. State *v.* Wrightson, 56 N. J. L. 126, 28 Atl. 56, 22 L. R. A. 548.

In New York there has been legislation sanctioning such voting in certain cases, and although the question has in several cases been before the court of appeals of that state, that court has always found a way of disposing of the cases in which the question was raised without passing upon the constitutionality of the law. Rathbone *v.* Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408; People *v.* Kenney, 96 N. Y. 294; People *v.* Crissey, 91 N. Y. 616.

41. Com. *v.* Reeder, 171 Pa. St. 505, 33 Atl. 67, 33 L. R. A. 141.

Election of aldermen by wards.— State *v.* McAlister, 88 Tex. 284, 31 S. W. 187, 28 L. R. A. 523.

42. McPherson *v.* Blacker, 146 U. S. 1, 13 S. Ct. 3, 36 L. ed. 869.

43. People *v.* Nelson, 133 Ill. 565, 27 N. E. 217.

44. Maynard *v.* Board of Canvassers, 84 Mich. 228, 239, 47 N. W. 756, 11 L. R. A. 332.

E. Power to Require Registration or Proof of Qualification — 1. Legislature Cannot Add Additional Qualifications. Where the right of suffrage is conferred by the constitution and the qualifications of electors are therein fully defined, a registration law which assumes to prescribe any additional qualification as a condition precedent to the right to vote, such for example as a longer residence in the county or precinct than that required by the constitution, is unconstitutional and void.[45] Although one is not a qualified voter under the constitution on the day the registration books are closed, yet if he becomes so before election day his vote cannot lawfully be rejected on the ground that he has not registered.[46] The legis-

Schemes to secure minority representation. — In Maynard *v.* Board of Canvassers, 84 Mich. 228, 232, 47 N. W. 756, 11 L. R. A. 332, Champlin, C. J., said: "These schemes may all be reduced to four well-recognized classes, viz.: 1. The 'restrictive,' which requires a certain number to be elected on one ticket, and prohibits any elector from voting for the whole number to be elected. Thus, if four are to be elected, no one can vote for more than two. 2. The 'cumulative,' which requires three or more to be elected, and permits the elector to cast as many votes as there are persons to be elected, and to distribute such votes among the candidates as the elector may choose. 3. The 'Geneva,' 'free vote,' or 'Gilpin' plan. By this plan the districts are required to be large, and each party puts in nomination a full ticket, and each voter casts a single ballot. The whole number of ballots having been ascertained, that sum is divided by the number of places to be filled, and each ticket is entitled to the places in proportion to the number of votes cast by it, taking the persons elected from the head of the tickets. This plan doubtless comes the nearest to a proportional representation of the minority of any plan devised which is practical for popular elections. It was originated by Mr. Gilpin in 1844, who advocated it in a pamphlet published in Philadelphia. It has never been adopted in this country, but has become the *liste libre* of Geneva, and is said to work well in Switzerland. 4. The 'Hare' plan, or 'single vote.' This method is too intricate and tedious ever to be adopted for popular elections by the people. It requires successive counts and redistribution of the votes until an election is reached."

45. *Georgia.*— Stephens *v.* Mayor, 84 Ga. 630, 11 S. E. 150.

Indiana.— Brewer *v.* McCleland, 144 Ind. 423, 32 N. E. 299, 17 L. R. A. 845; Morris *v.* Powell, 125 Ind. 281, 25 N. E. 221, 9 L. R. A. 326; Quinn *v.* State, 35 Ind. 485, 9 Am. Rep. 754.

Kentucky.— Owensboro *v.* Hickman, 90 Ky. 629, 14 S. W. 688, 12 Ky. L. Rep. 576, 10 L. R. A. 224.

Massachusetts.— Kinneen *v.* Wells, 144 Mass. 497, 11 N. E. 916, 59 Am. Rep. 105.

Michigan.— Atty.-Gen. *v.* Detroit, 78 Mich. 545, 44 N. W. 388, 18 Am. St. Rep. 458, 7 L. R. A. 99.

Mississippi.— State *v.* Kelly, (1902) 32 So. 909; Bew *v.* State, 71 Miss. 1, 13 So. 868.

Nebraska.— State *v.* Corner, 22 Nebr. 265, 34 N. W. 499, 3 Am. St. Rep. 267.

North Carolina.— People *v.* Canaday, 73 N. C. 198, 21 Am. Rep. 465.

Ohio.— Daggett *v.* Hudson, 43 Ohio St. 548, 3 N. E. 538, 54 Am. Rep. 832.

Oregon.— White *v.* Multnomah County, 13 Oreg. 317, 10 Pac. 484, 57 Am. Rep. 20.

Wisconsin.— Dells *v.* Kennedy, 49 Wis. 555, 6 N. W. 246, 381, 35 Am. Rep. 786; State *v.* Williams, 5 Wis. 308, 68 Am. Dec. 65.

United States.— Mills *v.* Green, 67 Fed. 818.

Ryan, C. J., in State *v.* Baker, 38 Wis. 71, 86, said: "The constitution vests every person having certain qualifications at the time of any election with the right of suffrage at such election. Some of these qualifications rest on time which may ripen, or facts which may accrue, on the very day of election. So that one may well become vested with the right of franchise pending the election, who was not so vested before, or perhaps entitled to be registered at the time of registry. So one entitled to the franchise may be sick, or absent or imprisoned, or otherwise disabled, at the time of registry. But the constitution vests and warrants the right at the time of election. And every one having the constitutional qualifications then, may go to the polls, vested with the franchise, of which no statutory condition precedent can deprive him. Because the constitution makes him, by force of his present qualifications, 'a qualified voter at such election.'"

McIver, C. J., in Butler *v.* Ellerbe, 44 S. C. 256, 281, 22 S. E. 425, expressed his opinion that the registration act of South Carolina was unconstitutional, because it required a residence of one hundred and twenty days in the county, whereas the constitution required only sixty days; but the majority of the judges declined to express any opinion upon that question, because they thought it unnecessary for the decision.

46. Quinn *v.* Lattimore, 120 N. C. 426, 26 S. E. 638, 58 Am. St. Rep. 797. See Kinneen *v.* Wells, 144 Mass. 497, 501, 11 N. E. 916, 59 Am. Rep. 105 [*citing* Humphrey *v.* Kingman, 5 Metc. (Mass.) 162; Bridge *v.* Lincoln, 14 Mass. 367; Kilham *v.* Ward, 2 Mass. 236].

But in Nevada it has been held that an act requiring for the adoption of a proposition to authorize the city council of a municipal corporation to borrow money a majority of the votes cast by the qualified electors of

lature cannot lengthen the constitutional period of residence by appointing a prior registration day instead of election day as the termination of the required term of residence.[47]

2. **May Require Reasonable Proof of Qualifications.** But the legislature, while it must leave the constitutional qualifications intact, and cannot add new ones, may nevertheless prescribe regulations to determine whether a given person who proposes to vote possesses the required qualifications; and to this end a registration law which does not assume to make previous registration the sole mode of proving those qualifications is not obnoxious to the constitution.[48] If the statute provides some other reasonable mode of proof by which an unregistered voter may establish his right to vote on election day this will save it from condemnation as being unconstitutional.[49]

3. **Registration Laws of Local Character.** And it may now be regarded as settled law that in the absence of constitutional inhibition the legislature may pass registration laws, even of a local character, if they merely regulate in a reasonable and uniform manner how the privilege of voting shall be exercised.[50]

4. **When the Constitution Authorizes Registration Laws.** Where the constitution provides that laws shall be made for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage, the power to pass a registry law requiring registration as a condition precedent to the right to vote seems to be fully implied.[51] The courts, when they could under the constitution, have uniformly upheld reasonable regulations of this kind designed to protect the

the city as shown by the last official registration was not in violation of the constitution providing that every male citizen of the United States, not subject to certain disabilities, and possessing certain qualifications, should be entitled to vote, as being a disfranchisement to qualified electors who became so after the last registration. State *v.* Ruhe, (1898) 52 Pac. 274.

47. State *v.* Kelly, (Miss. 1902) 32 So. 909; Page *v.* Allen, 58 Pa. St. 338, 98 Am. Dec. 272.

48. People *v.* Hoffman, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793; Byler *v.* Asher, 47 Ill. 101; Edmonds *v.* Banbury, 28 Iowa 267, 4 Am. Rep. 177; Southerland *v.* Norris, 74 Md. 326, 22 Atl. 137, 28 Am. St. Rep. 255; Capen *v.* Foster, 12 Pick. (Mass.) 485, 23 Am. Dec. 632.

49. Byler *v.* Asher, 47 Ill. 101; Cusick's Election, 136 Pa. St. 459, 20 Atl. 574, 10 L. R. A. 228; *In re* McDonough, 105 Pa. St. 488; State *v.* Hilmantel, 21 Wis. 566. In State *v.* Baker, 38 Wis. 71, 86, Ryan, C. J., said: "Statutes cannot impair the right, though they may regulate its exercise. Every statute regulating it must be consistent with the constitutionally qualified voter's right of suffrage when he claims his right at an election."

50. *Connecticut.*— Hyde *v.* Brush, 34 Conn. 454.

Georgia.— McMahon *v.* Savannah, 66 Ga. 217, 42 Am. Rep. 65.

Illinois.— People *v.* Hoffman, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793; Byler *v.* Asher, 47 Ill. 101.

Iowa.— Edmonds *v.* Banbury, 28 Iowa 267, 4 Am. Rep. 177.

Kentucky.— Cowan *v.* Prowse, 93 Ky. 156, 19 S. W. 407, 14 Ky. L. Rep. 273; Owensboro *v.* Hickman, 90 Ky. 629, 14 S. W. 688, 12 Ky. L. Rep. 576, 10 L. R. A. 224; Com. *v.* McClelland, 83 Ky. 686.

Louisiana.— Auld *v.* Walton, 12 La. Ann. 129.

Maryland.— Lankford *v.* Somerset County, 73 Md. 105, 20 Atl. 1017, 22 Atl. 412, 11 L. R. A. 491.

Massachusetts.— Capen *v.* Foster, 12 Pick. 485, 23 Am. Dec. 632.

Nevada.— State *v.* Board of Examiners, 21 Nev. 67, 24 Pac. 614, 9 L. R. A. 385.

Ohio.— Monroe *v.* Collins, 17 Ohio St. 665.

Pennsylvania.—Patterson *v.* Barlow, 60 Pa. St. 54.

Wisconsin.— State *v.* Baker, 38 Wis. 71.

See 18 Cent. Dig. tit. "Elections," § 14.

Thus certain limitations may apply only to cities and villages, and have no application to country precincts.

Illinois.— People *v.* Hoffman, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793.

Kansas.— State *v.* Shepherd, 42 Kan. 360, 22 Pac. 428; State *v.* Butts, 31 Kan. 537, 2 Pac. 618.

Kentucky.— Owensboro *v.* Hickman, 90 Ky. 629, 14 S. W. 688, 12 Ky. L. Rep. 576, 10 L. R. A. 224; Com. *v.* McClelland, 83 Ky. 686.

Nebraska.— State *v.* Leavitt, 33 Nebr. 285, 49 N. W. 1097.

New Hampshire.— *In re* Charter of Manchester, 47 N. H. 277.

United States.— Mason *v.* Missouri, 179 U. S. 328, 21 S. Ct. 125, 45 L. ed. 214.

51. *California.*—Webster *v.* Byrnes, 34 Cal. 273; People *v.* Laine, 33 Cal. 55.

Connecticut.— Hyde *v.* Brush, 34 Conn. 454.

Florida.— State *v.* Dillon, 32 Fla. 545, 14 So. 383, 22 L. R. A. 124.

Illinois.— Byler *v.* Asher, 47 Ill. 101.

purity of the ballot; and have recognized the importance of preparing lists of voters before the day of election, in order that the officers whose duty it is to administer the election laws may proceed with more deliberation in the discharge of their duties, and avoid the haste and confusion that must attend the determination, upon election day, of all questions concerning the right of individuals to vote. It has also been regarded as important that electors should be notified in advance, by means of the registry, what persons claim the right to vote, and be thereby enabled to make the necessary examination to determine whether the claim is well founded, and exercise the right of challenge if satisfied that any person registered is not a qualified voter.[52]

F. The Australian Ballot System. In general it may be said that the so-called Australian Ballot Acts, in the various forms in which they have been enacted in many of the states in this country, have been sustained by the courts.[53]

Kansas.— State *v.* Butts, 31 Kan. 537, 2 Pac. 618.

Kentucky.— Com. *v.* McClelland, 83 Ky. 686.

Louisiana.— Auld *v.* Walton, 12 La. Ann. 129.

Maryland.—Anderson *v.* Baker, 23 Md. 531.

Massachusetts.— Harris *v.* Whitcomb, 4 Gray 433; Blanchard *v.* Stearns, 5 Metc. 298.

Michigan.— Detroit *v.* Rush, 82 Mich. 532, 46 N. W. 951, 10 L. R. A. 171; People *v.* Kopplekom, 16 Mich. 342.

Missouri.— State *v.* Mason, 155 Mo. 486, 55 S. W. 636; Ensworth *v.* Albin, 46 Mo. 450.

New Hampshire.— Davis *v.* Haverhill School Dist., 44 N. H. 398.

New York.— People *v.* Wilson, 62 N. Y. 186 [*reversing* 3 Hun 437, 5 Thomps. & C. 636].

North Carolina.—State *v.* Scarborough, 110 N. C. 232, 14 S. E. 737.

Ohio.— Daggett *v.* Hudson, 43 Ohio St. 548, 3 N. E. 538, 54 Am. Rep. 832.

Pennsylvania.—Patterson *v.* Barlow, 60 Pa. St. 54.

Rhode Island.— *In re* Polling Lists, 13 R. I. 729.

Tennessee.— Moore *v.* Sharp, 98 Tenn. 491, 41 S. W. 587.

United States.— Wiley *v.* Sinkler, 179 U. S. 58, 21 S. Ct. 17, 45 L. ed. 84; Pacific Imp. Co. *v.* Clarksdale, 74 Fed. 528, 20 C. C. A. 635; U. S. *v.* Quinn, 27 Fed. Cas. No. 16,110, 8 Blatchf. 48.

See 18 Cent. Dig. tit. "Elections," §§ 14, 92 *et seq.*

The leading case on this subject is Capen *v.* Foster, 12 Pick. (Mass.) 485, 492, 23 Am. Dec. 632, in which the validity of a registration law was assailed on the ground that it added a new qualification as a condition precedent to the right to vote, but the law was sustained.

Where a valid registration law makes registration a condition precedent to the right to vote, an election held without such registration is void. People *v.* Laine, 33 Cal. 55; People *v.* Kopplekom, 16 Mich. 342.

52. See cases cited *supra*, note 51.

53. That is, provided the acts permit the voter to vote for such persons as he pleases, by leaving sufficient space on the official ballot in which he may write or insert in any other proper manner the names of such persons, and by giving him the means and a reasonable opportunity to write or insert such names.

Florida.— State *v.* Dillon, 32 Fla. 545, 14 So. 383, 22 L. R. A. 124.

Indiana.— Sego *v.* Stoddard, 136 Ind. 297, 36 N. E. 204, 22 L. R. A. 468.

Iowa.— Whittam *v.* Zahorik, 91 Iowa 23, 59 N. W. 57, 51 Am. St. Rep. 317.

Kansas.— Taylor *v.* Bleakley, 55 Kan. 1, 39 Pac. 1045, 49 Am. St. Rep. 233, 28 L. R. A. 683.

Maine.— Curran *v.* Clayton, 86 Me. 42, 29 Atl. 930.

Massachusetts.— Cole *v.* Tucker, 164 Mass. 486, 41 N. E. 681, 29 L. R. A. 668.

Michigan.— Atty.-Gen. *v.* May, 99 Mich. 538, 58 N. W. 483, 25 L. R. A. 325; Detroit *v.* Rush, 82 Mich. 532, 46 N. W. 951, 10 L. R. A. 171.

Missouri.— Bowers *v.* Smith, 111 Mo. 45, 20 S. W. 101, 33 Am. St. Rep. 491, 16 L. R. A. 754; State *v.* McMillan, 108 Mo. 153, 18 S. W. 784.

New Jersey.— State *v.* Black, 54 N. J. L. 446, 24 Atl. 489, 1021, 16 L. R. A. 769.

New York.— People *v.* Wappingers Falls, 144 N. Y. 616, 39 N. E. 641.

Pennsylvania.—De Walt *v.* Bartley, 146 Pa. St. 529, 24 Atl. 185, 28 Am. St. Rep. 814, 15 L. R. A. 771.

Wyoming.— Slaymaker *v.* Phillips, 5 Wyo. 453, 40 Pac. 971, 42 Pac. 1049, 47 L. R. A. 842.

History of the Australian ballot system.— Judge McCrary says: "The Australian Ballot System is said to have been the conception of Francis S. Dutton, member of the Legislature of South Australia from 1851 to 1865. The elections act of 1857–58 embodied his idea of the secret ballot, and is the basis of the system now generally in force in the United States as well as in England and upon the continent of Europe. The measure, though first agitated in South Australia, first became a law in Victoria in 1856. It was adopted in Tasmania and New South Wales in 1858, by New Zealand in 1870, and later by Queensland and West Australia. On May 30, 1872, the English Ballot Act (Statutes 35 and 36 Victoria, ch. 33) was passed by the English Commons. It contains the salient

The distinguishing feature of this ballot system is that every elector shall be permitted to vote for whom he pleases, by depositing a ticket bearing the names of the persons for whom he wishes to vote in a receptacle provided for the purpose, in such a way as to secure to the elector the privilege of complete and inviolable secrecy in regard to the persons for whom he voted.[54] It is competent for legislatures to prescribe official ballots and prohibit the use of any other. They may also provide for printing on such ballots the names of candidates who are regularly nominated or who run as independents, provided the constitutional right of the voter to cast his ballot for the person of his choice is not violated.[55] But it is not within the power of the legislature to restrict electors in their choice of candidates or prohibit them from voting for persons whose names are not printed on the ballots.[56] Nominations entitle the nominees to places upon the official ballots printed at public expense, but the voter is still at liberty to write or paste on his ballot other names than those which may be printed there, and the statutes generally recognize this right by requiring blanks for such writing or pasting next to the printed names.[57]

features of the South Australian Act, modified and adapted to new conditions. Following its adoption by the mother country came the introduction of the system in British Columbia in 1873; in the province of Ontario, March 24, 1874; in Canada, May 26, 1874; in the province of Quebec, February 23, 1875; in Nova Scotia, May 6, 1875; in the Northwest Territories, December 18, 1885, and in Manitoba, May 28, 1886. The European countries which have followed England in this reform are Belgium, which adopted the English system somewhat simplified on July 9, 1877, and Luxemburg in 1879, while in Austria, Italy and Norway laws providing for the secrecy of the ballot are in force, resembling in many respects the Australian system. In the United States, the first States to adopt the Australian ballot system were Massachusetts, Indiana, Wisconsin and Montana. The successful operation of the system as enacted in these States has led to its general adoption by the different States, and it is now common to every State in the Union except the Carolinas, Georgia and Connecticut." McCrary El. (4th ed.) § 691.

School elections.— The Illinois act to provide for the printing and distribution of ballots, commonly called the Australian Ballot Law, was not intended to apply to elections to establish high schools or to issue bonds to construct buildings in which to hold the same. Rankin *v.* Cowden, 66 Ill. App. 137.

54. The object of this privilege is to secure the independence of the voter, and enable him to express his preference secretly, without being subjected to intimidation, or being made the victim of ill-will or persecution on account of his vote.

Florida.— State *v.* Anderson, 26 Fla. 240, 8 So. 1.

Indiana.— Williams *v.* Stein, 38 Ind. 89, 10 Am. Rep. 97.

Michigan.— Atty.-Gen. *v.* May, 99 Mich. 538, 58 N. W. 483, 25 L. R. A. 325; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141.

Minnesota.— Brisbin *v.* Cleary, 26 Minn. 107, 1 N. W. 825.

New Jersey.— State *v.* Black, 54 N. J. L. 446, 24 Atl. 489, 1021, 16 L. R. A. 769.

New York.— People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242.

Pennsylvania.— Com. *v.* Woelper, 3 Serg. & R. 29, 8 Am. Dec. 628; Kneass' Case, 2 Pars. Eq. Cas. 553.

Vermont.— Temple *v.* Mead, 4 Vt. 535.

Wisconsin.— State *v.* Hilmantel, 23 Wis. 422.

Statute unconstitutional as destroying secrecy of ballot.— Where the constitution requires that popular elections shall be by ballot, a statute which requires that each ballot shall be numbered with figures corresponding with the figures placed opposite the name of the voter on the poll lists kept by the clerk of election is unconstitutional and void, inasmuch as it absolutely destroys the secrecy of the ballot. Williams *v.* Stein, 38 Ind. 89, 10 Am. Rep. 97; Brisbin *v.* Cleary, 26 Minn. 107, 1 N. W. 825.

55. State *v.* Dillon, 32 Fla. 545, 14 So. 383, 22 L. R. A. 124; Cole *v.* Tucker, 164 Mass. 486, 41 N. E. 681, 29 L. R. A. 668.

56. The constitutional right of suffrage entitles every qualified elector to vote for whom he pleases. Sanner *v.* Patton, 155 Ill. 553, 40 N. E. 290; Bowers *v.* Smith, 111 Mo. 45, 20 S. W. 101, 33 Am. St. Rep. 491, 16 L. R. A. 754; People *v.* Wappingers Falls, 144 N. Y. 616, 39 N. E. 641; People *v.* Shaw, 133 N. Y. 493, 31 N. E. 512, 16 L. R. A. 606.

57. *California.*— Eaton *v.* Brown, 96 Cal. 371, 31 Pac. 250, 31 Am. St. Rep. 225, 17 L. R. A. 697.

Illinois.— Sanner *v.* Patton, 155 Ill. 553, 40 N. E. 290.

Michigan.— Detroit *v.* Rush, 82 Mich. 532, 46 N. W. 951, 10 L. R. A. 171.

Missouri.— Bowers *v.* Smith, 111 Mo. 45, 20 S. W. 101, 33 Am. St. Rep. 491, 16 L. R. A. 754; Bowers *v.* Smith, (1891) 17 S. W. 761.

New York.— People *v.* Wappingers Falls, 144 N. Y. 616, 39 N. E. 641; People *v.* Shaw, 133 N. Y. 493, 31 N. E. 512, 16 L. R. A. 606.

See 18 Cent. Dig. tit. "Elections," § 142.

hood of states may if otherwise qualified vote at the place where they are stationed; for in such case there is no conflict of jurisdiction.[95]

D. Educational Qualifications. A provision in a state constitution that no person shall have the right to vote who shall not be able to read the constitution in the English language and write his name is valid.[96] So also a provision that a voter shall be able to read any section of the state constitution or understand and interpret it when read to him is not in contravention of the fifteenth amendment of the constitution of the United States, although it may disqualify more colored than white voters.[97]

E. Property Qualifications. It is believed that there is now no property qualification required of voters at general elections in any of the states, but in a number of states it is provided that in local elections to vote on propositions to levy taxes or to expend public money for some particular purpose, or the like, voters or their wives must be possessed of a certain amount of property subject to taxation.[98] The possession of the required amount of property will not, how-

95. Burleigh *v.* Armstrong, Smith Cas. Cont. El. 89.

96. Stone *v.* Smith, 159 Mass. 413, 34 N. E. 521.

Translation into foreign language.— When Wyo. Const. art. 6, § 9, providing that "no person shall have the right to vote who shall not be able to read the constitution of this State," was presented before the constitutional convention for adoption, its debates disclosed that the offer of the proposition referred to the Massachusetts constitution as being similar only, having added thereto the words, "in the English language." It has been held that these debates are not conclusive of an intention of the convention and of the people voting for the constitution that those who could read the constitution only when translated into a foreign language would be entitled to vote, especially where the debates indicate that some members of the convention had a contrary intention. Rasmussen *v.* Baker, 7 Wyo. 117, 50 Pac. 819, 38 L. R. A. 773.

97. Williams *v.* Mississippi, 170 U. S. 213, 18 S. Ct. 583, 42 L. ed. 1012.

98. *Connecticut.*—State *v.* Woodruff, 2 Day 504, 2 Am. Dec. 122.

Louisiana.— MacKenzie *v.* Wooley, 39 La. Ann. 944, 3 So. 128; St. Martin Police Jury *v.* Landry, 12 La. Ann. 841.

Maryland.— Hanna *v.* Young, 84 Md. 179, 35 Atl. 674, 57 Am. St. Rep. 296, 34 L. R. A. 55.

New York.— Crawford *v.* Wilson, 4 Barb. 504; Scott *v.* Twombly, 20 Misc. 652, 46 N. Y. Suppl. 1084.

Rhode Island.— *In re* Voting List, 19 R. I. 614, 35 Atl. 147; Johnston School Committee, 19 R. I. 279, 33 Atl. 369; *In re* Voting Laws, 12 R. I. 586.

See 18 Cent. Dig. tit. "Elections," § 75.

The R. I. Const. art. 2, § 1, provides that every male citizen of the United States of the age of twenty-one years who has had his residence and home in this state for one year and in the town or city in which he may claim a right to vote six months next preceding the time of voting, and who is really and truly possessed in his own right of real estate in such town or city of the value of one hundred and thirty-four dollars over and above all encumbrances, or which shall rent for seven dollars per annum over and above any rent reserved or the interest of any encumbrances thereon, being an estate in fee simple, fee tail, for the life of any person, or an estate in reversion or remainder, which qualifies no other person to vote, the conveyance of which estate, if by deed, shall have been recorded at least ninety days, shall thereafter have a right to vote in the election of all civil officers, and on all questions in all legal town or ward meetings so long as he continues so qualified. And if any person hereinbefore described shall own any such estate within this state, out of the town or city in which he resides, he shall have a right to vote in the election of all general officers and members of the general assembly in the town or city in which he shall have had his residence and home for the term of six months next preceding the election, upon producing a certificate from the clerk of the town or city in which his estate lies, bearing date within ten days of the time of his voting, stating forth that such person has a sufficient estate therein to qualify him as a voter, and that the deed, if any, has been recorded ninety days. Under this section it has been held that the estate required to qualify a voter must be a vested legal estate as distinguished from an equitable interest. *In re* Realty Voters, 19 R. I. 387, 35 Atl. 213. The word "possess," however, as used in this constitution, is not used in its technical and strict sense, because the instrument itself provides for ownership of an estate in reversion or remainder when possession would be in another. *In re* Realty Voters, 19 R. I. 387, 35 Atl. 213; *In re* Liquors of Horgan, 16 R. I. 542, 18 Atl. 279. But the elective franchise is not confined to the owners of real estate, for, by the R. I. Const. Amendm. art. 7, § 1, it is provided that every male citizen of the United States of the age of twenty-one years who has had his residence and home in the state for two years, and in the town or city in which he may offer to vote six months next preceding the time of his voting, and whose name shall be registered in the town or city where he resides any time

manent home, will not qualify the sojourner as an elector.[67] Residence in a state means a residence at some particular place therein, and the time required for acquiring a residence does not begin while a person is in transit to such place.[68] The right to vote in a certain precinct requires the concurrence of two things — the act of residing coupled with the intention to do so,[69] for the fact of residence for the purpose of voting depends largely on the intention of the person offering to vote.[70] One is not entitled to vote at any one time in either of two places, but must elect.[71]

2. WHAT CONSTITUTES PERMANENCY OF RESIDENCE. A residence for the purpose of voting at an election is the settled place of abode; it need not necessarily be permanent, although a certain degree of permanency is essential.[72] A permanent residence, to entitle one to vote, is where the intended voter means to abide and become a citizen until duty, business, moral obligation, contract, resolution, or convenience may compel him to elect a new home as his place of domicile.[73]

3. WHAT WILL WORK CHANGE OF RESIDENCE. In order to work a change of residence there must be both in fact and intention an abandonment of the former residence and a new domicile acquired by actual residence, coupled with an intention to make it a permanent home.[74] There is no ambiguity in the word "resi-

67. *Colorado.*—Jain *v.* Bossen, 27 Colo. 423, 62 Pac. 194; Sharp *v.* McIntire, 23 Colo. 99, 46 Pac. 115.

Indiana.— French *v.* Lighty, 9 Ind. 475.

North Carolina.— Boyer *v.* Teague, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547; State *v.* Grizzard, 89 N. C. 115.

Pennsylvania.— Fry's Election Case, 71 Pa. St. 302, 10 Am. Rep. 698.

Rhode Island.— State *v.* Aldrich, 14 R. I. 171.

See 18 Cent. Dig. tit. "Elections," § 67 *et seq.*

A mere change of residence is not sufficient to acquire a new domicile unless the change is intended to be permanent. Jain *v.* Bossen, 27 Colo. 423, 62 Pac. 194.

68. Esker *v.* McCoy, 5 Ohio Dec. (Reprint) 573, 6 Am. L. Rec. 694.

69. Esker *v.* McCoy, 5 Ohio Dec. Reprint 573, 6 Am. L. Rec. 694.

70. Hope *v.* Flentge, 140 Mo. 390, 41 S. W. 1002, 47 L. R. A. 806.

An intention to remove immediately after an election does not amount to a change or loss of residence; there must be a union of act and intention. Darragh *v.* Bird, 3 Oreg. 229.

71. When circumstances are such that a man may claim a domicile at either one of two places, the place he regards as his home or domicile will be his residence for the purpose of voting. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

72. *In re* Lower Oxford Contested Election, 11 Phila. (Pa.) 641.

Residence in boat.— Matter of Collins, 64 How. Pr. (N. Y.) 63. But see Esker *v.* McCoy, 5 Ohio Dec. (Reprint) 573, 6 Am. L. Rec. 694.

Unmarried men, who have been emancipated from parental control, and who have entered the world to labor for themselves, acquire a residence for the purpose of voting in the district in which they are employed if the election officers are satisfied that they are honestly there, pursuing their employment, with no fixed residence elsewhere. Fry's Election Case, 71 Pa. St. 302, 10 Am. Rep. 698.

73. *In re* Lower Merion Election, 1 Chest. Co. Rep. (Pa.) 257.

74. Collier *v.* Anlicker, 189 Ill. 34, 59 N. E. 615; Dorsey *v.* Brigham, 177 Ill. 250, 52 N. E. 303, 69 Am. St. Rep. 228, 42 L. R. A. 809; Moffett *v.* Hill, 131 Ill. 239, 22 N. E. 821; Fry's Election Case, 71 Pa. St. 302, 10 Am. Rep. 698.

An absence for months or even years, if all the while the party intended it as a mere temporary arrangement, to be followed by a resumption of his former residence, will not be an abandonment of such residence or deprive him of his right to vote thereat. The test is the presence or absence of the *animus revertendi.*

Alabama.— State *v.* Ninth Judicial Cir. Judge, 13 Ala. 805.

Colorado.— Jain *v.* Bossen, 27 Colo. 423, 62 Pac. 194.

Florida.— Dennis *v.* State, 17 Fla. 389.

Illinois.— Collier *v.* Anlicker, 189 Ill. 34, 59 N. E. 615; Carter *v.* Putnam, 141 Ill. 133, 30 N. E. 681; Moffett *v.* Hill, 131 Ill. 239, 22 N. E. 821.

Maryland.— Chew *v.* Wilson, 93 Md. 196, 48 Atl. 708; Jones *v.* Skinner, 87 Md. 560, 40 Atl. 381, 40 L. R. A. 752; Howard *v.* Skinner, 87 Md. 556, 40 Atl. 379, 40 L. R. A. 753; Turner *v.* Crosby, 85 Md. 178, 36 Atl. 760; Langhammer *v.* Munter, 80 Md. 518, 31 Atl. 300, 27 L. R. A. 330.

North Carolina.— State *v.* Grizzard, 89 N. C. 115.

Rhode Island.— Finn *v.* Board of Canvassers, 24 R. I. 482, 53 Atl. 633.

See 18 Cent. Dig. tit. "Elections," § 69.

A seafaring man retains his former domicile and residence for the purpose of voting, although he may be absent for a long period of time, until by actual residence elsewhere he acquires a new domicile. Howard *v.* Skinner, 87 Md. 556, 40 Atl. 379, 40 L. R. A. 753. And if his only sleeping room is on the boat

within the meaning of the law.[85] Constitutional and statutory provisions are to be found to the effect that for the purpose of voting no person shall be deemed to have gained or lost his residence by reason of his presence or absence while a student in any seminary or institution of learning;[86] but this does not necessarily mean that a voter may not change his legal residence into a new district in spite of the fact that he becomes a student in an institution of learning therein, but the facts to establish such a change must be wholly independent and outside of his presence in the new district as a student, and should be very clear and convincing to overcome the natural presumption.[87]

c. Residence in Charitable Institutions. So also as a rule persons supported in institutions maintained wholly or partly at public expense neither lose their right to vote at the places of their former residence nor acquire the right to vote in the districts wherein such institutions are located.[88] If the residence of a

85. *Illinois.*— Dale *v.* Irwin, 78 Ill. 170.
Indiana.— Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700.
Maryland.— Shaeffer *v.* Gilbert, 73 Md. 66, 20 Atl. 434.
Massachusetts.— Opinion of Justices, 5 Metc. 587.
Missouri.—Hall *v.* Schoenecke, 128 Mo. 661, 31 S. W. 97.
Nebraska.— Berry *v.* Wilcox, 44 Nebr. 82, 62 N. W. 249, 48 Am. St. Rep. 706.
New York.— Matter of Ward, 20 N. Y. Suppl. 606, 29 Abb. N. Cas. 187.
United States.—Worthington *v.* Post, Mobl. Cas. Cont. El. 647.
See 18 Cent. Dig. tit. "Elections," § 72.

86. See Cal. Const. art. 2, § 4; Colo. Const. art. 7, § 4; N. Y. Const. art. 2, § 3; Pa. Const. art. 8, § 13. Students who are in the preparatory department of a theological college are not entitled to vote merely by the fact of their presence in the college, unless they actually reside in the election district. *In re* Lower Merion Election, 1 Chest. Co. Rep. (Pa.) 257.

87. Stewart *v.* Kyser, 105 Cal. 459, 39 Pac. 19; *In re* Garvey, 147 N. Y. 117, 41 N. E. 439; *In re* Goodman, 146 N. Y. 284, 40 N. E. 769 [*affirming* 84 Hun 53, 31 N. Y. Suppl. 1043]; *In re* Ward, 20 N. Y. Suppl. 606. Pa. Const. art. 8, § 13, providing that for the purpose of voting no person shall be deemed to have gained a residence by reason of his presence while a student at any institution of learning, does not prohibit a student from voting in his school residence if he prove absolute abandonment of his former residence. *In re* Lower Oxford Contested Election, 11 Phila. (Pa.) 641.

Burden of proof.— The burden of proving an absolute abandonment of his former residence is upon a student at college or school to entitle him to vote as a resident of such college or school, and there should be other satisfactory evidence besides the student's own declarations. *In re* Lower Oxford Contested Election, 11 Phila. (Pa.) 641. While a student who goes abroad to an institution of learning may acquire a residence there, so as to entitle him to vote, his presence at the institution of learning is not even presumptive evidence of his intention to make that his actual residence. *In re* Lower Oxford Contested Election, 2 Pa. Co. Ct. 323. The presence of an affiliated or advanced student in a theological college gives him a right to vote in the election district in which the college is situated, if he proves to the satisfaction of the election board that he has selected the college as his place of residence, and that he has been an actual resident therein sixty days before the date of the election, and that he has assumed all the duties, rights, and responsibility of citizenship. A voucher as to residence should be required. *In re* Lower Merion Election, 1 Chest. Co. Rep. (Pa.) 257.

Failure to show loss of former residence.— Matter of McCormack, 86 N. Y. App. Div. 362, 83 N. Y. Suppl. 847.

88. *Idaho.*— Powell *v.* Spackman, 7 Ida. 692, 65 Pac. 503, 54 L. R. A. 378.
Illinois.— Clark *v.* Robinson, 88 Ill. 498; Dale *v.* Irwin, 78 Ill. 170.
Kansas.— Lawrence *v.* Leidigh, 58 Kan. 594, 50 Pac. 600, 62 Am. St. Rep. 631.
Michigan.— People *v.* Hanna, 98 Mich. 515, 57 N. W. 738; Wolcott *v.* Holcomb, 97 Mich. 361, 56 N. W. 837, 23 L. R. A. 215.
New York.— Silvey *v.* Lindsay, 107 N. Y. 55, 13 N. E. 444; Matter of Olwell, 54 N. Y. App. Div. 630, 66 N. Y. Suppl. 659 [*affirmed* in 165 N. Y. 642, 59 N. E. 1128].
Ohio.— Esker *v.* McCoy, 5 Ohio Dec. (Reprint) 573, 6 Am. L. Rec. 694.
Pennsylvania.— *In re* Registration of Voters, 21 Pa. Co. Ct. 473; Covode *v.* Foster, 4 Brewst. 414; *In re* Election Law, 9 Phila. 497.
See 18 Cent. Dig. tit. "Elections," § 73.

Quasi-employee in Bellevue hospital.— People *v.* Hagen, 48 N. Y. App. Div. 203, 62 N. Y. Suppl. 816.

Confinement in prison.— The New York city prison, "The Tombs," is not a place of residence save for the keeper and his family, and a person cannot, under the guise of a commitment, whether legal or illegal, go there as a prisoner and gain a residence. People *v.* Cady, 143 N. Y. 100, 37 N. E. 673, 25 L. R. A. 399.

Constitutional provision not retroactive.— The provision of the New York constitutional amendment of 1894 to the effect that for the purpose of voting no person shall be deemed to have gained or lost a residence by reason

pauper in an infirmary is not free and voluntary, he acquires no right to vote in the precinct where the infirmary is located.[89] The question of intention, however, is important, and it has been held that when a person voluntarily abandons his residence and becomes an inmate of a charitable institution with the intention of making it his permanent residence, he becomes a qualified voter in the precinct after the required period of residence.[90]

d. Persons Employed in Public Service. Persons employed in the service of the United States government do not acquire a residence for the purpose of voting in the election districts in which they may be stationed; nor do they lose their political domiciles in the places whence they came.[91] Although residence cannot be gained or lost merely by reason of a person's presence or absence while employed in the service of the government, yet one so employed may change his residence.[92]

8. Residence on Government Reservations. So also land which has been ceded by the state to the United States for the use of some department of the general government, without any reservation of jurisdiction except the right to serve civil and criminal process thereon, cannot become a voting residence in the state in which such land is located.[93] But the mere fact that a person is in the service of the United States on a government reservation will not deprive him of his right to vote in the place where he has a legal residence.[94] Persons residing on a government reservation in a territory which has not been admitted into the sister-

of his presence or absence while kept in any almshouse or other asylum or institution wholly or partly supported by public expense or by charity, is not retroactive; and a person who had gained a voting residence in a district wherein such institution is located, prior to the time the constitutional amendment took effect, may continue to vote therein. *In re* Griffiths, 16 Misc. (N. Y.) 128, 38 N. Y. Suppl. 953; Matter of Batterman, 14 Misc. (N. Y.) 213, 35 N. Y. Suppl. 593.

89. Esker *v.* McCoy, 5 Ohio Dec. (Reprint) 573, 6 Am. L. Rec. 694.

90. Stewart *v.* Kyser, 105 Cal. 459, 39 Pac. 19; Lankford *v.* Gebhart, 130 Mo. 621, 32 S. W. 1127, 51 Am. St. Rep. 585; Sturgeon *v.* Korte, 34 Ohio St. 525; Mallannee *v.* Hills, 2 Cinc. L. Bul. 61.

91. *California.*— Devlin *v.* Anderson, 38 Cal. 92; People *v.* Riley, 15 Cal. 48.

District of Columbia.— Mead *v.* Carrol, 6 D. C. 338.

Florida.— Dennis *v.* State, 17 Fla. 389.

Missouri.— Lankford *v.* Gebhart, 130 Mo. 621, 32 S. W. 1127, 51 Am. St. Rep. 585.

New York.— *In re* Highlands, 22 N. Y. Suppl. 137.

Pennsylvania.— Taylor *v.* Reading, 4 Brewst. 439.

United States.— *In re* Green, 5 Fed. 145; Biddle *v.* Wing, Cl. & H. Cas. Cont. El. 504.

See 18 Cent. Dig. tit. "Elections," § 73.

Persons in the United States railway mail service.— One who is in the United States railway mail service, and whose established home is with his father, cannot, by reason of his boarding at a hotel in another township, vote there. Lankford *v.* Gebhart, 130 Mo. 621, 32 S. W. 1127, 51 Am. St. Rep. 585.

92. Darragh *v.* Bird, 3 Oreg. 229.

93. Opinion of Justices, 1 Metc. (Mass.) 580; Sink *v.* Reese, 19 Ohio St. 306, 2 Am. Rep. 397; Curtis *v.* Lane, 3 Munf. (Va.) 579.

Residence in military reservation.— McMahon *v.* Polk, 10 S. D. 296, 73 N. W. 77, 47 L. R. A. 830.

West Point reservation.— *In re* Highlands, 22 N. Y. Suppl. 137.

Political status of land ceded to the general government.— Where the general government acquires the title to property without the consent of the state in which it is located, it holds it as a mere proprietor of the title the same as any other individual owner, and the jurisdiction of the state over it remains subject only to the limitation that it cannot legislate in such a way as to impair or destroy the purpose for which the property was acquired; but where the general government obtains the property with the consent of the state, that is, where the land is ceded to the general government by the state, there the political power of the state is transferred absolutely to the general government except so far as it is reserved in the act of cession. Ft. Leavenworth R. Co. *v.* Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. R. A. 264. It has been said that all the law that anybody wants on this subject will be found in the report of this case. Brown, J., in *In re* Highlands, 22 N. Y. Suppl. 137.

Recession to state.— Jurisdiction thus acquired by the United States from a state, although exclusive while it subsists, is to be regarded as a mere suspension of the state jurisdiction, and therefore an act of congress relinquishing such jurisdiction and receding it to the state is effective for that purpose without any acceptance or assent by the state; and thereafter the residents of such territory are to be regarded as residents of the state in which it is located. Renner *v.* Bennett, 21 Ohio St. 431.

94. *In re* Highlands, 22 N. Y. Suppl. 137.

dent." Every man is a resident who has taken up his permanent abode in the state with the intention of making it his home;[75] but one who is sojourning temporarily or for some special purpose is not a resident.[76] A person who removes from the jurisdiction with the intention of remaining thereby loses his residence, although he afterward changes his intention and returns; and he cannot vote until he has regained his residence by remaining in the jurisdiction the statutory period.[77]

4. Residence in One County — Business in Another. A person who has acquired a residence in one county does not lose it by residing and doing business in another county during a portion of the year, unless it was his intention to change his residence.[78]

5. No Fixed Residence in Any Precinct. In general an elector must vote in the precinct in which he resides, if he has a fixed place of abode.[79] But it has been held that where an individual is a *bona fide* resident of a county, but has no fixed residence or domicile in any particular precinct therein, he may vote in any precinct in which he may find himself on the day of election.[80]

6. Evidence of Residence — Declarations of Voter. The question of domicile is often a question of intent, and the declarations of a voter as to his qualifications, if made at the time of voting, are admissible in evidence as part of the *res gestæ*;[81] and if his declarations in that regard were not contemporaneous with the act of voting, but were made previously, they are admissible in evidence if they are in disparagement of his right to vote.[82]

7. Residence For Specific Purpose — a. In General. The mere act of abiding in a place for a specific purpose and for a definite time, with no present intention of remaining and making it a permanent home, does not constitute such a residence as entitles one to vote.[83]

b. Students in Institutions of Learning. The question as to whether or not a student at college is a *bona fide* resident of the place where the college is situated must depend upon the facts and circumstances of the case. If he has no intention of remaining in the place permanently, but has another home to which he intends to return after his sojourn at college, he is not a resident and has no right to vote.[84] But the undergraduates of a college, who are free from parental control, and regard the place where the college is situated as their home, having no other to which to return in case of sickness or domestic affliction, are as much entitled to vote as any other resident of the place where the college is situated, for that is *pro hac vice* the home of such students and their permanent abode

he does not thereby acquire a residence in the home port of the vessel which entitles him to be registered as a voter there. Jones *v.* Skinner, 87 Md. 560, 40 Atl. 381, 40 L. R. A. 752; Howard *v.* Skinner, 87 Md. 556, 40 Atl. 379, 40 L. R. A. 753.

75. Johnson *v.* People, 94 Ill. 505; Spragins *v.* Houghton, 3 Ill. 377; *In re* Collins, 64 How. Pr. (N. Y.) 63.

76. Fry's Election Case, 71 Pa. St. 302, 10 Am. Rep. 698.

77. Edwards *v.* Logan, 70 S. W. 852, 24 Ky. L. Rep. 1099.

78. State *v.* Ninth Judicial Cir. Judge, 13 Ala. 805.

79. Wood *v.* Fitzgerald, 3 Oreg. 568; Darragh *v.* Bird, 3 Oreg. 229; State *v.* Stumpf, 23 Wis. 630.

80. Wood *v.* Fitzgerald, 3 Oreg. 568. But it has also been held that a person having no home or fixed abode, but living in a certain district temporarily, is not entitled to vote at an election for school director therein. Shepard *v.* Allen, (Ill. 1888) 17 N. E. 756.

81. Boyer *v.* Teague, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547.

82. Boyer *v.* Teague, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547.

83. Fry's Election Case, 71 Pa. St. 302, 10 Am. Rep. 698.

84. *Colorado.*— Parsons *v.* People, 30 Colo. 388, 70 Pac. 689.

Iowa.— Vanderpoel *v.* O'Hanlon, 53 Iowa 246, 5 N. W. 119, 36 Am. Rep. 216.

Maine.— Sanders *v.* Getchell, 76 Me. 158, 49 Am. Rep. 606.

New York.— *In re* Barry, 164 N. Y. 18, 58 N. E. 12, 52 L. R. A. 831; *In re* Garvey, 147 N. Y. 117, 41 N. E. 439; *In re* Goodman, 146 N. Y. 284, 40 N. E. 769.

Ohio.— Esker *v.* McCoy, 5 Ohio Dec. (Reprint) 573, 6 Am. L. Rec. 694.

Pennsylvania.— Fry's Election Case, 71 Pa. St. 302, 10 Am. Rep. 698.

United States.— Campbell *v.* Morey, Mobl. Cas. Cont. El. 215.

See 18 Cent. Dig. tit. "Elections," § 72. And see, generally, Domicile.

ever, entitle one to vote who is not otherwise a qualified elector;[99] and when a statute provides that owners of land only may vote, the meaning and intent is that the real and *bona fide* owners may vote, and deeds which while colorably giving title were not made for the purpose of changing the ownership in the land, but merely for the sake of giving the grantees the apparent right to vote, with the implied understanding that they would vote as desired by the grantor or grantors, are a fraud upon the statute and give the grantees no right to vote.[1]

F. Payment of Taxes — 1. In General. Inasmuch as the right to vote is not a natural right, it is competent for a state, by its constitution or by statute, in case there is nothing in its constitution limiting the power of the legislature in that regard, to confer the right only upon those who contribute to the support of the government by the payment of taxes;[2] and although the qualifications of voters at general elections be fixed by the constitution of the state, it is still within the province of the legislature, in granting municipal charters and providing for special local elections, to make the payment of taxes a condition precedent to the right to vote at such elections.[3] A statute conferring upon all taxpayers, without regard to age, citizenship, or other constitutional qualifications, the right to vote is void.[4]

2. Assessment of the Tax. Under a constitution requiring as a qualification

before the last day of December in the year next preceding the time of his voting, shall have a right to vote in the election of all civil officers and on all questions in all legally arranged town and ward meetings, provided that no person shall at any time be allowed to vote in the election of the city council of any city or upon any proposition to impose a tax or for the expenditure of money in any town or city, unless he shall, within the year next preceding, have paid a tax assessed upon his property therein valued at least at one hundred and thirty-four dollars.

99. MacKenzie *v.* Wooley, 39 La. Ann. 944, 3 So. 128.

1. McGraw *v.* Greene County, 89 Ala. 407, 8 So. 852; Murdock *v.* Weimer, 55 Ill. App. 527.

Property acquired on election day.— It has been held that the *bona fide* acquisition of the requisite amount of property on the morning of election day is sufficient to qualify the voter, if he is otherwise qualified. Bridge *v.* Lincoln, 14 Mass. 367.

Property in another city or town.— A person qualified by age, residence, and citizenship to vote in one city or town, who produces a certificate of ownership of real estate in another city or town in the state, can vote on the certificate in the city or town where he resides only for general officers of the state, for members of the general assembly, members of congress, and electors for presidents and vice-presidents of the United States. *In re* Voting List, 19 R. I. 614, 35 Atl. 147.

2. *Arkansas.*— Whittaker *v.* Watson, 68 Ark. 555, 60 S. W. 652.

Colorado.— Phillips *v.* Corbin, 8 Colo. App. 346, 46 Pac. 224.

Delaware.— Frieszleben *v.* Shallcross, 9 Houst. 1, 69 Atl. 576, 8 L. R. A. 337.

Florida.— State *v.* Dillon, 32 Fla. 545, 14 So. 383, 22 L. R. A. 124.

Georgia.— McMahan *v.* Savannah, 66 Ga. 217, 42 Am. Rep. 65.

Louisiana.— State *v.* Cain, 52 La. Ann. 2120, 28 So. 226; Selby *v.* Levee Com'rs. 14 La. Ann. 434.

Maryland.— Hanna *v.* Young, 84 Md. 179, 35 Atl. 674, 57 Am. St. Rep. 396, 34 L. R. A. 55.

Massachusetts.— Opinion of Justices, 5 Metc. 591; Opinion of Justices, 11 Pick. 538.

Mississippi.— Roane *v.* Matthews, 75 Miss. 94, 21 So. 665.

New Hampshire.—Ford *v.* Holden, 39 N. H. 143.

Pennsylvania.—Patterson *v.* Barlow, 60 Pa. St. 54; Catlin *v.* Smith, 2 Serg. & R. 267; *In re* White, 4 Pa. Dist. 363; Middendorf's Case, 4 Pa. Dist. 78; *In re* Griffiths, 1 Kulp 157; *In re* Election, etc., Acts, 2 Brewst. 138; *In re* Beamish's Contest, 7 L. T. N. S. 17.

Rhode Island.— *In re* Realty Voters, 14 R. I. 645; *In re* Providence Voters, 13 R. I. 737; Pearce's Appeal, 6 R. I. 589.

Tennessee.— State *v.* Old, 95 Tenn. 723, 34 S. W. 690, 31 L. R. A. 837.

See 18 Cent. Dig. tit. "Elections," § 77 *et seq.*

Not in conflict with the fifteenth amendment.— U. S. *v.* Reese, 92 U. S. 214, 23 L. ed. 563.

Discrimination against classes.— The clause of the Indiana act which makes the exercise of the right of suffrage by one who has been absent from the state for six months or more on business of the state or United States dependent on proof that he is a taxpayer of the county, and that his name has been continuously kept on the tax duplicates during his absence, is unconstitutional and void, as it requires a property qualification in this class of voters in addition to the qualifications prescribed by the constitution. Morris *v.* Powell, 125 Ind. 281, 25 N. E. 221, 9 L. R. A. 326.

3. Buckner *v.* Gordon, 81 Ky. 665.

4. Cronly *v.* Tuscon, (Ariz. 1899) 56 Pac. 876.

for voting the payment of a tax assessed a certain length of time before the election, it has been held that the assessment intended was a personal one, and not merely a general assessment laid on the whole county;[5] and after a general assessment of a tax has been made and committed by the assessors to the proper officer for collection they cannot assess a poll or other tax upon persons not upon the list, for the purpose of enabling them to vote at any election.[6] It seems that payment of a state or county tax within the time prescribed before election, by one who is otherwise qualified, entitles him to vote, although such tax was illegally assessed upon him.[7]

3. What Constitutes Payment. The payment of taxes must be made to a person lawfully authorized to receive them;[8] and where the payment of taxes is made a qualification of electors, the right to vote depends upon the fact of actual payment, and the belief of a party that his taxes have been paid by another who agreed to pay them is immaterial.[9] There can be no doubt but that an elector may pay his tax through an authorized agent,[10] and although a tax which has been assessed upon one person is paid for him by another without his previous authority, yet if he recognizes the act and repays or promises to repay the amount, or otherwise ratifies the act of payment on the ground that such other person acted as his agent, he thereby acquires the same right to vote as if he had paid the tax with his own hand;[11] and although a citizen's taxes be paid by

5. Catlin *v.* Smith, 2 Serg. & R. (Pa.) 267. In *In re* Election, etc., Acts, 2 Brewst. (Pa.) 138, it is held that the constitution of Pennsylvania did not require that the tax should be assessed within two years to entitle one to vote, as it might have been assessed more than two years before election, and if paid within two years of election a person otherwise qualified could vote.

6. Opinion of Justices, 18 Pick. (Mass.) 575.

7. Humphrey *v.* Kingman, 5 Metc. (Mass.) 162.

8. Marshall *v.* Baldwin, 11 Phila. (Pa.) 403.

9. Roane *v.* Matthews, 75 Miss. 94, 21 So. 665. Voters who were registered and assessed at the time of a tax assessment, but did not pay the tax to the assessor, as provided by the Pennsylvania act of April 4, 1872, before the return was made by him, under the first section of that act, cannot do so after such return is made, in order to secure the right to vote. *In re* White, 4 Pa. Dist. 363. One who erroneously paid as his a tax assessed to another person of the same name is not disqualified from voting on the ground of nonpayment of the tax assessed to him. Hughes's Election, 3 Lack. Jur. (Pa.) 313. A person who pays the sum of twenty cents to the tax-collector, as an alleged county tax, but against whom no tax has been assessed, is not entitled to be placed upon the registration list as a taxpayer. *In re* Coudersport Registry List, 23 Pa. Co. Ct. 419. Where the tax on an individual voter is sixty cents, ten cents whereof is specified to be for the sinking fund of the county, the payment of the ten cents is not the payment of the county tax for the year, within the meaning of the constitutional provision relating to qualifications of voters. *In re* Blythe Tp. Election, 19 Pa. Co. Ct. 499.

For what year payment must be made.— Phillips *v.* Corbin, 8 Colo. App. 346, 46 Pac. 224.

10. State *v.* Dillon, 32 Fla. 545, 14 So. 383, 22 L. R. A. 124; *In re* Dauphin County Election, 11 Phila. (Pa.) 645; McPherson's Case, 2 Leg. Rec. (Pa.) 135.

11. Humphrey *v.* Kingman, 5 Metc. (Mass.) 162; *Ex p.* Griffiths, 1 Kulp (Pa.) 157; *In re* Dauphin County Election, 11 Phila. (Pa.) 645; McPherson's Case, 2 Leg. Rec. (Pa.) 135; Glazier *v.* Merringer, 12 Lanc. Bar (Pa.) 61. Where the tax has been paid by another for the voter one month before the election, it is not necessary that the voter should ratify such payment one month before the election; ratification is sufficient any time before the election. Fowler *v.* Felthoff, 1 Leg. Rec. (Pa.) 105. A vote will not be rejected because cast by one whose tax has been paid for him by another, provided the payment, when made, was so appropriated. Gillin *v.* Armstrong, 12 Phila. (Pa.) 626. A collector of poll taxes cannot be enjoined from receiving such taxes from any other than a voter in person. Clark *v.* Taylor, 1 Pa. Dist. 761. Where the county taxes had been for several years assessed against the land of one who died intestate, and paid by one of his sons, who owned the land as co-partners, it was held that another son might vote, so far as the payment of said taxes is required to qualify him. State *v.* Livingston, Houst. Cr. Cas. (Del.) 109.

Under the Pennsylvania act of July 15, 1897, providing that it shall be unlawful for any person to pay any occupation or poll tax assessed against any elector except on a written order of such elector, made within thirty days prior to the date of the election at which he desires to vote, the payment of an elector's poll tax by his wife, with his money, and in his absence, does not constitute a violation

another with the express or implied understanding that he shall vote as desired by the party paying them, this does not invalidate his vote, notwithstanding the corrupt agreement or understanding may be a penal offense under the statute.[12]

4. EVIDENCE OF PAYMENT. A tax receipt, if signed by the proper officer, is sufficient evidence of the payment of taxes.[13] In the absence of such receipt the voter's affidavit may be accepted as *prima facie* evidence of the payment of his taxes,[14] and he need not produce the receipt if he can furnish other satisfactory evidence that his taxes have been paid.[15]

G. Sex — 1. EFFECT OF FOURTEENTH AMENDMENT OF FEDERAL CONSTITUTION. The first clause of the fourteenth amendment of the constitution of the United States advances women who have the other requisite qualifications to full citizenship and clothes them with the capacity to become voters; but the provision ends with the declaration of their citizenship. It is a constitutional provision that is not self-executing;[16] it is the creation of a constitutional condition that requires the supervention of legislative power in the exercise of legislative discretion to give it effect. The constitutional capability of becoming a voter created by this amendment lies dormant until made effective by legislative action.[17]

2. POWER OF STATE TO ENFRANCHISE WOMEN. But women who are born of citizen parents within the jurisdiction of the United States, and foreign women who marry citizens, if they might lawfully be naturalized, are citizens, and it is clearly within the power of a state by constitutional provision or by legislative enactment, if the power of the legislature is not limited in that regard by the constitution, to confer the right of suffrage upon them.[18]

3. CONSTITUTIONAL OFFICES — a. In General. It has always been understood that the legislature has no power to confer the elective franchise upon other classes than those to whom it is given in the constitution, for the description of

of the act so as to deprive the elector of his right to vote. *In re* Thomas, 6 Lack. Leg. N. (Pa.) 227, 14 York Leg. Rec. (Pa.) 65.

12. U. S. *v.* Foster, 6 Fed. 247, 4 Hughes 514. While the courts will use every effort under the law to prevent frauds in election, yet the constitution cannot be so construed as to prevent a fair exercise of the elective franchise by suffering a friend to pay the taxes due by a sick or absent neighbor, although the latter may afterward vote according to the wishes of the former. McPherson's Case, 2 Leg. Rec. (Pa.) 135.

13. *In re* Tax-Receipts, 12 Phila. (Pa.) 637; U. S. *v.* Foster, 6 Fed. 247, 4 Hughes 514.

14. *In re* Beamish's Contest, 7 L. T. N. S. (Pa.) 17.

15. *In re* Election, etc., Acts, 2 Brewst. (Pa.) 138.

Testimony of elector.— *In re* Fairchance, 22 Pa. Co. Ct. 451.

16. Susan B. Anthony took the view that this amendment to the constitution was self-executing and gave women an immediate right to vote, and accordingly voted at a congressional election, whereupon she was indicted by the federal grand jury, and there being no dispute as to her sex, or the fact of her having voted, the court instructed the jury to find her guilty. U. S. *v.* Anthony, 24 Fed. Cas. No. 14,459, 11 Blatchf. 200.

17. *California.*—Van Valkenburg *v.* Brown, 43 Cal. 43, 13 Am. Rep. 136.

District of Columbia.— Spencer *v.* Board of Registration, 1 MacArthur 169, 29 Am. Rep. 582.

Illinois.— Dorsey *v.* Brigham, 177 Ill. 250, 52 N. E. 303, 69 Am. St. Rep. 228, 42 L. R. A. 809.

Indiana.— Gougar *v.* Timberlake, 148 Ind. 38, 46 N. E. 339, 62 Am. St. Rep. 487, 37 L. R. A. 644.

Michigan.— Mudge *v.* Jones, 59 Mich. 165, 26 N. W. 325.

New York.— People *v.* Barber, 48 Hun 198.

Tennessee.— Ridley *v.* Sherbrook, 3 Coldw. 569.

United States.— Minor *v.* Hoppersett, 21 Wall. 162, 22 L. ed. 627 [*affirming* 53 Mo. 58].

See 18 Cent. Dig. tit. "Elections," § 60 *et seq.*

18. Wheeler *v.* Brady, 15 Kan. 26; Woodley *v.* Clio, 44 S. C. 374, 22 S. E. 410; Wilson *v.* Florence, 40 S. C. 290, 18 S. E. 792; Lyman *v.* Martin, 2 Utah 136. In Bloomer *v.* Todd, 3 Wash. Terr. 599, 19 Pac. 135, 1 L. R. A. 111, it was held that the Washington Territory act of Jan. 18, 1888, giving the right of suffrage to women, was void inasmuch as the organic act of the territory provided that the qualifications of voters should be prescribed by the legislature, and provided that the right of suffrage should be exercised only by adult citizens of the United States, which was construed to mean male citizens only.

Subsequent citizenship does not legalize prior vote. Dorsey *v.* Brigham, 177 Ill. 250,

those entitled is regarded as excluding all others;[19] but while it must be conceded that no person can vote for the election of any officer mentioned in the constitution unless he possesses the qualifications of an elector prescribed in that instrument, it does not follow that none but such electors can vote for officers for whom the legislature has the right to provide, in order to carry out the purpose declared in the constitution.[20]

b. School Elections. So in a number of states women are entitled to vote at school elections, and this they may be authorized to do by the legislature if the constitutional provisions restricting the right of suffrage to male citizens do not apply to such elections;[21] but if the office be such as must be regarded as a political office under the terms of the constitution, whether relating to schools or not, the constitutional provisions defining the qualifications of general electors will control.[22]

H. Forfeiture of Citizenship. Where citizenship of the United States is one of the qualifications of an elector, a forfeiture of that citizenship will disqualify any elector; but a regular trial and conviction by a lawfully authorized tribunal must be shown.[23]

I. Commission of Crime — 1. In General. It is provided in the constitutions of many of the states that persons convicted of infamous crimes[24] or crimes of a high degree, usually those punishable by imprisonment in the state prison, shall not be permitted to vote.[25]

52 N. E. 303, 69 Am. St. Rep. 228, 42 L. R. A. 809.

19. *In re* Election Inspectors, 25 N. Y. Suppl. 1063; McCafferty *v.* Guyer, 59 Pa. St. 109.

20. The power to create an office carries with it the power to prescribe the qualifications of electors to fill the office. Belles *v.* Burr, 76 Mich. 1, 43 N. W. 24.

Election under stock law.— Leflore County *v.* State, 70 Miss. 769, 12 So. 904.

21. *Illinois.*— Dorsey *v.* Brigham, 177 Ill. 250, 52 N. E. 303, 69 Am. St. Rep. 228, 42 L. R. A. 809; Ackerman *v.* Haenck, 147 Ill. 514, 35 N. E. 381; Plummer *v.* Yost, 144 Ill. 68, 33 N. E. 191, 19 L. R. A. 110.

Kansas.— Wheeler *v.* Brady, 15 Kan. 26.

Michigan.— Belles *v.* Burr, 76 Mich. 1, 43 N. W. 24.

Nebraska.— State *v.* Cones, 15 Nebr. 444, 19 N. W. 682.

Ohio.— State *v.* Board of Elections, 9 Ohio Cir. Ct. 134, 6 Ohio Cir. Dec. 36.

Washington.— Holmes, etc., Furniture Co. *v.* Hedges, 13 Wash. 696, 43 Pac. 944.

Wisconsin.— Gilkey *v.* McKinley, 75 Wis. 543, 44 N. W. 762; Brown *v.* Phillips, 71 Wis. 239, 36 N. W. 242.

See 18 Cent. Dig. tit. "Elections," § 62.

22. *Illinois.*— People *v.* English, 139 Ill. 622, 29 N. E. 678, 15 L. R. A. 131.

Indiana.— Gougar *v.* Timberlake, 148 Ind. 38, 46 N. E. 339, 62 Am. St. Rep. 487, 37 L. R. A. 644.

Kansas.— Wheeler *v.* Brady, 15 Kan. 26; Winans *v.* Williams, 5 Kan. 227.

Michigan.— Coffin *v.* Board of Election Com'rs, 97 Mich. 188, 56 N. W. 567, 21 L. R. A. 662.

New Jersey.— Chamberlain *v.* Board of Education, 57 N. J. L. 605, 31 Atl. 1033; Kimball *v.* Hendee, 57 N. J. L. 307, 30 Atl. 894.

Wisconsin.— Brown *v.* Phillips, 71 Wis. 239, 36 N. W. 242.

See 18 Cent. Dig. tit. "Elections," § 62.

School commissioners.— In *In re* Gage, 141 N. Y. 112, 35 N. E. 1094, 25 L. R. A. 781, it was held that a school commissioner is a constitutional officer, elected by the people, and so, under the state constitution prescribing the qualifications of voters, may be voted for only by male citizens; and that N. Y. Laws (1892), c. 214, conferring upon women the right to vote for such officers, is unconstitutional and void.

Superintendent of public instruction.— Under the Illinois statute, women above the age of twenty-one years, and having the qualifications required in that act, are entitled to vote at any election of school officers except that of superintendent of public instruction and county superintendents of schools, these being constitutional offices. Plummer *v.* Yost, 144 Ill. 68, 33 N. E. 191, 19 L. R. A. 110.

23. State *v.* Symonds, 57 Me. 148; Severance *v.* Healey, 50 N. H. 448; Gotcheus *v.* Matheson, 58 Barb. (N. Y.) 152, 40 How. Pr. (N. Y.) 97; McCafferty *v.* Guyer, 59 Pa. St. 109; Huber *v.* Reily, 53 Pa. St. 112.

24. Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307, 9 Ky. L. Rep. 181; Barker *v.* People, 20 Johns. (N. Y.) 457.

25. Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307, 9 Ky. L. Rep. 181.

Felonious assault.— A person convicted of the offense of malicious shooting and malicious cutting, which are made felonies by statute, is not entitled to vote. Cowan *v.* Prowse, 93 Ky. 156, 19 S. W. 407, 14 Ky. L. Rep. 273.

Grand larceny.— Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307, 9 Ky. L. Rep. 181.

2. Bigamy or Polygamy. Statutes forbidding bigamists and polygamists to vote, and requiring an oath by the voter that he is not a member of any order that teaches the commission of those crimes, are valid.[26]

3. What Constitutes Conviction.[27] Whether a citizen has been guilty of a crime forfeiting his right to vote is of necessity a judicial question which must be determined in an orderly manner by a tribunal legally ordained for the trial and punishment of the offense, and cannot be determined collaterally by election officers.[28] Under a constitutional provision declaring that the privilege of an elector shall be forfeited by a conviction of any crime which is punishable by imprisonment in a penitentiary, it has been held that a conviction of such crime under a plea of guilty deprives defendant of his right to vote, although the court in its discretion may punish him only by the imposition of a fine;[29] but it would seem to be the better opinion that the judgment of the court determines the degree of the offense of which defendant is convicted, and when the court, in affixing the punishment for a given offense, is authorized in its discretion to consider it either as a felony or as a mere misdemeanor and treat it accordingly, the punishment which the court actually affixes must determine the grade of the offense, especially when in consequence of such offense it is sought to deprive the offender of civil rights.[30] However this may be, it is certain that a person does not forfeit his rights as an elector by a mere verdict of guilty or a confession, when indicted for a felony; in order that such forfeiture shall attach, the verdict or confession, as the case may be, must be followed by a judgment of the court against the accused.[31]

4. Conviction in Federal Court. It has been held that the conviction in a federal court of a mere statutory offense against the United States does not deprive the offender of his right to vote,[32] but on the other hand it has been held that a conviction of crime of a disqualifying degree in a federal court has the effect to exclude the person convicted from office and suffrage the same as if he had been convicted in a state court.[33]

5. Restoration to Citizenship. A general absolute pardon by the executive relieves the person to whom it is granted not only from imprisonment but from all consequential disabilities of the judgment of his conviction, and restores such person to the full enjoyment of his civil rights, including the right to vote.[34] A pardon by the president of the United States restores the right of suffrage to one who has been deprived of that right by a conviction of crime in a federal court.[35]

Petit larceny.— Anderson *v.* State, 72 Ala. 187; State *v.* Buckman, 18 Fla. 267.

Dueling is expressly made a disqualification in some states. Dwight *v.* Rice, 5 La. Ann. 580; Barker *v.* People, 20 Johns. (N. Y.) 457.

26. Wooley *v.* Watkins, 2 Ida. (Hasb.) 590, 22 Pac. 102; Hayward *v.* Bolton, 2 Ida. (Hasb.) 452, 17 Pac. 457; Innis *v.* Bolton, 2 Ida. (Hasb.) 442, 17 Pac. 264; Davis *v.* Beason, 133 U. S. 333, 10 S. Ct. 299, 33 L. ed. 637.

27. "Convicted" and "conviction" defined see 9 Cyc. 864 *et seq.*

28. Burkett *v.* McCarty, 10 Bush (Ky.) 758; Garrison *v.* Mays, Mobl. Cas. Cont. El. 55.

29. U. S. *v.* Watkinds, 6 Fed. 152, 7 Sawy. 85.

30. People *v.* Cornell, 16 Cal. 187; Gandy *v.* State, 10 Nebr. 243, 4 N. W. 1019.

31. State *v.* Houston, 103 N. C. 383, 9 S. E. 699.

32. U. S. *v.* Barnabo, 24 Fed. Cas. No. 14,522, 14 Blatchf. 74.

33. Cowan *v.* Prowse, 93 Ky. 156, 19 S. W. 407, 14 Ky. L. Rep. 273; Jones *v.* Board of Registrars, 56 Miss. 766, 31 Am. Rep. 385.

34. Jones *v.* Board of Registrars, 56 Miss. 766, 31 Am. Rep. 385; Wood *v.* Fitzgerald, 3 Oreg. 568 [*overruling* on this point Darragh *v.* Bird, 3 Oreg. 229]; Knote *v.* U. S., 95 U. S. 149, 24 L. ed. 442; Carlisle *v.* U. S., 16 Wall. (U. S.) 147, 21 L. ed. 426; U. S. *v.* Klein, 13 Wall. (U. S.) 128, 20 L. ed. 519; U. S. *v.* Padelford, 9 Wall. (U. S.) 531, 19 L. ed. 788; *Ex p.* Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366.

Pardon after expiration of sentence.— Sutton *v.* McIlhany, 1 Ohio Dec. (Reprint) 235, 5 West. L. J. 356.

Restoration of privilege by legislature.— Opinion of Justices, 4 R. I. 583.

35. Cowan *v.* Prowse, 93 Ky. 156, 19 S. W. 407, 14 Ky. L. Rep. 273; Jones *v.* Board of Registrars, 56 Miss. 766, 31 Am. Rep. 385. But the pardon of a person by the president of the United States, although it restores him to the rights and privileges of a citizen of the United States, does not, without the as-

Disfranchisement will be presumed to continue in the case of ex-convicts unless shown to have been removed by the production of a pardon from the executive.[36]

J. Betting on Elections. In the constitutions of some of the states it is declared that no person who shall make or become directly or indirectly interested in any bet or wager dependent upon the result of any election shall vote at such election.[37] But such provision seems to be beyond the power of a state legislature, where the constitution has fully defined the qualifications of electors and is silent on the subject of wagers.[38]

K. Pauperism. In the absence of constitutional or statutory disqualification, there is no reason why persons incapable of self-support, who are in other respects qualified voters, may not vote;[39] but constitutional and statutory provisions are to be found whereby persons who have within a certain period before election been supported either wholly or partly as public charges are disqualified as electors.[40] This disqualification, however, ceases with the disappearance of its cause, and when a person again becomes self-supporting he is restored to his right of suffrage.[41]

L. Mental Capacity. It has been said that by the common political law, both of England and the United States, idiots and lunatics are excluded from exercising the right of suffrage;[42] and in the constitutions of many of the states it is expressly provided that no person under guardianship, *non compos mentis*, or insane shall be qualified to vote at any election.[43] The vote of a man otherwise qualified who is neither a lunatic nor an idiot, but whose faculties are merely greatly enfeebled by age, ought not to be rejected.[44]

M. Soldier Voting Acts. Many of the state constitutions designate the place as well as the time of holding elections, and require that electors shall vote in the district or precinct in which they reside; and this brings up an interesting question of constitutional law. The legislatures of a number of states whose constitutions contain such provisions have undertaken by statute to authorize soldiers in the actual military service to vote in camp or in the field, beyond the boundaries of the state of their residence; these statutes have uniformly been held unconstitutional by the state courts;[45] and clearly are so except as to votes cast for mem-

sent of the state, where the sovereign power of the state has excluded him from the right of suffrage, restore him to the exercise of that right. Ridley *v.* Sherbrook, 3 Coldw. (Tenn.) 569.

36. Esker *v.* McCoy, 5 Ohio Dec. (Reprint) 573, 6 Am. L. Rec. 694.

37. See for example N. Y. Const. art. 3, § 3.

38. *In re* Clothier, 2 Chest. Co. Rep. (Pa.) 355.

39. Stewart *v.* Kyser, 105 Cal. 459, 39 Pac. 19; Le Moyne *v.* Farwell, Smith Cas. Cont. El. 406.

40. Opinion of Justices, 7 Me. 497; Edwards *v.* Lloyd, 20 Q. B. D. 302, Fox 54, 52 J. P. 519, 57 L. J. Q. B. 121, 58 L. T. Rep. N. S. 409; Dix *v.* Kent, Fox 186, 55 J. P. 213, 63 L. T. Rep. N. S. 641, 39 Wkly. Rep. 173; Baker *v.* Monmouth, 49 J. P. 776, 53 L. T. Rep. N. S. 668, 34 Wkly. Rep. 64.

Receiving aid from college.— *In re* Ward, 20 N. Y. Suppl. 606.

41. Opinion of Justices, 124 Mass. 596.

Former paupers in the almshouse, who have been discharged as such, but who remain in that institution under a contract of services for hire, are entitled to vote as residents of the precinct. *In re* Registry List, 10 Phila. (Pa.) 232.

42. Cooley Const. Lim. (7th ed.) p. 902; McCrary El. (4th ed.) § 116. See also Sinks *v.* Reese, 19 Ohio St. 306, 2 Am. Rep. 397.

Evidence of insanity.— It is competent to show that a person who voted was *non compos mentis* and this without a finding in lunacy. Thompson *v.* Ewing, 1 Brewst. (Pa.) 67.

43. See the constitutions of the various states.

44. Sinks *v.* Reese, 19 Ohio St. 306, 2 Am. Rep. 397.

A person who is capable of doing ordinary work, and transacting business, who knows money and its value, makes his own contracts and does his own trading, a person vacillating and easily persuaded, or a person who has been laboring under some kind of an illusion or hallucination, but not so as to incapacitate him for the general management of business, which illusion or hallucination is not shown to extend to political matters, cannot be denied the privilege of the elective franchise on the ground of want of mental capacity. Clark *v.* Robinson, 88 Ill. 498.

45. *California.*— Bourland *v.* Hildreth, 26 Cal. 161.

Connecticut.— Opinion of Judges, 30 Conn. 591.

Michigan:— People *v.* Blodgett, 13 Mich. 127.

bers of the national house of representatives, but, inasmuch as the federal constitution declares that the legislatures of the states shall prescribe the times, the places, and the manner of holding elections for members of congress subject to change by congress itself, except as to the place of electing senators, it has been decided by the house of representatives that such statutes are constitutional so far as they affect the election of members of that body, for the constitutional convention of a state is not the legislature, within the meaning of the language of the federal constitution;[46] and it is clearly within the province of the legislature to make a statute of this description applicable to the election of state or municipal officers, if the state constitution is silent on the place of voting.[47]

V. REGISTRATION[48] OF VOTERS.

A. In General. The object of the registration law is to prevent illegal voting by providing in advance of election an authentic list of the qualified electors. Necessarily an efficient system of registration must involve a certain amount of inconvenience to voters, and probably under the best system that could be devised some qualified electors would lose their votes through inability to avail themselves of the opportunities or to comply with the conditions of registration. The law should be so framed therefore, and when its terms are doubtful should be so construed, as to give the fullest opportunity to voters to procure the entry of their names upon the register that is consistent with reasonable precautions against fraudulent registration.[49]

B. Necessity For General Registration. A law requiring the registration of voters as a condition precedent to holding an election[50] is mandatory, and any attempted election without regard to such registration law is a nullity; and the fact that none but duly qualified electors voted will not help the matter.[51]

C. Elections Subject to Registration Laws. A general law in regard to

New Hampshire.— Opinion of Justices, 44 N. H. 633.

Pennsylvania.— Chase *v.* Miller, 41 Pa. St. 403.

46. Baldwin *v.* Trowbridge, 2 Bartl. Cas. Cont. El. 46.

47. Morrison *v.* Springer, 15 Iowa 304; Lehman *v.* McBride, 15 Ohio St. 573; State *v.* Main, 16 Wis. 398.

48. The word "registration," is used in a generic and not a technical sense, consequently it includes any list, registry, or schedule on which the names of electors must appear as a prerequisite to the right to vote. *In re* Appointment of Election Sup'rs, 1 Fed. 1.

49. Welch *v.* Williams, 96 Cal. 365, 31 Pac. 222. The fact that a registration law makes no provision for the registration of those who become competent to vote after registration and before election does not vitiate the registration. Weil *v.* Calhoun, 25 Fed. 865.

An offer to register does not dispense with the necessity thereof, although registration was prevented by the registration officers' refusal to permit it. Esker *v.* McCoy, 5 Ohio Dec. (Reprint) 573, 6 Am. L. Rec. 694.

A registration of voters made at another time or in another manner than that prescribed by statute is not a legal registration. State *v.* Sumter County Com'rs, 20 Fla. 859.

Minors are as much within the law requiring registration as adults. Esker *v.* McCoy, 5 Ohio Dec. (Reprint) 573, 6 Am. L. Rec. 694.

50. Where a state constitution provides that the legislature shall enact a registration law and shall require a compliance with such law before any electors shall be allowed to vote, and the legislature neglects to enact such a law, an election without registration is valid; otherwise there could be no election at all. Stallcup *v.* Tacoma, 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25.

51. *California.*— People *v.* Laine, 33 Cal. 55.

Iowa.— Nefzger *v.* Davenport, etc., R. Co., 36 Iowa 642.

Michigan.— People *v.* Kopplekom, 16 Mich. 342.

Missouri.— State *v.* Frazier, 98 Mo. 426, 11 S. W. 973; Ranney *v.* Bader, 67 Mo. 476; State *v.* Brassfield, 67 Mo. 331; Zeiler *v.* Chapman, 54 Mo. 502; State *v.* Albin, 44 Mo. 346.

New York.— Pitkin *v.* McNair, 56 Barb. 75.

North Carolina.—State *v.* Scarborough, 110 N. C. 232, 14 S. E. 737.

Wisconsin.— State *v.* Stumpf, 23 Wis. 630.

United States.— Smith *v.* Skagit County, 45 Fed. 725; Platt *v.* Good, Smith Cas. Cont. El. 650.

See 18 Cent. Dig. tit. "Elections," § 92.

Limitations of rule.— Where an act provided for the organization of a county, and required an election to be held within a less number of days than was required for the registration of voters, it was held that the general registration law, although made ap-

the registration of electors does not always apply to municipal and other local and special elections. It depends entirely upon whether there is anything in express terms or by necessary implication in the constitution or statute making the registration for such elections necessary; in other words, it is a matter of constitutional or statutory construction.[52]

D. Persons Entitled to Registration. All persons possessing the constitutional qualifications of electors are entitled, upon making proper application to the registrars, to have their names registered on the voting lists of their respective districts,[53] provided they furnish proof of their qualifications and offer to

plicable to all elections, of necessity permitted an exception in this instance, and that the election was valid, although there was no registration. State *v.* Piper, 17 Nebr. 614, 24 N. W. 204. So where a new registration of voters of a township was ordered, but was not had for the reason that the order was made within less than thirty days of the time required by law for opening the books of registration, and forty-five days intervened between the date of the order of registration and the day of election, it was held that the county board of canvassers erred in rejecting the vote of the township because there had been no new registration as ordered. Swain *v.* McRae, 80 N. C. 111. In Mussey *v.* White, 3 Me. 290, it was held that the preparation of an alphabetical list of voters previous to the annual meeting of a town for a choice of its officers was not necessary to the validity of the election; the statute in that respect being merely directory.

52. **Proposition to issue bonds.**— Brand *v.* Lawrenceville, 104 Ga. 486, 30 S. E. 954; Carver *v.* Dawson, 99 Ga. 7, 25 S. E. 832; Heilbron *v.* Cuthbert, 96 Ga. 312, 23 S. E. 206; Howell *v.* Athens, 91 Ga. 139, 16 S. E. 966; Kaigler *v.* Roberts, 89 Ga. 476, 15 S. E. 542; Stephens *v.* Albany, 84 Ga. 630, 11 S. E. 150; Smith *v.* Stephan, 66 Md. 381, 7 Atl. 561, 10 Atl. 671; Bray *v.* Florence, 62 S. C. 57, 39 S. E. 810; Graves *v.* Seattle, 8 Wash. 248, 35 Pac. 1079; Seymour *v.* Tacoma, 6 Wash. 138, 32 Pac. 1077.

Proposition to subscribe for stock.— People *v.* Dutcher, 56 Ill. 144; People *v.* Ohio Grove Tp., 51 Ill. 191.

School elections.— People *v.* Prewett, 124 Cal. 7, 56 Pac. 619; Madison *v.* Wade, 88 Ga. 699, 16 S. E. 21; Luzader *v.* Sargeant, 4 Wash. 299, 39 Pac. 142.

County-seat election.— State *v.* Hamilton County, 35 Kan. 640, 11 Pac. 902.

Municipal elections.— Gooding *v.* Brown, 22 Fla. 437; Davis *v.* Dawson, 90 Ga. 817, 17 S. E. 110; Pitkin *v.* McNair, 56 Barb. (N. Y.) 75; Voight *v.* Britton, 15 S. C. 614.

Local option elections.— Bew *v.* State, 71 Miss. 1, 13 So. 868.

Supplementary registration of female voters. — People *v.* Bates, 24 Colo. 413, 51 Pac. 162.

53. *California.*— Cohen *v.* Harvey, 56 Cal. 70.

Maryland.— Langhammer *v.* Munter, 80 Md. 518, 31 Atl. 300, 27 L. R. A. 330; Blackford *v.* Robinson, 80 Md. 419, 31 Atl. 448; Carle *v.* Musgrove, 77 Md. 174, 26 Atl. 407; McLane *v.* Hobbs, 74 Md. 166, 21 Atl. 708; Rellihan *v.* Titlow, 74 Md. 77, 21 Atl. 694.

Massachusetts.— In Kinneen *v.* Wells, 144 Mass. 497, 11 N. E. 916, 59 Am. Rep. 105, it was held that a statute providing that no person thereafter naturalized in any court should be entitled to be registered as a voter within thirty days of such naturalization was in conflict with the constitution of the commonwealth and was void.

Missouri.— State *v.* Bond, 38 Mo. 425.

New York.— People *v.* Bell, 119 N. Y. 175, 23 N. E. 533; *In re* Hamilton, 80 Hun 511, 30 N. Y. Suppl. 499.

Pennsylvania.— Com. *v.* Cuncannon, 3 Brewst. 344; *In re* Election, etc., Acts, 2 Brewst. 138; *In re* Registry List, 41 Leg. Int. 17.

Rhode Island.— *In re* Certificate Voters, 19 R. I. 726, 37 Atl. 810; *In re* Canvassers' Powers, 17 R. I. 809, 21 Atl. 910.

United States.— U. S. *v.* McCormick, 26 Fed. Cas. No. 15,663*a*, 2 Hayw. & H. 189.

See 18 Cent. Dig. tit. "Elections," § 93.

Domicile of seafaring man.— Langhammer *v.* Munter, 80 Md. 518, 31 Atl. 300, 27 L. R. A. 230.

One not yet a citizen.— One not yet a citizen of the United States may register his name in the registry books of the town of his residence on or before the last day of December, provided he can be naturalized and become qualified to vote during the ensuing year. Ward *v.* Joslin, 16 R. I. 661, 19 Atl. 322. Md. Acts (1896), c. 202, provide that persons constitutionally qualified shall be registered as voters at the September sitting of the registers. Section 21 of the act provides that the registers shall sit in October for the purpose of revising their register, and no new name shall then be added. In September a party applied to the registers stating that he was then an unnaturalized foreigner, under twenty-one years of age, but that he would come of age on October 13, following, and would on that date apply for naturalization, and if successful present the papers to the registers. His name was entered as an applicant on the duplicate lists, but registration was refused. On October 13, the applicant being then of age, was naturalized, and on the same day presented his naturalization papers to the registers, who were in session at the time. It was held that he was entitled to be registered as a voter. Barret *v.* Taylor, 85 Md. 173, 36 Atl. 708, 36 L. R. A. 129.

comply with such reasonable regulations respecting the registration as may have been provided by statute.[54] A statutory requirement that before registering persons shall be required to read from the official edition of the constitution and write their names is not in violation of the fifteenth amendment of the constitution of the United States.[55]

E. Registration Officers — 1. Appointment, Qualifications, and Tenure. The matter of the appointment, qualifications, and tenure of office of registrars is regulated wholly by local statutes, and no general rule can be stated on the subject.[56]

2. Powers and Duties. The powers and duties of registration officers are matters of statutory regulation entirely, but in general it may be said that they sit as a board in their respective districts on certain days prescribed by law and between certain hours so prescribed for the purpose of registering all qualified voters within their precincts who apply to them for registration.[57]

3 Representation of Political Parties. Where a statute requires that the leading political parties shall be equally represented in the board of election officers, a canvasser will be removed if he does not belong to the political party he was chosen to represent;[58] but it is not necessary that a registrar be in good standing with the prevailing faction of the party he is appointed to represent; it is sufficient if he acts with that party.[59]

Removal of disability before election.— Drake *v.* Drewry. 112 Ga. 308, 37 S. E. 432.

Name improperly stricken from the list.— State *v.* Jefferson County, 17 Fla. 707.

54. Southerland *v.* Norris, 74 Md. 326, 22 Atl. 137, 28 Am. St. Rep. 255; State *v.* Scarborough, 110 N. C. 232, 14 S. E. 737.

Production of naturalization papers.— People *v.* Smith, 10 Misc. (N. Y.) 100, 31 N. Y. Suppl. 199.

Certificate of removal.— Boyer *v.* Teague, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547.

55. Stone *v.* Smith, 159 Mass. 413, 34 N. E. 521.

56. Upon this question the following cases may be consulted:

California.— Meyers *v.* Pond, 86 Cal. 64, 24 Pac. 808; Schmitt *v.* Dunn, 55 Cal. 651.

Louisiana.— Tullos *v.* Lane, 45 La. Ann. 333, 12 So. 508.

Maryland.— Hardesty *v.* Taft, 23 Md. 512, 87 Am. Dec. 584.

Missouri.— State *v.* Smith, 42 Mo. 506.

Nevada.— State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128; Stinson *v.* Sweeney, 17 Nev. 309, 30 Pac. 997.

New Hampshire.— State *v.* Bean, 63 N. H. 249.

Pennsylvania.— Matter of Griffiths, 1 Kulp 157; *In re* Election, etc., Act, 2 Brewst. 138.

Virginia.— Coleman *v.* Sands, 87 Va. 689, 13 S. E. 148.

United States.— *In re* Sup'rs of Registration, 53 Fed. 227.

See 18 Cent. Dig. tit. "Elections," § 98.

Authority to call in an umpire.— Epping *v.* Columbus, 117 Ga. 263, 43 S. E. 803.

57. Pike *v.* Megoun, 44 Mo. 491; *In re* Election, etc., Acts, 2 Brewst. (Pa.) 138.

Cannot sit after hour prescribed by law for closing books.— *In re* Registry Law, 8 Phila. (Pa.) 352.

Subpœnaing witnesses.—Where the statute authorizes the registration officers may subpœna witnesses. *In re* Election, etc., Acts, 2 Brewst. (Pa.) 138.

Ordering arrest.— So also by like authority they may order an arrest. *In re* Election, etc., Acts, 2 Brewst. (Pa.) 138.

Custody of the books.— During the recess between sittings of the board of canvassers the books should be kept securely as a majority of the board may direct. *In re* Election, etc., Acts, 2 Brewst. (Pa.) 138.

Meetings should be public.— Canvassers should hold their meetings publicly as the public have an interest in their proceedings. *In re* Election, etc., Acts, 2 Brewst. (Pa.) 138.

Should sit full time prescribed.— It is the duty of the canvassers to sit during each and all of the hours named in the law. Matter of Election Law, 4 Brewst. (Pa.) 397.

Meetings for making extra assessments.— The meeting of the canvassers for making extra assessments to meet upon the tenth day preceding the general election and any adjourned meeting must be held at the place fixed by the board of aldermen and not elsewhere. Matter of Election Law, 4 Brewst. (Pa.) 397.

Should be governed by assessment list.— Under the statute the civil authorities making a check list of voters entitled to vote at town meetings should be governed by the assessment list which at the time of making the check list is the last completed one and should not check names from an assessment list only partially complete. State *v.* O'Hearn, 58 Vt. 718, 6 Atl. 606.

58. Jaquith *v.* Wellesley, 171 Mass. 138, 50 N. E. 538; *In re* Election, etc., Acts, 2 Brewst. (Pa.) 138.

59. Jaquith *v.* Wellesley, 171 Mass. 138, 50 N. E. 538, holding it not necessary that he act in all things with the dominant faction.

4. Compensation. It is generally provided by statute that officers for the registration of electors shall be entitled to compensation at a specified rate *per diem*,[60] but one who acted as registrar of voters preliminary to a city election, held in pursuance of an unconstitutional statute, cannot recover the value of his services in an action against the city.[61]

5. Liability For Refusal to Register Voters. Registration officers who wrongfully and wilfully refuse to place the name of a qualified elector on the voting list, whereby he loses his vote, are liable in a civil action for damages;[62] and this whether or not he appears on election day and offers to vote;[63] and an action lies against supervisors of the check list for wilfully and maliciously neglecting or refusing to insert the name of a qualified voter on the check list, notwithstanding their misconduct may be a punishable offense under the law;[64] but members of a board of registration are not personally liable for honest mistakes and errors of judgment in deciding upon the qualifications of voters;[65] and they are not liable for the decisions of matters expressly placed within their discretion.[66]

F. Registration Proceedings — 1. Inquiry as to Qualifications of Voters. Registrars are usually required to ask one applying for registration certain questions touching his qualifications as a voter,[67] and if the registrars are not satisfied that the applicant is a qualified voter they may require further proof of his qualifications.[68] But it seems that an applicant should not be asked if he has been

60. Under Md. Acts (1882), c. 22, officers for registration of electors are entitled to compensation at a rate *per diem* not only for the time occupied in registering names but for the time, not exceeding five days, occupied by the making and publishing of the handbill list of voters. Ryninger *v.* Keating, 60 Md. 334. Under Mo. Acts (1868), p. 138, §§ 27, 29, the allowance of three dollars *per diem* is paid to the registration officers as compensation. This allowance is not designed to cover expenses. State *v.* Callaway County Treasurer, 43 Mo. 228. In Alberts *v.* Torrent, 98 Mich. 512, 57 N. W. 569, it was held that a provision of the charter of the city of Muskegon, which limits the compensation of aldermen for services, either as councilmen, aldermen, or otherwise, to a yearly salary of one hundred dollars, prevents their receiving extra compensation while acting *ex officio* as members of the boards of registration or as inspectors of election. In Ridgway *v.* Haverhill, 152 Mass. 530, 25 N. E. 968, it was held that a clerk of a city voting precinct, required by statute to attend the meeting of such clerks within a representative district on the tenth day following the election, and to make a record of the returns of votes, is entitled, under the vote of the city council fixing the compensation of such clerks at a certain sum per day for actual services, to one day's pay for attending the meeting but not to another day's pay for making the record.

61. Darby *v.* Wilmington, 76 N. C. 133.

62. Kinneen *v.* Wells, 144 Mass. 497, 11 N. E. 916, 59 Am. Rep. 105; Bacon *v.* Benchley, 2 Cush. (Mass.) 100; Murphy *v.* Ramsey, 114 U. S. 15, 5 S. Ct. 747, 29 L. ed. 47.

Where the name of a voter was on the register of voters as required by law, and he appeared before the selectmen and gave satisfactory evidence of his qualifications as a voter, and the selectmen then erased his name from the register, thereby depriving him of his right to vote at the next election, it was held that the erasure of the name was an injury to the voter for which, if wrongful, the selectmen were liable, even if the erasure was not wilfully made. Larned *v.* Wheeler, 140 Mass. 390, 5 N. E. 290, 54 Am. Rep. 483.

63. Bacon *v.* Benchley, 2 Cush. (Mass.) 100.

64. Hanlon *v.* Patridge, 69 N. H. 88, 44 Atl. 807.

65. Perry *v.* Reynolds, 53 Conn. 527, 3 Atl. 555; Keenan *v.* Cook, 12 R. I. 52; Fansler *v.* Parsons, 6 W. Va. 486, 20 Am. Rep. 431.

66. Ala. Const. (1901) art. 8, § 186, provides for the creation of a board of registrars and defines its powers and duties, declaring that the board shall register all persons applying who possess the prescribed qualifications. Plaintiff sued a board of registration for damages for a refusal to register him, alleging that this section and others prescribing the qualifications of electors were repugnant to the fourteenth and fifteenth amendments of the federal constitution. It was held that the complaint was demurrable, as, if the provisions of the state constitution are void, then the board was without authority to register plaintiff and its refusal could not render it liable for damages; while if they were valid section 186 conferred judicial discretion on the board for the exercise of which its members were not liable in damages. Giles *v.* Teasley, 136 Ala. 164, 33 So. 819.

67. Such as his name, age, residence, place of birth, how long he has resided in the state, county and district where he was last registered, if at all, and the like, and to these questions an applicant must respond, otherwise he is not entitled to registration. *In re* Reid, 119 N. C. 641, 26 S. E. 337.

68. *In re* Election, etc., Acts, 2 Brewst. (Pa.) 138; *In re* Election Law, 9 Phila. (Pa.)

convicted of an infamous crime, for this is a cause for challenge which registrars are not authorized to try.[69]

2. COMPELLING REGISTRATION. Whether or not mandamus[70] will lie to compel registration officers to place the names of qualified voters upon the voting list is a question about which there has been some difference of opinion. In some cases the writ has been awarded where it was clear that the petitioners were duly qualified electors and had made proper application to be registered;[71] but on the other hand it has been held that the duties of these officers, although not judicial in the strict sense of the word, are not merely ministerial, and that mandamus will not lie to control them in the exercise of their judgment and discretion in regard to the registration of voters.[72] If the ground of the applicant's relief involves a denial of the legal existence of the board of registration his petition will be bad on demurrer.[73]

3. CORRECTION OF VOTING LIST. Various provisions are made for the correction of voting lists; in some jurisdictions boards of canvassers sit for that purpose;[74] in others aggrieved electors who have wrongfully been denied registration may apply directly to the courts to have their names placed on the voting list,[75] or they may appeal to the court from a decision of the election officers.[76] So also the names of those who are manifestly not qualified voters may be stricken from

497; *In re* Canvassers, 8 Phila. (Pa.) 622; *In re* Registry Law, 8 Phila. (Pa.) 352; Anonymous, 29 Leg. Int. (Pa.) 317.

Examination of applicant under oath.—People *v.* Detroit, 17 Mich. 427; People *v.* Rankin, 15 Mich. 156.

Presumption as to due administration of oath.— State *v.* Nicholson, 102 N. C. 465, 9 S. E. 545, 11 Am. St. Rep. 767.

Failure to administer oath.— Quinn *v.* Lattimore, 120 N. C. 426, 26 S. E. 638, 58 Am. St. Rep. 797.

Sufficiency of response.— A response to the inquiry as to the place of birth and residence of the voter, giving the name of the county, is sufficient compliance with the statute in that respect, but a response giving only the name of the state is too indefinite; and a registration thereon is invalid. Harris *v.* Scarborough, 110 N. C. 232, 14 S. E. 737.

Personal knowledge of registrar.— It has been held that the registration officer should reject an applicant for registration if he is aware that the applicant has falsely stated his place of residence. U. S. *v.* Egan, 30 Fed. 495.

69. *In re* Reid, 119 N. C. 641, 26 S. E. 337. See *supra*, IV, I.

70. **Mandamus** generally see MANDAMUS.

71. Davies *v.* McKeeby, 5 Nev. 369. The court will not order names to be put on the registry lists unless it is alleged that they were omitted by the wilful neglect of the assessors to perform their duties. *In re* Registry List, 16 Phila. (Pa.) 481. The court has no power to compel the assessor to add names to the assessor's list sixty-one days prior to an election, the law providing only for the completion of the lists sixty days before election. *In re* Derr, 1 Wkly. Notes Cas. (Pa.) 113.

Petition premature.— Where the time is fixed by statute for the hearing of applications, to the board of judges of election, to add to or to omit from the list of voters the names of particular persons, a petition to the court for a writ of mandamus to compel the board to register the petitioner's name should be dismissed as premature, when the board has not yet held its session for hearing such applications. U. S. *v.* Bowen, 6 D. C. 196.

72. Freeman *v.* New Haven, 34 Conn. 406.

73. Giles *v.* Teasley, 136 Ala. 164, 33 So. 820.

Court will not compel registration under a void law.— Giles *v.* Harris, 189 U. S. 475, 23 S. Ct. 639, 47 L. ed. 909.

74. Patterson *v.* Barlow, 60 Pa. St. 54; *In re* Election, etc., Acts, 2 Brewst. (Pa.) 138; Com. *v.* Copeland, 2 Leg. Gaz. (Pa.) 46; Keenan *v.* Cook, 12 R. I. 52.

Correction on election day.—Waite *v.* Woodward, 10 Cush. (Mass.) 143.

Registration on election day.— Boyer *v.* Teague, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547.

75. Rellihan *v.* Titlow, 74 Md. 77, 21 Atl. 694; Baltimore *v.* Fledderman, 67 Md. 161, 8 Atl. 758.

76. Davis *v.* O'Berry, 93 Md. 708, 50 Atl. 273; Cox *v.* Bryan, 81 Md. 287, 31 Atl. 447, 852; Ticer *v.* Thomas, 74 Md. 342, 22 Atl. 402; Plummer *v.* Wilson, 73 Md. 472, 21 Atl. 322; Shaeffer *v.* Gilbert, 73 Md. 66, 20 Atl. 434; Baltimore *v.* Fledderman, 67 Md. 161, 8 Atl. 758; People *v.* York, 34 Misc. (N. Y.) 120, 68 N. Y. Suppl. 741; Matter of Hart, 25 Misc. (N. Y.) 93, 53 N. Y. Suppl. 1071; Matter of Ward, 20 N. Y. Suppl. 606, 29 Abb. N. Cas. (N. Y.) 187.

Time to take appeal.—Cox *v.* Bryan, 81 Md. 287, 31 Atl. 447, 852.

Premature appeal.— Ticer *v.* Thomas, 74 Md. 342, 22 Atl. 402.

Time for appeal and bill of exceptions.— Ritter *v.* Etchison, 86 Md. 206, 37 Atl. 795; Miller *v.* Murray, 71 Md. 61, 17 Atl. 939; Baltimore Bldg. Assoc. No. 2 *v.* Grant, 41 Md. 560.

the list by the proper authority.[77] By statutory authority names may be stricken from the registry by a judge at chambers if it conclusively appears that the persons are not qualified voters, and cannot become such before election day;[78] but this should not be done in a case of doubt and uncertainty.[79]

4. Inspection of Lists. The lists of registered voters are public records and are open to reasonable inspection by the public,[80] and the right of inspection includes the right to make copies of the record which may be enforced by mandamus if it be wrongfully denied.[81]

G. Conclusiveness of Voting Lists. Inasmuch as one of the beneficial results sought to be attained by registration laws is that electors may by an inspection of the register be informed in advance of election as to the persons who claim a right to vote, and be prepared to exercise the right to challenge, the general rule is that the appearance of a person's name on the registry is *prima facie* but not conclusive evidence of his right to vote;[82] and the qualifications of voters may be inquired into in a contest by the tribunal having jurisdiction of such contest;[83] but where ample provision is made for the exercise of the right of challenge and the correction of the voting list before election day, there is no reason why the perfected register used at the polls should not be conclusive.[84]

H. Irregularities and Defects as Affecting Right to Vote. Statutes prescribing the mode of proceeding of public officers are regarded as directory unless there is something in the statute which shows a different intent. Hence as a gen-

77. Humphrey *v.* Kingman, 5 Metc. (Mass.) 162.

78. *In re* Garvey, 147 N. Y. 117, 41 N. E. 439; *In re* Goodman, 146 N. Y. 284, 40 N. E. 769; Bressler's Petition, 6 Pa. Dist. 656.

Service of order.— An order to show cause why the name of a person should not be stricken from a registry list need not be served upon any one except such person, although the order provides for service upon others. Matter of Griffiths, 16 Misc. (N. Y.) 128, 38 N. Y. Suppl. 953.

79. If there is a dispute about the facts or ground for differing inferences the judge should not interfere but should leave the voter to swear in his vote at his peril, taking upon himself the risk of his persistence. *In re* Goodman, 146 N. Y. 284, 40 N. E. 769; Matter of Hamilton, 80 Hun (N. Y.) 511, 30 N. Y. Suppl. 499.

Mandamus to compel registrars to strike names from lists.— Arrison *v.* Cook, 6 D. C. 335.

Power to strike names from list upon summary application.— Neither the board of registry nor a judge upon summary application has judicial power to determine a contested question of fact as to the residence of a voter within the election district, and to strike the name of such voter from the registry list, where he has complied with all the statutory qualifications entitling him to register. Matter of Ward, 20 N. Y. Suppl. 606, 29 Abb. N. Cas. (N. Y.) 188.

80. State *v.* Williams, 96 Mo. 13, 8 S. W. 771; State *v.* Hoblitzelle, 85 Mo. 620; *In re* Depriest, 43 Fed. 911.

81. State *v.* Williams, 96 Mo. 13, 8 S. W. 771; State *v.* Hoblitzelle, 85 Mo. 620; People *v.* General Committee, 25 N. Y. App. Div. 339, 49 N. Y. Suppl. 723; Keller *v.* Stone, 96 Va. 667, 32 S. E. 454.

Inspection of books — Mandamus.— Although the registrar be allowed no compensation for time lost in so doing, yet mandamus will lie to compel him to allow any citizen to inspect or take copies of the registration books, as they are of a public nature, and every citizen has an interest in them. The law providing that those books be open at times to public inspection was intended as a safeguard against fraud and must be liberally construed. Clay *v.* Ballard, 87 Va. 787, 13 S. E. 262.

82. *California.*— Preston *v.* Culbertson, 58 Cal. 198.

District of Columbia.— Alden *v.* Hinton, 6 D. C. 217.

Idaho.— Wilson *v.* Bartlett, 7 Ida. 271, 62 Pac. 416.

Massachusetts.— Harris *v.* Whitcomb, 4 Gray 433; Com. *v.* Wallace, Thach. Cr. Cas. 592; Com. *v.* Algar, Thach. Cr. Cas. 412.

Michigan.— Harbaugh *v.* Cicott, 33 Mich. 241.

Texas.— Austin *v.* Gulf, etc., R. Co., 45 Tex. 234.

Vermont.— While the vote of a person whose name is on the check list and who is a resident cannot lawfully be rejected, yet the list is not conclusive that he is a legal voter. State *v.* O'Hearn, 58 Vt. 718, 6 Atl. 606.

United States.— U. S. *v.* McCormick, 26 Fed. Cas. No. 15,660*a*, 2 Hayw. & H. 156.

See 18 Cent. Dig. tit. "Elections," § 109 *et seq.*

Registration adds no qualification to voters but merely serves to identify them as persons qualified to vote. Madison *v.* Wade, 88 Ga. 699, 16 S. E. 21.

83. Auld *v.* Walton, 12 La. Ann. 129.

84. Hyde *v.* Brush, 34 Conn. 454. The registration of an elector who is qualified to vote must be accepted as the act of a public

eral rule a statute prescribing the powers and duties of registration officers should not be so construed as to make the right to vote by registered voters depend upon a strict observance by the registrars of all the minute directions of the statute in preparing the voting list, and thus render the constitutional right of suffrage liable to be defeated, without the fault of the elector, by the fraud, caprice, ignorance, or negligence of the registrars; for if an exact compliance by these officers with all statutory directions should be deemed essential to the right of an elector to vote, elections would often fail, and electors would be deprived without their fault of an opportunity to vote.[85] A constitutional or statutory provision that no one shall be entitled to register without first taking an oath to support the constitution of the state and that of the United States is directed to the registrars and to them alone; and if they through inadvertence register a qualified voter who is entitled to register and vote, without administering the prescribed oath to him, he cannot be deprived of his right to vote through this negligence of the officers.[86] But it has been held that a statute providing that no registration of voters should be valid, unless it specified as nearly as might be the age, occupation, residence, and the like of the elector, was mandatory in its term, and that any one who sought to vote without complying therewith must show that he offered to do all that was required of him, and was prevented by the fraud of the registration officers.[87]

I. Right to Vote of Persons Not Registered. Where a state constitution or a positive statute not in conflict therewith makes registration a specified time before election day an imperative prerequisite to the right to vote, those who are not so registered cannot vote, whatever may be their other qualifications;[88] but unless

officer, and entitles the elector to cast his vote. State *v.* Nicholson, 102 N. C. 465, 9 S. E. 545, 11 Am. St. Rep. 767.

85. *Louisiana.*— Tullos *v.* Lane, 45 La. Ann. 333, 12 So. 508.

Maryland.— Davis *v.* O'Berry, 93 Md. 708, 50 Atl. 273.

Nevada.— Stinson *v.* Sweeney, 17 Nev. 309, 30 Pac. 997.

New York.— People *v.* Wilson, 62 N. Y. 186; People *v.* Bidelman, 69 Hun 596, 23 N. Y. Suppl. 954.

Pennsylvania.— *In re* Wheelock, 82 Pa. St. 297.

Wisconsin.— State *v.* Baker, 38 Wis. 71.

United States.— Curtin *v.* Yocum, 1 Ellsw. Cas. Cont. El. 416; Campbell *v.* Weaver, Mobl. Cas. Cont. El. 455.

See 18 Cent. Dig. tit. "Elections," § 110.

Place of registration.— Newson *v.* Earnheart, 86 N. C. 391.

Registration book closed too soon.—State *v.* Nicholson, 102 N. C. 465, 9 S. E. 545, 11 Am. St. Rep. 767.

Change of result.— An irregularity in the registration of voters will not invalidate the latter unless it is shown that it would have changed the result. Barnes *v.* Pike County, 51 Miss. 305.

Wrong spelling of name.— *In re* Contested Elections, 2 Brewst. (Pa.) 1. See also *In re* Brant, 13 York Leg. Rec. (Pa.) 145; Matter of Griffiths, 1 Kulp (Pa.) 157.

Registration by unauthorized person.— Tullos *v.* Lane, 45 La. Ann. 333, 12 So. 508; State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 573. See also State *v.* Weed, 60 Conn. 18, 22 Atl. 443.

Failure to post list.—Soper *v.* Sibley County, 46 Minn. 274, 48 N. W. 1112; Edson *v.* Child, 18 Minn. 64; Taylor *v.* Taylor, 10 Minn. 107.

86. Quinn *v.* Lattimore, 120 N. C. 426, 26 S. E. 638, 58 Am. St. Rep. 797; Southerland *v.* Goldsboro, 96 N. C. 49, 1 S. E. 760.

Where a registrar receives a certificate of removal outside of the township for which he is acting, administers the proper oath to the voter, and enters his name on the registration book after his return home, although he did not have the book with him, such registration is valid. People *v.* Teague, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547.

87. State *v.* Scarborough, 110 N. C. 232, 14 S. E. 737.

88. *California.*— Falltrick *v.* Sullivan, 119 Cal. 613, 51 Pac. 947.

Illinois.— People *v.* Hoffman, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793.

Kansas.— State *v.* Butts, 31 Kan. 537, 2 Pac. 618.

Massachusetts.— Capen *v.* Foster, 12 Pick. 485, 23 Am. Dec. 632.

Michigan.— Atty.-Gen. *v.* McQuade, 94 Mich. 439, 53 N. W. 944.

Pennsylvania.— Patterson *v.* Barlow, 60 Pa. St. 54.

Rhode Island.— Opinion of Justices, 22 R. I. 651, 47 Atl. 547; *In re* Polling Lists, 13 R. I. 729.

South Carolina.— Mew *v.* Charleston, etc., R. Co., 55 S. C. 90, 32 S. E. 828.

Washington.— State *v.* Peter, 21 Wash. 243, 57 Pac. 814.

United States.— McLean *v.* Broadhead, Rowell Cas. Cont. El. 412.

See 18 Cent. Dig. tit. "Elections," § 113. See also CONSTITUTIONAL LAW, 8 Cyc. 695.

the constitution or a valid statute makes prior registration imperative, if an individual voter offers to comply with the regulations in reference to registration, and is prevented from such compliance by the wrongful act of the registrars, his vote should unquestionably be counted, provided he is a qualified elector, and appears on election day and offers to vote.[89] In some jurisdictions it is provided by statute that non-registered electors may vote upon the presentation of evidence of their qualifications on election day.[90]

VI. ELECTION DISTRICTS[91] OR PRECINCTS.

As a general rule the governing boards of counties or towns and the corresponding bodies in cities are authorized either by the constitution or by statute to apportion[92] territory under their jurisdiction into separate election districts, and it is usually provided that these districts shall be compact in form and consist of contiguous territory, shall be wholly within the county, town, or ward of a city, and shall contain not more than a designated number of voters.[93] If the statute

An offer to register will not dispense with the necessity therefor, although the hindrance arose from the wrongful act of the registering officers. Esker *v.* McCoy, 5 Ohio Dec. (Reprint) 573, 6 Am. L. Rec. 694.

89. State *v.* Scarborough, 110 N. C. 232, 14 S. E. 737.

Congress provided for this emergency in national elections by the act of May 31, 1870. 16 U. S. St. at L. 140; U. S. Rev. St. (1878) § 2007, now repealed.

90. Farren *v.* Buffalo County, 5 Dak. 36, 37 N. W. 756; Matter of Griffiths, 1 Kulp (Pa.) 157; Matter of Duffy, 4 Brewst. (Pa.) 531; Com. *v.* Cornelius, 8 Wkly. Notes Cas. (Pa.) 215; *In re* School Director, 18 Phila. (Pa.) 458; Matter of Barber, 10 Phila. (Pa.) 579 [*affirmed* in 7 Leg. Gaz. 126, 32 Leg. Int. 229]; Daly *v.* Petroff, 10 Phila. (Pa.) 389; Marks *v.* Park, 7 Leg. Gaz. (Pa.) 70; Glazier *v.* Merringer, 12 Lanc. Bar (Pa.) 61; *In re* Beamish's Contest, 7 L. T. N. S. (Pa.) 17; State *v.* Hilmantel, 21 Wis. 566.

Evidence of qualifications cannot be received on contest. *In re* McDonough, 105 Pa. St. 488; *In re* Flynn, 5 Pa. Dist. 168; *In re* Wilkes Barre Tp., 4 Kulp (Pa.) 196; *In re* School Director, 18 Phila. (Pa.) 458; Glazier *v.* Merringer, 12 Lanc. Bar (Pa.) 61; *Ex p.* Wallace, 3 L. T. N. S. (Pa.) 69.

Corroborating evidence.— In Pennsylvania the testimony of at least one competent disinterested witness is required in addition to the affidavit of the elector. Kneass' Case, 2 Pars. Eq. Cas. (Pa.) 553; *In re* Contested Elections, 2 Brewst. (Pa.) 1.

Voucher by election officer.— Or the elector may be vouched for by an election officer who makes his statement under oath. *In re* Contested Elections, 2 Brewst. (Pa.) 1; Sheppard *v.* Gibbons, 8 Phila. (Pa.) 469.

Presumption where no challenge was made. — Where a person votes at an election without having registered and without any proof of right, if it does not appear that he was challenged or that any objection was made to his vote, the presumption is that he was a legal voter and was known to be such by the judges of election. Kuykendall *v.* Harker, 89 Ill. 126; Clark *v.* Robinson, 88 Ill. 498; Dale *v.* Irwin, 78 Ill. 170.

91. "**Election district**" **defined** see *In re* Newark, 54 N. J. L. 82, 84, 23 Atl. 421; Chase *v.* Miller, 41 Pa. St. 403, 419; McDaniel's Case, 3 Pa. L. J. 310, 312, 2 Pa. L. J. Rep. 82, Brightly Lead. Cas. El. 238.

92. A failure to make this apportionment and appoint boards of registration as the statute requires will render any attempted election void. People *v.* Laine, 33 Cal. 55.

93. *California.*— People *v.* Laine, 33 Cal. 55.

Illinois.— Williams *v.* Potter, 114 Ill. 628, 3 N. E. 729.

Indiana.— Duncan *v.* Shenk, 109 Ind. 26, 9 N. E. 690.

Kansas.— Hayes *v.* Rogers, 24 Kan. 143.

Mississippi.— Perkins *v.* Carraway, 59 Miss. 222.

Nebraska.— State *v.* Emery, 20 Nebr. 301, 30 N. W. 57.

New York.— People *v.* Richmond, 5 Misc. 26, 25 N. Y. Suppl. 144.

Pennsylvania.— Kelly *v.* Board of Aldermen, 29 Leg. Int. 254.

Texas.— Bell *v.* Faulkner, 84 Tex. 187, 19 S. W. 480; Davis *v.* State, 75 Tex. 420, 12 S. W. 957; *Ex p.* White, 33 Tex. Cr. 594, 28 S. W. 542.

See 18 Cent. Dig. tit. "Elections," § 40 *et seq.*

In territory allotted to Indians and persons of Indian descent.— In State *v.* Denoyer, 6 N. D. 586, 72 N. W. 1014, it was held that where territory in the county of Benson and also in the Devil's Lake reservation had been allotted to certain Indians and persons of Indian descent, in severalty, who were living upon their respective allotments and farming the same, it was the duty of the commissioners of Benson county to establish a voting precinct for such territory.

Indian reservation.— Hankey *v.* Bowman, 82 Minn. 328, 84 N. W. 1002.

Two counties.— Brattland *v.* Calkins, 67 Minn. 119, 69 N. W. 699.

Change of boundaries in election districts. — Union County *v.* Short, 77 Ill. App. 448.

so provides the question of the division of election districts may be submitted to a vote of the electors of the district proposed to be divided, and their decision will be final;[94] or the power to rearrange election districts may be conferred upon the courts of record in whose jurisdictions the territory to be redistricted lies.[95] Where under the general law each township constitutes one election district, the county officers have no power to partition it into two or more districts,[96] and the mere creation of village organizations within townships for the purpose of local government cannot be deemed to make them separate election districts for other than village elections.[97] Where a city is partitioned into wards, each of which constitutes a separate election district, an election held at a single polling-place in such city is without authority of law.[98] Election districts, whether composed, as at different periods and in different states they have been, of counties, cities, townships, boroughs, wards of cities, or of precincts, always denote subdivisions of the territory of a state marked out by known boundaries prearranged and declared by public authority, and within which the citizens residing therein must as a rule vote.[99]

VII. ELECTION OFFICERS.[1]

A. Qualifications. Supervisors and inspectors of elections must of course possess the statutory qualifications, the first of which as a rule is that they must be qualified voters in the election districts wherein their duties are to be performed.[2]

Insufficient accommodations.— Where the evidence shows that from failure of the officers of the town to properly redistrict it, so that at a statutory local option election the polls were so crowded that it was impossible for the officers of a certain district to receive all the votes, and that two hundred and fifty voters were standing in a line formed when the polls were closed, the statutory local option questions must be resubmitted. Matter of Griffin, 35 Misc. (N. Y.) 532, 71 N. Y. Suppl. 1127.

94. Kugler's Appeal, 55 Pa. St. 123.

95. Crutcher *v.* Shelby R. Dist., 3 Ky. L. Rep. 533; *In re* Boggs Tp., 112 Pa. St. 145, 5 Atl. 224; *In re* Norristown, 3 Pa. Co. Ct. 475; *In re* North Chester Election Dist., 3 Pa. Co. Ct. 247; *In re* North Chester Borough, 4 Lanc. L. Rev. 117; *In re* Scranton Election Dist., 1 Lack. Leg. Rec. (Pa.) 495.

Court of quarter sessions.— The constitution of Pennsylvania provides that townships and wards of cities or boroughs shall form or be divided into election districts of compact or contiguous territories in such manner as the court of quarter sessions of the city or county in which the same are located may direct; and it has been held that this repeals all prior statutes providing for the apportionment of election districts. *In re* Dist.-Atty., 11 Phila. (Pa.) 645. See also *In re* Huntington Tp., 3 Kulp (Pa.) 367. Inasmuch as the power to divide townships into election districts is vested in the court of quarter sessions by the constitution of Pennsylvania, it was held that the act of May 18, 1876, was in conflict with the constitution in commanding the court to confirm the report of the commissioners appointed under said act unless exceptions thereto were filed within a given time. *In re* Bern Tp., 115 Pa. St. 615, 9 Atl. 62.

Power to rearrange election districts.— The court has power to rearrange the election districts of a township when the circumstances require it without an election, although it had previously made different divisions. *In re* Boggs Tp., 43 Leg. Int. (Pa.) 340.

Confirmation of reports of viewers.— The court of quarter sessions has jurisdiction to confirm the report of viewers arranging the election districts of a township, when such is not an annexation of one district to another, which requires an election, under the Pennsylvania act of 1876. *In re* Boggs Tp., 43 Leg. Int. (Pa.) 340.

A petition for the division of an election district need not contain an affidavit that at least twenty signatures to the petition were of qualified electors, but the court of quarter sessions must be satisfied of that fact. *In re* La Porte Tp. Polling Place, 19 Pa. Co. Ct. 497.

96. Williams *v.* Potter, 114 Ill. 628, 3 N. E. 729.

97. Stemper *v.* Higgins, 38 Minn. 222, 37 N. W. 95; State *v.* Spaude, 37 Minn. 322, 34 N. W. 164.

98. Bean *v.* Barton County Ct., 33 Mo. App. 635.

99. State *v.* Fitzgerald, 37 Minn. 26, 32 N. W. 788; Chase *v.* Miller, 41 Pa. St. 403; McDaniels' Case, 2 Pa. L. J. Rep. 82, 3 Pa. L. J. 310, Brightly Lead. Cas. El. 238.

1. **"Election officer"** defined see U. S. *v.* Clayton, 25 Fed. Cas. No. 14,814, 2 Dill. 219.

2. *In re* Election Sup'rs, 43 Fed. 859.

Educational qualifications.—Under the federal statute, while it existed, supervisors of election were required to be able to read and write the English language. *In re* Election Sup'rs, 43 Fed. 859. And under a state statute requiring a registrar of elections to be able to read and write the English language, a person who cannot read or write except to write his name is not qualified to act. Mullen *v.* Morrow, 123 N. C. 773, 31 S. E. 1003.

B. Ineligibility and Disqualification. There is nothing better settled than that the acts of election officers *de facto* who are in under color of election or appointment are as valid as to third parties and the public as those of officers *de jure*. The doctrine that electors may be disfranchised because one or more of the judges or inspectors of election did not possess all the qualifications required by law finds no support in the decisions of any judicial tribunal;[3] there is, however, a lack of harmony in the legislative cases on this point; in the earlier cases in the house of representatives of the United States it was held that an election held by officers not duly qualified was void;[4] but the recent cases decided by that body seem to be in harmony with the judicial decisions.[5]

C. Appointment or Election — 1. In General. Election officers can be appointed or elected by statutory authority only,[6] and it follows that they must be appointed or elected in the very manner pointed out by the statute.[7] A

But where the statute requiring officers to appoint inspectors of election does not require the persons appointed to have educational qualifications, the courts cannot add such requirement and thereby annul an appointment of persons who cannot read and write. Taylor *v.* Kolb, 100 Ala. 603, 13 So. 779.

3. *Arkansas.*—Swepston *v.* Barton, 39 Ark. 549.

Florida.— Pickett *v.* Russell, 42 Fla. 116, 634, 28 So. 764.

Georgia.— Collins *v.* Huff, 63 Ga. 207. But see Walker *v.* Sanford, 78 Ga. 165, 1 S. E. 424.

Kentucky.— Pratt *v.* Breckinridge, 112 Ky. 1, 65 S. W. 136, 66 S. W. 405, 23 Ky. L. Rep. 1356, 1858; Common School Dist. No. 88 *v.* Garvey, 80 Ky. 159.

Michigan.— People *v.* Avery, 102 Mich. 572, 61 N. W. 4.

Minnesota.— Hankey *v.* Bowman, 82 Minn. 328, 84 N. W. 1002; State *v.* Bernier, (1888) 38 N. W. 368; Quinn *v.* Markoe, 37 Minn. 439, 35 N. W. 263; Taylor *v.* Taylor, 10 Minn. 107.

New York.— People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451; People *v.* McManus, 34 Barb. 620.

Pennsylvania.— Boileau's Case, 2 Pars. Eq. Cas. 503; Mann *v.* Cassidy, 1 Brewst. 11.

Texas.— Bell *v.* Faulkner, 84 Tex. 187, 19 S. W. 480.

West Virginia.— Dial *v.* Hollandsworth, 39 W. Va. 1, 19 S. E. 557.

Wisconsin.— State *v.* Stumpf, 21 Wis. 579.

See 18 Cent. Dig. tit. "Elections," § 48.

Officer of election himself a candidate.— That an officer of election was himself a candidate voted for will not invalidate the poll except as to his own election. Swepston *v.* Barton, 39 Ark. 549.

Persons not registered.— A person may act as clerk if a resident of the district, although his name is not registered on any list. *In re* Election, etc., Acts, 2 Brewst. (Pa.) 138.

Clerk a candidate.— The fact that the person appointed as clerk was a trustee of the common school district and was reëlected with others as a trustee at the election did not affect the validity of the election as to the change of the district to a graded school district. Collins *v.* Masden, 74 S. W. 720, 25 Ky. L. Rep. 81.

4. Delano *v.* Morgan, 2 Bartl. Cas. Cont. El. 168; Howard *v.* Cooper, 1 Bartl. Cas. Cont. El. 275; Draper *v.* Johnson, Cl. & H. Cas. Cont. El. 702; Easton *v.* Scott, Cl. & H. Cas. Cont. El. 272; McFarland *v.* Culpepper, Cl. & H. Cas. Cont. El. 221; Jackson *v.* Wayne, Cl. & H. Cas. Cont. El. 47.

5. Eggleston *v.* Strader, 2 Bartl. Cas. Cont. El. 897; Barnes *v.* Adams, 2 Bartl. Cas. Cont. El. 760; Flanders *v.* Hahn, 1 Bartl. Cas. Cont. El. 438; Blair *v.* Barrett, 1 Bartl. Cas. Cont. El. 313; Clark *v.* Hall, 1 Bartl. Cas. Cont. El. 215; Milliken *v.* Fuller, 1 Bartl. Cas. Cont. El. 176.

6. Munroe *v.* Wells, 83 Md. 505, 35 Atl. 142.

7. *Colorado.*— Phillips *v.* Corbin, 8 Colo. App. 346, 46 Pac. 224.

Maryland.— Sudler *v.* Lankford, 82 Md. 142, 33 Atl. 455.

Ohio.— State *v.* Finger, 48 Ohio St. 505, 28 N. E. 135; State *v.* Connor, 5 Ohio Cir. Ct. 305, 3 Ohio Cir. Dec. 151.

Pennsylvania.— Thompson *v.* Ewing, 1 Brewst. 67, 5 Phila. 102.

Rhode Island.— McDermott *v.* Lapham, 18 R. I. 295, 27 Atl. 220.

Utah.— People *v.* Utah Com'rs, 7 Utah 279, 26 Pac. 577.

See 18 Cent. Dig. tit. "Elections," § 44 *et seq.*

Appointment on election day.— Collins *v.* Masden, 74 S. W. 720, 25 Ky. L. Rep. 81.

Election by bystanders.— Kirkpatrick *v.* Vickers, 24 Kan. 314; Sanders *v.* Lacks, 142 Mo. 255, 43 S. W. 653; Thompson *v.* Ewing, 1 Brewst. (Pa.) 67, 5 Phila. (Pa.) 102.

Where a new division is erected out of territory belonging to an old one, the officers elected to the old division continue to act therein, and are to appoint the officers for the new division. *In re* Contested Elections, 2 Brewst. (Pa.) 1. But upon the division of an election district into two new districts, the functions of the election officers are destroyed and cannot be exercised in either of the new election districts into which the old one is divided. *In re* Penn. Dist. Election Cases, Brightly Lead. Cas. El. 617. And under such circumstances the court is obliged of necessity to appoint election officers to act

statute providing for the selection of election officers by the county board, the members of which are all appointed by the state board, composed wholly of members of one political party, does not render the law violative of that clause of the constitution which requires that "all elections shall be free and equal."[8] The election returns should not be rejected for any irregularity in the appointment of the officers of election, where it does not appear that any injurious result accrued therefrom either by the reception of illegal votes, or the rejection of legal votes, or that any of the candidates lost or gained votes thereby.[9]

2. STATUTES AUTHORIZING APPOINTMENT BY COURTS. It has been held that a statute imposing on judges of the supreme court of a state the duty of appointing supervisors of election is unconstitutional and void, inasmuch as the exercise of such power is not a judicial function;[10] but on the other hand an act conferring on the judges of the supreme and superior courts general supervisory jurisdiction over clerks of the superior courts in the performance of their duties in appointing judges of election has been sustained;[11] and the late federal statute conferring upon judges of the circuit courts of the United States power to appoint supervisors of elections of members of the house of representatives was held to be a constitutional exercise of legislative powers.[12]

D. Removal. Any election officer may be removed for cause, but unless such removal be made while the officer is actually on duty on the day of registration, revision of the registration or election, and for improper conduct as an election officer, it can be made only after notice in writing to the officer to be removed, which notice shall set forth clearly and distinctly the reason for his removal.[13]

in the two new districts. Matter of Dist.-Atty., 11 Phila. (Pa.) 645.

Where, in redistricting a city into election districts, some of the former districts remained unchanged, and additional districts were created, it was held that the common council had power, under the Michigan election law of 1891, to appoint inspectors of election for such additional districts. Conely *v.* Detroit, 93 Mich. 446, 53 N. W. 564.

8. Sweeney *v.* Coulter, 109 Ky. 295, 58 S. W. 784, 22 Ky. L. Rep. 885.

Violative of local self-government.— The act, in conferring the power upon the state board to appoint members of the county board and investing them with authority to appoint election officers, and to act as canvassing and contesting boards, does not violate the principle of local self-government, as the duties imposed concern the state government; but if it did so that would not render the statute unconstitutional. Purnell *v.* Mann, 105 Ky. 87, 48 S. W. 407, 49 S. W. 346, 50 S. W. 264, 20 Ky. L. Rep. 1146, 1393, 21 Ky. L. Rep. 1129.

9. *California.*— Keller *v.* Chapman, 34 Cal. 635; Sprague *v.* Norway, 31 Cal. 173.

Pennsylvania.— Thompson *v.* Ewing, 1 Brewst. 67, 5 Phila. 102.

South Carolina.— State *v.* Townsend, 1 McMull. 495.

Tennessee.—McCraw *v.* Harralson, 4 Coldw. 34.

Texas.— Hunnicutt *v.* State, 75 Tex. 233, 12 S. W. 106.

See 18 Cent. Dig. tit. "Elections," § 47.

10. *In re* Election Sup'rs, 114 Mass. 247, 19 Am. Rep. 341.

11. Harkins *v.* Cathey, 119 N. C. 649, 26 S. E. 136.

In filling vacancies in the office of registrars of election, caused by the removal of some of the appointees, the court is not bound by the recommendation of the chairman of the party from which the appointments came. Mullen *v.* Morrow, 123 N. C. 773, 31 S. E. 1003.

The Pennsylvania statute providing for the appointment of overseers of election by the court of common pleas on the petition of five or more citizens of the election district is repealed by the act of June 10, 1893, which provides for the appointment of such overseers by each political party, and repeals all laws inconsistent therewith. *In re* Appointment of Overseers, 9 Pa. Dist. 629.

12. *Ex p.* Siebold, 100 U. S. 371, 25 L. ed. 717.

13. Gardner *v.* People, 62 N. Y. 299. In McDougal *v.* Guigon, 27 Gratt. (Va.) 133, it was held that the county and corporation courts have authority to remove a judge of elections for malfeasance in office in the gross neglect of duty, although he has not been convicted by the verdict of a jury of any offense.

It is official misconduct for a commissioner of elections to refuse to register applicants, with the intent wilfully to deprive them of the right of suffrage, when he knows that they are true voters in the wards or precincts in which they offer to register. McMaster *v.* Herald, 56 Kan. 231, 42 Pac. 697.

Under the federal statute providing for the appointment of supervisors of election, while it was in force, it was held that the circuit court would not remove a chief supervisor of elections for issuing instructions which were the same as those previously issued, and were shown to have been approved by the district attorney and the circuit judge. *In re*

Where the law requires an equal distribution of the inspectors and registrars of election between the political parties, an inspector or registrar who is shown not to be a member of the party which he represents on the board will be removed.[14]

E. Oath of Office. Election officers are required to take an oath prescribed by statute,[15] and until they take that oath they are not authorized to act or to administer such oaths as the law makes it their duty to administer to voters, no matter what other official position they hold authorizing them to administer oaths in other cases;[16] but the omission of the officers to take the oath prescribed by law or their being improperly sworn will not invalidate the election or the votes cast at the precinct or the return of the same.[17]

F. Representation of Political Parties. It is also a usual provision that the election officers of each district shall consist of members of opposing political parties.[18] In one jurisdiction this has been held unconstitutional, as making particular political opinions a condition to holding public office.[19] This subject, however, has not been much attended to in other jurisdictions, but where the question has been raised it has been held that such a provision does not establish such a political test of office as is repugnant to the constitution, but is rather a rule for the guidance of the appointing power.[20]

G. Compensation. The matter of the compensation of election officers is regulated entirely by statute; it is generally provided that they shall receive a specified sum *per diem* for the time of actual service on registration and election

Davenport, 48 Fed. 527; *In re* Walsh, 29 Fed. Cas. No. 17,112*a*.

14. Mullen *v.* Morrow, 123 N. C. 773, 31 S. E. 1003.

Burden of proof.— In a proceeding against a county board to show cause why registrars of election appointed by them, one from each political party, should not be removed, the burden is on the petitioners to show that an appointee is not a member of the party from which he is appointed or is otherwise disqualified. Mullen *v.* Morrow, 123 N. C. 773, 31 S. E. 1003.

15. Biggerstaff *v.* Com., 11 Bush (Ky.) 169.

16. Biggerstaff *v.* Com., 11 Bush (Ky.) 169.

17. *California.*— Whipley *v.* McKune, 12 Cal. 352.

Florida.—State *v.* Baker County Com'rs, 22 Fla. 29; State *v.* Alachua County, 17 Fla. 9.

Illinois.— Ackerman *v.* Haenck, 147 Ill. 514, 35 N. E. 381; People *v.* Hilliard, 29 Ill. 413.

Kentucky.— Lunsford *v.* Culton, 23 S. W. 946, 15 Ky. L. Rep. 504.

Maine.— Sargent *v.* Wilder, 71 Me. 380.

Minnesota.— Taylor *v.* Taylor, 10 Minn. 107.

Missouri.— Sanders *v.* Lacks, 142 Mo. 255, 43 S. W. 653.

Montana.— Heyfron *v.* Mahoney, 9 Mont. 497, 24 Pac. 93, 18 Am. St. Rep. 757; Wells *v.* Taylor, 5 Mont. 202, 3 Pac. 255.

New York.— People *v.* Cook, 8 N. Y. 67, 50 Am. Dec. 451.

Pennsylvania.— Marks *v.* Park, 7 Leg. Gaz. 70.

See 18 Cent. Dig. tit. "Elections," § 44 *et seq.*

18. *Alabama.*— Taylor *v.* Kolb, 100 Ala. 603, 13 So. 779.

Kentucky.— Com. *v.* Miller, 98 Ky. 446, 33 S. W. 401, 17 Ky. L. Rep. 1033.

New York.— Matter of Manning, 71 Hun 236, 24 N. Y. Suppl. 1039; People *v.* Wheeler, 18 Hun 540; People *v.* McLean, 12 N. Y. Suppl. 521, 25 Abb. N. Cas. 466; People *v.* New York Police Com'rs, 57 How. Pr. 445. The power to select the election officers to represent a political party in the county of New York resides in the county committee of the party whose action is to be authenticated by the chairman of the executive committee. Sheehan *v.* McMahon, 44 N. Y. App. Div. 63, 60 N. Y. Suppl. 452.

North Carolina.— Harkins *v.* Cathey, 119 N. C. 649, 26 S. E. 136.

Ohio.— State *v.* Kinney, 63 Ohio St. 304, 58 N. E. 809; State *v.* Finger, 48 Ohio St. 505, 28 N. E. 135.

Pennsylvania.— *In re* Election, etc., Acts, 2 Brewst. 138; Kelly *v.* Board of Aldermen, 29 Leg. Int. 254.

Rhode Island.— McDermott *v.* Lapham, 18 R. I. 295, 27 Atl. 220.

United States.— *In re* Election Sup'rs, 43 Fed. 859; *In re* Appointment of Election Sup'rs, 9 Fed. 14, 20 Blatchf. 13.

See 18 Cent. Dig. tit. "Elections," § 46.

Commissioners of registration are not county officers in such sense that the legislative provision conferring upon the governor the power to appoint them violates the constitutional provision that no county office created by the legislature shall be filled other than by the people or the county court. Cook *v.* State, 90 Tenn. 407, 16 S. W. 471, 13 L. R. A. 183.

19. Atty.-Gen. *v.* Detroit, 58 Mich. 213, 24 N. W. 887, 55 Am. Rep. 675.

20. People *v.* Hoffman, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 796; Patterson *v.* Barlow, 60 Pa. St. 54.

days, and in some cases they are also allowed mileage.[21] It has been held that election officers are entitled to their *per diem* not only on the day on which the voting is done, but also for the time their services are required in completing the count and making up the returns;[22] but there are also decisions to the contrary.[23] There is no legal liability on the part of either a county or a city to pay the expenses of primary elections which are purely voluntary.[24]

H. Liability in Damages For Refusal to Accept Lawful Votes. As early as the year 1704, it was held in England by the house of lords that a qualified elector might maintain an action on the case for damages against an election officer who maliciously refused to accept his vote for a candidate for the lower house of parliament.[25] So also in the United States it has generally been held that a wilful and malicious refusal to accept the vote of a duly qualified elector is a cause of action for damages;[26] and if the vote be wilfully, fraudulently, and

21. Early County *v.* Powell, 94 Ga. 680, 20 S. E. 10; Ridgway *v.* Haverhill, 152 Mass. 530, 25 N. E. 968; Bennett *v.* Orange, 69 N. J. L. 176, 54 Atl. 249; People *v.* Hasbrouck, 54 How. Pr. (N. Y.) 418.

The statute fixing the number of hours which will constitute a day's work does not apply to election officers, and, although they may have been obliged to work until nearly midnight on election day, they are not entitled to compensation for more than one day. People *v.* West Turin, 27 Misc. (N. Y.) 470, 59 N. Y. Suppl. 234; Corr *v.* Lackawanna County, 163 Pa. St. 57, 29 Atl. 745; Bubb *v.* Lycoming County, 134 Pa. St. 112, 19 Atl. 493; Mellott *v.* Fulton County, 7 Pa. Dist. 81; Young *v.* Huntingdon County, 20 Pa. Co. Ct. 374; Potter *v.* Tioga County, 8 Pa. Co. Ct. 24.

Under the Ohio statute, providing that judges and clerks of election shall receive certain compensation, to be paid by the county, except in township elections, the fees of judges and clerks of municipal elections must be paid by the county, as the exception of township elections does not include municipal elections. Baker *v.* State, 4 Ohio Cir. Ct. 30, 2 Ohio Cir. Dec. 401.

22. Early County *v.* Powell, 94 Ga. 680, 20 S. E. 10.

The federal statute, now repealed, which authorized the appointment of supervisors of election, provided that there should be allowed and paid to each supervisor who was appointed and performed his duty as such, compensation at the rate of five dollars per day for each day he was actually on duty not exceeding ten days. Under this provision it was held that a supervisor could in no case be paid more than fifty dollars, although he might have actually served more than ten days, and it was also held that he could not be deprived of full compensation if he was required to serve ten days or more. *In re* McDowell, 53 Fed. 76; Stocksdale *v.* U. S., 39 Fed. 62; Berry *v.* U. S., 35 Fed. 269; Williams *v.* U. S., 34 Fed. 25; Scholfield *v.* U. S., 32 Fed. 576; *In re* Conrad, 15 Fed. 641; Fulmer *v.* U. S., 23 Ct. Cl. 320. For fees and perquisites which were allowed to chief supervisors under this statute see Dennison *v.* U. S., 168 U. S. 241, 18 S. Ct. 57, 42 L. ed. 453; Sherman *v.* U. S., 155 U. S. 673, 15 S. Ct. 234, 39 L. ed. 307; U. S. *v.* Poinier, 140 U. S. 160, 11 S. Ct. 752, 35 L. ed. 395; U. S. *v.* McDermott, 140 U. S. 151, 11 S. Ct. 746, 35 L. ed. 391; Walker *v.* U. S., 41 Fed. 672; Dimmick *v.* U. S., 36 Fed. 82; Gayer *v.* U. S., 33 Fed. 625.

23. Bratton *v.* Perry County, 6 Pa. Co. Ct. 62; Salter *v.* Philadelphia County, 1 Phila. (Pa.) 255.

24. Schiel *v.* Cook County, 137 Ill. 46, 27 N. E. 293.

25. Ashby *v.* White, 14 How. St. Tr. 695, 2 Ld. Raym. 938, 3 Ld. Raym. 320, 1 Smith Lead. Cas. 231, approving the dissenting opinion of Lord Holt in that case. See also McGowan *v.* Sedley, 8 Ir. C. L. 342.

In Canada a voter whose name has been struck off the voter's list wrongfully has a right to recover, although he has proved no special damage. Martin *v.* Montreal, 6 Montreal Leg. N. 23.

26. *Connecticut.*— Perry *v.* Reynolds, 53 Conn. 527, 3 Atl. 555; Hyde *v.* Brush, 34 Conn. 454.

Illinois.— Bernier *v.* Russell, 89 Ill. 60.

Indiana.— Carter *v.* Harrison, 5 Blackf. 138.

Kentucky.— Chrisman *v.* Bruce, 1 Duv. 63, 85 Am. Dec. 603.

Louisiana.— Bridge *v.* Oakey, 2 La. Ann. 968.

Maine.— Pierce *v.* Getchell, 76 Me. 216.

Maryland.— Elbin *v.* Wilson, 33 Md. 135.

Massachusetts.—Lombard *v.* Oliver, 7 Allen 155; Gates *v.* Neal, 23 Pick. 303.

Missouri.— Pike *v.* Megoun, 44 Mo. 491.

Ohio.— Anderson *v.* Millikin, 9 Ohio St. 568.

See 18 Cent. Dig. tit. "Elections," § 53.

Civil remedy not merged in criminal offense.— Sutton *v.* McIlhany, 1 Ohio Dec. (Reprint) 235, 5 West. L. J. 356.

What evidence should go to the jury.— Friend *v.* Hamill, 34 Md. 298.

Evidence of declarations made to officers.— In an action against the selectmen of the town for refusing to put plaintiff's name upon the list of voters and rejecting his vote, plaintiff may prove his own statements relating to his residence made to the selectmen before offering his vote not under oath for the purpose of furnishing to them evidence of his having the legal qualifications of a voter, and he may testify to his own intention in leaving the town for a prolonged absence previous

corruptly rejected, the injured party is entitled to recover such exemplary damages as the jury may think proper under the circumstances;[27] but whether malice is an essential ingredient of the cause of action the decisions are not in harmony; the general rule is that election officers, acting as they do in a quasi-judicial capacity, are not personally liable for mistakes and errors of judgment if they acted in good faith, and that an action will not lie against them for refusing to accept the vote of a person lawfully qualified to vote, unless malice, express or implied, be both alleged and proved;[28] on the other hand it has been held that an action lies against them for the wrongful refusal to accept a vote, although they are not chargeable with malice;[29] but in that case they may show in mitiga-

to the time of the acts complained of. Lombard *v.* Oliver, 7 Allen (Mass.) 155.

Declarations of plaintiff as evidence.— Elbin *v.* Wilson, 33 Md. 135.

Allegation and proof of corrupt motives.— In order to sustain an action against a judge of an election for refusing to permit a qualified voter to exercise the right of suffrage, it must be alleged and proved that such refusal was not according to his honest conviction of his duty and of the legal rights of plaintiff, but knowingly, wrongfully, and prompted by impure and corrupt motives. Caulfield *v.* Bullock, 18 B. Mon. (Ky.) 494.

Parol evidence that name was not on voting list.— In an action against selectmen for refusing to receive the vote of an inhabitant of the town, parol evidence that plaintiff's name was on the voting list is inadmissible without first giving notice to produce the list. Harris *v.* Whitcomb, 4 Gray (Mass.) 433.

Allegation as to plaintiff's residence.— In an action for damages against the judges of an election for wrongfully rejecting plaintiff's vote, the declaration must contain a distinct and positive averment that plaintiff has resided in the state for one year next preceding the election as the constitution requires, otherwise it would be adjudged bad on demurrer. Blair *v.* Ridgely, 41 Mo. 63, 97 Am. Dec. 248.

27. Elbin *v.* Wilson, 33 Md. 135.

28. *Connecticut.*— Perry *v.* Reynolds, 53 Conn. 527, 3 Atl. 555.

Delaware.— State *v.* Porter, 4 Harr. 556; State *v.* McDonald, 4 Harr. 555.

Indiana.— Carter *v.* Harrison, 5 Blackf. 138.

Kentucky.— Miller *v.* Rucker, 1 Bush 135; Morgan *v.* Dudley, 18 B. Mon. 693, 68 Am. Dec. 735; Caulfield *v.* Bullock, 18 B. Mon. 494.

Louisiana.— Patterson *v.* D'Auterive, 6 La. Ann. 467, 54 Am. Dec. 564; Bridge *v.* Oakey, 2 La. Ann. 968.

Maine.— Pierce *v.* Getchell, 76 Me. 216; Sanders *v.* Getchell, 76 Me. 158, 49 Am. Rep. 606.

Maryland.— Friend *v.* Hamill, 34 Md. 298; Bevard *v.* Hoffman, 18 Md. 479, 81 Am. Dec. 618.

Michigan.— Gordan *v.* Farrar, 2 Dougl. 411; Walker *v.* Brockway, 1 Mich. N. P. 57.

Missouri.— Pike *v.* Megoun, 44 Mo. 491.

New Hampshire.— Wheeler *v.* Patterson, 1 N. H. 88, 8 Am. Dec. 41.

New York.— Goetchens *v.* Matthewson, 5 Lans. 214; Jenkins *v.* Waldron, 11 Johns. 114, 6 Am. Dec. 359.

North Carolina.— Peavey *v.* Robbins, 48 N. C. 339.

Pennsylvania.—Weckerly *v.* Geyer, 11 Serg. & R. 35; Thomas *v.* Smith, 9 Pa. Dist. 469, 23 Pa. Co. Ct. 577; Moran *v.* Rennard, 3 Brewst. 601.

Rhode Island.— Keenan *v.* Cook, 12 R. I. 52.

Tennessee.— Rail *v.* Potts, 8 Humphr. 225.

England.—Milward *v.* Sarjeant, 1 East 568 note, 6 Rev. Rep. 350; Drewe *v.* Coulton, 1 East 563 note; Tozer *v.* Child, 7 E. & B. 377, 3 Jur. N. S. 774, 26 L. J. Q. B. 151, 5 Wkly. Rep. 287, 90 E. C. L. 377; Cullen *v.* Morris, 2 Stark. 577, 20 Rev. Rep. 742, 3 E. C. L. 536.

See 18 Cent. Dig. tit. "Elections," § 53.

What constitutes malice.— Bridge *v.* Oakey, 12 Rob. (La.) 638.

29. Larned *v.* Wheeler, 140 Mass. 390, 5 N. E. 290, 54 Am. Rep. 483; Blanchard *v.* Stearns, 5 Metc. (Mass.) 298; Lincoln *v.* Hapgood, 11 Mass. 350; Gardner *v.* Ward, 2 Mass. 244 note; Kilham *v.* Ward, 2 Mass. 236; Monroe *v.* Collins, 17 Ohio St. 665; Jeffries *v.* Ankeny, 11 Ohio 372; Gillespie *v.* Palmer, 20 Wis. 544. In Capen *v.* Foster, 12 Pick. (Mass.) 485, 486, 23 Am. Dec. 632, Shaw, C. J., said: "It has been regarded as a question of doubt and difficulty, whether upon strict principle, a public officer who acts honestly and according to the best of his judgment, in the discharge of his duty, and who through such honest mistake and error of judgment, denies to a citizen his right of voting, should be answerable, in an action for damages. But considering the utility of having a plain and perfect remedy, in case of so much importance, and the difficulty which there would be, in bringing questions of this sort to the test of judicial determination, were not each individual citizen permitted to vindicate his own particular right as a voter, before a competent judicial tribunal; and considering that the question of damages will always be in the hands of a jury, who will take care to give slight damages, when the object is principally to settle a really disputed and doubtful right, and when the municipal officers have acted honestly and in good faith, it has been decided upon great considerations of public policy, that such an action may be sustained."

Refusal knowingly and wilfully made.— Where the judge of election knowingly and

tion of damages that they acted in good faith.[30] No recovery can be had in such case if plaintiff had no legal right to vote, although the judges of election may have based their decision on the wrong ground.[31] In such an action an allegation that plaintiff was a duly qualified elector, but without an allegation that he was ever registered as such, is insufficient to state a cause of action for unlawfully rejecting his vote, under a statute requiring him to be registered.[32] In an action against election officers for refusing to receive the vote of a qualified voter or for omitting to put his name on the list of voters, the declaration or complaint must aver specifically all the facts which constitute plaintiff's qualifications to vote at the election at which his vote was refused, and that he before offering his vote furnished defendants with sufficient evidence of his having those qualifications.[33] The remedy of one whose name is erased from the voting list by the selectmen before the voting commenced and whose vote when offered is refused by them is an action against them for erasing his name and not an action for refusing his vote.[34]

I. Irregularities in Conduct of Election. It is the duty of the court to sustain an election authorized by law if it has been so conducted as to give a free and fair expression of the popular will, and the actual result thereof is clearly ascertained;[35] for elections should never be held void unless they are clearly illegal.[36] In the absence of fraud mere irregularities in the conduct of an election, where it does not appear that the result was affected either by the rejection of legal votes or the reception of illegal ones, will not justify the rejection of the whole vote of the precinct, although the circumstances may be such as to subject the officers to punishment.[37]

VIII. AUTHORITY TO HOLD ELECTIONS.

A. In General. In the final analysis, under all popular forms of government, the controlling political power rests with the people, who are the makers of con-

wilfully refused to accept a valid vote, such act alone is sufficient to warrant the finding that the refusal was made under influence of a bad motive, so as to render the officer liable for damages. Chrisman *v.* Brown, 1 Duv. (Ky.) 63, 85 Am. Dec. 603.

Unreasonable refusal to receive votes.— Under a statute making selectmen liable for an unreasonable refusal to receive the vote of a qualified voter, it has been held that as to what is an unreasonable refusal, each case must depend on its facts, that where all presumptions were in favor of the right to vote, a refusal might be deemed unreasonable; but that no wrong or injury being intended, damages should be neither exemplary nor severe. Pierce *v.* Getchell, 76 Me. 216; Sanders v. Getchell, 76 Me. 158, 49 Am. Rep. 606.

30. Long *v.* Long, 57 Iowa 497, 10 N. W. 875.

Where a challenged elector does not insist on voting.— A voter who is challenged at the polls cannot maintain an action against the selectmen for refusing to receive his vote, if they do not act wilfully or maliciously, but under a mistake into which they are led by his conduct which was likely to mislead them into a belief that he had abandoned his claim to a right to vote. Humphrey *v.* Kingman, 5 Metc. (Mass.) 162.

Challenged electors should offer proof of qualifications. Alden *v.* Hinton, 6 D. C. 217.

31. Byler *v.* Asher, 47 Ill. 101.

An action will not lie for refusing to receive the vote of an alien, who has gone through the form of admission to citizenship, in a court having no jurisdiction for that purpose. Mills *v.* McCabe, 44 Ill. 194; Gordan *v.* Farrar, 2 Dougl. (Mich.) 411; Pryce *v.* Belchers, 4 C. B. 866, 16 L. J. C. P. 264, 56 E. C. L. 866.

32. Wiley *v.* Sinkler, 179 U. S. 58, 21 S. Ct. 17, 45 L. ed. 84.

33. Blanchard *v.* Stearns, 5 Metc. (Mass.) 298.

Facts must be alleged. Curry *v.* Cabliss, 37 Mo. 330.

34. Harris *v.* Whitcomb, 4 Gray (Mass.) 433.

35. State *v.* Burbridge, 24 Fla. 112, 3 So. 869.

36. People *v.* Prewett, 124 Cal. 7, 56 Pac. 619; State *v.* Hudson County, 35 N. J. L. 269.

37. *California.*— Fragley *v.* Phelan, 126 Cal. 383, 58 Pac. 923; Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183; Bourland *v.* Hildreth, 26 Cal. 161.

Illinois.— Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; People *v.* Logan County, 63 Ill. 374.

Louisiana.— Lucky *v.* Bienville Parish Police Jury, 46 La. Ann. 679, 15 So. 89.

Nevada.— State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 753.

New York.— People *v.* Cook, 8 N. Y. 67, 59

stitutions and the institutions which exist under them; but they must exercise this power in an orderly manner; consequently, there can be no valid election without some lawful authority behind it; the right to hold an election cannot exist or be lawfully exercised without an express grant of power by the constitution or by the legislature acting under constitutional authority; and no case has been found where a volunteer election has been held valid, even though the term of the incumbents had expired.[38]

B. Construction of Statutes[39]— **1. In General.** In the construction of statutes regulating elections it is important to keep in mind two recognized principles: (1) The legislative will is the supreme law under the constitution, and the legislature may prescribe the forms to be observed in the conduct of elections, and provide that such method shall be exclusive of all others; (2) since the first consideration of the state is to give effect to the expressed will of the majority, it is directly interested in having each voter cast a ballot in accordance with the dictates of his individual judgment.[40]

2. Mandatory Statutes. Recognizing the principle first above stated, the courts have uniformly held that when the statute expressly or by fair implication declares any act to be essential to a valid election, or that an act shall be performed in a given manner and in no other, such provisions are mandatory and exclusive.[41]

Am. Dec. 451; *In re* Pine Hill, 33 N. Y. Suppl. 181.

Pennsylvania.— Thompson *v.* Ewing, 1 Brewst. 67, 5 Phila. 102; Fowler *v.* Felthoff, 1 Leg. Rec. 105.

Tennessee.— Cook *v.* State, 90 Tenn. 407, 16 S. W. 471, 13 L. R. A. 183.

Texas.— Ewing *v.* Duncan, 81 Tex. 230, 16 S. W. 1000.

West Virginia.— Minear *v.* Tucker County Ct., 39 W. Va. 627, 20 S. E. 659.

For example the omission of the board of election commissioners to appoint for each precinct as many officers of election as it was authorized to appoint will not justify the setting aside of the election; such omission is but an irregularity which should be overlooked, where it does not appear that it had any effect upon the election either in the number of votes that were cast or in the correctness of the canvass and returns. Fragley *v.* Phelan, 126 Cal. 383, 58 Pac. 923. So where one of the judges appointed by the superintendent of schools to conduct an election to determine whether a high school should be established in a school-district fails to attend and the other judges choose a substitute, instead of his being appointed by the electors present, the irregularity will not vitiate the election where the result was not changed thereby. People *v.* Lodi High School Dist., 124 Cal. 694, 57 Pac. 660. The failure of an election officer to be sworn, although a felony, does not invalidate the election. People *v.* Prewett, 124 Cal. 7, 56 Pac. 619.

38. *Arkansas.*— State *v.* Smith, 4 Ark. 613.

California.— Kenfield *v.* Irwin, 52 Cal. 164; People *v.* Mathewson, 47 Cal. 442; People *v.* Martin, 12 Cal. 409; People *v.* Weller, 11 Cal. 49, 70 Am. Dec. 754; Dickey *v.* Hurlburt, 5 Cal. 343.

Florida.— State *v.* Phillips, 30 Fla. 579, 11 So. 922.

Illinois.—People *v.* Gochenour, 54 Ill. 123; People *v.* Salomon, 46 Ill. 415.

Kansas.— Ward *v.* Clark, 35 Kan. 315, 11 Pac. 827; Matthews *v.* Shawnee County, 34 Kan. 606, 9 Pac. 765 (holding that inasmuch as no election was provided for by either the constitution or by any statute, for the office of judge of the superior court of Shawnee county, no valid election was or could have been held); State *v.* Robinson, 1 Kan. 17.

Maryland.— Munroe *v.* Wells, 83 Md. 505, 35 Atl. 142.

Michigan.— People *v.* Palmer, 91 Mich. 283, 51 N. W. 999.

Missouri.— State *v.* Jenkins, 43 Mo. 261.

Nevada.— State *v.* Washoe County Com'rs, 6 Nev. 104; State *v.* Collins, 2 Nev. 351; Sawyer *v.* Haydon, 1 Nev. 75.

New York.—People *v.* Crissey, 91 N. Y. 616.

North Carolina.—State *v.* Taylor, 108 N. C. 196, 12 S. E. 1005, 23 Am. St. Rep. 51, 12 L. R. A. 202.

Pennsylvania.— Young's Appeal, 153 Pa. St. 34, 25 Atl. 617; Com. *v.* Baxter, 35 Pa. St. 263.

South Carolina.— State *v.* Sims, 18 S. C. 460.

South Dakota.— State *v.* Gardner, 3 S. D. 553, 54 N. W. 606.

Tennessee.— Brewer *v.* Davis, 9 Humphr. 280, 49 Am. Dec. 706.

Texas.— Boone *v.* State, 10 Tex. App. 418, 38 Am. Rep. 641.

See 18 Cent. Dig. tit. "Elections," § 19.

If an election be held without warrant of law, or if it be ordered by a person or tribunal having no authority, there can be no doubt but that the whole proceedings will be absolutely void. Stephens *v.* People, 89 Ill. 337; Force *v.* Batavia, 61 Ill. 99; Clarke *v.* Hancock County, 27 Ill. 305.

39. **Interpretation of statutes** generally see Statutes.

40. See *infra*, VIII, B, 2, 3.

41. *Missouri.*— McKay *v.* Minner, 154 Mo. 608, 55 S. W. 866 [*overruling* on this point Bowers *v.* Smith, 111 Mo. 45, 20 S. W. 101,

3. DIRECTORY STATUTES. By an application of the second principle above stated the courts, in order to give effect to the will of the majority, and to prevent a disfranchisement of legal voters, have quite as uniformly held that those provisions which are not essential to a fair election are merely formal and directory.[42]

C. Submission of Specific Questions to a Vote of the People — 1. VALIDITY OF STATUTES. Inasmuch as the constitution of the United States guarantees to each state a republican form of government, the law-making power is necessarily

33 Am. St. Rep. 491, 16 L. R. A. 754]; State *v.* Albin, 44 Mo. 378.

Nebraska.— State *v.* Russell, 34 Nebr. 116, 51 N. W. 465, 33 Am. St. Rep. 625, 15 L. R. A. 740.

North Carolina.—State *v.* Scarborough, 110 N. C. 232, 14 S. E. 737; Van Amridge *v.* Taylor, 108 N. C. 196, 12 S. E. 1005, 23 Am. St. Rep. 51, 12 L. R. A. 202.

Pennsylvania.— Cusick's Election, 136 Pa. St. 459, 20 Atl. 574, 10 L. R. A. 228.

Texas.— Fowler *v.* State, 68 Tex. 30, 3 S. W. 255.

United States.— Smith *v.* Skagit County, 45 Fed. 725.

42. For where the clearly mandatory provisions of the statute have been complied with not much attention should be paid to mere irregularities in the means of bringing the election about or in the proceedings of election officers in conducting it, where it appears that the will of the voters was substantially recorded, and it does not appear that any legal voters were prevented from voting or any disqualified voters permitted to vote by any fault, wrongful intention, or misconduct on the part of those who conducted the election.

Alabama.— Hawthorn *v.* State, 116 Ala. 487, 22 So. 394.

Arizona.— Territory *v.* Mohave County, (1887) 12 Pac. 730.

California.— Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 49 Am. St. Rep. 68, 29 L. R. A. 673; San Luis Obispo County *v.* White, 91 Cal. 432, 24 Pac. 864, 27 Pac. 756; Sprague *v.* Norway, 31 Cal. 173; People *v.* Brenham, 3 Cal. 477.

Colorado.— Allen *v.* Glynn, 17 Colo. 338, 29 Pac. 670, 31 Am. St. Rep. 304, 10 L. R. A. 743.

Connecticut.— State *v.* Weed, 60 Conn. 18, 22 Atl. 443.

Illinois.—Ackerman *v.* Haenck, 147 Ill. 514, 35 N. E. 381; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; Jacksonville, etc., R. Co. *v.* Virden, 104 Ill. 339; Bacon *v.* Malzacher, 102 Ill. 663; Hodge *v.* Linn, 100 Ill. 397; Piatt *v.* People, 29 Ill. 54.

Indiana.—Parvin *v.* Wimberg, 130 Ind. 561, 30 N. E. 790, 30 Am. St. Rep. 254, 15 L. R. A. 775; Irwin *v.* Lowe, 89 Ind. 540; Gass *v.* State, 34 Ind. 425.

Iowa.— State *v.* O'Day, 69 Iowa 268, 28 N. W. 642.

Kansas.— Jones *v.* Caldwell, 21 Kan. 186; Morris *v.* Vanlaningham, 11 Kan. 269; Gilleland *v.* Schuyler, 9 Kan. 569.

Kentucky.— Sterritt *v.* McAdams, 99 Ky. 37, 34 S. W. 903, 17 Ky. L. Rep. 1354; Smith *v.* Crutcher, 92 Ky. 586, 18 S. W. 521, 13 Ky. L. Rep. 817.

Louisiana.— Webre *v.* Wilton, 29 La. Ann. 610.

Minnesota.— Soper *v.* Sibley County, 46 Minn. 274, 48 N. W. 1112; State *v.* Bernier, (1888) 38 N. W. 368; Stemper *v.* Higgins, 38 Minn. 222, 37 N. W. 95; Edson *v.* Child, 18 Minn. 64; Taylor *v.* Taylor, 10 Minn. 107.

Mississippi.— Barnes *v.* Pike County, 51 Miss. 305.

Missouri.— In Bowers *v.* Smith, 111 Mo. 45, 20 S. W. 101, 30 Am. St. Rep. 491, 16 L. R. A. 754, this doctrine was announced, but it seems that the court went too far and held that the statutory provision that no judge of election should deposit any ballot on which the names or initials of the judges of election did not appear was merely directory, and on this point the case has been overruled in McKay *v.* Minner, 154 Mo. 608, 55 S. W. 866.

Nebraska.— State *v.* Van Camp, 36 Nebr. 91, 54 N. W. 113; State *v.* Russell, 34 Nebr. 116, 51 N. W. 465, 33 Am. St. Rep. 625, 15 L. R. A. 740.

New Jersey.— Lehlbach *v.* Haynes, 54 N. J. L. 77, 23 Atl. 422; State *v.* Tolan, 33 N. J. L. 195.

New York.— People *v.* Wilson, 62 N. Y. 186; People *v.* Cook, 8 N. Y. 67, Seld. Notes 66, 59 Am. Dec. 451.

North Carolina.— State *v.* Nicholson, 102 N. C. 465, 9 S. E. 545, 11 Am. St. Rep. 767.

Ohio.— Fry *v.* Booth, 19 Ohio St. 25.

Pennsylvania.— *In re* Wheelock, 82 Pa. St. 297; Boileau's Case, 2 Pars. Eq. Cas. 503, Brightly Lead. Cas. El. 268; Thompson *v.* Ewing, 1 Brewst. 671, 5 Phila. 102.

South Carolina.— Trimmier *v.* Bomar, 20 S. C. 354.

Texas.— McKinney *v.* O'Connor, 26 Tex. 5; Hannah *v.* Shepherd, (Civ. App. 1894) 25 S. W. 137.

Washington.— Williams *v.* Shoudy, 12 Wash. 362, 41 Pac. 169.

West Virginia.— Dial *v.* Hollandsworth, 39 W. Va. 1, 19 S. E. 557; Loomis *v.* Jackson, 6 W. Va. 613.

Wisconsin.— State *v.* Baker, 38 Wis. 71.

United States.— Curtin *v.* Yocum, 1 Ellsw. Cas. Cont. El. 416.

The object of free popular elections for office is to ascertain the will of the people as to who shall serve them. The laws enacted to secure this object, in so far as they require the election to be by ballot, the day of the election, and the places within the designated precincts where the election shall be held, are mandatory. Other provisions prescribing the conduct and return of an election are directory, and mere irregularities in their observance which have not prevented the electors from exercising freely and fairly their right

vested in the representatives of the people, and cannot be delegated to any other authority, even the people themselves. In the application of this principle it has been held in some jurisdictions that statutes authorizing the submission to a vote of the people of specific questions of a local character, such as local option, as it is known in common parlance, are unconstitutional and void as an attempt to delegate legislative power to the people.[43] But there can be no doubt as to the power of the legislature to enact a law to take effect upon the happening of a future contingency; and it would seem that the distinction attempted between the contingency of a popular vote and other future contingencies is without any just foundation in sound policy or sound reasoning. The fallacy of the argument lies in attributing the consequence to the voice that speaks, instead of to the law, which makes the people its own mouth-piece, and has beforehand proclaimed the consequence of the utterance. Accordingly statutes providing for the submission of local questions to a vote of the people have been very generally sustained as a constitutional exercise of legislative power.[44]

2. PETITION OF ELECTORS. Statutes of this description usually make the presentation of a petition to some local authority the initial step for holding such election; and where a statute provides for the calling of a special local election to vote upon a proposition to determine some question, such as a subscription for corporate stock, an issue of bonds, the licensing and sale of spirituous liquors, whether live stock shall run at large, or the like, upon the presentation of a petition to a designated officer or authority, the presentation of such petition is a condition precedent to holding an election; and it must be signed by the number of qualified persons prescribed by the statute, otherwise the election will be void.[45]

of suffrage and from having their votes properly estimated for the candidates of their choice must be treated as informalities which do not vitiate the election; provided such irregularities are not of a character which the law declares shall vitiate an election. Fowler v. State, 68 Tex. 30, 3 S. W. 255.

The votes of innocent electors are not invalidated by irregularities or unauthorized acts on the part of public officers charged with the duty of printing and preparing official ballots when no irregularity or want of authority appears on the face of the ballots. People v. Wood, 148 N. Y. 142, 42 N. E. 536.

43. *Ex p.* Wall, 48 Cal. 279, 17 Am. Rep. 425; Rice v. Foster, 4 Harr. (Del.) 479; State v. Weir, 33 Iowa 134, 11 Am. Rep. 115; Geebrick v. State, 5 Iowa 491. It was so held in Maize v. State, 4 Ind. 342; Parker v. Com., 6 Pa. St. 507, 47 Am. Dec. 480, but these cases have been overruled. See *infra*, note 44.

44. *Arkansas.*— Boyd v. Bryant, 35 Ark. 60, 37 Am. Rep. 6.

Connecticut.— State v. Wilcox, 42 Conn. 364, 19 Am. Rep. 536.

Dakota.— Territory v. O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 355.

Georgia.— Caldwell v. Barrett, 73 Ga. 604.

Illinois.— Gunnarssohn v. Sterling, 92 Ill. 569; Erlinger v. Boneau, 51 Ill. 94.

Indiana.— State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313; Groesch v. State, 42 Ind. 547.

Maryland.— Fell v. State, 42 Md. 71, 20 Am. Rep. 83; Hammond v. Haines, 25 Md. 541, 90 Am. Dec. 77.

Massachusetts.— Com. v. Fredericks, 119 Mass. 199; Com. v. Dean, 110 Mass. 357; Com. v. Bennett, 108 Mass. 27.

Michigan.—Feek v. Bloomingdale, 82 Mich. 393, 47 N. W. 37, 10 L. R. A. 69.

Minnesota.— State v. Cooke, 24 Minn. 247, 31 Am. Rep. 344.

Mississippi.— Schulherr v. Bordeaux, 64 Miss. 59, 8 So. 201.

Missouri.— State v. Pond, 93 Mo. 606, 6 S. W. 469.

New Hampshire.— State v. Noyes, 30 N. H. 279.

New Jersey.— State v. Morris County, 36 N. J. L. 72, 13 Am. Rep. 422.

North Carolina.— Cain v. Davie County Com'rs, 86 N. C. 8.

Pennsylvania.— Locke's Appeal, 72 Pa. St. 491, 13 Am. Rep. 716.

Texas.— *Ex p.* Kennedy, 23 Tex. App. 77, 3 S. W. 114.

Vermont.— State v. Parker, 26 Vt. 357; Bancroft v. Dumas, 21 Vt. 456.

Virginia.— Savage's Case, 84 Va. 619, 5 S. E. 565.

Wisconsin.— Slinger v. Henneman, 38 Wis. 504; State v. O'Neill, 24 Wis. 149.

Canada.— Fredericton v. Reg., 3 Can. Supreme Ct. 505.

See 18 Cent. Dig. tit. "Elections," § 30 *et seq.*

45. Tally v. Grider, 66 Ala. 119; Slack v. Blackburn, 64 Iowa 373, 20 N. W. 478; Hovey v. Barker, 45 Kan. 707, 26 Pac. 591; Kansas City R. Co. v. Rich Tp., 45 Kan. 275, 25 Pac. 595; State v. Rush County, 35 Kan. 150, 10 Pac. 535; Hoxie v. Scott, 45 Nebr. 199, 63 N. W. 387. See also People v. Oldtown, 88 Ill. 202; People v. Cline, 63 Ill. 394.

Alterations of petition for election.—Illinois, etc., R. Co. v. Barnett, 85 Ill. 313.

Withdrawal of signature.— Dutten v. Hanover Village, 42 Ohio St. 215.

The petition must contain all the averments necessary to give jurisdiction to call the election.[46] When a proper petition is presented the authorities appointed to call the election have no discretion in the matter; they are obliged to call it.[47]

3. ORDER FOR SPECIAL ELECTION. Upon the filing of a sufficient petition with the proper authority an order should be made calling for a special election to determine the question presented by the petition, which question must be stated in the order substantially as it is stated in the petition,[48] and if no such order is made no valid election can be held;[49] but after the sufficiency of the petition has been passed upon by the proper authority and the order has been made the decision is not open to collateral attack,[50] especially where an election has been held under the order and in other respects according to law;[51] and an order made under the assumption that the preliminary proceedings are sufficient is conclusive until set aside by certiorari.[52]

IX. PROCLAMATION OR NOTICE.

A. General Object. The object of a proclamation is to give notice to the electors that an election will be held, and this notice lies at the foundation of any public elective system and must be given in some form in order to hold a valid election.[53]

B. In General Elections. The time and place of holding regular elections are generally prescribed by public laws, and when this is so the rule is that an omission to give the prescribed statutory notice will not vitiate an election held at the time and place appointed by law. In such case the provision for notice is considered as directory and not mandatory. The time and place being appointed

Signature cut from other petitions.— Under Cal. St. (1883) c. 93, § 4, providing for submission to a vote at the next general election of the proposition to reorganize a town as a city, whenever a petition shall be presented to the board, signed by one fifth of the qualified electors, a petition to which the required number of signatures was obtained by attaching thereto signatures cut from other petitions, identical in form, gives the board no jurisdiction to submit such proposition. People v. Berkeley, 102 Cal. 298, 36 Pac. 591. But see Graves v. Rudd, 26 Tex. Civ. App. 554, 65 S. W. 63, where it was held that a petition consisting of eight sheets of paper, each headed by the petition required by the statute, and all filed with the clerk as one petition, were sufficient; the eight combined bearing the requisite number of signatures.

46. Tally v. Grider, 66 Ala. 119. See also Birge v. Berlin Iron Bridge Co., 133 N. Y. 477, 31 N. E. 609.

An appropriation of money or a subscription and issue of bonds must be considered unauthorized if the petition and notice of election do not specify the amount of the proposed appropriation or issue of bonds (Detroit, etc., R. Co. v. Bearss, 39 Ind. 598; People's Nat. Bank v. Pomona, 48 Kan. 55, 28 Pac. 1089), and the petition and notice must specify the corporation to which a proposed issue of bonds is to be made (People's Nat. Bank v. Pomona, 48 Kan. 55, 28 Pac. 1089).

47. Glencoe v. People, 78 Ill. 382.

48. *In re* Ryon Tp., 1 Walk. (Pa.) 137. Where a petition was to determine whether "hogs, sheep and goats" should be prohibited from running at large, and the order of the court directing the election was to determine whether "hogs, sheep or goats" should be prohibited, it was held that the election was void. McElroy v. State, 39 Tex. Cr. 529, 47 S. W. 359. Where a petition for an election, under the general laws of 1899, chapter 128, was to determine whether "horses, mules, jacks, jennies and cattle" should be prohibited from running at large, the fact that the order for election and notice thereof contained the word "jennets" instead of "jennies" was held not to invalidate the adoption of the law. Graves v. Rudd, 26 Tex. Civ. App. 554, 65 S. W. 63. In Board of Com'rs v. Harrell, 147 Ind. 500, 46 N. E. 124, it was held that an order for an election on only two proposed gravel roads, when there was a single petition for three, if erroneous, was not void, and was not therefore subject to collateral attack.

Two or more propositions.— There is no constitutional reason why the legislature may not authorize the submission of two or more propositions to the vote of the people at the same time. Brand v. Lawrenceville, 104 Ga. 486, 30 S. E. 954.

49. Jacksonville, etc., R. Co. v. Virden, 104 Ill. 339.

50. West v. Whitaker, 37 Iowa 598; Ryan v. Varga, 37 Iowa 78; State v. Mackin, 51 Mo. App. 299.

51. Ryan v. Varga, 37 Iowa 78.

52. Bennett v. Hetherington, 41 Iowa 142.

53. *Arizona.*— Sheen v. Hughes, (1895) 40 Pac. 679.

California.— People v. Thompson, 67 Cal. 627, 9 Pac. 833; Kenfield v. Irwin, 52 Cal. 164; People v. Martin, 12 Cal. 409; People v. Weller, 11 Cal. 49, 70 Am. Dec. 754.

by law, the electors are bound to take notice of the same and therefore derive notice from the statute itself, inasmuch as they are presumed to know the law. The purpose of the prescribed notice is to give greater publicity to the election, but the authority to hold it comes directly from the statute; if it were otherwise any public election might be defeated by the ignorance, carelessness, or design of the officers whose duty it is to give the notice.[54] And *a fortiori* a defective official notice which does not mislead the electors or cause them to lose their votes will not vitiate a general election held under such circumstances;[55] for where there has been a substantial compliance with the requirements of the law in this regard, and there has been a fair election, the result cannot be defeated by mere technical irregularities.[56] The vital and essential question in all the cases is whether the want of a statutory notice has resulted in depriving a sufficient number of electors of the opportunity to exercise their franchise to change the result of the election.[57]

Iowa.— State *v.* Young, 4 Iowa 561.

Kansas.— Wood *v.* Bartling, 16 Kan. 109; Jones *v.* State, 1 Kan. 273.

Kentucky.— Wilson *v.* Brown, 109 Ky. 229, 58 S. W. 595, 22 Ky. L. Rep. 708.

Missouri.— Bean *v.* Barton County Ct., 33 Mo. App. 635; State *v.* Tucker, 32 Mo. App. 620.

See 18 Cent. Dig. tit. "Elections," § 33.

54. *Arizona.*— Sheen *v.* Hughes, (1895) 40 Pac. 679.

Arkansas.— Wheat *v.* Smith, 50 Ark. 266, 7 S. W. 161; *In re* Pulaski County Board of Equalization Cases, 49 Ark. 518, 6 S. W. 1, Hodgkin *v.* Fry, 33 Ark. 716.

California.— People *v.* Brenham, 3 Cal. 477.

Florida.— State *v.* Burbridge, 24 Fla. 112, 3 So. 869.

Illinois.— Stephens *v.* People, 89 Ill. 337.

Indiana.— Lafayette *v.* State, 69 Ind. 218; State *v.* Jones, 19 Ind. 356, 81 Am. Dec. 403; Beal *v.* Ray, 17 Ind. 554; Carson *v.* McPhetridge, 15 Ind. 327.

Iowa.— Dishon *v.* Smith, 10 Iowa 212.

Kansas.— Morgan *v.* Pratt County, 24 Kan. 71; Jones *v.* Gridley, 20 Kan. 584; George *v.* Oxford Tp., 16 Kan. 72.

Kentucky.— Augusta *v.* Maysville, etc., R. Co., 97 Ky. 145, 30 S. W. 1; Smith *v.* Crutcher, 92 Ky. 586, 18 S. W. 521, 13 Ky. L. Rep. 817; Berry *v.* McCollough, 94 Ky. 247, 22 S. W. 78, 15 Ky. L. Rep. 117.

Michigan.— McPherson *v.* Secretary of State, 92 Mich. 377, 52 N. W. 469, 31 Am. St. Rep. 587, 16 L. R. A. 475; Adsit *v.* Osmun, 84 Mich. 420, 48 N. W. 31, 11 L. R. A. 534; People *v.* Witherell, 14 Mich. 48; People *v.* Hartwell, 12 Mich. 508, 86 Am. Dec. 70.

Nebraska.— State *v.* Lansing, 46 Nebr. 514, 64 N. W. 1104, 35 L. R. A. 124; State *v.* Van Camp, 36 Nebr. 9, 91, 54 N. W. 113; State *v.* Thayer, 31 Nebr. 82, 47 N. W. 704; State *v.* Skirving, 19 Nebr. 497, 27 N. W. 723.

Nevada.— State *v.* Gorin, 6 Nev. 276.

New Jersey.— Morgan *v.* Gloucester City, 44 N. J. L. 137.

New York.— People *v.* Schiellein, 95 N. Y. 124; People *v.* O'Brien, 38 N. Y. 193; People *v.* Cowles, 13 N. Y. 350; People *v.* Wappingers Falls, 9 Misc. 246, 30 N. Y. Suppl. 265.

Ohio.— State *v.* Taylor, 15 Ohio St. 137.

Pennsylvania.— Com. *v.* Reynolds, 8 Pa. Co. Ct. 568; *In re* Bongard, 16 Phila. 491.

Rhode Island.— State *v.* Carroll, 17 R. I. 591, 24 Atl. 835.

Washington.— State *v.* Doherty, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39; Seymour *v.* Tacoma, 6 Wash. 427, 33 Pac. 1059.

Wisconsin.— State *v.* McKinney, 25 Wis. 416; State *v.* Gœtze, 22 Wis. 363; State *v.* Orvis, 20 Wis. 235.

United States.— Strobach *v.* Herbert, 2 Ellsw. Cas. Cont. El. 5; Patterson *v.* Belford, 1 Ellsw. Cas. Cont. El. 52.

This doctrine was recognized by the house of representatives of the United States as early as 1796. Lyon *v.* Smith, 1 Cl. & H. Cas. Cont. El. 101.

55. Com. *v.* Smith, 132 Mass. 289; Williams *v.* Shoudy, 12 Wash. 362, 41 Pac. 169; Welch *v.* Wetzel County Ct., 29 W. Va. 63, 1 S. E. 337. See also State *v.* Sherman County, 39 Kan. 293, 18 Pac. 179. It has been held that an article in a warrant for a town meeting calling upon the inhabitants "to choose all necessary town officers" is sufficient for the election of such officers as may lawfully be chosen by towns. Com. *v.* Smith, 132 Mass. 289; Sherman *v.* Torrey, 99 Mass. 472; Williams *v.* Lunenburg School Dist., 21 Pick. (Mass.) 75, 32 Am. Dec. 243.

56. Seymour *v.* Tacoma, 6 Wash. 427, 33 Pac. 1059.

57. *Illinois.*—Chicago, etc., R. Co. *v.* Pinckney, 74 Ill. 277.

Indiana.— State *v.* Jones, 19 Ind. 356, 81 Am. Dec. 403.

Iowa.— Dishon *v.* Smith, 10 Iowa 212.

Massachusetts.— Com. *v.* Smith, 132 Mass. 289.

Missouri.— State *v.* Westport, 116 Mo. 582, 22 S. W. 888; Hayward *v.* Guilford, 69 Mo. App. 1.

Nebraska.— Ellis *v.* Karl, 7 Nebr. 381.

Nevada.— State *v.* Grey, 21 Nev. 378, 32 Pac. 190, 19 L. R. A. 134.

Washington.— State *v.* Doherty, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39.

C. In Special Elections — 1. In General. When the time and place of holding the election are not fixed by law,[58] but the election is only to be called and the time and place to be fixed by some authority named in the statute, after the happening of some condition precedent, it is essential to the validity of such an election that it be called, and the time and place of holding it be fixed by the very agency designated by law and by none other;[59] and where there is no notice of such an election, either by proclamation or in fact, and it is obvious that the great body of electors were misled for want of official proclamation, its absence becomes such an irregularity as prevents an actual choice by the electors and renders invalid any semblance of an election which may have been attempted.[60]

2. To Vote on Proposed Issue of Bonds. In a special election to submit to the people the question of a proposed issue of bonds, the notice of election must be given in strict conformity with the statute,[61] and the election must be called by the very officer designated by the statute for that purpose.[62]

3. Elections to Fill Vacancies. This rule has peculiar application in cases of special elections to fill vacancies caused by death, resignation, or removal, where the vacancy is not required by law to be filled at the next general election, and where without official notice the general public might not be aware that an election is to be held.[63] But if the law directs that vacancies shall be filled at the next general election after they have occurred, the better opinion is that want of

See 18 Cent. Dig. tit. "Elections," § 33.

Election ordered by de facto officers.— State *v.* Goowin, 69 Tex. 55, 5 S. W. 678.

58. Where the statute authorizing the election fixes the time for holding it, the notice otherwise required to be given may be dispensed with, the same as in the case of a general election. Augusta *v.* Maysville, etc., R. Co., 97 Ky. 145, 30 S. W. 1, 16 Ky. L. Rep. 890.

59. *California.*— Kenfield *v.* Irwin, 52 Cal. 164; People *v.* Rosborough, 14 Cal. 180; People *v.* Martin, 12 Cal. 409; People *v.* Templeton, 12 Cal. 394; People *v.* Weller, 11 Cal. 49, 70 Am. Dec. 754; People *v.* Porter, 6 Cal. 26.

Georgia.— Athens *v.* Hemerick, 89 Ga. 674, 16 S. E. 72.

Illinois.— Snowball *v.* People, 147 Ill. 260, 35 N. E. 538; Jacksonville, etc., R. Co. *v.* Virden, 104 Ill. 339; Stephens *v.* People, 89 Ill. 337.

Indiana.— Demaree *v.* Johnson, 150 Ind. 419, 49 N. E. 1062, 50 N. E. 376.

Kansas.— Jones *v.* State, 1 Kan. 273.

Kentucky.— Wilson *v.* Brown, 109 Ky. 229, 58 S. W. 595, 22 Ky. L. Rep. 708.

Michigan.— People *v.* Palmer, 91 Mich. 283, 51 N. W. 999; People *v.* Highland Park, 88 Mich. 653, 50 N. W. 660; Adsit *v.* Board of State Canvassers, 84 Mich. 420, 48 N. W. 31, 11 L. R. A. 534.

Missouri.— St. Louis, etc., R. Co. *v.* Epperson, 97 Mo. 300, 10 S. W. 478; McPike *v.* Pen, 51 Mo. 63; State *v.* Martin, 83 Mo. App. 55; Bean *v.* Barton County Ct., 33 Mo. App. 635; State *v.* Tucker, 32 Mo. App. 620.

Nebraska.— State *v.* Buck, 13 Nebr. 273, 13 N. W. 406.

New Jersey.— Morgan *v.* Gloucester City, 44 N. J. L. 137; Bolton *v.* Good, 41 N. J. L. 296.

Texas.— McHan *v.* Connell, (App. 1891) 15 S. W. 384; Smith *v.* State, 19 Tex. App. 444; *Ex p.* Kramer, 19 Tex. App. 123; Stallworth *v.* State, 18 Tex. App. 378; Field *v.* Hall, 16 Tex. Civ. App. 233, 40 S. W. 749.

Vermont.— Pratt *v.* Swanton, 15 Vt. 147.

Virginia.— Haddox *v.* Clarke County, 79 Va. 677.

Wisconsin.— Hubbard *v.* Williamstown, 61 Wis. 397, 21 N. W. 295; State *v.* McKinney, 25 Wis. 416.

See 18 Cent. Dig. tit. "Elections," § 34.

Election called by wrong authority.— A special election, called by the county court when it should be called by the board of supervisors of the county, is void. Force *v.* Batavia, 61 Ill. 99; Marshall County *v.* Cook, 38 Ill. 44, 87 Am. Dec. 282.

60. Foster *v.* Scarff, 15 Ohio St. 532.

Manner of giving notice of special elections. — In special elections commissioners of registration are required to give notice of the time, place, and object of such election in a newspaper published in the county. If none is published in the county, then by notice at the court-house door, and at each of the voting districts in the county; and a failure to give such notice would render the election in the county void. Barry *v.* Lauck, 5 Coldw. (Tenn.) 588.

Several propositions submitted.— Where several propositions are submitted to a vote of the people at the same election only one notice of election is necessary. Baker *v.* Seattle, 2 Wash. St. 576, 27 Pac. 462.

61. People *v.* Caruthers School-Dist., 102 Cal. 184, 36 Pac. 396; George *v.* Oxford Tp., 16 Kan. 72; St. Louis, etc., R. Co. *v.* Apperson, 97 Mo. 300, 10 S. W. 478.

62. Force *v.* Batavia, 61 Ill. 99.

63. *California.*— People *v.* Thompson, 67 Cal. 627, 9 Pac. 833; Kenfield *v.* Irwin, 52 Cal. 164; People *v.* Rosborough, 14 Cal. 180; People *v.* Weller, 11 Cal. 49, 70 Am. Dec. 754; People *v.* Porter, 6 Cal. 26.

Colorado.—People *v.* Kerwin, 10 Colo. App. 472, 51 Pac. 530.

notice will not vitiate an election actually and fairly held at the time and place fixed by law for filling such vacancies;[64] and upon principle the same is true of any special election directed by statute to be held at the time and place for holding the general election, for the statute itself gives such notice,[65] although it has been held that in case of a special election to fill a vacancy notice is necessary, although such election be held at the same time as a general election.[66] And in any case an election to fill a vacancy cannot be held until the vacancy actually occurs.[67]

D. Requisites and Sufficiency of Notice — 1. In General. The form of the notice is generally prescribed by statute, but in the case of general elections this is merely directory, and notice in any form which does not mislead the electors and cause them to lose their votes will be sufficient.[68]

Kansas.— Cook *v.* Mock, 40 Kan. 472, 20 Pac. 259.

Kentucky.— Toney *v.* Harris, 85 Ky. 453, 3 S. W. 614, 9 Ky. L. Rep. 36.

Michigan.— Secord *v.* Foutch, 44 Mich. 89, 6 N. W. 110.

Nevada.— Sawyer *v.* Haydon, 1 Nev. 75.

See 18 Cent. Dig. tit. "Elections," § 34.

Compare Morgan *v.* Gloucester City, 44 N. J. L. 137, holding that where the election is to fill a vacancy, the time and place for holding which is to be fixed by the chief executive or some other power, the notice is essential not only as to the fact of the vacancy, and the object of the election, but the time and place for depositing the ballots.

Death of an officer who has been regularly elected before he takes the oath and assumes the duties of his office does not create a vacancy. State *v.* Benedict, 15 Minn. 198.

64. *Indiana.*— State *v.* Jones, 19 Ind. 356, 81 Am. Dec. 403.

Michigan.— People *v.* Hartwell, 12 Mich. 508, 86 Am. Dec. 70.

Nebraska.— State *v.* Skirving, 19 Nebr. 497, 27 N. W. 723.

New York.— People *v.* Cowles, 13 N. Y. 350.

Wisconsin.— State *v.* Gœtze, 22 Wis. 363.

See 18 Cent. Dig. tit. "Elections," § 34.

In proceedings by mandamus, where it appeared that the office of clerk of the district court of a certain county became vacant by the removal of the incumbent more than thirty days before the general election, and that upon the canvass of the votes cast at such election the relator was declared duly elected to such office, that said canvass and declaration was duly evidenced by a certificate of election issued and delivered to the relator, under the hand and official seal of the county clerk, and that the relator had taken the oath of office and filed the bond as required by law, which bond was duly approved, and that the relator had thereafter demanded the said office and the books and papers belonging thereto of the incumbent, who had been appointed to said office by the board of county commissioners, which were refused, it was held that a writ of mandamus would issue without inquiry as to the form of the notice of said election or of the ballots cast thereat. State *v.* Dobson, 21 Nebr. 218, 31 N. W. 788.

65. Colbert County *v.* Thurmond, 116 Ala. 209, 22 So. 558.

66. People *v.* Thompson, 67 Cal. 627, 9 Pac. 833; People *v.* Rosborough, 29 Cal. 415; Beal *v.* Morton, 18 Ind. 346; Beal *v.* Ray, 17 Ind. 554; Wilson *v.* Brown, 109 Ky. 229, 58 S. W. 595, 22 Ky. L. Rep. 708; Secord *v.* Foutch, 44 Mich. 89, 6 N. W. 110. But if an election to fill vacancies is ordered for the general election no call for a special election is necessary. Atty.-Gen. *v.* Trombly, 89 Mich. 50, 50 N. W. 744.

67. Clemmens *v.* Cato, 4 Sneed (Tenn.) 291.

68. Com. *v.* Smith, 132 Mass. 289; State *v.* Bernier, (Minn. 1888) 38 N. W. 368.

Special and general election at the same time.— Where the proclamation for a general election notified the electors that a certain office would be voted for, such office having been rendered vacant by the death of the incumbent, it was held that it was no objection to the validity of the vote for such office that the proclamation failed to state that as to that office the election was a special one. Tillson *v.* Ford, 53 Cal. 701.

Scroll instead of seal.— San Luis Obispo County *v.* White, 91 Cal. 432, 24 Pac. 864, 27 Pac. 756.

Signature of school notice.— It is not necessary that a notice of the time and object of a vote on a school tax shall be signed by all the trustees; a signature by the chairman is a signature by the trustees, within the statute requiring the notice to be signed by the trustees. Frederick *v.* Ragland, 7 Ky. L. Rep. 743.

General election designated as special election.— Atty.-Gen. *v.* Trombly, 89 Mich. 50, 50 N. W. 744.

Notice in conformity with repealed law.— People *v.* Avery, 102 Mich. 572, 61 N. W. 4.

Erroneous designation of persons notified. — Although the act required notice of the election to be given to the tax-paying electors, notice to the taxable inhabitants was held a substantial compliance therewith. Cartwright *v.* Sing Sing, 46 Hun (N. Y.) 548.

Notice given by wrong officer.— Where an election was held at the right time and place, and by the proper officers, it was held that it could not be contested on the ground that notice to hold it was not given by the officers

2. PUBLICATION AND POSTING. It is not an unusual statutory provision that notice of a coming election shall be published in one or more newspapers for a certain time before election day; the sole purpose of this being to warn the electors that an election is to be held, it is generally held that a substantial compliance with the statute is all that is required.[69] If an election is duly ordered a mere irregularity in the publication of the notice will not vitiate the election.[70] So also it is frequently provided that notices shall be posted either at the polling-places or at a number of public places; and it has been held that where this provision of the statute was complied with a failure to publish the notice in a newspaper would not invalidate the election;[71] and conversely it has been held that where the notice was duly published in a newspaper, a failure to post it would not vitiate the election;[72] and so it would seem to be largely discretionary with the election officers to adopt either or both of the modes of giving notice pointed out by the statute.[73] But in the case of a special election to vote on a proposition there must be a substantial compliance with the statutory mode of publishing the notice; otherwise the election will be a nullity;[74] and if in such case the statute

elected to do so. Battis *v.* Price, 2 Pearson (Pa.) 456. Where a statute requires the notice of election to be given by the board of supervisors of a town, it may be given by the order of the board, signed only by their clerk. Lawson *v.* Milwaukee, etc., R. Co., 30 Wis. 597.

General and township elections held at same time.— Jones *v.* Gridley, 20 Kan. 584.

69. San Luis Obispo County *v.* White, 91 Cal. 432, 24 Pac. 864, 27 Pac. 756; Johnson *v.* Kessler, 76 Iowa 411, 41 N. W. 57; Moore *v.* Walla Walla, 60 Fed. 961. And see Hawthorn *v.* State, 116 Ala. 487, 22 So. 894, Waycross *v.* Youmans, 85 Ga. 708, 11 S. E. 865; Coffroth *v.* Somerset County, 19 Pa. Co. Ct. 354.

Publication on election day.— State *v.* Young, 4 Iowa 561.

Publication in weekly paper.—Where thirty days' notice of an election is required, a publication in a weekly newspaper is sufficient, provided that the first publication is at least thirty days prior to the election, and it is continued in each successive issue of the paper up to the time of the election. Scott *v.* Paulen, 15 Kan. 162. A law requiring the publication of a notice of an election for four weeks in a newspaper is satisfied if twenty-eight days intervene between the first one of consecutive weekly publications and the day of the election, without a daily insertion for the whole period. *In re* Woolridge, 30 Mo. App. 612. Under an order of the county court requiring notice of a special election to be given in a newspaper for five weeks, an advertisement in five consecutive weekly issues of the paper named is sufficient. Knox County *v.* New York City Ninth Nat. Bank, 147 U. S. 91, 13 S. Ct. 267, 37 L. ed. 93.

70. Waycross *v.* Youmans, 85 Ga. 708, 11 S. E. 865.

Irregularity in publication of notice.— Epping *v.* Columbus, 117 Ga. 263, 43 S. E. 803.

71. Wheat *v.* Smith, 50 Ark. 266, 7 S. W. 161; State *v.* Sumter County Com'rs, 19 Fla. 518. Where a statute did not in terms provide that the four successive weeks of posting required should be the four weeks next preceding the election, it was held that notices posted on the fourth day of October, remaining posted for four successive weeks, were sufficient for an election on the eighth day of November. Woodward *v.* Fruitvale Sanitary Dist., 99 Cal. 554, 34 Pac. 239.

By whom posted.— Where the statute requires the town clerk or supervisors to post notices, those officers need not post them in person, but may employ other persons to do so. Phillips *v.* Albany, 28 Wis. 340.

Notice of town meeting.— Clark *v.* Wardwell, 55 Me. 61; Sanborn *v.* Machias Port, 53 Me. 82; Brown *v.* Witham, 51 Me. 29; Bearce *v.* Fossett, 34 Me. 575; State *v.* Williams, 25 Me. 561.

72. San Luis Obispo County *v.* White, 91 Cal. 432, 24 Pac. 864, 27 Pac. 756.

73. For the established rule is that the particular form and manner pointed out by the statute for giving notice is not essential; actual notice to the great body of the electors is sufficient, and the question in such cases is, whether the want of the statutory notice has resulted in depriving sufficient of the electors of the opportunity to exercise their franchise to change the result of the election.

Arkansas.— Wheat *v.* Smith, 50 Ark. 266, 7 S. W. 161.

Iowa.— Dishon *v.* Smith, 10 Iowa 212.

Massachusetts.— Com. *v.* Smith, 132 Mass. 289.

Nebraska.— State *v.* Skirving, 19 Nebr. 497, 27 N. W. 723.

Wisconsin.— State *v.* McKinney, 25 Wis. 416; State *v.* Orvis, 20 Wis. 235.

See 18 Cent. Dig. tit. "Elections," § 38.

74. Williams *v.* Roberts, 88 Ill. 11. Notices posted on the 13th day of May, of a special election to be held on the 23d day of the same month, have been held sufficient. Coe *v.* Caledonia, etc., R. Co., 27 Minn. 197, 6 N. W. 621.

Under the Missouri local option law it has been held that there must be four weeks' notice of the election, that is, there must be twenty-eight days' notice, excluding the day

requires that the notice of election shall be both published in a newspaper and posted in the form of hand-bills, both must be done or the election will be invalid, although the electors may have actual notice of the election.[75] Whether or not the publication of an election notice was duly made is a question of law for the court.[76]

3. In Elections on Specific Questions. In elections to determine specific questions more particularity is required in the notice in order that the voters may be fully informed of the question they are called upon to decide.[77] Thus the notice of a special election to levy a tax, make an appropriation, or issue bonds must specify the amount of money proposed to be raised by taxation or appropriated, or the amount of bonds proposed to be issued, as the case may be.[78] So also if the election require an issue of bonds, the notice should state the rate of interest to be paid thereon;[79] but it is not necessary that the precise sum to be paid annually as interest should be stated, when the rate of interest and other facts furnishing the basis of easy calculation are stated.[80] So also the notice of an election to levy a tax or issue bonds in aid of a railroad should specify the line of railroad to be aided,[81] and the amount of work required to be done before the tax should become payable or the bonds deliverable to the company.[82] In such cases the notice must show on its face that it is official, that is, that the election was

of the first publication, and including the day of election. Bean *v.* Barton County, 33 Mo. App. 635; Leonard *v.* Saline County, 32 Mo. App. 633; State *v.* Tucker, 32 Mo. App. 620.

Posting in hotel.— Pritchard *v.* Magoun, 109 Iowa 364, 80 N. W. 512, 46 L. R. A. 381.

Posting by sheriff.— Johnson *v.* Wilson County, 34 Kan. 670, 9 Pac. 384.

But in Washington it has been held that where there has been a substantial compliance with the requirements of the law governing notices of election in the matter of voting municipal bonds and there has been a fair election thereunder, the result cannot be defeated by technical irregularities, such as posting the notice for twenty-six days instead of thirty, and a failure to publish the notice in the official paper on the day immediately preceding the election, when the ordinance required publication for the thirty days next preceding election day. Seymour *v.* Tacoma, 6 Wash. 427, 33 Pac. 1059.

75. Mays *v.* Slemmons, 14 Ky. L. Rep. 660.

76. Lancaster Intelligencer *v.* Lancaster County, 9 Pa. Dist. 392.

77. Under statutes providing that the polls must not be open before nine o'clock A. M., nor kept open less than four hours, a notice of election requiring the polls to be kept open from two o'clock P. M. until sunset, on May 23, is a sufficient compliance with the law. People *v.* Lodi High School Dist., 124 Cal. 694, 57 Pac. 660. And so of a notice stating that the polls will be open between the hours of one P. M. and five P. M. People *v.* Prewett, 124 Cal. 7, 56 Pac. 619.

Removal of county-seat.— People *v.* Hamilton County Com'rs, 3 Nebr. 244.

78. Athens *v.* Hemerick, 89 Ga. 674, 16 S. E. 72; Bowen *v.* Greenboro, 79 Ga. 709, 4 S. E. 150; Crooke *v.* Daviess County, 36 Ind. 320. See also Derby *v.* Modesto, 104 Cal. 515, 38 Pac. 900.

A statement that it is a certain per cent on the taxable property of the county will not do; there must be a statement of the specified amount. Detroit, etc., R. Co. *v.* Bearss, 39 Ind. 598.

79. Athens *v.* Hemerick, 89 Ga. 674, 16 S. E. 72; Bowen *v.* Greenboro, 79 Ga. 709, 4 S. E. 159.

Where notice refers to petition.— Proceedings on election to authorize issuing town bonds in aid of a railroad were not impaired by an omission to state in the notice of election what time the bonds would have to run, and what interest they would bear, where the notice referred to the petition on file, and the petition disclosed these facts. Chicago, etc., R. Co. *v.* Pinckney, 74 Ill. 276.

80. Ponder *v.* Forsyth, 96 Ga. 572, 23 S. E. 498.

81. A notice naming the railroad and giving the location of line in direction and terminal points is sufficient. Yarish *v.* Cedar Rapids, etc., R. Co., 72 Iowa 556, 34 N. W. 417; Burges *v.* Mabin, 70 Iowa 633, 27 N. W. 464. A notice specifying that the proposed railroad was to be built from "a point on the levee in the said city of Davenport, Scott county, Iowa, between Brady and Main streets, . . . to Anamosa in Jones county, Iowa, or to a point nearer, to connect with a railroad not now running to Davenport aforesaid," sufficiently indicates the termini of the railroad to satisfy the statute. Bartemeyer *v.* Rohlfs, 71 Iowa 582, 587, 32 N. E. 673.

82. This requirement is complied with by a notice specifying the point to which the railroad shall have its line of road with the iron, and cars running thereon. Yarish *v.* Cedar Rapids, etc., R. Co., 72 Iowa 556, 34 N. E. 417. A notice which states that one-half of the amount of said tax shall be paid when the first ten miles of said railroad from said point of beginning, in said city of Davenport, shall be graded, bridged and tied, and that part of the said line within the limits of the city of Davenport shall be completed for the passage of cars thereon. The other half of said tax shall be paid when

ordered by the proper authority and that the notice itself is signed by the proper officer.[83] If the notice of special election is contradictory on its face as to the place for holding it the election will be void.[84]

E. Proof of Notice. Where an election has been held, and the will of the voters has been executed by the proper authority, it may be presumed that due notice of the election was given, under the rule that where the performance of a prior act is necessary to the legality of a subsequent act, proof of the latter carries with it a presumption of the due performance of the former.[85] It has been held that if the clerk of a board of supervisors neglects to record an order for the publication of a special election proclamation, as he is required to do by law, parol evidence is admissible to prove that such an order was made.[86] So also parol evidence is admissible to prove that notice of election was duly published.[87]

X. NOMINATION OF CANDIDATES.

A. By Political Convention.[88] In the absence of statutory regulation the usual way of making nominations is by a convention of delegates chosen by the members of their party at their primaries.[89]

B. What Is a Political Party Authorized to Call a Convention. If a duly organized[90] political party has polled the requisite percentage of votes it

thirty miles of said railroad shall be completed for the passage of cars, or a connection be made, at a shorter distance, with some other railroad, constructed and operated, but not running to said city of Davenport, is sufficient to satisfy the requirements of the statute that notice be specified that the amount of work to be done before the amount stated should become due. Bartemeyer *v.* Rohlfs, 71 Iowa 582, 587, 32 N. W. 673.

83. Com. *v.* Barrett, 17 S. W. 336, 13 Ky. L. Rep. 451; Swenson *v.* McLaren, 2 Tex. Civ. App. 331, 21 S. W. 300.

Proclamation by acting mayor.— *In re* Cleveland, 52 N. J. L. 188, 19 Atl. 17, 20 Atl. 317, 7 L. R. A. 431.

Notice signed by clerk.— Where it clearly appears on the face of a notice that the election was ordered by the proper authority, it is sufficient if the notice be signed by the clerk of the body so ordering it. Jordon *v.* Hayne, 36 Iowa 9; Lawson *v.* Milwaukee, etc., R. Co., 30 Wis. 597; Smith *v.* Skagit County, 45 Fed. 725. But the clerk cannot by his own motion give notice of an election until it has been duly ordered by the proper authority. People *v.* Gochenour, 54 Ill. 123.

84. People *v.* Caruthers School Dist., 102 Cal. 184, 36 Pac. 396.

85. Brownell *v.* Palmer, 22 Conn. 107; Knox County *v.* New York City Ninth Nat. Bank, 147 U. S. 91, 13 S. Ct. 267, 37 L. ed. 93. When in a contested election case it was alleged that the constable had not given notice of a township election, and the constable was not examined, and the evidence was merely negative, that the witnesses examined saw no notice of election, it was held that such evidence was not sufficient to overbear the presumption that the officer had discharged a known and clearly enjoined duty. *In re* Walker, 3 Luz. Leg. Reg. (Pa.) 130.

But in Maine it has been held that the party desiring to establish the legality of a township meeting must either show by the return upon the warrant calling the meeting that an attested copy thereof was posted up in some public and conspicuous place in the town where the meeting was to be held, or else that the meeting was called in accordance with a different mode prescribed by a vote of the town at a legal meeting. Clark *v.* Wardwell, 55 Me. 61.

86. San Luis Obispo County *v.* White, 91 Cal. 432, 24 Pac. 864, 27 Pac. 756.

87. Com. *v.* Smith, 163 Mass. 411, 40 N. E. 189.

Evidence of notice need not appear of record. Gaston *v.* Lamkin, 115 Mo. 20, 21 S. W. 1100.

88. **A political convention** is an organized assemblage of electors or delegates representing a political party and avowing distinct principles. Convention representation implies a gathering of electors springing from the electors who compose a political party or adhere to a political principle. State *v.* Johnson, 18 Mont. 548, 46 Pac. 533, 34 L. R. A. 313; State *v.* Rotwitt, 18 Mont. 502, 46 Pac. 370.

"Convention" defined see 9 Cyc. 819.

89. *In re* Jeffries, 9 Pa. Dist. 663, 24 Pa. Co. Ct. 529.

90. **A political party authorized to certify nominations** is a body of electors having distinctive aims and purposes, and united in opposition to other bodies of electors in the community within which it exists. *In re* McKinley-Citizens Party, 6 Pa. Dist. 109. An organization may have polled the prescribed number of votes cast at a preceding election to constitute the aggregation of voters a political party, but if it has adopted no platform and proclaimed no political creed in opposition to the well defined principles of any established political party, inviting the support of the community at large, and not a mere section or fragment of it, it cannot be

may in the usual way nominate candidates for all offices, including those for which it made no nominations at the preceding election.[91]

C. Call For Convention. A political convention to be valid must be regularly called according to law or the customs and usages of the party, by the party officials authorized to make and publish the call.[92]

D. Selection of Delegates. Such conventions are composed of delegates selected by party caucuses or primaries called by local committees for the purpose, and the delegates chosen by caucuses or primaries regularly called are entitled to seats in the convention and none other.[93] The party caucus is one held by those who believe in or adhere to the principles of their party, and if persons of another political faith are run into their caucus a nomination so secured is not a party nomination.[94] But a member of long standing in a party does not cease to be such by occasionally voting for one or more candidates of another party;[95] neither can it be inferred that a member of a political party changes his party affiliation by signing a nomination paper for a member of another party, without proof of his having followed it up by voting the ticket or taken an active interest in its behalf.[96] It is not within the power of a mere caucus or fraction of the voters of a political party to dispense with a primary election in defiance of the rules of their party, and place candidates in nomination on their own responsibility.[97]

E. Organization of Convention — 1. In General. The roll of delegates is the only evidence of the true membership of a convention, and the right of the delegates named in it to their seats cannot be questioned in the proceedings for

deemed a political party, authorized to nominate candidates in the usual way, within the legislative intent. *In re* Jeffries, 9 Pa. Dist. 663, 24 Pa. Co. Ct. 529.

91. Corcoran *v.* Bennett, 20 R. I. 6, 36 Atl. 1122.

92. State *v.* Piper, 50 Nebr. 42, 69 N. W. 384.

Nomination by political club.— State *v.* Tooker, 18 Mont. 540, 46 Pac. 530, 34 L. R. A. 315.

Persons assembled in response to a personal invitation.— The nomination of a county ticket and presidential electors by a so-called citizens' silver party convention is a nullity, where the convention was participated in by twenty-one electors of the county, who appeared in response to a personal invitation and after acting as a county convention then proceeded to hold a state convention, it appearing that no call for a state convention was ever given, or delegates elected to either convention, or notice published throughout the state or county of the gathering of the new party. State *v.* Johnson, 18 Mont. 548, 46 Pac. 533, 34 L. R. A. 313 [*approving* State *v.* Rotwitt, 18 Mont. 502, 46 Pac. 370].

Place on the ballot.— A convention not called by officers having authority from a political party as previously organized is not entitled to have its ticket assigned to the position on the official ballot which would have been accorded to the ticket of that party regularly nominated in a convention called and organized by the proper officers. Baker *v.* Board of Election Com'rs, 110 Mich. 635, 68 N. W. 752.

Convention called by new committee.— McCoach *v.* Whipple, 24 Colo. 379, 51 Pac. 164.

Convention called by ward committee.— *In re* Ker, 2 Pa. Dist. 14, 12 Pa. Co. Ct. 200; *In re* Donahue, 2 Pa. Dist. 5, 12 Pa. Co. Ct. 198.

Convention regularly called.— Where contention arises between two conventions of the same party as to which is entitled to have the ticket nominated by it placed upon the official ballot under the recognized party name, the convention called by the regular state central committee of the party is entitled to the preference. Williams *v.* Lewis, 6 Ida. 184, 54 Pac. 619.

93. *In re* Broat, 6 Misc. (N. Y.) 445, 27 N. Y. Suppl. 176.

Change of place of holding primary.— *In re* Woodworth, 16 N. Y. Suppl. 147.

Irregularities in selection of committee.— Irregularities in the manner of electing members of a ward executive committee and delegates to a congressional convention are not ground for attacking the validity of a nomination by such convention, when the city executive committee, the only body authorized to speak for the whole party in the city, recognized such committee and the presiding officer of the convention accepted credentials bearing the signatures of the officers of such ward committees. *In re* Ker, 2 Pa. Dist. 14, 12 Pa. Co. Ct. 200; *In re* Donahue, 2 Pa. Dist. 5, 12 Pa. Co. Ct. 198.

94. *In re* Gibbons, 5 Pa. Dist. 194.

Illegal votes cast at caucus.— Where candidates for nomination at their party caucus are aware that the votes of members of another party or parties are received, and make no objection, they cannot afterward object to the regularity of such caucus because such votes were received. *In re* Winton Borough, 2 Lack. Leg. N. (Pa.) 13.

95. Ginter *v.* Scott, 8 Pa. Dist. 536.

96. Ginter *v.* Scott, 8 Pa. Dist. 536.

97. *In re* Allegheny City Elections, 12 Pa. Co. Ct. 660.

temporary organization.[98] Upon the temporary organization the roll of delegates must be called in order that it may be ascertained who is entitled to vote; a vote *viva voce* is entirely out of place as it would admit bystanders who are not entitled to vote to a voice in the organization.[99]

2. COMMITTEES ON CREDENTIALS. In a convention for the nomination of candidates for public office the question whether certain delegates are entitled to vote is properly submitted to the committee on credentials;[1] but such committee may properly refuse to determine which of two contesting delegations is entitled to be seated, and leave the question for the determination of the convention.[2]

F. Place of Holding Convention. A nomination made by a convention which did not meet at the place fixed according to the rules of the party is illegal.[3]

G. Nomination of Candidates to Be Voted For in Two Counties. A candidate to be voted for by the electors of two or more counties must be nominated by the delegates of such counties in concert and not separately.[4]

H. Delegation of Power to Nominate. A duly assembled convention of a political party may delegate its power and confer upon a duly selected and properly designated committee full authority to nominate candidates for office, to be voted for in an ensuing election, or to fill vacancies which may occur on the ticket.[5] But a committee to which no convention has delegated its authority has no power to place candidates in nomination.[6]

I. Requiring Pledges of Candidates. A resolution of a committee or convention requiring all candidates for congress or the state legislature to pledge themselves to attend the caucuses of their party, and be bound by the decisions of the same as conditions precedent to being registered as candidates, is inoperative.[7]

J. Refusal of Delegates to Vote — 1. IN GENERAL. Where delegates entitled to sit in a party convention are present but refrain from voting, they cannot by so doing invalidate the action of the majority of those who do vote.[8]

2. VOLUNTARY WITHDRAWAL OF DELEGATES. The voluntary withdrawal of delegates from a political convention which has been regularly organized does not

98. Gerry *v.* Beckwith, 28 Colo. 60, 62 Pac. 856; French *v.* Roosevelt, 18 Misc. (N. Y.) 307, 41 N. Y. Suppl. 1080.

99. French *v.* Roosevelt, 18 Misc. (N. Y.) 307, 41 N. Y. Suppl. 1080.

1. Beck *v.* Board of Election Com'rs, 103 Mich. 192, 61 N. W. 346.

2. Gerry *v.* Beckwith, 28 Colo. 60, 62 Pac. 856.

3. *In re* Saunders, 5 Pa. Dist. 661, 18 Pa. Co. Ct. 228.

4. State *v.* Rotwitt, 18 Mont. 502, 46 Pac. 370; *In re* Savage, 3 Pa. Dist. 705, 15 Pa. Co. Ct. 229; *In re* Ingram, 14 Pa. Co. Ct. 1; State *v.* Weir, 5 Wash. 82, 31 Pac. 417.

Each county should be represented; the delegates of a single county, although constituting a majority of all the delegates entitled to seats, cannot make a valid nomination. *In re* Lewis, 9 Pa. Dist. 657, 24 Pa. Co. Ct. 510.

If the certificate of nomination shows that the delegates from one of the counties were not regularly appointed the nomination will not be upheld. *In re* Little, 7 Pa. Dist. 580, 21 Pa. Co. Ct. 337.

5. White *v.* Sanderson, 74 Minn. 118, 76 N. W. 1021, 73 Am. St. Rep. 334. 42 L. R. A. 231; Stackpole *v.* Hallaham, 16 Mont. 40, 40 Pac. 80, 28 L. R. A. 502; State *v.* Benton, 13 Mont. 306, 34 Pac. 301; Gregg *v.* Rogers, 1 Ohio S. & C. Pl. Dec. 163, 1 Ohio N. P. 117.

Action by part of committee.— *In re* Stucker, 18 Pa. Co. Ct. 227.

Revocation of power of committee.— The nomination of a ticket by a political convention is a revocation of the power given by it to a committee on the previous day to nominate a ticket. Leighton *v.* Bates, 24 Colo. 303, 50 Pac. 856, 858.

6. State *v.* Tooker, 18 Mont. 540, 46 Pac. 530, 34 L. R. A. 315. *Compare* Corser *v.* Scott, (Minn. 1902) 91 N. W. 1101.

7. Com. *v.* Havard, 9 Pa. Dist. 493, inasmuch as it is violative of the spirit of the constitution which vests the legislative power in congress or the legislature, as the case may be, and not in the conventions which nominate the members, or the committees which control the party machinery.

8. State *v.* Porter, 11 N. D. 309, 91 N. W. 944; *In re* Woodruff, 7 Pa. Dist. 623.

According to the rules of common law, whenever electors are present and do not vote at all, they virtually acquiesce in the election made by those who do; in other words a majority of the meeting means a majority of those who chose to take part in the proceedings of the assembly. Smith *v.* Proctor, 130 N. Y. 319, 29 N. E. 312, 14 L. R. A. 403;

deprive those who remain of the power to act, and the presence of the majority of those entitled to participate is not necessary to render the action of the convention legal.[9] Where a party has regularly made its nominations, further nominations by a bolting caucus or convention are invalid as nominations by that party, and the candidates are not entitled to the use of the party name on the ballot.[10]

K. Less Than a Majority Present. A nominating convention is authorized to proceed with its business even if less than a majority of the delegates entitled to seats attend, and the action of a majority of those who do attend is binding on the party.[11]

L. Rescission of Nominations. A nominating convention is a deliberative body and may rescind a nomination made for office at any time before final adjournment;[12] but it cannot do so after final adjournment, for then its power as a convention is exhausted.[13] A party having made one nomination cannot while that remains in force make another for the same office.[14] The central committee

Gosling *v.* Veley, 7 Q. B. 406, 53 E. C. L. 406; Oldknow *v.* Wainwright, 1 W. Bl. 229, 2 Burr. 1017.

9. State *v.* Porter, 11 N. D. 309, 91 N. W. 944.

10. Hutchinson *v.* Brown, 122 Cal. 189, 54 Pac. 738, 42 L. R. A. 232; *In re* Sanner, 9 Pa. Dist. 638; *In re* Quinn, 8 Pa. Dist. 267; *In re* Heberling, 7 Pa. Dist. 648; *In re* Brown, 5 Pa. Dist. 663, 18 Pa. Co. Ct. 232; *In re* Gibbons, 5 Pa. Dist. 194; *In re* Sanders, 18 Pa. Co. Ct. 228; *In re* Savage, 15 Pa. Co. Ct. 306; *In re* Wilkes Barre Tp., 7 Kulp (Pa.) 529. See also Beck *v.* Board of Election Com'rs, 103 Mich. 192, 61 N. W. 346. Thus a nomination made by delegates withdrawing from a convention because of its arbitrary and illegal action cannot be recognized where a majority of the delegates whose right to seats is not questioned remained and participated in the regular nomination. *In re* Rutledge, 5 Pa. Dist. 638, 18 Pa. Co. Ct. 317.

Factional nomination.— Where a county central committee divided into two factions, the first of which was composed of eight regular members and the second of six regular members and of one alternate, whose principal was acting with the first faction, and of another alternate whose principal was acting with the second faction, it was held that a writ of mandamus would not lie to compel the county clerk to place the nomination of the second faction on the official ballot since the first had a majority of the regular members and was entitled to be recognized in preference to the second. State *v.* Young, 160 Mo. 320, 60 S. W. 1086.

Ticket nominated by bolting minority.— Where minority delegates elected to a county democratic convention secede on the ground that the majority faction is dominated by corporate influences, and cause a separate convention to be called, at which a ticket designated as the "Bryan Democratic Ticket" is nominated, such ticket is entitled to a place on the official ballot under such designation, since there is a sufficient distinctive principle in such designation in connection with the fact to warrant the conclusion that the differences are actual and substantial. State *v.* Arms, 24 Mont. 447, 63 Pac. 401.

There is no principle of law, nor any rule or custom of the republican party which would justify the holding that a nomination could be made by a minority of the legal conferees of a congressional district. *In re* Kooser, 5 Pa. Dist. 650, 18 Pa. Co. Ct. 360.

11. Spencer *v.* Maloney, 28 Colo. 38, 62 Pac. 850; Whipple *v.* Broad, 25 Colo. 407, 55 Pac. 172.

Contesting delegations.— Where a convention of a judicial district has been regularly called by the district committee, and the unchallenged delegates elected under such call, although a minority of the whole number of delegates met and effected a temporary organization and seated one of two contesting delegations, it was held that such convention was a regular convention; and hence its nominee was the regular nominee and entitled to be certified as such by the secretary of state. Beckwith *v.* Rucker, 28 Colo. 31, 62 Pac. 836.

Combination of bolters and rejected delegates.— A political convention is the exclusive judge of the credentials and qualifications of persons claiming to be delegates thereto, and a minority of the delegates as thus determined by the convention cannot by withdrawing from said convention and joining themselves to the persons whose credentials have been rejected by the convention constitute a legal party convention. State *v.* Lavik, 9 N. D. 461, 83 N. W. 914.

12. Phillips *v.* Gallagher, 73 Minn. 528, 76 N. W. 285, 42 L. R. A. 222; Matter of Nash, 36 Misc. (N. Y.) 113, 72 N. Y. Suppl. 1057.

13. Le Bert *v.* Shirley, 24 Colo. 269, 50 Pac. 862; People *v.* Board of Police Com'rs, 10 Misc. (N. Y.) 98, 31 N. Y. Suppl. 112.

Nomination to fill vacancy.— Where a committee authorized by a petition among electors of an organized party to fill a vacancy among nominees for office has executed a certificate of nomination to fill a certain vacancy, it cannot subsequently rescind its action and make another nomination. Le Bert *v.* Shirley, 24 Colo. 269, 50 Pac. 862.

14. Palmer *v.* Ruland, 28 Colo. 65, 62 Pac. 841; Johnson *v.* Jones, 82 Mo. App. 204; People *v.* Board of Police Com'rs, 10 Misc. (N. Y.) 98, 31 N. Y. Suppl. 112.

Mass convention.— In Manston *v.* McIn-

of a political party may rescind its actions in regard to matters not consummated;[15] but it is otherwise if the action of the committee has been consummated and the rights of parties established according to party rules.[16] So also a party committee may rescind its actions in regard to matters not consummated, and its later actions in regard to the same matters will be considered as regular.[17] Petitioners who have successfully put a candidate in nomination cannot withdraw his name; there is no withdrawal known to the election law except that of a candidate himself.[18]

M. Filling Vacancies. Where vacancies occur after the holding of a general primary, means are generally provided for filling them without again submitting the matter to the general suffrage of the members of the party.[19] And where vacancies occur and are regularly filled, the election commissioners cannot ignore the names of the candidates thus put in nomination in printing the names on the official ballot.[20]

N. Judicial Interference With Party Government and Nominations — 1. IN GENERAL. In the absence of any statute giving them jurisdiction, the courts have no power to interfere with the judgments of the committees and tribunals of established political parties in matters involving party government and discipline.[21] It is much more proper that questions which relate to the regularity of conventions or nomination of candidates and the constitution of committees should be determined by the regularly constituted party authorities[22] than to have every

tosh, 58 Minn. 525, 60 N. W. 672, 28 L. R. A. 605, it appeared that a mass convention of the republicans of Itasca county, Minn., was held for the purpose of nominating candidates for county offices; that the convention met and nominated such candidates; that the chairman of the county committee, believing that such mass meeting was illegal under the statute, called a delegate convention, which was held, and also nominated candidates for county offices; and it was held that the mass convention was valid notwithstanding the use of the word "delegates" in the statute regulating primary elections.

15. Twombley *v.* Smith, 25 Colo. 425, 55 Pac. 254.

16. Leggett *v.* Orr, 25 Colo. 462, 55 Pac. 178.

Nominations of a county convention for county offices cannot be set aside by the state central committee of the party except on a hearing accorded the nominees, and a showing that the nominations were procured by fraud or in disregard of the usages and customs of the party. State *v.* Crittenden, 164 Mo. 237, 64 S. W. 162.

17. Twombley *v.* Smith, 25 Colo. 425, 55 Pac. 254, Campbell, J., dissenting.

At an adjourned meeting.— Members of a convention of a political party, meeting at a day to which the convention was adjourned, may revoke the nomination made at a prior meeting, although their number is less than a majority of those who made the nomination. Phillips *v.* Smith, 25 Colo. 398, 55 Pac. 177.

18. Sterling *v.* Bones, 87 Md. 141, 39 Atl. 424.

19. People *v.* Kings County, 63 N. Y. App. Div. 438, 71 N. Y. Suppl. 528 [*affirmed* in 168 N. Y. 639, 61 N. E. 1133].

Thus a political party may adopt a rule giving delegates present at a convention power to fill vacancies in the delegations. Matter of Kennedy, 36 Misc. (N. Y.) 721, 74 N. Y. Suppl. 369.

20. Gibson County *v.* State, 148 Ind. 675, 48 N. E. 226.

21. *Colorado.*— Whipple *v.* Stevenson, 25 Colo. 447, 55 Pac. 188; Whipple *v.* Broad, 25 Colo. 407, 55 Pac. 172.

Kentucky.—Davis *v.* Hambrick, 109 Ky. 276, 58 S. W. 779, 22 Ky. L. Rep. 815, 51 L. R. A. 671. In Cain *v.* Page, 42 S. W. 336, 337, 19 Ky. L. Rep. 977, Hazelrigg, J., said: "When counsel questions the authority of the state convention in party organization, it is as if the Mohammedan should doubt the Koran, or a Christian the Book of Books."

Massachusetts.— Atty.-Gen. *v.* Drohan, 169 Mass. 534, 48 N. E. 279, 61 Am. St. Rep. 301.

New York.— Wallace *v.* McCabe, 32 Misc. 336, 66 N. Y. Suppl. 695.

North Dakota.— State *v.* Liudahl, 11 N. D. 320, 91 N. W. 950; State *v.* Porter, 11 N. D. 309, 91 N. W. 944; State *v.* Lavik, 9 N. D. 461, 83 N. W. 914.

Pennsylvania.— *In re* Sanner, 9 Pa. Dist. 638, 24 Pa. Co. Ct. 43; *In re* Doyle, 7 Pa. Dist. 635; *In re* Cassell, 7 Pa. Dist. 597; *In re* Magee, 5 Pa. Dist. 654; *In re* Ker, 2 Pa. Dist. 14, 12 Pa. Co. Ct. 200; *In re* Donahue, 2 Pa. Dist. 5, 12 Pa. Co. Ct. 198.

22. *Colorado.*— Whipple *v.* Broad, 25 Colo. 407, 55 Pac. 172.

Kansas.— Breidenthal *v.* Edwards, 57 Kan. 332, 46 Pac. 469, 34 L. R. A. 146.

Kentucky.—Moody *v.* Trimble, 109 Ky. 139, 58 S. W. 504, 22 Ky. L. Rep. 692, 50 L. R. A. 810.

Minnesota.—Phillips *v.* Gallagher, 73 Minn. 528, 76 N. W. 285, 42 L. R. A. 222.

Montana.— State *v.* Smart, 24 Mont. 413, 62 Pac. 591.

New York.— *In re* Fairchild, 151 N. Y. 359, 45 N. E. 943.

Pennsylvania.— *In re* Gerberich, 9 Pa.

question relating to a caucus, convention, or nomination determined by the courts, and thus in effect compel them to make party nominations and regulate the details of party procedure instead of having them controlled by party authorities. Thus the action of a state convention in deciding between two contesting delegations is conclusive;[23] and the fact that the delegates who were seated voted on the question of the contest is immaterial, where it appears that there was a clear majority of all the delegates present in their favor without counting their vote.[24] Where there is a division of a regularly called political convention, and two rival conventions are held, neither of which has a majority of delegates admittedly entitled to seats, the court will refuse to determine which is to be treated as the regular convention of the party.[25] Inasmuch as a political organization is an unincorporated voluntary association in which no rights of property or personal liberty are involved, a court of equity has no jurisdiction to interfere by injunction to control

Dist. 659, 24 Pa. Co. Ct. 250; *In re* Hutchins, 8 Pa. Dist. 109; *In re* Ker, 2 Pa. Dist. 14, 12 Pa. Co. Ct. 200; *In re* Donahue, 2 Pa. Dist. 5, 12 Pa. Co. Ct. 198; Com. ex rel. Mansfield, 18 Pa. Co. Ct. 428.

South Carolina.— *Ex p.* Sanders, 53 S. C. 478, 31 S. E. 290.

Effect of party usage.— Spelling *v.* Brown, 122 Cal. 277, 55 Pac. 126.

Nominations by warring factions.— It has been held that the court will not attempt to determine which of two rival county conventions, held by opposing factions of the same political party, and composed of delegates regularly elected to a convention called by the constituted authorities of the party, is entitled to represent the party, by enjoining the county clerk from placing the names of the nominees of either convention on the official ballot. State *v.* Johnson, 18 Mont. 556, 46 Pac. 440.

An injunction does not lie to restrain an arbitrary seating of delegates in a political convention by the convention's members or committees. *In re* Grear, 9 Ohio S. & C. Pl. Dec. 299, 6 Ohio N. P. 312.

Erroneous decision of chair acquiesced in by convention.— Where the chairman of a political convention, through misapprehension, announces that a nomination of a certain person has been made, as the result of a ballot, and the convention acquiesces in the nomination without protest or objection, and adjourns *sine die*, the nomination so announced will be treated by the courts as the final determination of the convention. State *v.* Moore, 23 Wash. 276, 62 Pac. 769.

23. Stephenson *v.* Board of Election Com'rs, 118 Mich. 396, 76 N. W. 914, 74 Am. St. Rep. 402, 42 L. R. A. 214; State *v.* Liudahl, 11 N. D. 320, 91 N. W. 950. But see *contra*, Spencer *v.* Maloney, 28 Colo. 38, 62 Pac. 850. And see State *v.* Hogan, 24 Mont. 383, 62 Pac. 583, holding that a mass meeting in one of two counties composing a judicial district, called without notice except to those present at the final adjournment of a regular county convention, for the announced purpose of formulating a protest to the action of the convention, has no authority to name delegates to represent the county in a state and judicial convention in place of those named by the regular county convention; and that delegates named by such meeting, although recognized and seated by the state convention, have no authority to represent the county in the judicial convention, and a nomination made by it is invalid because the electors of both counties are not represented.

A determination by the state convention of a party, on a contest between two delegations as to the regularity of the conventions by which they were nominated, will be treated by the courts as conclusive. Matter of Redmond, 5 Misc. (N. Y.) 369, 25 N. Y. Suppl. 381.

Contesting delegations.— Where by reason of dissensions in the central committee of the democratic party of a county the committee divided and each faction elected delegates to attend the state convention, and the contest so occasioned was presented to the state convention on the application of the delegates of both factions for seats, and the state convention decided such contest before any candidates for county officers were nominated, it was held that the decision so made was conclusive, and the candidates subsequently nominated by the successful faction were entitled to have their names printed on the official ballot under the party name. State *v.* Weston, 27 Mont. 185, 70 Pac. 519, 1134.

Combination of minority of delegates with those whose credentials have been rejected.— A minority of the lawful delegates to a political convention cannot withdraw from the regular convention and unite themselves with persons whose credentials have been rejected by the convention, and then successfully claim that they constitute a legal party convention. State *v.* Porter, 11 N. D. 309, 91 N. W. 944.

24. State *v.* Weston, 27 Mont. 185, 70 Pac. 519, 1134.

25. Stephenson *v.* Board of Election Com'rs, 118 Mich. 396, 76 N. W. 914, 74 Am. St. Rep. 402, 42 L. R. A. 214.

No standard of manners has been established to which a party convention must conform under penalty of having its action set aside. *In re* Magee, 18 Pa. Co. Ct. 225, in which it was stated that there were no rules for the governing of political conventions except Rugby rules, and the court felt a natural hesitancy about undertaking their reformation.

its actions or those of its officers.[26] It would seem that the courts have no power by writ of prohibition to compel constitutional conventions to refrain from inquiring into the qualifications of their own members.[27]

2. IN CASES OF FACTIONAL FIGHTS. But in cases of factional party fights it is sometimes necessary for the courts to pass upon the regularity of nominations in order that a ticket may be made up.[28] And nominations made by a convention conducted in defiance of party rules have been held illegal.[29] And where a statute has given the court power to pass upon the validity of nominations, it is not bound by the decisions of party tribunals.[30]

O. Primary Election Laws[31]— 1. IN GENERAL. Unless it is expressly made so a general election law is not applicable to primary elections, which are merely creations of political parties and associations, and may be held at such times and places and on such terms and conditions as may seem fit.[32] But the legislature may recognize the existence of political parties, and within reasonable limits regulate the means by which partisan efforts shall be protected in exercising individual preferences for party candidates, and this is the general purpose of primary election laws which are designed to secure to individual voters a free expression of their will.[33] While independent of statutory authority the courts have no inherent power to interfere in the management of purely party affairs, many abuses, such as "bulldozing," fraudulent "packing" of primaries, and the like, whereby the will of the majority of a political party is frequently defeated, have produced a general tendency to regulate primary elections by statute.[34] A statute

26. McKane *v.* Adams, 123 N. Y. 609, 25 N. E. 1057, 20 Am. St. Rep. 785; Kearns *v.* Howley, 188 Pa. St. 116, 41 Atl. 273, 68 Am. St. Rep. 852, 42 L. R. A. 235.

Under the rules of the republican party in the city of Philadelphia, the ward executive committee is the proper tribunal to determine whether any of its members have violated their duty to the party. *In re* Huey, 6 Pa. Dist. 113, 19 Pa. Co. Ct. 138.

27. Trapper's Case, 49 Alb. L. J. 384.

28. Spencer *v.* Maloney, 28 Colo. 38, 62 Pac. 850; State *v.* Crittenden, 164 Mo. 237, 64 S. W. 162; Matter of Broat, 6 Misc. (N. Y.) 445, 27 N. Y. Suppl. 176; *In re* Woodworth, 16 N. Y. Suppl. 147; *In re* Douglass, 9 Pa. Dist. 187; *In re* Savage, 3 Pa. Dist. 705.

Scope of inquiry.— In determining which of two sets of nominees of a split political convention are entitled to have their names placed on the official ballot as the party nominees, the inquiry of the court should not extend to an examination of political methods further than to ascertain the identity of the regular party convention. Addle *v.* Davenport, 7 Ida. 282, 62 Pac. 681; State *v.* Porter, 11 N. D. 309, 91 N. W. 944.

Where two rival factions of a political party both hold conventions and nominate candidates, the officer whose duty it is to consider objections to certificates of nomination cannot determine which faction truly represents the party, nor exclude the candidates of either faction from the official ballot after the nomination of its candidates has been regularly certified to the county clerk. So held in Sims *v.* Daniels, 57 Kan. 552, 46 Pac. 952, 35 L. R. A. 146.

29. Capps *v.* Krier, 25 Colo. 474, 55 Pac. 166; *In re* De Witt, 9 Pa. Dist. 648, 24 Pa. Co. Ct. 385; *In re* Robb, 7 Pa. Dist. 620, 21 Pa. Co. Ct. 433; *In re* Boger, 18 Pa. Co. Ct. 230.

Decision of party tribunal not binding.— In proceedings to determine the regularity of party nominations, the decisions of party conventions, committees, or caucuses are not binding, and have no weight with the court. Matter of Broat, 6 Misc. (N. Y.) 445, 27 N. Y. Suppl. 176, 56 N. Y. St. 780. See also Matter of Heacock, 18 Misc. (N. Y.) 311, 41 N. Y. Suppl. 161.

30. Matter of Heacock, 18 Misc. (N. Y.) 311, 41 N. Y. Suppl. 161.

31. **"Primary meeting"** defined see 9 Cyc. 819.

32. People *v.* Cavanaugh, 112 Cal. 674, 44 Pac. 1057.

33. State *v.* Moore, 87 Minn. 308, 92 N. W. 4, 94 Am. St. Rep. 702, 59 L. R. A. 447; Ladd *v.* Holmes, 40 Oreg. 167, 66 Pac. 714.

34. These statutes are modeled more or less along the lines of the general election laws of the states in which they are enacted, with the additional provision that electors voting thereat must express an intention to give general support to the party at whose primary election they vote. They provide for the election machinery to carry them into effect, and prescribe the duties of certain party officials in the conduct of the primaries whose acts are subject to review by the courts the same as those of general election officers. Young *v.* Beckham, 72 S. W. 1092, 24 Ky. L. Rep. 2135; People *v.* Democratic Gen. Committee, 164 N. Y. 335, 58 N. E. 124, 51 L. R. A. 674 [*reversing* 52 N. Y. App. Div. 170, 65 N. Y. Suppl. 57]; *In re* Woodworth, 16 N. Y. Suppl. 147.

The dominant idea pervading these statutes is the absolute assurance to the citizen that

which provides that one who has voluntarily become a candidate for a party nomination at the primary election and has failed to secure it shall not have his name on the official ballot is neither obnoxious to the constitution nor unreasonable, for he is still eligible to office, and the electors are at liberty to write his name on the ballot if he can induce them to do so.[35]

2. BLANK SPACES ON PRIMARY BALLOTS. It has been held that an election of candidates to the position of nominees is not an election within the meaning of the constitution, and therefore that a primary election law which makes no provision for leaving blank spaces on the ballots to enable the voters to write in the names of persons of their choice is not obnoxious to the constitution.[36]

3. NOTICE OF INTENTION TO BECOME A CANDIDATE. One feature of the primary election law is that persons desiring to submit their names to the voters in a primary election shall, not later than a certain date or certain number of days next preceding the holding of such primary election, file a notice or affidavit of their intention to become candidates, and for what offices, in order that the officers may know what names to place upon the ballots.[37]

4. ENROLMENT OF PARTY VOTERS. Among other things the primary election laws usually make provision for the enrolment of the voters of the different political

his wish as to the conduct of the affairs of his party may be expressed through his ballot, and thus given effect, whether it be in accord with the wishes of the leaders of his party or not; and that thus shall be put in effective operation in the primaries that fundamental principle of democracy which makes the will of an unfettered majority controlling. In other words the scheme is to permit the voters to construct the organization from the bottom upward instead of permitting the leaders to construct it from the top downward. People *v.* Democratic Gen. Committee, 164 N. Y. 235, 58 N. E. 124, 51 L. R. A. 674.

Not applicable to certain parties.—The New York primary election law provides that no party shall be subject to provisions of the act unless they elect to come under it, which casts less than three per cent of the entire vote of the state for governor at the last preceding election. Under this provision it has been held that a party which failed to cast three per cent of the entire vote but did cast more than ten thousand votes is entitled to nominate its candidates by convention under the old law. Matter of Ward, 36 Misc. (N. Y.) 727, 74 N. Y. Suppl. 403.

State central committee has no power to call off primary election. Neal *v.* Young, 75 S. W. 1082, 25 Ky. L. Rep. 183.

Mandamus to compel recognition of a member of a committee.— An application for a peremptory writ of mandamus requiring the democratic central committee of the county of New York to recognize the relator and his associates, who have been elected members of such general committee at a primary election as members thereof, to recognize as a member of the executive committee of such committee a person chosen by the relator and his associates was held to be properly denied where the person chosen was not named and the relator had not been denied his rights as a member of the general committee and no demand was made for the recognition of any specific person as a member of the executive committee and no person had made a demand to be recognized as such. People *v.* Democratic Gen. Committee, 175 N. Y. 415, 67 N. E. 898 [*affirming* 82 N. Y. App. Div. 173, 81 N. Y. Suppl. 784].

Committee cannot determine the eligibility of candidates in advance. Young *v.* Beckham, 72 S. W. 1092, 24 Ky. L. Rep. 2135.

Ballots supplied by candidates.— Where a primary election law makes no provision for the determination of a contest in advance of the election, a candidate for nomination has the right to supply ballots with his own name on them in case the committee refuses to print his name on the regular ballot. Flanagan *v.* Hynes, 75 Conn. 584, 54 Atl. 737.

35. State *v.* Moore, 87 Minn. 308, 92 N. W. 4, 94 Am. St. Rep. 702, 59 L. R. A. 447.

The Minnesota primary election law does not apply to the nomination of candidates for general state officers. These are still as formerly placed in nomination either by a party convention or a petition of electors. Davidson *v.* Hanson, 87 Minn. 211, 91 N. W. 1124, 92 N. W. 93.

36. State *v.* Johnson, 87 Minn. 221, 91 N. W. 604, 840.

37. Where the statute provided that any person desiring to submit his name to the voters in a primary election should, not later than fifteen days next preceding the holding of such primary election, apprise the committee or governing authority of the political party holding such primary of the fact that he is a candidate, it was held that the party committee could not fix an earlier date for the candidates to submit their names so as to deprive any candidate who submitted his name to the committee as much as fifteen days before the election of the right to have his name placed on the ballot. Egan *v.* Grewe, 112 Ky. 232, 65 S. W. 437, 23 Ky. L. Rep. 1495.

parties in order to prevent all persons whatever from voting in the party primaries except such as are entitled to do so.[38]

P. Percentage of Entire Vote to Preserve Right to Make Regular Nominations. It is not an unusual statutory provision that only political parties which polled at the last preceding election a certain percentage at the least of the entire vote cast may make nominations in the regular way.[39] However, a political organization, by a failure to poll sufficient votes at the previous election to entitle it to nominate candidates in the regular way, does not on that account cease to exist, but may put its candidates in nomination by a petition of electors.[40] And although a political party did not poll the requisite percentage of votes in the whole state, yet if it did so in a particular district, division, or municipality, it may there place its local candidates in nomination in the regular way.[41] A ballot law requiring a political party to have polled a certain per cent of the aggregate vote at the previous election before it can have the names of its nominees placed on the official ballot, or a petition signed by an equal number of electors, pledging themselves to vote for the nominees, is not repugnant to the constitution so long as the right of individual electors to vote for whom they please is secured.[42]

Q. Nomination by Petition of Electors — 1. In General. By statute when any combination or number of persons not constituting a political party entitled to make nominations in the usual way and to have the names of their candidates placed on the official ballot are desirous of placing candidates in nomination for office and of having their names printed on the official ballot, they may do so by presenting to the proper officers a petition bearing no less than the

38. Spier *v.* Baker, 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 196; People *v.* General Committee, 25 N. Y. App. Div. 339, 49 N. Y. Suppl. 723.

39. *Colorado.*—Schafer *v.* Whipple, 25 Colo. 400, 55 Pac. 180.

Illinois.— People *v.* Williamson, 185 Ill. 106, 56 N. E. 1127.

Ohio.— State *v.* Kinney, 57 Ohio St. 221, 48 N. E. 942.

Pennsylvania.— *In re* Citizens' Party, 7 Pa. Dist. 641; *In re* Citizens' Party, 1 Dauph. Co. Rep. 328.

Rhode Island.— Corcoran *v.* Bennett, 20 R. I. 6, 36 Atl. 1122.

This is not construed to mean that the party must have polled the requisite percentage of votes for each candidate to be voted for; it is sufficient if the party at the preceding election as a party casts a vote of the required amount, and then it may nominate a full ticket in the regular manner, although there may have been vacancies on the ticket at the last election. Corcoran *v.* Bennett, 20 R. I. 6, 36 Atl. 1122.

When statute deemed merely directory.— Schuler *v.* Hogan, 168 Ill. 369, 48 N. E. 195.

40. Davidson *v.* Hanson, 87 Minn. 211, 91 N. W. 1124, 92 N. W. 93.

41. People *v.* Williamson, 185 Ill. 106, 56 N. E. 1127. Under a statute providing that nominations might be made by any party which at the last general election polled ten thousand votes in the state or one per cent of the votes in the district, it was held that a nominating body which had at the last general election polled ten thousand votes in the state might make nominations in a district, although it did not poll therein one per cent of the vote. Matter of Cantine, 14 Misc. (N. Y.) 139, 35 N. Y. Suppl. 584.

42. Ransom *v.* Black, 54 N. J. L. 446, 24 Atl. 489, 1021, 16 L. R. A. 769; State *v.* Poston, 48 Ohio St. 620, 51 N. E. 150, 42 L. R. A. 237; De Walk *v.* Bartley, 146 Pa. St. 529, 24 Atl. 185, 28 Am. St. Rep. 814, 15 L. R. A. 771.

A statute providing that none but the names of regular nominees shall be placed on the official ballot, unless their **names are** presented by a petition signed by a certain percentage of the highest vote cast at the last preceding election, is not an abridgment of the elective franchise, where the act preserves the right of every citizen to vote for any candidate whose name is not on the official ballot by inserting the name of his candidate in the blank left for that purpose. State *v.* Poston, 48 Ohio St. 620, 51 N. E. 150, 42 L. R. A. 237; De Walt *v.* Bartley, 146 Pa. St. 529, 24 Atl. 185, 28 Am. St. Rep. 814, 15 L. R. A. 771.

A statute, however, prohibiting the election of delegates to a convention of a political party representing less than a designated percentage of the votes cast at the last election is unconstitutional and void, as taking away the rights of self-control and self-preservation from a party. It is easy to see that if the legislature has power to destroy one party in this manner it may destroy all but one, for it is a question of power and not of reasonableness which the court has to decide. Britton *v.* Board of Election Com'rs, 129 Cal. 337, 61 Pac. 1115, 51 L. R. A. 115; Spier *v.* Baker, 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 196.

statutory number of signatures of qualified electors; and adopting a party name and device, if the latter be required; whereupon the nominees are entitled to the same privileges on the official ballot as if they were regularly nominated by an existing party.[43] It is not necessary that the signers of the petition should be members of the party; it is sufficient if they are qualified electors and desire to vote for the nominee for office.[44] But a signer's name should not appear on more than one petition for the same office.[45] Where the office to be filled is not named in the statute, the number of signatures necessary for an independent nomination may be determined by analogy to the number required to nominate candidates for other offices to be voted for in the same political division.[46] So too where the election law mentions every political division known to the statutes of the state at the time of its enactment, but a subsequent statute subdivides some of these divisions and provides that officers formerly elected from the whole should thereafter be elected from such subdivisions, this does not affect the right to independent nominations.[47]

2. Cannot Usurp Name of Existing Party. By statute in some states a political party cannot appropriate to itself any part of the name of another political organization, or have its candidates designated thereby on the official ballot; and this restriction extends to parties who maintain their political existence either through a nomination by convention or a petition of electors.[48] The name of an established political party cannot be adopted by a new political organization, since

43. *Colorado.*— Whipple *v.* Kleckner, 25 Colo. 423, 55 Pac. 163; Schaefer *v.* Whipple, 25 Colo. 400, 55 Pac. 180.

Idaho.— Phillips *v.* Curtis, 4 Ida. 193, 38 Pac. 405.

Kentucky.— Jones *v.* Wilshire, 98 Ky. 391, 33 S. W. 199, 17 Ky. L. Rep. 989.

New York.—People *v.* Rice, 11 N. Y. Suppl. 832, 25 Abb. N. Cas. 460.

Pennsylvania.— *In re* Jeffries, 9 Pa. Dist. 663, 24 Pa. Co. Ct. 529; Com. *v.* Richmond, 5 Pa. Dist. 647; *In re* King, 1 Pa. Dist. 807, 12 Pa. Co. Ct. 161.

Personal signature of elector.—Com. *v.* Connelly, 163 Mass. 539, 40 N. E. 862.

Signatures to affidavit in support of petition.— People *v.* New York, 10 Misc. (N. Y.) 200, 31 N. Y. Suppl. 467.

Residence and oath of petitioner.— Matter of Adams, 21 Misc. (N. Y.) 396, 47 N. Y. Suppl. 543.

Officer bound to recognize petition.— Davidson *v.* Hanson, 87 Minn. 211, 91 N. W. 1124, 92 N. W. 93.

Attaching names from another petition.— Where, after a petition has been put in circulation and a number of electors has signed it, and some of the nominees then resigned and a new petition was prepared in which their place was filled by other names, the names signed to the first petition cannot be considered in ascertaining whether the new petition had the requisite number of signatures. State *v.* Lesueur, 136 Mo. 452, 38 S. W. 325.

Amending petition.— Whipple *v.* Kleckler, 25 Colo. 423, 55 Pac. 163.

44. Wilkins *v.* Duffy, 70 S. W. 668, 24 Ky. L. Rep. 913, 968.

45. If it does he cannot be counted as a petitioner for either candidate. Southall *v.* Griffith, 100 Ky. 91, 37 S. W. 577, 18 Ky. L. Rep. 599.

Signers who have participated in a party convention.— A statute prohibiting the same persons from joining in a certificate of nomination by electors of more than one person for the same office does not prohibit an elector who has participated in a party convention from joining in a certificate of nomination of a candidate of another party for the same office. State *v.* Burdick, 6 Wyo. 448, 46 Pac. 854, 34 L. R. A. 845.

46. Matter of Fagan, 21 Misc. (N. Y.) 403, 47 N. Y. Suppl. 288.

47. Thus, in People *v.* Voorhis, 168 N. Y. 367, 61 N. E. 283, it appeared that at the time of the enactment of the primary election law, the aldermen of the city of New York were elected as representatives of their wards. Subsequently the charter of the city of New York divided the wards into aldermanic districts, and provided that aldermen should be elected to represent these districts within the wards. No such political division was known at the time of the enactment of the election law, yet the court held that it was within the spirit of the statute that independent nominations might be made. It should be added, however, that Parker, C. J., and O'Brien, J., dissented from this opinion.

48. Davidson *v.* Hanson, 87 Minn. 211, 91 N. W. 1124, 92 N. W. 93. Thus, in Lind *v.* Scott, 87 Minn. 226, 91 N. W. 1125, it appeared that defendant as auditor of Hennepin county had printed on the official ballots to be used at the general election, in November, 1902, in that county, the name of a candidate for congress, designated as "social democrat." The application was to strike out the word "democrat." Upon due deliberation the court not only struck out the word "democrat," but ordered that not only that but the word "democratic" should be prohibited on the ballots.

this is on its face a fraudulent scheme to deceive unwary voters.[49] If a party is organized, although it may not have sufficient strength to make nominations by convention, it is entitled to have whatever proceedings it may take with reference to making nominations protected in the same way that nominations by convention are; and therefore if parties who are not authorized to do so undertake to make a nomination by petition such nomination cannot be sustained as against one made by those who do represent the party.[50]

3. NAMES CANNOT BE PRINTED ON TICKET OF EXISTING PARTY. The names of candidates nominated by petition cannot be placed on the regular ticket of any party, although there be vacancies on the ticket of the party of which they are members.[51] Political parties have a right to refrain from making nominations if they see fit; but in that case the places must remain vacant on the official ballot. A candidate nominated by petition is the nominee of the petitioners only, whatever may be his political faith.[52] If, however, the candidates of a political party decline after it is too late to make the regular nominations, the vacancies may be filled by petition of the electors and the names of the substitutes may be printed on the regular party ticket.[53]

R. Certificates of Nomination — 1. IN GENERAL ELECTIONS. A certificate of nomination of a political convention for an office in order to be filed should be signed by the presiding officer and secretary of the convention, and acknowledged or sworn to if the statute so requires.[54] If the certificate of nomination is regular

49. Porter *v.* Flick, 60 Nebr. 773, 84 N. W. 262; *In re* Savage, 15 Pa. Co. Ct. 508.

If upstart parties were at liberty to usurp the names of established political parties it would result in no end of political trickery and fraud designed to mislead voters into voting the wrong ticket.

Colorado.— McMillan *v.* Spencer, 28 Colo. 80, 62 Pac. 849; Phillips *v.* Curley, 28 Colo. 34, 62 Pac. 837; Philips *v.* Smith, 25 Colo. 456, 55 Pac. 184; Whipple *v.* Wheeler, 25 Colo. 421, 55 Pac. 188.

Idaho.— Williams *v.* Lewis, 6 Ida. 184, 54 Pac. 619.

Montana.— State *v.* Moran, 24 Mont. 433, 63 Pac. 390.

New York.— Matter of Smith, 36 Misc. 292, 73 N. Y. Suppl. 463.

Pennsylvania.— Com. *v.* Kreimer, 8 Pa. Dist. 603, 22 Pa. Co. Ct. 618.

Certificate of bolting convention.— *In re* Bundy, 7 Pa. Dist. 625.

The designation "National Democratic Party" on the official ballot is sufficiently distinctive to avoid confusion with "Democratic Party." Craig *v.* Brown, 114 Cal. 480, 46 Pac. 870 (Beatty, C. J., and Garoutte, J., dissenting); Matter of Greene, 9 N. Y. App. Div. 223, 41 N. Y. Suppl. 177 (Cullen and Bartlett, JJ., dissenting).

The names "The Anti-Fusion Populist Party," "The People's Party" and "The National People's Party" are not so similar as to mislead or confuse voters; hence a certificate of nomination designating the candidates as nominees of the first-named party will not be kept from the files because of the prior filing of certificates of nomination of the other two parties. Acker *v.* Smith, 25 Colo. 461, 55 Pac. 162.

50. Philips *v.* Smith, 25 Colo. 456, 55 Pac. 184.

51. Whipple *v.* Owen, 24 Colo. 319, 50 Pac. 861; Phillips *v.* Curtis, 4 Ida. 193, 38 Pac. 405; Lowry *v.* Davis, 101 Iowa 236, 70 N. W. 190; Atkeson *v.* Lay, 115 Mo. 538, 22 S. W. 481.

False certificate does not help the matter. Landrum *v.* Shutt, 45 S. W. 1046, 24 Ky. L. Rep. 290.

Failure to make nominations by convention.—Under a statute providing that a party entitled to make nominations by convention, in case of a failure to do so may put its candidates in nomination by petition, it was held that before a clerk could be compelled by mandamus to print the name of a nominee by petition under a party device and title, it must be shown that such party had made no nomination by convention, and that the candidate was in fact a nominee by petition of that party. Southall *v.* Griffith, 100 Ky. 91, 37 S. W. 577, 18 Ky. L. Rep. 599. Where a petition nominating a candidate for an office asks that his name be placed on the ballots under the device and title of a party, and he is not shown to be entitled to have his name printed as the candidate of such party, his name should not be placed on the ballots at all. Southall *v.* Griffith, 100 Ky. 91, 37 S. W. 577, 18 Ky. L. Rep. 599.

52. State *v.* Fransham, 19 Mont. 273, 48 Pac. 1; State *v.* Reek, 18 Mont. 557, 46 Pac. 438; State *v.* Tooker, 18 Mont. 540, 46 Pac. 530, 34 L. R. A. 315; State *v.* Rotwill, 18 Mont. 502, 46 Pac. 370; State *v.* Elliott, 17 Wash. 18, 48 Pac. 734.

53. State *v.* Burdick, 6 Wyo. 448, 46 Pac. 854, 34 L. R. A. 845.

54. White *v.* Sanderson, 74 Minn. 118, 76 N. W. 1021, 73 Am. St. Rep. 334, 42 L. R. A. 231; *In re* Twenty-Eighth Ward School Directors, 8 Pa. Dist. 140, 22 Pa. Co. Ct. 308.

on its face, and filed with the proper officer it is *prima facie* evidence of the nomination of the person certified to have been nominated.[55] A statutory provision requiring certificates of nominations of candidates for office to be made and filed in order that the names of the candidates may be printed on the official ballot is mandatory.[56] The certificate must designate the particular office for which the candidate was nominated.[57]

2. OF NOMINATIONS TO FILL VACANCIES. Where a committee is empowered to fill vacancies, their certificate of nomination should state the cause of the vacancy, the office, the name of the original nominee, and that of the person appointed to take his place; and also the authority of the committee to act in the premises.[58] The certificates of nomination in such cases may be executed by the presiding officer and secretary of the nominating committee.[59]

A certificate of nomination made by a ward convention will be declared void when such certificate is neither signed nor sworn to by the officers of election in accordance with the party rules. *In re* Twenty-Eighth Ward School Directors, 8 Pa. Dist. 140, 22 Pa. Co. Ct. 308.

In Illinois certificates of nomination must not only be signed by the presiding officer and secretary of the convention, but must also be sworn to by them to be true to the best of their knowledge and belief, and a certificate of the oath must be annexed to the certificate of nomination. Schuler *v.* Hogan, 168 Ill. 369, 378, 48 N. E. 195.

In Missouri such certificates should be acknowledged by the presiding officer and secretary of the convention in the same manner as deeds for land. State *v.* Lesueur, 103 Mo. 253, 15 S. W. 539.

Personal knowledge of officer taking oath.— Matter of McClosky, 21 Misc. (N. Y.) 365, 47 N. Y. Suppl. 294.

Signed by wrong officers.— *In re* Allegheny City Elections, 12 Pa. Co. Ct. 660.

Waiver of defect.— Jones *v.* State, 153 Ind. 440, 55 N. E. 229.

Want of sufficient signatures.— Nomination papers will be rejected when an indispensable sheet containing ninety-two names was vouched for by only four signers, and they did not become receivable by the action of the fifth voucher in signing several days afterward when the time for filing had elapsed. Com. *v.* Martin, 7 Pa. Dist. 659.

55. Schuler *v.* Hogan, 168 Ill. 369, 48 N. E. 195; State *v.* Benton, 13 Mont. 306, 34 Pac. 301; Robbins *v.* Harrity, 2 Pa. Dist. 163.

A certificate of nomination from a turbulent convention will not be sustained where the evidence forbids the conclusion that a majority of the lawful delegates voted for the certified nominee. *In re* De Witt, 9 Pa. Dist. 648; *In re* Lauer, 7 Pa. Dist. 646; *In re* Robb's, etc., Nomination, 7 Pa. Dist. 577.

56. State *v.* Hays, 27 Mont. 174, 70 Pac. 321; Price *v.* Lush, 10 Mont. 61, 24 Pac. 749, 9 L. R. A. 467; State *v.* Barber, 4 Wyo. 56, 32 Pac. 14.

Filing certificate with wrong officer.—Where the statute provided that certificates of nomination for state offices should be filed with the secretary of the commonwealth, and certificates for all other offices should be filed with the county commissioners, it was held that if a candidate for the house of representatives filed a certificate with the county commissioners, the printing of his name on the official ballot would not be prohibited. *In re* Prohibition Party's Nomination Papers, 15 Pa. Co. Ct. 319.

Lost certificate.— Where a certificate of nomination has been properly filed but has been lost, it may be supplied by the political party or persons making the original nomination or by the executive committee of such party at any time before election day. Rathburn *v.* Hamilton, 53 Kan. 470, 37 Pac. 20.

57. State *v.* Falley, 9 N. D. 464, 83 N. W. 913.

58. The provisions of the Australian Ballot Law prescribing the facts to be stated in the certificate of nomination and the manner in which the nomination may be declined and the resulting vacancy filled should not be considered mandatory, when the question of a failure to comply with them quickly is raised after an election, the fairness of which is not questioned. Stackpole *v.* Hallaham, 16 Mont. 40, 40 Pac. 80, 28 L. R. A. 502 [*modifying* Price *v.* Lush, 10 Mont. 61, 24 Pac. 749, 9 L. R. A. 467].

A certificate purporting to fill a vacancy, but stating neither the cause of the vacancy, whether by resignation, declination, or death, nor the authority to fill it, nor giving the name of the person whose place is to be filled, is insufficient, and should not be filed or the name of the nominee thus designated be placed on the official ballot. Lucas *v.* Ringsrud, 3 S. D. 355, 53 N. W. 426. See also Price *v.* Lush, 10 Mont. 61, 24 Pac. 749, 9 L. R. A. 467.

Where no provision for filling vacancies was made by the nominating convention, and there was no time to call another convention, vacancies caused by the county clerk's holding a certificate of nomination to be inoperative may under the Kansas statute be filled by the central committee by renominating the original candidate. Bower *v.* Clemans, 61 Kan. 129, 58 Pac. 969.

59. White *v.* Sanderson, 74 Minn. 118, 76 N. W. 1021, 73 Am. St. Rep. 334, 42 L. R. A. 231. But see *In re* Berlin, 7 Pa. Dist. 663, where it was held that the certificate of substituted nominations was invalid when naming only the president and secretary of the

3. Formal Defects. The statute, in so far as it relates to the form of the certificate and of the acknowledgment or affidavit, is generally regarded as being directory, and mere informality in either will not be permitted to defeat an election fairly held;[60] although the statute may be so worded that the courts will construe its provisions as to matters of form as mandatory.[61] No objection to nomination papers will be considered by the courts unless they come strictly within the provisions of the statute, the authority of the courts in that regard being purely statutory.[62]

4. Time of Filing. Statutory provisions in regard to the time of filing certificates of nomination are mandatory, and a certificate offered after the time limited is properly rejected.[63] The presentation of a certificate of nomination in due time to the proper officer is tantamount to a filing, although the officer does not mark it as filed.[64] The rule does not apply to the filling of vacancies caused by the death or declination of candidates after the time for filing certificates has expired.[65] So if through the carelessness of officers a certificate is not filed in time it may be treated as a case of vacancy, which may be filled by a duly authorized committee.[66] And the same is true where the certificate, although filed in time, is fatally defective.[67] It seems, however, that a statutory requirement that the certificate of nomination shall be filed not more than sixty days before the election is directory merely, and the nominee loses no right by filing it sooner.[68]

5. Objections to Nomination Papers — a. In General. When the authority to make a nomination is legally challenged by objections filed to the certificate of

committee and not the names of the committee authorized to make such substituted nominations.

60. Stackpole *v.* Hallaham, 16 Mont. 40, 40 Pac. 80, 28 L. R. A. 502; State *v.* Barber, 4 Wyo. 56, 32 Pac. 14.

The certificate of nomination need not show on its face that the party making the nomination cast the requisite statutory percentage of the entire vote of the state to entitle it to make a regular nomination. Schuler *v.* Hogan, 168 Ill. 369, 48 N. E. 195.

61. Lucas *v.* Ringsrud, 3 S. D. 355, 57 N. W. 426.

62. *In re* Shenandoah, etc., Nominations, 6 Pa. Dist. 156; *In re* Jobes, 2 Pa. Dist. 8; *In re* Van Storch, 2 Pa. Dist. 7.

The court has no power to amend an election certificate by striking a name therefrom and substituting another for the same office, on an allegation of fraud by election officers, not raised before or passed upon by the party tribunal charged with the duty of declaring and certifying the nominees. Com. *ex rel.* Mansfield, 18 Pa. Co. Ct. 428.

63. *California.*—Griffin *v.* Dingley, 114 Cal. 481, 46 Pac. 457.

Kansas.— Bower *v.* Clemans, 61 Kan. 129, 58 Pac. 969.

Kentucky.— Hollon *v.* Center, 102 Ky. 119, 43 S. W. 174, 19 Ky. L. Rep. 1134.

New York.— *In re* Cudderback, 3 N. Y. App. Div. 103, 39 N. Y. Suppl. 388; Matter of McDonald, 25 Misc. 80, 54 N. Y. Suppl. 690.

Pennsylvania.— *In re* Ringler, 8 Pa. Dist. 620; Donahoe *v.* Johnson, 8 Pa. Dist. 316; *In re* Ewing, 3 Pa. Dist. 477, 13 Pa. Co. Ct. 638; *In re* Weyant, 2 Pa. Dist. 818, 13 Pa. Co. Ct. 561; *In re* Rosenstock, 9 Kulp 538.

See 18 Cent. Dig. tit. "Elections," § 127.

But see State *v.* Licking County, 17 Ohio Cir. Ct. 396, 9 Ohio Cir. Dec. 427, where it was held that the statute, although mandatory in form, should be regarded as directory, where it appeared that the failure to file the certificate in due time could not have affected the result of the election.

Sunday or legal holiday.— If the last day for filing a certificate fall on a Sunday or a legal holiday it must be filed the day before to be in time. Griffin *v.* Dingley, 114 Cal. 481, 46 Pac. 457; State *v.* Falley, 9 N. D. 464, 83 N. W. 913.

The election law is satisfied by the delivery of a certificate of nomination to the officer at any time before midnight of the last day for filing, and wherever he may be; it need not be delivered to him at his office. Matter of Norton, 34 N. Y. App. Div. 79, 53 N. Y. Suppl. 1092 [*reversing* 25 Misc. 48, 53 N. Y. Suppl. 924].

64. Reese *v.* Hogan, 117 Iowa 603, 91 N. W. 907.

65. State *v.* Hogan, 24 Mont. 397, 62 Pac. 683; *In re* Clay, 2 Pa. Dist. 19, 12 Pa. Co. Ct. 419.

66. People *v.* Hartley, 170 Ill. 370, 48 N. E. 950; State *v.* Clark, 56 Nebr. 584, 77 N. W. 87.

Vacancies caused by failure to file certificate in time.— Where the certificate of nomination was not filed within the required time and vacancies thus occurred, it was held that such vacancies might be filled, under the provisions of the statute authorizing the filling of vacancies. Reese *v.* Hogan, 117 Iowa 603, 91 N. W. 907.

67. State *v.* Hogan, 24 Mont. 397, 62 Pac. 683.

68. Hollon *v.* Center, 102 Ky. 119, 43 S. W. 174, 19 Ky. L. Rep. 1134.

nomination, and violation or disregard of the party rules is alleged, the court must hear the facts and determine the question.[69] One who is not a member of the party making nominations cannot object to the regularity of the proceedings resulting in the nomination.[70]

b. Time of Making. It is usually provided by statute that objections to nomination papers shall be made within a designated time after such papers are filed,[71] or within a certain number of days before election.[72] And, after the time for filing objections has passed, in the absence of fraud a certificate of nomination to which no objections were filed and which is regular in form cannot be attacked.[73] At all events such objection should be made before the election, for if not so made the legal authority of a convention will in the absence of fraud be conclusively presumed.[74]

c. Notice of Objections. Service of a copy of the written objections to the certificate of nomination of a candidate whose nomination is attacked is sufficient notice.[75]

d. Waiver of Objections. The conduct of the person or persons having the right to raise objections to nomination papers may be such as to constitute a waiver of such objections.[76]

6. Amendment of Nomination Papers. If nomination papers are defective they may be amended, but this cannot be done by the courts; it must be done by the party filing them.[77]

7. Determination of Regularity of Certificate and Nomination. Officers with whom certificates of nomination are filed have authority to pass upon the form

69. *In re* Robb, 7 Pa. Dist. 620, 21 Pa. Co. Ct. 433.

70. *In re* Winton Borough, 2 Lack. Leg. N. (Pa.) 13.

71. State *v.* Piper, 50 Nebr. 40, 69 N. W. 383; Matter of Cowie, 11 N. Y. Suppl. 838, 25 Abb. N. Cas. (N. Y.) 455.

72. *In re* Reed, 10 Pa. Dist. 210, 24 Pa. Co. Ct. 636.

73. *In re* Thomas, 6 Pa. Dist. 652, 20 Pa. Co. Ct. 165.

A party convention is not required to wait until an unusual hour or to adjourn until the following day to permit an arrival of delegates detained by an extraordinary flood who have notified the convention of their detention. *In re* Davis, 3 Pa. Dist. 824, 15 Pa. Co. Ct. 305.

Where a statute requires the written objections to a certificate of nomination to be filed within five days after the filing of the certificate and notice thereof to be given to the candidate, if no objections in writing are filed and the certificate is regular on its face, the clerk must treat the nomination as valid. Hoos *v.* O'Donnell, 60 N. J. L. 35, 37 Atl. 72, 447.

74. Schuler *v.* Hogan, 168 Ill. 369, 48 N. E. 195; State *v.* Norris, 37 Nebr. 299, 55 N. W. 1086.

75. *In re* Thomas, 6 Pa. Dist. 652, 20 Pa. Co. Ct. 165.

76. Thus where a candidate for public office makes no objection to the certificate of nomination of his opponent before the election, when the statute provides for the time and mode of presenting such objections he should be regarded as having waived all objections that may exist to the presence on the official ballot of any names of nominees not properly entitled to be there. Allen *v.* Glynn, 17 Colo. 338, 29 Pac. 670, 31 Am. St. Rep. 304, 15 L. R. A. 743; Schuler *v.* Hogan, 168 Ill. 369, 48 N. E. 195; Bowers *v.* Smith, 111 Mo. 45, 20 S. W. 101, 33 Am. St. Rep. 491, 16 L. R. A. 754; State *v.* Elliott, 17 Wash. 18, 48 Pac. 734.

77. *In re* Ewing, 3 Pa. Dist. 477, 13 Pa. Co. Ct. 638; *In re* Savage, 15 Pa. Co. Ct. 306.

An affidavit to a nomination paper which fails to state that the signers were qualified electors of the district may be amended where the affiants actually made the necessary affidavit, and the mistake was that of the attesting magistrate in not filling the proper blanks. Com. *v.* Reeder, 5 Pa. Dist. 662, 18 Pa. Co. Ct. 229.

Defective affidavit to petition.— *In re* Butler, 4 Pa. Dist. 187, 7 Kulp (Pa.) 489, 16 Pa. Co. Ct. 78.

Defective execution of certificate of nomination.— *In re* Robinson, 7 Pa. Dist. 639.

Defect in appellation of party.— *In re* Thomas, 6 Pa. Dist. 652, 20 Pa. Co. Ct. 165.

Substitution of candidates.— Com. *ex rel.* Mansfield, 18 Pa. Co. Ct. 428.

The court can amend only defect in form. Where the exclusion of properly accredited delegates changed the result in the nomination made by a political convention, the certificate of nomination was null and void, and could not be amended by inserting the name of the candidate who would have received the majority of the votes had the delegates who were excluded been admitted, as the court has power to amend only where the certificate is defective. *In re* Reitzel, 9 Pa. Dist. 645, 24 Pa. Co. Ct. 379.

Objections to second certificate.—Objections to a nomination paper of a candidate will

and sufficiency of such certificates;[78] but they have no authority to decide controversies in regard to the regularity of nominations,[79] unless the statute expressly gives them power to do so.[80] Under the Australian Ballot Law the secretary of state and other officers with whom certificates of nomination are to be filed have somewhat enlarged powers. They must pass in the first instance not only upon the form and sufficiency of the certificate of nomination, but have power to decide, upon extrinsic evidence, whether the candidate named in such certificate was in fact nominated by a convention called and held in accordance with the precedents and usages of a political party which cast the statutory percentage of votes at the last general state election.[81] The usual course is that disputed ques-

be sustained when a prior nomination certificate by the same party is already filed, but the paper is not wholly void, and the defect may be remedied by amendment. *In re* Thomas, 6 Pa. Dist. 652, 20 Pa. Co. Ct. 165.

New certificate filed nunc pro tunc.—Where through a misconstruction of the statute there was a fatal defect in a certificate of nomination which was filed in time the court ordered a new and proper certificate to be filed *nunc pro tunc*. *In re* Grogan, 13 N. Y. Suppl. 421.

78. State *v.* Lesueur, 103 Mo. 253, 15 S. W. 539; Com. *v.* Martin, 7 Pa. Dist. 662.

79. *Colorado.*— People *v.* Pueblo Dist. Ct., 18 Colo. 26, 31 Pac. 339.

New York.— People *v.* Roosevelt, 9 N. Y. App. Div. 626, 41 N. Y. Suppl. 572.

North Dakota.— State *v.* Falley, 9 N. D. 450, 32 N. W. 860.

Oregon.— Sears *v.* Kincaid, 33 Oreg. 215, 53 Pac. 303.

Pennsylvania.— Jeffries *v.* Griest, 9 Pa. Dist. 683, 24 Pa. Co. Ct. 412; Com. *v.* Richmond, 5 Pa. Dist. 647.

The statute giving the secretary of state power to pass on objections to certificates of nomination gave him no authority to exclude the nominations of the republican party from the official ballot on the ground that it had been superseded by the silver republican party. People *v.* McGaffey, 23 Colo. 156, 46 Pac. 930.

80. State *v.* Allen, 43 Nebr. 651, 62 N. W. 35. See also Chapman *v.* Miller, 52 Ohio St. 166, 39 N. E. 24.

Under the Colorado statute providing that the officer with whom the original certificate of nominations by a political party is filed shall pass on the validity of all objections, such officer in the first instance, and the court on review, may determine the claim of rival factions of the same political party to have their nominees placed on the official ballot. Spencer *v.* Maloney, 28 Colo. 38, 62 Pac. 850.

Under the Kansas statute, a special tribunal, consisting of the secretary of state, state auditor, and attorney-general, is given power to inquire after objections made as to the regularity of nomination papers filed with the secretary of state, and to consider further questions arising in relation thereto, on notice to the candidates affected; and the statute provides that a decision by a majority of said officers shall be final. It was held that after a hearing before such officers and a finding by them that one of two candidates for state senator was regularly nominated by a convention, which divided into two parts, each naming a candidate, that their decision will not be disturbed by the courts in the absence of bad faith or arbitrary conduct showing wrongful acts amounting to fraud on the part of the officers. Miller *v.* Clark, 62 Kan. 278, 62 Pac. 664.

Under the Ohio statute providing that certificates of nomination and nomination papers on being filed, if in apparent conformity with such act, shall be deemed to be valid unless objections are made within a certain time, which objections or other questions arising in the course of the nomination of candidates for county officers shall be considered by the board of election, and their decision shall be final, but if no decision can be arrived at the controversy shall be submitted to the state supervisor of election, who shall summarily decide the question submitted to him, and his decision shall be final, the board of elections cannot be interfered with by the courts in matters of detail pertaining to the printing of official ballots. State *v.* Ehrman, 2 Ohio S. & C. Pl. Dec. 400.

Adopting benefit of Australian Ballot Law. — A candidate who adopts the benefits conferred on him by the Australian Ballot Law, by filing his nomination papers with the secretary of state, cannot repudiate that part of the statute which has set up a board of officers with jurisdiction to determine finally the regularity of his nomination in case of a contest. Miller *v.* Clark, 62 Kan. 278, 62 Pac. 664.

81. State *v.* Piper, 50 Nebr. 42, 69 N. W. 384; Phelps *v.* Piper, 48 Nebr. 724, 67 N. W. 755, 33 L. R. A. 53; State *v.* Allen, 43 Nebr. 651, 62 N. W. 35. It has been held that where two or more conventions purporting to represent a political party nominate candidates, the registrar must decide in the first instance which is the regular party convention. McDonald *v.* Hinton, 114 Cal. 484, 46 Pac. 870, 35 L. R. A. 152.

Affidavit to impeach nomination.— On a hearing on the legality of a nomination, before the officer with whom a certificate of nomination has been filed, affidavits of purported signers of the certificate are admissible to impeach the certificate of the notary public. Matter of Adams, 21 Misc. (N. Y.) 396, 47 N. Y. Suppl. 543.

Admission of notary.— It is competent for the notary himself to admit that he inadvertently failed to swear certain signers of a

tions of law and fact touching the regularity of nominations are tried by the court and not by the officer to whom the papers are brought to be filed.[82] And the determination of the court at the hearing may be reviewed on appeal.[83]

XI. TIME AND PLACE OF HOLDING ELECTIONS.

A. In General. Time and place are of the substance of every election,[84] and as a rule it is essential to the validity of an election that it be held at the time and in the place provided by law;[85] and if it be not so held the eligibility of the candidates voted for will not help the matter.[86]

B. Time For Holding. In order to make a popular election legal, there must be a time fixed in advance for holding it, either by law or by the officer or officers empowered by law to appoint the time; and if no time be fixed in either manner no valid election can be held.[87] If the time is fixed by general law, that

certificate of nomination. Matter of Adams, 21 Misc. (N. Y.) 396, 47 N. Y. Suppl. 543.

82. Leighton *v.* Bates, 24 Colo. 303, 50 Pac. 856, 858; People *v.* Arapahoe County Dist. Ct., 23 Colo. 150, 46 Pac. 681. See Beck *v.* Board of Election Com'rs, 103 Mich. 192, 61 N. W. 346; Emmet *v.* Ennis, 150 N. Y. 538, 44 N. E. 1102; Matter of Cuddeback, 3 N. Y. App. Div. 103, 39 N. Y. Suppl. 388; Fernbacher *v.* Roosevelt, 90 Hun (N. Y.) 441, 14 Misc. (N. Y.) 199, 35 N. Y. Suppl. 898; Matter of Woodworth, 64 Hun (N. Y.) 522, 19 N. Y. Suppl. 525; Gillespie *v.* McDonough, 39 Misc. (N. Y.) 147, 79 N. Y. Suppl. 182; State *v.* Falley, 9 N. D. 450, 83 N. W. 860; Jeffries *v.* Griest, 9 Pa. Dist. 683, 24 Pa. Co. Ct. 412; *In re* Van Storch, 2 Pa. Dist. 7, 12 Pa. Co. Ct. 253; *In re* Dailey, 1 Pa. Dist. 697, 12 Pa. Co. Ct. 163, 3 Wkly. Notes Cas. (Pa.) 128; *In re* Wilkes-Barre Tp. Nominations, 7 Kulp (Pa.) 529.

Where a statute provides that a final order of the court reviewing the determinations and acts of the officers with whom certificates of nomination are filed must be made on or before the last day fixed for filing certificates of nominations to fill vacancies, that is, fifteen days before election, it is directory and not mandatory; and where the court has acquired jurisdiction and a case has been submitted within the time required by statute, its order will be effectual, although made after the expiration of such time. *In re* Hennessy, 164 N. Y. 393, 58 N. E. 446 [*reversing* 54 N. Y. App. Div. 180, 66 N. Y. Suppl. 463].

83. Leighton *v.* Bates, 24 Colo. 303, 50 Pac. 856, 858.

Appellate proceedings in Colorado.— Liggett *v.* Bates, 24 Colo. 314, 50 Pac. 860.

Review in summary proceedings.— *In re* Fairchild, 151 N. Y. 359, 45 N. E. 943.

84. Dickey *v.* Hurlburt, 5 Cal. 343.

The federal constitution provides (art. 1, § 2) that when vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies; and it has been held by the house of representatives that this power carries with it the power to fix the time and place of holding such elections, where they have not been fixed by law. Hoge's Case, Cl. & H. Cas. Cont. El. 135. So too, inasmuch as it is provided in the fourth section of the fourth article of the constitution that the United States shall guarantee to every state in the Union a republican form of government, it seems that where the government of a state has been disorganized by war or insurrection and the people are without representation in congress a military governor appointed by the United States may call an election and fix the time and place of holding it. Bonzano's Case, 2 Bartl. Cas. Cont. El. 1; Flanders *v.* Hahn, 1 Bartl. Cas. Cont. El. 446.

85. *California.*— Bourland *v.* Hildreth, 26 Cal. 161; Satterlee *v.* San Francisco, 23 Cal. 314.

Illinois.— Snowball *v.* People, 147 Ill. 260, 35 N. E. 538; Stephens *v.* People, 89 Ill. 337.

Michigan.— Atty.-Gen. *v.* St. Clair County, 11 Mich. 63.

Missouri.— State *v.* Fiala, 47 Mo. 310.

Nevada.— State *v.* Collins, 2 Nev. 351.

New Jersey.—Sibbald *v.* Brickell, 59 N. J. L. 420, 36 Atl. 1032.

Ohio.— Sawyer *v.* State, 45 Ohio St. 343, 13 N. E. 84.

See 18 Cent. Dig. tit. "Elections," § 26 *et seq.*

86. Satterlee *v.* San Francisco, 23 Cal. 314.

87. *California.*— Kenfield *v.* Irwin, 52 Cal. 164; People *v.* Rosborough, 14 Cal. 180; People *v.* Martin, 12 Cal. 409; People *v.* Weller, 11 Cal. 49, 70 Am. Dec. 754; People *v.* Porter, 6 Cal. 26.

Indiana.— State *v.* Winter, 148 Ind. 177, 47 N. E. 462.

Kentucky.— Toney *v.* Harris, 85 Ky. 453, 3 S. W. 614, 9 Ky. L. Rep. 36.

Missouri.— State *v.* Ruark, 34 Mo. App. 325.

Texas.— Field *v.* Hall, 16 Tex. Civ. App. 233, 40 S. W. 749.

United States.— Hoge's Case, Cl. & H. Cas. Cont. El. 135.

See 18 Cent. Dig. tit. "Elections," § 169 *et seq.*

When the constitution fixes the day for holding the election it will be valid if regularly held on that day, whether or not an act of the legislature regulating the election at that time was passed in accordance with

will govern, and no election can be held at any other time except under statutes providing for special elections;[88] and where the statute fixes the time for holding an election there is no power to adjourn it to a subsequent day,[89] unless the constitution or statute in terms authorizes such adjournment.[90] But it has been held that where it is provided that certain officers shall be elected by a municipal body at their regular meeting on a certain date they may adjourn from time to time to a day certain until an election is had, for such adjourned sessions are deemed but continuances of the regular session.[91] If the statute fixes the time for holding local elections at a certain date annually at the time of holding the general elections and a subsequent statute changes the time of holding general elections, this does not change the time of holding such special election unless the statute so provides in terms or by necessary implication;[92] for a general statute does not repeal a special statute unless the purpose to do so is clear.[93] If the statute requires a special election for any purpose to be held within a certain time after the presentation of a petition, an election held after that time will be void,[94] and the omission to hold an election at the proper time cannot be supplied by a subsequent one not provided for by law;[95] but a mistake of the officer, by whom the preliminary steps for holding a local election must be taken, in calling it for the wrong day will not necessarily be fatal if it appears that the election was fairly and honestly conducted, and that no voter was deceived by the error.[96] It has been held that if a statute creates a new office and provides for an election at a

the provisions of the constitution. Hall *v.* Com., 94 Ky. 322, 22 S. W. 333, 15 Ky. L. Rep. 102.

88. *Illinois.*— Kelly *v.* Gahn, 112 Ill. 23.

Nevada.— State *v.* Collins, 2 Nev. 351; Sawyer *v.* Haydon, 1 Nev. 75.

New Jersey.—Sibbald *v.* Brickell, 59 N.J. L. 420, 36 Atl. 1032.

Ohio.— State *v.* Dombaugh, 20 Ohio St. 167.

Tennessee.— State *v.* Banks, 106 Tenn. 394, 61 S. W. 778.

Washington.— State *v.* Twichell, 4 Wash. 715, 31 Pac. 19.

See 18 Cent. Dig. tit. "Elections," § 27.

Statutes construed.— A statute requiring that a county election after the adoption of township organization shall be held at the next general election means that it shall be held at the first general election at which county officers are to be chosen. State *v.* Hedlund, 16 Nebr. 566, 20 N. W. 876. Where an act provided that no election for a specified purpose should be held within less than two years of the last previous election, on the first Monday in May, it was held that the day named, that is the first Monday in May, fixed the time of the election, although it came two days earlier in the month than at the previous election. McNeely *v.* Morganton, 125 N. C. 375, 34 S. E. 510. In Loran *v.* Webb, 82 Ky. 246, it appeared that the clerk of the Jefferson county court died on the 24th of July, 1881. Less than eight days intervened between that time and the following August election. The county judge ordered an election to fill the vacancy on the 27th of August following. The appellee was elected, and it was held that the order was properly made, inasmuch as less than eight days elapsed from the death of the clerk until the regular election; under such circumstances the statute required a special election.

89. Opinion of Justices, 23 Pick. (Mass.) 547; Stone *v.* Small, 54 Vt. 498; Rex *v.* Pole, 7 Mod. 194.

The postponement of election of a school trustee is wrong. If within the time required by law a sufficient number of qualified voters organize and hold an election, a person so elected will hold his office notwithstanding an adjournment of the election at another hour of the day. People *v.* Brewer, 20 Ill. 474.

90. Com. *v.* Hubbard, 24 Pick. (Mass.) 98; State *v.* South Kingstown, 18 R. I. 258, 27 Atl. 599, 22 L. R. A. 65; *In re* Narragansett Election, 16 R. I. 761, 16 Atl. 907.

91. State *v.* Fagan, 42 Conn. 32; Stockton *v.* Powell, 29 Fla. 1, 10 So. 688, 15 L. R. A. 42; Carter *v.* McFarland, 75 Iowa 196, 39 N. W. 268.

92. People *v.* Shaw, 14 Ill. 476.

93. State *v.* South Kingstown, 18 R. I. 258, 27 Atl. 599, 22 L. R. A. 65. Ohio Rev. St. § 2978, as amended March 24, 1886, providing that all general elections for judge of the court of common pleas shall be held on the first Tuesday after the first Monday of November, does not apply to elections for filling vacancies in the office of the additional judge, authorized by the act of Feb. 24, 1868, nor does it repeal or otherwise affect that act. State *v.* Barbee, 45 Ohio St. 347, 13 N. E. 731.

This rule, however, is only one of interpretation, and must yield when it is apparent that the legislature intended to repeal a special act. McCormick *v.* People, 139 Ill. 499, 28 N. E. 1106.

94. Gossard *v.* Vaught, 10 Kan. 162; Doores *v.* Varnon, 94 Ky. 507, 22 S. W. 852, 15 Ky. L. Rep. 244; State *v.* Webb, 49 Mo. App. 407; State *v.* Ruark, 34 Mo. App. 325; State *v.* Washoe County Com'rs, 6 Nev. 104.

95. State *v.* Jenkins, 43 Mo. 261.

96. People *v.* Keeling, 4 Colo. 129. Where an election was ordered to be held between

particular time, but provides no machinery for holding the election, the clause in reference to the time for holding the election should be disregarded as surplusage, and the election should be held at the time for the next general election.[97]

C. Readjustment of Commencement of Official Terms. It is within the province of the legislature to postpone elections and readjust the commencement of official terms in order to do away with frequent and unnecessary elections, in which case the incumbents may either hold over or special elections may be authorized to fill the vacancies thus occasioned until the next general election. Such statutes are not in violation of the constitution, where it is clear that the object is to regulate the time of holding elections, and not merely to extend the terms of incumbents;[98] but if the legislative intent is clearly to extend the terms of present incumbents in office, the act will fall within the constitutional inhibition of such legislative interference.[99]

D. Place of Holding — 1. In General. So also the place of holding an election must either be fixed by law or appointed by legally authorized officials, and votes cast at a different place will avail nothing; for it is essential to the validity of an election that it be held in the place fixed by law;[1] but it does not follow that the polls must be opened and the election conducted in the very building designated

the hours of seven A. M. and seven P. M., when the law provided that it should be held between the hours of six A. M. and seven P. M., it was held that such an informality did not render the election void. Clark *v.* Leathers, 5 S. W. 576, 9 Ky. L. Rep. 558.

Where an election for officers of a municipal corporation was held on the wrong day, without objection, and by a pure mistake, which was not discovered by any person interested either as an officer of election, candidate, or voter, until after the election was held, and where there was no pretense of fraud or corrupt motives on the part of any persons concerned in the election, which was participated in by a large majority of the qualified voters in the city, it was held that the court in the exercise of its discretion might properly refuse to allow an information in the nature of a quo warranto against defendant, who was chosen as alderman at such election, to inquire by what authority he held and exercised his office. State *v.* Tolan, 33 N. J. L. 195. In People *v.* Fairbury, 51 Ill. 149, it was held that where the members of a municipal corporation were directed to be annually elected the words were only directory and did not take away the power incident to the corporation to elect afterward when the annual day had by some means free from design or fraud been passed by.

97. Sawyer *v.* State, 45 Ohio St. 343, 13 N. E. 84. See also State *v.* Barbee, 45 Ohio St. 347, 13 N. E. 731.

98. *Colorado.*—Sipe *v.* People, 26 Colo. 127, 56 Pac. 571; *In re* County Treasurers, 9 Colo. 631, 21 Pac. 474.

Indiana.— Larned *v.* Elliott, 155 Ind. 702, 57 N. E. 901; Scott *v.* State, 151 Ind. 556, 52 N. E. 163; State *v.* Menaugh, 151 Ind. 260, 51 N. E. 117, 357, 43 L. R. A. 408, 418.

Kansas.— Wilson *v.* Clark, 63 Kan. 505, 65 Pac. 705; State *v.* Breidenthal, 55 Kan. 308, 40 Pac. 651; State *v.* Foster, 36 Kan. 504, 13 Pac. 841; Ward *v.* Clark, 35 Kan. 315, 10 Pac. 827; State *v.* Mechem, 31 Kan. 435, 2 Pac. 816; Morgan *v.* Pratt County, 24 Kan. 71; Hagerty *v.* Arnold, 13 Kan. 367.

Michigan.— Detroit Common Council *v.* Schmid, 128 Mich. 379, 87 N. W. 383.

Minnesota.— Jordan *v.* Bailey, 37 Minn. 174, 33 N. W. 778.

Missouri.— State *v.* McGovney, 92 Mo. 428, 3 S. W. 867; State *v.* Ranson, 73 Mo. 78.

Ohio.— State *v.* McCracken, 51 Ohio St. 123, 36 N. E. 941.

99. People *v.* McKinney, 52 N. Y. 374; People *v.* Bull, 46 N. Y. 57, 7 Am. Rep. 302; State *v.* Krez, 88 Wis. 135, 59 N. W. 593.

1. *Georgia.*— Walker *v.* Sanford, 78 Ga. 165, 1 S. E. 424.

Illinois.— Williams *v.* Potter, 114 Ill. 628, 3 N. E. 729; People *v.* Gochenour, 54 Ill. 123; School Directors *v.* National School Furnishing Co., 53 Ill. App. 254. See People *v.* Adams County, 185 Ill. 288, 56 N. E. 1044, construing Ill. Laws (1899), c. 209, relating to places of holding elections in counties containing soldiers' homes.

Michigan.— People *v.* Knight, 13 Mich. 424.

Mississippi.— Word *v.* Sykes, 61 Miss. 649.

Montana.— Heyfron *v.* Mahoney, 9 Mont. 497, 24 Pac. 93, 18 Am. St. Rep. 757.

Pennsylvania.— Melvin's Case, 68 Pa. St. 333; Chadwick *v.* Melvin, Brightly Lead. Cas. El. 251; Marks *v.* Park, 7 Leg. Gaz. 70. And see Egly *v.* Armstrong County Com'rs, 158 Pa. St. 65, 27 Atl. 851.

Wisconsin.— State *v.* Alder, 87 Wis. 554, 58 N. W. 1045.

See 18 Cent. Dig. tit. "Elections," § 26.

Establishment of two places in precinct.— Black *v.* Pate, 130 Ala. 514, 30 So. 434.

Place several miles distant.—If persons appointed inspectors and judges of elections hold the election at a place several miles distant from that appointed by the board of supervisors, it is misconduct enough to invalidate the election. Knowles *v.* Yates, 31 Cal. 82.

in the notice;[2] and a slight change in the voting place ought not to render an election void where it was in all other respects regular and conducted according to law; especially when it appears that no one was prevented from voting at such election on account of the change in the polling-place.[3] Where the polling-place selected by the proper officers is outside of the election district, the electors of the district who vote thereat are not disfranchised on that account, if the election is otherwise lawfully conducted.[4]

2. CHANGE OF PLACE. The court may upon petition of electors change a polling-place to a more convenient position.[5] The court will also consider the size of the rooms offered and the convenience afforded the election officers and voters at the several places proposed.[6]

3. ELECTIONS BY CONGRESSIONAL DISTRICTS. Under the constitutional warrant for such legislation[7] congress enacted that in each case where a state was entitled to more than one representative the number should be elected by districts composed of contiguous territory.[8] A statute now provides for the election of repre-

2. Dale v. Irwin, 78 Ill. 170; Wakefield v. Patterson, 25 Kan. 709; Smith v. Higby, 2 Pa. Dist. 311, 12 Pa. Co. Ct. 423. Thus where the polls for a certain precinct were opened a short distance from and in plain view of the place appointed by the supervisors, the owner of the house selected having objected to the election proceeding at his house, but it did not appear that any voter was misled or deprived of his vote by reason of the change, it was held that the court did not err in refusing to reject the vote of the precinct. Preston v. Culbertson, 58 Cal. 198.

Under Ky. St. § 1443, providing that "if for any good cause the election cannot be held at the house appointed as the place of voting, the judges of the election may, on the morning of the election, adjourn to the most convenient place, after having publicly proclaimed the change, and posted notices of same on said house," where C at whose house the last election had been held, because the original voting place had become unfit for the purpose, refused to allow the election to be held there, and it was held at the house of G about a half mile therefrom, and about fifty yards from a public highway, that being the nearest house that could be procured, and notice of the change being posted prior to the time of election at the original voting place and at C's, the election was not void; there being a substantial compliance with the statute, and no evidence that any elector was misled. Anderson v. Likens, 104 Ky. 699, 713, 47 S. W. 867, 20 Ky. L. Rep. 1001.

3. People v. Brown, 189 Ill. 619, 60 N. E. 46; Simons v. People, 119 Ill. 617, 9 N. E. 220; Chicago v. People, 80 Ill. 496; Lafayette, etc., R. Co. v. Geiger, 34 Ind. 185; Farrington v. Turner, 53 Mich. 27, 18 N. W. 544, 51 Am. Rep. 88; *Ex p.* Williams, 35 Tex. Cr. 75, 31 S. W. 653; *Ex p.* Segars, 32 Tex. Cr. 553, 25 S. W. 26.

Removal of house designated as polling-place.— Steele v. Calhoun, 61 Miss. 556.

4. Otis v. Lane, (N. J. Err. & App. 1903) 54 Atl. 442.

Place outside of district.— It is not beyond the power of the legislature to establish or authorize a polling-place for an election district beyond the boundary line of the district; and the provision of the charter of the city of Lockport, by which the election of the inhabitants of the town of Lockport are permitted to be held at such places within the city as may be designated, is not in violation of section 1 of article 2 of the constitution, nor are the votes cast at polling-places so designated void. People v. Carson, 155 N. Y. 491, 50 N. E. 292 [*affirming* 35 N. Y. Suppl. 1114].

5. Thus where a polling-place is in the extreme end of the division, the court will change it to one more centrally located, being satisfied as to the desirability of the change, it appearing that the old location is such that by reason of its surroundings residents from other portions of the division are not likely to go there to vote. *In re* Seventh Ward, 8 Pa. Dist. 208; *In re* Change of Polling Place, 9 Kulp (Pa.) 533.

Place occupied as campaign headquarters of political party.— A polling-place will be changed upon petition where it occupies one floor of a frame building separate and distinct from other erections and the second floor is occupied as the campaign headquarters in a ward of one of the leading political parties, there being no other occupants of said building on election day. *In re* Eighth Ward Election, 18 Pa. Co. Ct. 518.

Frequent changes in polling-places are against public policy, and the change will not be made except for good reasons, such as the public welfare or convenience of voters. *In re* Change of Polling Place, 8 Kulp (Pa.) 373.

6. *In re* Change of Polling Place, 9 Kulp (Pa.) 533.

7. U. S. Const. art. 1, § 4, providing that the times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but that congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

8. 5 U. S. St. at L. 491.

A number of states which had hitherto chosen their representatives upon a general ticket either neglected or refused to change their system, and returned representatives elected by the former system. Nevertheless congress, being the sole judge of the election

sentatives at large in case an apportionment increases the number of representatives in any state.[9] If after a congressional election the state is redistricted and a vacancy then occurs, such vacancy should be filled by the suffrage of the electors of the old district and not by that of the electors of the new district in which the retiring officer resides or may have resided.[10]

XII. MANNER OF VOTING.

A. Viva Voce Voting. The subject of *vive voce* voting is not now of much importance, although some traces of it are still to be found in minor elections such as those for school officers.[11] An interesting question has been presented as to the rights of deaf and dumb persons, where the law requires that votes shall be personally and publicly given *viva voce*, and it would seem to be the better opinion that they have the right to vote if they possess the qualifications of voters.[12]

B. Voting by Ballot — 1. The Official Ballot — a. In General. It is a common provision of the statutes that official ballots shall be printed and distributed at public expense and that these shall be used to the exclusion of all others.[13] A statute prescribing the form of the official ballot and directing that none other shall be counted is mandatory.[14] It has been held, however, that where the ballots used at an election were those furnished by the election commissioners, the voters of such ballots cannot be disfranchised because such ballots bore words or characters not provided for by statute.[15] Statutes prescribing the dimensions of official ballots, the quality and color of the paper to be used, and the character of type and the color of ink to be used in printing them are directed to the officers whose duty it is to prepare the supply of ballots; and it has been held that a violation of the law in any of these respects will not disfranchise the voters who make use

of its own members, seated the members so elected. See the report of the Douglas' Case, 1 Bartl. Cas. Cont. El. 47 *et seq.* A similar ruling was also made in the Phelps' Case, 1 Bartl. Cas. Cont. El. 248.

9. 31 U. S. St. at L. 734 [1 U. S. Comp. St. (1901) p. 10].

10. Were it otherwise a portion of the people might have two representatives in congress for the remainder of the unexpired term, while another portion would have none. Hunt *v.* Menard, 2 Bartl. Cont. Cas. El. 477 [*overruling* Perkins' Case, 1 Bartl. Cas. Cont. El. 142].

11. Moss *v.* Riley, 102 Ky. 1, 43 S. W. 421, 19 Ky. L. Rep. 993.

Graded school election.— The Kentucky statute which provides that on the day set apart for the election the officer shall open a poll and shall propound to each voter who may vote the question, "Are you for or against the graded common school tax?" and his vote shall be recorded for or against the same as he may direct requires the election to be held *viva voce.* Sisk *v.* Gardnier, 74 S. W. 686, 25 Ky. L. Rep. 18.

Votes once cast cannot be changed.— In the case of *viva voce* voting for trustee of a school-district, where one casts his vote for one candidate and it is so recorded and he leaves the table where his vote is taken and other votes are then cast and recorded, he cannot thereafter have his vote changed to the other candidate, even though he had intended to vote for him and called the name by mistake or inadvertence. Hopkins *v.* Swift, 100 Ky. 14, 37 S. W. 155, 18 Ky. L. Rep. 526.

12. Thus the constitution of Kentucky formerly provided that votes "shall be publicly and personally given *viva voce.*" In a congressional election it appeared that three deaf and dumb persons otherwise qualified had voted for one of the candidates and the committee of the house of representatives of the United States held that their votes should be received, as clearly within the spirit of the constitution. Letcher *v.* Moore, Cl. & H. Cas. Cont. El. 715.

13. McCrary El. (4th ed.) § 693 *et seq.*

14. *Ex p.* Riggs, 52 S. C. 298, 29 S. E. 645.

15. State *v.* Walsh, 62 Conn. 260, 25 Atl. 1, 17 L. R. A. 364; Fields *v.* Osborne, 60 Conn. 544, 21 Atl. 1070, 12 L. R. A. 551; Lindstrom *v.* Manistee County, 94 Mich. 467, 54 N. W. 280, 19 L. R. A. 171.

Marks apparently made by a printer's quad. — A writ of peremptory mandamus will not issue to compel the board of county canvassers to reject as marks for identification ballots having opposite the name of one of the candidates blurred ink marks, as if made by a printer's quad, where there is no proof that they were so marked for an illegal purpose, since such marks by themselves are just as consistent with mistake as with design. People *v.* Dutchess County, 135 N. Y. 522, 32 N. E. 242.

Official ticket improperly printed in factional column.— Official ballots improperly prepared by reason of the insertion in the column of a faction of a political party nominating only candidates for local offices of the nominees of the regular party for state officers are not marked ballots. People *v.* Wood, 148 N. Y. 142, 42 N. E. 536.

of the ballots supplied to them by the election officers;[16] for where electors vote the official ballots supplied to them by the judges of election, their legally expressed will cannot be overthrown where they are not at fault, by the fact that the public officer who prepared the ballots in some way neglected his duty.[17] On the other hand it has been held that where the statute requires that the ballots shall be printed on plain white paper a ballot written or printed on colored paper is illegal and should be rejected.[18]

b. Constitutionality of Official Ballot Laws. There can be no constitutional objection to a law providing for an official ballot with the names of all candidates regularly nominated printed thereon so long as the electors have the right and opportunity to vote for whom they please, either by writing in the names or by using adhesive pasters.[19] A candidate for public office is entitled to have his name written upon the official ballot by voters who desire to support him as their choice for office, although he has not been nominated by any convention, caucus, or meeting;[20] and it is the constitutional right of electors to vote for any person eligible for office whether he has been nominated or not.[21] But it has been held that an official ballot law denying to electors the right to write in the names of persons for whom they wish to vote is not repugnant to the constitution.[22] It has been held that an objection that the clause of an election law which provides that any ballot having thereon a mark, sign, signature, or device other than is permitted by the act shall be void is unconstitutional, because the voter may lose his vote by the fraud of those preparing the ballot, is not sound.[23]

c. Party Devices or Emblems. The devices or emblems used at the head of party tickets were resorted to in order to enable the illiterate voter to select his party ticket.[24] Where there are several factions of a party in one county the

16. Kirk *v.* Rhoads, 46 Cal. 398; Kellogg *v.* Hickman, 12 Colo. 256, 21 Pac. 325; People *v.* Kilduff, 15 Ill. 492, 60 Am. Dec. 769.

17. State *v.* Fransham, 19 Mont. 273, 48 Pac. 1.

18. State *v.* McKinnon, 8 Oreg. 493.

Paper furnished by secretary of state.— State *v.* Wolf, 17 Oreg. 119, 20 Pac. 316.

Question for the jury.— Under a statute which requires the election tickets to be printed on plain white paper, no especial grade, quality, or thickness of paper being specified, it is a question of fact for the jury whether certain paper used is plain and white. State *v.* Wasson, 99 Ind. 261.

19. *Colorado.*— People *v.* District Ct., 18 Colo. 26, 31 Pac. 339.

Kansas.— Taylor *v.* Bleakley, 55 Kan. 1, 39 Pac. 1045, 49 Am. St. Rep. 233, 28 L. R. A. 683.

Pennsylvania.—De Walk *v.* Bartley, 146 Pa. St. 529, 24 Atl. 185, 28 Am. St. Rep. 814, 15 L. R. A. 771.

Rhode Island.— *In re* Ballot Act, 16 R. I. 766, 19 Atl. 656, 6 L. R. A. 773.

Tennessee.— Cook *v.* State, 90 Tenn. 407, 16 S. W. 471, 13 L. R. A. 183.

Wisconsin.— State *v.* Anderson, 100 Wis. 523, 76 N. W. 482, 42 L. R. A. 239.

See 18 Cent. Dig. tit. "Elections," § 146.

20. Schuler *v.* Hogan, 168 Ill. 369, 48 N. E. 195.

21. Schuler *v.* Hogan, 168 Ill. 369, 48 N. E. 195; Sanner *v.* Patton, 155 Ill. 553, 40 N. E. 290.

Voting for too many candidates.— Where there was but one vacancy to fill and each party put three candidates in nomination and placed their names upon the ticket, and the candidates of the majority party all had an equal number of votes, and one elector used a paster and voted for one candidate only, it was held that the candidate voted for by this single ballot was elected. Montgomery *v.* O'Dell, 67 Hun (N. Y.) 169, 22 N. Y. Suppl. 412 [*affirmed* without opinion in 142 N. Y. 665, 37 N. E. 570].

Where no nominations were made for the office of police justice and a number of electors voted for a certain person by the use of pasters upon the official ballot, it was held that such person was elected. People *v.* Wappingers Falls, 9 Misc. (N. Y.) 246, 30 N. Y. Suppl. 265.

22. Chamberlain *v.* Wood, 15 S. D. 216, 88 N. W. 109, 91 Am. St. Rep. 674, 56 L. R. A. 187.

23. State *v.* Black, 54 N. J. L. 446, 24 Atl. 489, 1021, 16 L. R. A. 769, since the most stringent directions are given respecting the preparation of the official ballot, and the law presumes that they will be obeyed.

24. Fernbacher *v.* Roosevelt, 97 Hun (N. Y.) 441, 35 N. Y. Suppl. 898.

It is the intention of the law that there should be a single column for a single party and a single device at the head of that column so that the voter who desires to vote a straight party ticket may do so, or he may vote a straight independent ticket, or he may vote an eclectic ticket, selecting the candidates of his choice on the different tickets. Fernbacher *v.* Roosevelt, 90 Hun (N. Y.) 441, 35 N. Y. Suppl. 898. A statutory provision that an elector wishing to vote a straight

state convention decides which faction is regular, and because of such decision as to its regularity that one faction becomes entitled to the sole use of the party emblem for its local candidates.[25] A party may select for its emblem or device the portrait of one of its candidates;[26] and may select a new device or emblem for each successive election;[27] but it has the prior right to the use of the device used by it at the last election.[28] The regular nominees of a party have the right to the use of the party name and emblem in preference to a bolting faction of such party who set up an opposing ticket.[29] If a faction of a party chooses to make nominations of persons some of whom are not on the regular ticket it must select a separate emblem of its own as an independent party and list the names of its candidates under its own party heading on the ballot.[30] Where there are only two tickets in the field the fact that one of the parties does not select an emblem as required by statute cannot mislead voters and will not invalidate votes cast for candidates on that list.[31]

d. Designation of Office to Be Filled. Ballots making no designation of the offices intended to be filled are void for uncertainty,[32] and voters cannot supply the omission by putting on the ballot stickers bearing the title of the office and the name of the candidate, where the only provision for addition to the ballot is that for the insertion of names in blank spaces under the titles of offices.[33]

e. Duty of Secretary of State to Certify Nominations. When certificates of nomination have been filed with the secretary of state, it becomes his duty to certify to the county officials authorized to make up and print the tickets the names of all candidates whose nomination papers have been filed with him, and have not been found and declared to be invalid.[34] So also he must send the form of ballot to be used immediately upon the expiration of the time allowed for correcting certificates of nomination.[35]

f. Printing of Ballots — (i) *Duty of Officer to Place Names on Ballots.* The county officer whose duty it is to prepare and print the official ballot acts in a purely ministerial capacity, and he must place upon the ballot all names regularly certified to him as having been put in nomination.[36] But while it is the constitutional privilege of every elector to vote for whom he pleases, it is not the

ticket may do so by making a single mark on the ballot opposite the party emblem, whereas one desiring to vote for any number of candidates of a party less than all is required to place a cross opposite the name of each candidate and to write in the name of any candidate not on the ticket for whom he may wish to vote, is not an unreasonable or unconstitutional discrimination between voters. If an elector does not wish to vote a straight ticket he must do the additional work enjoined on him by statute. Ritchie *v.* Richards, 14 Utah 345, 47 Pac. 670.

25. Fernbacher *v.* Roosevelt, 90 Hun (N. Y.) 441, 35 N. Y. Suppl. 898. See also Matter of Heacock, 18 Misc. (N. Y.) 311, 41 N. Y. Suppl. 161.

Jurisdiction of court to decide.— People *v.* Arapahoe County Dist. Ct., 23 Colo. 150, 46 Pac. 681. See also Whipple *v.* Broad, 25 Colo. 407, 55 Pac. 172.

26. Kratzer *v.* Allen, 10 Colo. App. 492, 50 Pac. 209.

27. Kratzer *v.* Allen, 10 Colo. App. 492, 50 Pac. 209.

28. Kratzer *v.* Allen, 10 Colo. App. 492, 50 Pac. 209.

29. Whipple *v.* Wheeler, 25 Colo. 421, 55 Pac. 188. And see McKnight *v.* Whipple, 25 Colo. 469, 55 Pac. 182.

30. Fernbacher *v.* Roosevelt, 90 Hun (N. Y.) 441, 35 N. Y. Suppl. 898. See also Matter of Mitchell, 81 Hun (N. Y.) 401, 30 N. Y. Suppl. 962.

Where no effective nomination for a particular office has been made by any convention or primary meeting held by the delegates of an organized political party for the purpose of nominating a candidate for an office, a person is not entitled to have his name placed upon the regular party ticket, as the nominee for that office, solely by a petition of voters who nominate him as a candidate of such regularly organized party. State *v.* Rotwitt, 18 Mont. 502, 46 Pac. 370.

31. Jones *v.* State, 153 Ind. 440, 55 N. E. 229.

32. State *v.* Griffey, 5 Nebr. 161; *In re* Forney, 19 Pa. Co. Ct. 250.

Extrinsic evidence.— State *v.* Mahncke, 16 Tex. Civ. App. 560, 41 S. W. 185.

33. *In re* Lawlor, 180 Pa. St. 566, 37 Atl. 92.

34. Com. *v.* Reeder, 6 Pa. Dist. 605.

35. State *v.* Taylor, 55 Ohio St. 385, 45 N. E. 715.

36. Miller *v.* Davenport, (Ida. 1902) 70 Pac. 610; Bates *v.* Crumbaugh, 71 S. W. 75, 24 Ky. L. Rep. 1205; Wells *v.* Munroe, 86 Md. 443, 38 Atl. 987.

duty or privilege of the election officers to place upon the official ballot the names of persons who have not been regularly nominated in some manner provided by law.[37]

(II) *Mandamus*[38] *to Compel Printing of Names.* Candidates who have been regularly nominated have a right to have their names printed on the official ballots in the proper column under the appropriate party designation;[39] and if the officers charged with the duty of preparing the official ballots wrongfully refuse to print the name of any nominee thereon mandamus will lie to compel them to do so.[40] Courts will not limit the number of nominations to be placed upon an official ballot simply because of the expense to be incurred in the printing;[41] and if there is a vacancy in office to be filled at a certain election, and a person has been duly nominated therefor, the officer may be compelled by mandamus to put his name upon the official ballot;[42] but the writ will not be issued if there be in fact no vacancy in the office to be filled.[43]

(III) *Persons Nominated by Petition.* Although a party nomination by petition is allowable only in case of a failure to nominate by convention or a primary, yet the name of the person nominated by a petition, not stating that there was no other nomination, should be put on the ballot of that party by the clerk, he knowing that there was no other nomination by the party for the office, and that none claimed it.[44]

(IV) *Right to Have Name Printed on Ballot More Than Once.* A political party may nominate for office a person who has been nominated by another party for the same office.[45] And where the law provides that the names of candidates of each political party shall be grouped in columns on the official ballot, under the party name, or name and emblem, if the latter be required, a candidate nominated by more than one party is entitled to have his name printed in the column set apart for each party that nominated him.[46] But where the

37. Chateau *v.* Jacob, 88 Mich. 170, 50 N. W. 102; Price *v.* Lush, 10 Mont. 61, 24 Pac. 749, 9 L. R. A. 467.

A ticket nominated by a mere meeting or assembly of persons, acting as volunteers, without authority from any primary election, cannot be placed on the official ballot. *In re* Citizens' Party Nomination, 7 Pa. Dist. 656, 21 Pa. Co. Ct. 417.

38. **Mandamus** generally see Mandamus.

39. State *v.* Martin, 24 Mont. 403, 62 Pac. 588.

40. People *v.* District Ct., 18 Colo. 26, 31 Pac. 339; Williams *v.* Lewis, 6 Ida. 184, 54 Pac. 619; People *v.* Hartley, 170 Ill. 370, 48 N. E. 950; *In re* Clay, 12 Pa. Co. Ct. 419.

Irregularity of proceedings no defense.— State *v.* Falley, 8 N. D. 90, 76 N. W. 996.

Mandamus will lie to enforce the right of a duly registered candidate for the office of precinct committee-man when the chairman of the city executive committee refuses to print such candidate's name upon the ticket in accordance with the party rules. Com. *v.* Stucker, 18 Pa. Co. Ct. 587. Mandamus will lie to compel election officers to place upon the ballot the names of all candidates regularly nominated for office. Wells *v.* Munroe, 86 Md. 443, 38 Atl. 987.

41. State *v.* Piper, 50 Nebr. 25, 69 N. W. 378; Matter of McClosky, 21 Misc. (N. Y.) 365, 47 N. Y. Suppl. 294.

42. Wells *v.* Munroe, 86 Md. 443, 38 Atl. 987.

43. Wells *v.* Munroe, 86 Md. 443, 38 Atl. 987.

44. Wilkins *v.* Duffy, 70 S. W. 668, 24 Ky. L. Rep. 968.

45. Gillespie *v.* McDonough, 39 Misc. (N. Y.) 147, 79 N. Y. Suppl. 182; Gregg *v.* Rogers, 1 Ohio S. & C. Pl. Dec. 163, 1 Ohio N. P. 177; *In re* Magee, 5 Pa. Dist. 654, 18 Pa. Co. Ct. 225; *In re* Gunster, 21 Pa. Co. Ct. 350.

46. **For each political party has a perfect** right to select its candidates as it pleases, and to have their names printed under its own party heading. Simpson *v.* Osborn, 52 Kan. 328, 34 Pac. 747; Fisher *v.* Dudley, 74 Md. 242, 22 Atl. 2, 12 L. R. A. 586.

One of the nominations irregular.— Where a person has been nominated by two parties for the same office and his name has been put on the tickets of both parties, all votes cast for him should be counted, although one of the nominations was irregular. Gregg *v.* Rogers, 1 Ohio S. & C. Pl. Dec. 163, 1 Ohio N. P. 117.

Constitutionality of statutes prohibiting printing more than once.— It has been held that a statute providing that the name of a candidate shall be printed only once upon the ballot, and if any candidate is nominated by more than one certificate of nomination, he must, by a writing, signed and verified by him, and filed with the officer where the certificate of nomination is filed, choose which of such party designations he desires to have his name printed under, is unconstitutional and void, as it is an unwarrantable and drastic interference with political parties in making nominations. Murphy *v.* Curry, 137

names of the candidates of all parties are printed in a single column, and grouped under the names of the offices for which they are severally running, a candidate is not entitled to have his name printed on the ballot more than once, no matter how many parties may have nominated him.[47]

(v) *Must Designate Names of Candidates For Long and Short Terms.* Where several officers are to be elected for the same office, but for terms of different duration, the ballots must show the term for which each candidate is nominated, otherwise they will be void for uncertainty.[48]

(vi) *Submission of Propositions.* Propositions are usually submitted to voters on separate ballots on which the words "yes" and "no," or words of similar import are printed together, with voting space opposite such words.[49] But while a separate ballot must be prepared for the submission of propositions to

Cal. 479, 70 Pac. 461. Under a similar statute in Pennsylvania the court awarded a peremptory writ of mandamus to the secretary of state, commanding him to print the name of a candidate on the ballot as often as he had been nominated by a regularly organized party. Com. v. Martin, 6 Pa. Dist. 645, 20 Pa. Co. Ct. 117. See also Com. v. Richmond, 5 Pa. Dist. 647. Nevertheless statutes of this description have been upheld on doubtful ground in other jurisdictions. Todd v. Board of Election Com'rs, 104 Mich. 474, 62 N. W. 564, 64 N. W. 496, 29 L. R. A. 330; State v. Bode, 55 Ohio St. 224, 45 N. E. 195, 60 Am. St. Rep. 696, 34 L. R. A. 498; State v. Anderson, 100 Wis. 323, 76 N. W. 482, 42 L. R. A. 239.

47. State v. Allen, 43 Nebr. 651, 62 N. W. 35; Miller v. Pennoyer, 23 Oreg. 364, 31 Pac. 830; State v. Burdick, 6 Wyo. 448, 46 Pac. 854, 34 L. R. A. 845.

In that case, however, it is proper to print on the ballot in connection with the name the party designation of each party that nominated him, in order to show that he is the nominee of such parties. State v. Burdick, 6 Wyo. 448, 46 Pac. 854, 34 L. R. A. 845.

48. Page v. Kuykendall, 161 Ill. 319, 43 N. E. 1114, 32 L. R. A. 656; State v. Chambers, 20 Ohio St. 336; *In re* Gilleland, 96 Pa. St. 224; Milligan's Appeal, 96 Pa. St. 222; North Union Tp. School Directors' Case, 23 Pa. Co. Ct. 593; Matter of Wier, 13 Phila. (Pa.) 579; Miller v. Milligan, 12 Phila. (Pa.) 605; *In re* Reilly Tp., 1 Leg. Rec. (Pa.) 261; *In re* Elizabethville, 2 Dauph. Co. Rep. (Pa.) 380.

Highest number of votes for longest term.— A statute which provides that at an election for school directors a person having the highest number of votes shall serve the longest term and so on, when the voters shall all neglect to designate on their tickets the term of office for which each person voted for is a candidate, does not apply where a part of the voters do designate the term. Chamberlin v. Hartley, 152 Pa. St. 544, 25 Atl. 572.

49. Janeway v. Duluth, 65 Minn. 292, 68 N. W. 24; Matter of Arnold, 32 Misc. (N. Y.) 439, 66 N. Y. Suppl. 557; State v. Elwood, 12 Wis. 551.

For village organization.— A ballot cast at an election on the question of founding a corporation, under a statute authorizing the submission of the question, marked in pencil in lieu of the official stamp, or having no mark except the words "against corporation" at the bottom, is invalid. People v. Sausalito, 106 Cal. 500, 39 Pac. 937. Under a statute which declares that in proceedings to organize a village each voter may cast a ballot with the words thereon "for village organization under the general law" or "against village organization under the general law" it is proper to refuse to count a ballot reading "against incorporation." People v. Hanson, 150 Ill. 122, 36 N. E. 998, 37 N. E. 580.

Expression of voter's political views.— Where the question of voting a tax in aid of a railway company was submitted to the voters of a township, and the trustees prescribed that the ballots should have written upon them the words "for taxation" or "against taxation," and certain electors cast their ballots bearing the words "against taxation for the benefit of railroad companies or any other monopolies to the indebtedness of the poor man," it was held that such ballots should be counted the same as if they were in the form prescribed by the trustees. Cattell v. Lowry, 45 Iowa 478.

Omission of a word.— An order authorizing a vote of electors for or against an issue of school bonds provided that on the ballots should be printed "for the bonds," "against the bonds." The word "the" was omitted from the ballots and it was held that the error was not of a nature to vitiate the election. State v. Metzger, 26 Kan. 395.

Defeated candidate not helped by erroneous submission of proposition.— Atkeson v. Lay, 115 Mo. 538, 22 S. W. 481.

The addition of a few words to the statutory form of the submission of a proposition of voters, where the meaning is not changed, is immaterial. Hopkins v. Duluth, 81 Minn. 189, 83 N. W. 536.

Reference to statute but not to amendments.— The fact that ballots used at an election for the purpose of authorizing a township committee to purchase a building for township use refer to the statute under which such election is held as the act of March 1, 1886, without reference to later amendments, does not render such election invalid, since the title to a public statute may properly be used to denote the law embodied in the statute as modified by its amendments and supplements. Drew v. West Orange Tp., 64 N. J. L. 481, 45 Atl. 787.

voters, yet two or more propositions may be submitted on the same ballot.[50] In voting for constitutional amendments, and propositions of all sorts which are submitted to popular vote, it is not customary to print *in extenso* upon the ballot the thing to be voted for.[51]

g. Order of Tickets on Ballot. The position of the tickets on the ballot is matter of statutory regulation.[52]

h. Numbering Ballots. A statute providing that all ballots cast shall be numbered with numbers corresponding to the poll numbers of the electors is mandatory, and ballots not so numbered cannot be counted.[53] Such a statute, however, is unconstitutional where the constitution requires that all elections shall be by secret ballot, because this mode of numbering furnishes a sure means of identifying the ballots.[54] Where one of the judges made mistakes in numbering the ballots, but it appears that such irregularity was not fraudulent or did not affect the result, the ballots should not therefore be discredited.[55] Where the statute provides that the ballots shall be numbered consecutively, the numbers should run from the unit upward.[56]

i. Indorsing Officers' Initials on Ballots. It has been held that a statute requiring an election officer delivering a ballot to an elector to indorse his initials on the ballot is directory merely, and that unindorsed ballots should be counted.[57]

50. Matter of Arnold, 13 Misc. (N. Y.) 439, 66 N. Y. Suppl. 557.

51. It is sufficient if it be printed in the warrant of election, and the words "yes" and "no" be printed on the ballot to enable the voter to express his preference. Hubbard *v.* Woodsum, 87 Me. 88, 32 Atl. 802; Williams *v.* Shoudy, 12 Wash. 362, 41 Pac. 169.

52. Thus it is generally provided that the party which polled the greatest number of votes at the last preceding election shall have the first place on the ballot; that the party polling the next highest number of votes shall have the second place on the ballot, and so on; candidates nominated by petition of electors being placed last in order. Edgar *v.* Board of Election Com'rs, 118 Mich. 418, 76 N. W. 972; Higgins *v.* Berg, 74 Minn. 11, 76 N. W. 788, 42 L. R. A. 245. Again it is provided in some jurisdictions that the names of candidates shall be printed under the designation of the office in alphabetical order according to surnames together with the name of the party or principle which each candidate represents. Woods *v.* State, 44 Nebr. 430, 63 N. W. 23; Sawin *v.* Pease, 6 Wyo. 91, 42 Pac. 750.

The regularly called democratic convention having joined with the conventions of the people's party and the union silver party and nominated a joint ticket, a mass meeting composed wholly of democrats was held, at which presidential electors and candidates for state offices were placed in nomination as a democratic ticket. The mass meeting was not called or held under the auspices of any previous state organization. It was held that the ticket so nominated was not entitled to the place on the ballot belonging to the regular democratic ticket, under the provisions of the Election Law. Baker *v.* Board of Election Com'rs, 110 Mich. 635, 68 N. W. 752.

53. Ledbetter *v.* Hall, 62 Mo. 422; West *v.* Ross, 53 Mo. 350; *In re* Hughes, 3 Lack. Jur. (Pa.) 313; State *v.* Connor, 86 Tex. 133, 23 S. W. 1103.

Where it affirmatively appears that there were unnumbered ballots in excess of the names found on the poll lists, and that the judges failed to reject such ballots as required by statute, they may be rejected by the court on the hearing of a contest over the election. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

54. Ritchie *v.* Richards, 14 Utah 345, 47 Pac. 670.

55. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

A ballot, the number of which is illegible, should be counted, where it appears that there was an elector who voted and whose vote cannot be accounted for unless such ballot be his. Blankenship *v.* Israel, 132 Ill. 514, 24 N. E. 615.

Ballots improperly numbered.— People *v.* Bidelman, 69 Hun (N. Y.) 596, 23 N. Y. Suppl. 954.

Failure to remove stub.—Lynip *v.* Buckner, 22 Nev. 426, 41 Pac. 762, 30 L. R. A. 354.

The fact that two ballots each bear the same number is not of itself a sufficient ground for excluding them. Blankinship *v.* Israel, 132 Ill. 514, 24 N. E. 615; Gray *v.* State, 19 Tex. Civ. App. 521, 49 S. W. 699.

56. People *v.* Bidelman, 69 Hun (N. Y.) 596, 23 N. Y. Suppl. 954.

57. Inasmuch as unsuspecting voters should not be disfranchised by official neglect. King *v.* State, 30 Tex. Civ. App. 320, 70 S. W. 1019.

The absence of the election officer's initials does not vitiate the ballot, the statute not expressly creating such a cause of invalidating. Grant *v.* McCallum, 12 Can. L. J. N. S. 113; White *v.* Mackenzie, 20 L. C. Jur. 22; *Ex p.* Tremblay, 13 Quebec 64; Dionne *v.* Gagnon, 9 Quebec 20.

Not applicable to election of city officers.— Donnell *v.* Lee, 101 Mo. App. 191, 73 S. W. 997.

On the other hand it has been held that such statutes are mandatory, and the presumption is that all ballots not bearing the official indorsement were not officially given out and therefore should not be counted.[58] And where this rule obtains it is immaterial whether the failure to indorse the ballots before delivery to the voters resulted through ignorance or fraud on the part of the election officers.[59] Ballots cast in one voting precinct, having an official indorsement indicating that they were prepared for another precinct, are properly rejected.[60] In the absence of fraud ballots should not be rejected on account of slight irregularities in the manner of indorsing the ballots by election officers.[61] Thus the provisions of the statutes prescribing the position of the indorsement on the ballots are held to be directory, and ballots honestly indorsed in a different place should not on that account be rejected.[62] It would seem that laws requiring the official indorsement of ballots are not an unreasonable and unconstitutional restriction of the right of suffrage.[63] But it has been held that a statute provid-

58. *Connecticut.*— Mallett *v.* Plumb, 60 Conn. 352, 22 Atl. 772.

Illinois.— Perkins *v.* Bertrand, 192 Ill. 58, 61 N. E. 405, 85 Am. St. Rep. 315; Caldwell *v.* McElvain, 184 Ill. 552, 56 N. E. 1012; Kelly *v.* Adams, 183 Ill. 193, 55 N. E. 837.

Iowa.— Kelso *v.* Wright, 110 Iowa 560, 81 N. W. 805.

Maryland.—Coulehan *v.* White, 95 Md. 703, 53 Atl. 786.

Missouri.— McKay *v.* Minner, 154 Mo. 608, 55 S. W. 866.

Nebraska.— Mauck *v.* Brown, 59 Nebr. 382, 81 N. W. 313; Orr *v.* Bailey, 59 Nebr. 128, 80 N. W. 495; State *v.* Russell, 34 Nebr. 116, 51 N. W. 465, 33 Am. St. Rep. 625, 15 L. R. A. 740.

North Dakota.— Lorin *v.* Seitz, 8 N. D. 404, 79 N. W. 869; Miller *v.* Schallern, 8 N. D. 395, 79 N. W. 865.

Texas.— Hanscom *v.* State, 10 Tex. Civ. App. 638, 31 S. W. 547.

Wyoming.— Slaymaker *v.* Phillips, 5 Wyo. 453, 40 Pac. 971, 42 Pac. 1049, 47 L. R. A. 842.

Notwithstanding the mandatory feature of the statute, it has been held proper to count an unindorsed ballot, where it showed both by its face and by its numbers that it was a genuine official ballot. Hehl *v.* Guion, 155 Mo. 76, 55 S. W. 1024.

Indorsement of clerk.— Frazer *v.* Fitzsimmons, 124 Mich. 511, 83 N. W. 282.

Indorsement with wrong instrument.— Frazer *v.* Fitzsimmons, 124 Mich. 511, 83 N. W. 282.

59. Kirkpatrick *v.* Deegans, 53 W. Va. 275, 44 S. E. 465.

60. Lippincott *v.* Felton, 61 N. J. L. 291, 39 Atl. 646.

61. State *v.* Gay, 59 Minn. 6, 60 N. W. 676, 50 Am. St. Rep. 389.

Part of ballots indorsed by each clerk.— The vote of an election precinct will not be rejected because the poll clerks, instead of each writing his name on the ballots, by agreement divided the ballots between them, and each signed his own name and that of the other clerk to his share of the ballots in the presence of each other and of the other election officers, as such duty is a ministerial one, which may be delegated by signing, and is a substantial compliance with the statute of West Virginia, requiring each polling clerk to write his name on the back of each ballot under the printed words "poll clerk." Snodgrass *v.* Wetzel County Ct., 44 W. Va. 56, 29 N. W. 1035. But in Arkansas it has been held that all ballots on which the initials of a judge are not written by his own hand should be thrown out and not counted. Rhodes *v.* Driver, 69 Ark. 501, 64 S. W. 272. And in West Virginia it is held that the name of each poll clerk must be placed on the ballot by the clerk in his own handwriting, and where the names of both poll clerks are written by one of them or by some other person the ballots are void. Kirkpatrick *v.* Deegans, 53 W. Va. 275, 44 S. E. 465.

The fact that judges of election mark their names in full on the ballots instead of their initials as required by statute does not invalidate the ballots. Perkins *v.* Bertrand, 192 Ill. 58, 61 N. E. 405, 85 Am. St. Rep. 315.

62. Horning *v.* Burgess, 119 Mich. 51, 77 N. W. 446.

Position of indorsement.— Where the statute provided that the ballot should be indorsed by the poll clerk with his initials at the lower left-hand corner, and he through honest mistake indorsed his initials at the lower right-hand corner, it was held that the statute prescribing the position of the indorsement was directory merely, and that the ballots should be counted. Parvin *v.* Wimberg, 130 Ind. 561, 30 N. E. 790, 30 Am. St. Rep. 254, 15 L. R. A. 775. That the clerks of an election wrote their names on the outside upper right-hand corner of each ballot before it was delivered to the voter, instead of on the outer lower left-hand corner, as the statute prescribes, will not nullify an election which was otherwise properly conducted. Jones *v.* State, 153 Ind. 440, 55 N. E. 229.

Officer's initials on detachable coupons.— Coulehan *v.* White, 95 Md. 703, 53 Atl. 786.

63. Orr *v.* Bailey, 59 Nebr. 128, 80 N. W. 495; Lorin *v.* Seitz, 8 N. D. 404, 79 N. W. 869; Miller *v.* Schallern, 8 N. D. 395, 79 N. W. 865. See also Kirkpatrick *v.* Deegan, 53 W. Va. 275, 44 S. E. 465.

ing that in the canvass of votes any ballot which is not indorsed by the initials of some one of the election officers shall not be counted is unconstitutional and void.[64]

j. Official Certificates. Under a statute forbidding the deposit in the ballot-box of official ballots unless they are certified by the city clerk ballots from which such certificate has been accidentally omitted by the printer are still entitled to be counted after being deposited in the ballot-box.[65]

k. Irregularities and Mistakes — (i) *In General.* Mere irregularities or slight errors on the part of an officer charged with the preparation of official ballots will not destroy the efficacy of the ballots nor invalidate the election.[66] But where the officer whose duty it is to prepare the official ballot is a candidate for reëlection, there may be irregularities in the preparation of the ballot which will render his election void, but not that of other successful candidates on the same ticket, as they were not responsible for his errors.[67] Where the name of a candidate is misspelled on the official ballot it may be corrected with ink.[68] But if the name of a candidate regularly nominated has been omitted from the official ballot the omission cannot be supplied by the use of a rubber stamp.[69]

(ii) *Objections.* The statutes generally provide that candidates shall have an opportunity to inspect the printed ballots and to make application to the court for the correction of any errors therein, but if having had this opportunity a candidate makes no objection to the contents of the ballot until after the election his objections come too late.[70]

(iii) *Remedies.* Where the officer having charge of the preparation of the ballot is about to print an unauthorized ticket on the official ballot, such action

64. Since its effect would be to debar voters of their constitutional right to vote without fault on their part. Moyer *v.* Vande Vanter, 12 Wash. 377, 41 Pac. 60, 50 Am. St. Rep. 900, 29 L. R. A. 670.

65. O'Connell *v.* Mathews, 177 Mass. 518, 59 N. E. 195.

66. The fact that the officer charged with the preparation of the official ballot improperly put a name on the ballot does not destroy the efficacy of the ballots cast for any other candidate who was legally and properly nominated and certified. Schuler *v.* Hogan, 168 Ill. 369, 48 N. E. 195.

A municipal election otherwise fairly held is not invalidated by the fact that the mayor and council without authority changed the heading of the ballots, and that the election officers accepted those and refused to use the ballots prepared by the recorder who was rightfully authorized to prepare them. State *v.* Bernholtz, 106 Iowa 157, 76 N. W. 662.

67. Creech *v.* Davis, 51 S. W. 428, 21 Ky. L. Rep. 325.

68. State *v.* Walsh, 62 Conn. 260, 25 Atl. 1, 17 L. R. A. 364.

The misplacing or misspelling of the name of a candidate on the ballot is not a ground for declaring the election invalid, in the absence of anything to show that the mistakes affected the result of the election; the statute expressly requiring that fact to appear. *In re* Justice of the Peace, 13 Montg. Co. Rep. (Pa.) 69.

Wrong initials of a candidate.— Ballots prepared and furnished to the judges according to law and correct in every particular except the initial of a candidate thereon do not, in the absence of resulting fraud or injustice, cease to be official ballots because the judges, without authority, correct such initial. Cook *v.* Fisher, 100 Iowa 27, 69 N. W. 264.

69. Rollins *v.* McKinney, 157 Mo. 656, 57 S. W. 1027.

70. *Colorado.*— Allen *v.* Glynn, 17 Colo. 338, 29 Pac. 670, 31 Am. St. Rep. 304, 15 L. R. A. 743.

Idaho.— Baker *v.* Scott, 4 Ida. 596, 43 Pac. 76.

Missouri.— Bowers *v.* Smith, 111 Mo. 45, 20 S. W. 101, 33 Am. St. Rep. 491, 16 L. R. A. 754.

New York.— Matter of Hirsh, 14 Misc. 377, 36 N. Y. Suppl. 19.

Wyoming.— Sawin *v.* Pease, 6 Wyo. 91, 42 Pac. 750.

See 18 Cent. Dig. tit. "Elections," § 150.

An elector who, after notice by publication of the nominations to office as required by statute, neglects to avail himself of the remedy provided in the statute to correct an error of the clerk in the preparation of the official ballot cannot complain of it after election. State *v.* Fransham, 19 Mont. 273, 48 Pac. 1.

No ground for contest.— Where by statute errors or omissions by the clerk in publishing the names or descriptions of candidates nominated for office or in printing the ballots may be corrected on application to the proper judge. A candidate who makes no timely objection to the ballots as printed and used cannot after the election contest the result on the ground that names were printed on the ballots which were not entitled to be there. Bowers *v.* Smith, (Mo. 1891) 17 S. W. 761.

Objection too late in absence of fraud.— Where by statute a candidate may make objections to the ballots as printed by the

would affect both the public and the candidates, and hence it is proper for a candidate to sue in the name of the state to restrain the officer from exceeding his authority, since there will thus be someone answerable both for the propriety of the suit and for its costs.[71] And it seems that a duly qualified elector may proceed to have the official ballot corrected before election.[72]

2. INDICATION OF VOTER'S CHOICE — a. In General. There are two general forms of the secret or so-called Australian ballot system. In the first form the tickets of the several parties are printed in parallel columns beneath the party names and devices, together with a blank column in which electors are at liberty to write the names of persons not already on the ballot. A circle is usually found beneath the device and there are voting spaces either to the right or left of the names of all candidates. With this form of ballot the elector may vote a straight party ticket by simply placing a cross mark in the circle beneath the party emblem. If he wishes to split his ticket he may do so in either of two ways: (1) By placing a cross mark in the circle under the emblem of his party and making cross marks opposite the names of such candidates as he wishes to support on other tickets; or (2) he may omit the cross mark in the circle, and simply make a cross mark in the voting space opposite the names of all candidates for whom he wishes to vote. In the second form the names of candidates are printed in a single column, grouped under the titles of the offices for which they are running, with a blank space in each group for the reception of names not on the ballot. In this form of ballot the party designation of candidates is printed on the ballot, and there are voting spaces opposite the names of all candidates, in which the elector must make cross marks opposite the names of all candidates for whom he wishes to vote. Almost every conceivable mark which a voter could make or omit to make has been the subject of discussion in the various cases which have been before the courts; and although statutes regulating the manner in which voters shall indicate their choice are held to be mandatory, yet through it all runs the general principle of construction that a voter should not be disfranchised if it is clear that he has made an honest effort to comply with the requisites of the statute, although he has been more or less unsuccessful.[73] In order to be counted

county clerk, who neglects to do so, until after the election, he cannot object to the result because of any error in the political designation without a showing of fraud and that the error presented a full expression of the will of the voters. State *v.* Norris, 37 Nebr. 299, 55 N. W. 1086.

Waiver of objections.—Fishback *v.* Bramel, 6 Wyo. 293, 44 Pac. 840.

71. State *v.* Moran, 24 Mont. 433, 63 Pac. 390.

Inherent power of court.— The power of the court to order a correction of the ballot to be used at an election on application of a candidate is independent of the statute. State *v.* Elliott, 17 Wash. 18, 48 Pac. 734.

72. State *v.* Ramsey County Dist. Ct., 74 Minn. 177, 77 N. W. 28.

73. *Alabama.*— Black *v.* Pate, 130 Ala. 514, 30 So. 434.

California.— People *v.* Campbell, 138 Cal. 11, 70 Pac. 918; Murphy *v.* San Luis Obispo, 119 Cal. 624, 51 Pac. 1085, 39 L. R. A. 444; Lay *v.* Parsons, 104 Cal. 661, 38 Pac. 447; Eaton *v.* Brown, 96 Cal. 371, 31 Pac. 250, 31 Am. St. Rep. 225, 17 L. R. A. 697.

Colorado.—Young *v.* Simpson, 21 Colo. 460, 42 Pac. 666, 52 Am. St. Rep. 254.

Illinois.— Parker *v.* Orr, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227.

Indiana.— Bechtel *v.* Albin, 134 Ind. 193, 33 N. E. 967.

Iowa.— Spurrier *v.* McLennan, 115 Iowa 461, 88 N. W. 1062.

Kentucky.— Houston *v.* Steele, 98 Ky. 596, 34 S. W. 6, 17 Ky. L. Rep. 1149; Edwards *v.* Logan, 70 S. W. 852, 24 Ky. L. Rep. 1099; Little *v.* Hall, 70 S. W. 642, 24 Ky. L. Rep. 1060.

Massachusetts.— Flanders *v.* Roberts, 182 Mass. 524, 65 N. E. 902.

Michigan.— People *v.* Kamps, 129 Mich. 217, 88 N. W. 475; People *v.* Fox, 114 Mich. 652, 72 N. W. 611.

Minnesota.— Truelsen *v.* Hugo, 81 Minn. 73, 83 N. W. 500.

Missouri.— Hope *v.* Flentge, 140 Mo. 390, 41 S. W. 1002, 47 L. R. A. 806.

Nebraska.— State *v.* Frye, 62 Nebr. 817, 88 N. W. 149.

New York.— People *v.* Mehrer, 20 N. Y. App. Div. 48, 46 N. Y. Suppl. 898; People *v.* Moody, 45 N. Y. Suppl. 606.

Pennsylvania.— *In re* Newberry Tp., 187 Pa. St. 297, 40 Atl. 822; *In re* Flynn, 181 Pa. St. 457, 37 Atl. 523; *In re* Fairchance, 22 Pa. Co. Ct. 451; *In re* Blythe Tp., 19 Pa. Co. Ct. 499. And see *In re* Justice of Peace, 173 Pa. St. 59, 33 Atl. 703.

South Dakota.— McMahon *v.* Polk, 10 S. D.

a ballot must be marked, although it contain but one ticket and a blank column for the reception of names.[74] When the intention of the elector to make a cross is clearly apparent, and the cross is made, whether with a stamp or otherwise, any informality merely in making it should be disregarded.[75] An election ballot must be so marked as to make it reasonably certain for whom the elector intended to vote, although the statute declares only those ballots void from which it is impossible to determine the elector's choice; but requires a part to be counted when the ballot is sufficiently plain to gather therefrom a part of the elector's intention.[76]

b. Position of Cross Mark. In order to permit the counting of a ballot, the voter's intention must be manifested by a cross substantially in the place designated, showing an honest intent to follow the directions of the law.[77] When the elector makes the cross mark in the circle at the head of the party ticket, and erases no name thereon, the vote must be counted for the entire party ticket.[78] A ballot marked with a cross in the square to the right of the first candidate's name on one party ticket, and marked nowhere else, should be counted for that candidate alone, although probably intended for the entire ticket on which his name appears.[79] It has been held that a ballot upon which a cross mark has been placed on the wrong side of a candidate's name cannot be counted as a vote for that candidate;[80] but where a statute merely directs that cross marks shall be

296, 73 N. W. 77, 47 L. R. A. 830; Vallier *v.* Brakke, 7 S. D. 343, 64 N. W. 180.

West Virginia.— Daniel *v.* Simms, 49 W. Va. 554, 39 S. E. 690; Morris *v.* Charleston, 49 W. Va. 251, 38 S. E. 500; Dunlevy *v* Marshall County, 47 W. Va. 513, 35 S. E. 956.

See 18 Cent. Dig. tit. "Elections," § 151 *et seq.*

Direction as to writing in names.—The provision of a statute that one voting for another than the candidate whose name is on the ballot shall erase the printed name and write that of the person voted for in the blank space left for that purpose is not complied with by pasting over the printed name a slip containing the name of the person voted for. Waterman *v.* Cunningham, 89 Me. 295, 36 Atl. 395.

Incomplete cross.— Coulehan *v.* White, 95 Md. 703, 53 Atl. 786.

Curls.— The fact that the cross mark opposite the candidate's name on the official ballot terminates in curls will not invalidate the ballot; the likelihood of the marks constituting identification marks not being apparent. Coulehan *v.* White, 95 Md. 703, 53 Atl. 786.

Lines extending beyond the square.— Coulehan *v.* White, 95 Md. 703, 53 Atl. 786.

Extension beyond circle.— The fact that in retracing a perfect cross the voter allows his pencil to waver somewhat and extends the mark beyond the circle does not render the ballot invalid, in the absence of erasures or other marks. McMahon v. Polk, 10 S. D. 296, 73 N. W. 77, 47 L. R. A. 830.

Title of office not to be inserted.— The only prescribed mode of voting for persons whose names are not already on the ballot is by inserting their names in the blank space prepared therefor in the right-hand column of the official ballot. It is the name only that is to be thus inserted, not the title of the office to be filled; the latter is already printed there and constitutes a part of the ballot prepared for the use of the voter. *In re* Lawler, 180 Pa. St. 566, 37 Atl. 92; *In re* Little Beaver Tp. School Directors, 165 Pa. St. 233, 30 Atl. 955, 27 L. R. A. 234.

74. People *v.* Fessenden, 31 N. Y. App. Div. 371, 52 N. Y. Suppl. 324.

75. Vallier *v.* Brakke, 7 S. D. 343, 64 N. W. 180.

Where the statute simply requires the voters to make a cross, for example, an X, without providing that any other kind of cross mark can be used, ballots marked with a Latin cross or a Greek cross are to be counted as well as those marked with an X. Coulehan *v.* White, 95 Md. 703, 53 Atl. 786. So a ballot should be counted where the cross mark placed in the circle at the head of a party ticket is not perfect and is something more than a cross mark. People *v.* Morgan, 20 N. Y. App. Div. 48, 46 N. Y. Suppl. 898; Loucks' Case, 3 Pa. Dist. 127.

76. State *v.* Peter, 21 Wash. 243, 57 Pac. 814.

77. Parker *v.* Orr, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227.

No conjectures indulged in.— O'Connell *v.* Mathews, 177 Mass. 518, 59 N. E. 195.

Where it is clear that the voter made an honest attempt to conform to the statute by making the cross in the proper place, although with more or less imperfect success, the ballot should be counted. Parker *v.* Orr, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227; Bechtel *v.* Aldin, 134 Ind. 193, 33 N. E. 967; Houston *v.* Steele, 98 Ky. 596, 34 S. W. 6, 17 Ky. L. Rep. 1149.

78. McKittrick *v.* Pardee, 8 S. D. 39, 65 N. W. 23.

79. Houston *v.* Steele, 98 Ky. 596, 34 S. W. 6, 17 Ky. L. Rep. 1149.

80. *Illinois.*— Apple *v.* Barcroft, 158 Ill. 649, 41 N. E. 1116.

Maine.— Curran *v.* Clayton, 86 Me. 42, 29 Atl. 930.

Nevada.— State *v.* Sadler, 25 Nev. 131, 58

made opposite the names of candidates for whom the elector desires to vote, it is immaterial on which side the cross marks are made.[81] Ballots marked with a cross to the right side of a name, not in the voting space left for that purpose, but in a vacant space immediately after the name, will be counted.[82] So if the cross opposite the name of a candidate is partly within and partly without the square, the vote should be counted, inasmuch as the elector's intention has been sufficiently indicated.[83] It has been held, however, that a cross placed anywhere on the ballot except within the circle at the head of one of the columns, or within a voting space opposite a candidate's name, is of no avail.[84] Thus a ballot marked with a cross at the head of a party ticket, but not within the circle as required by the statute, cannot be counted for any candidate on the ticket so marked.[85]

c. Examples of Defective Marking. There are numerous examples of markings of ballots which have been condemned by the courts.[86] Ballots defectively

Pac. 284, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 573.

South Dakota.— McKittrick *v.* Pardee, 8 S. D. 39, 65 N. W. 23; Parmley *v.* Healy, 7 S. D. 401, 64 N. W. 186; Vallier *v.* Brakke, 7 S. D. 343, 64 N. W. 180.

Canada.— White *v.* Mackenzie, 20 L. C. Jur. 52.

See 18 Cent. Dig. tit. "Elections," § 151 *et seq.*

Under the liberal rule of construction for arriving at the voter's intention, it has been held that a ballot marked with a cross mark at the wrong side of the candidate's name should be counted, provided the mark is within the party column. Mauck *v.* Brown, 59 Nebr. 382, 81 N. W. 313; *In re* Twentieth Ward, 3 Pa. Dist. 120; *In re* Sharon Hill, 5 Del. Co. (Pa.) 381; State *v.* Fawcett, 17 Wash. 188, 49 Pac. 346.

81. Young *v.* Simpson, 21 Colo. 460, 42 Pac. 666, 52 Am. St. Rep. 254.

82. *California.*— Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 49 Am. St. Rep. 68, 29 L. R. A. 673.

Nebraska.— Spurgin *v.* Thompson, 37 Nebr. 39, 55 N. W. 297.

Nevada.— State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 573.

New York.— People *v.* Morgan, 20 N. Y. App. Div. 48, 46 N. Y. Suppl. 898.

Pennsylvania.— Loucks' Case, 3 Pa. Dist. 127.

Rhode Island.— *In re* Vote Marks, 17 R. I. 812, 21 Atl. 962.

South Dakota.— Vallier *v.* Brakke, 7 S. D. 343, 64 N. W. 180.

Washington.— State *v.* Peter, 21 Wash. 243, 57 Pac. 814.

Canada.— Cameron *v.* Maclennan, 11 Can. L. J. N. S. 163.

See 18 Cent. Dig. tit. "Elections," § 151 *et seq.*

Mark anywhere in space occupied by name. — Where an election law requires the elector to indicate his choice by a mark, the ballot should be counted if the mark is made anywhere in the space occupied by the name of the chosen candidate, so long as it does not obliterate such name. Van Winkle *v.* Crabtree, 34 Oreg. 462, 55 Pac. 831, 56 Pac. 74.

83. Patterson *v.* People, 65 Ill. App. 651; People *v.* Parkhurst, 24 Misc. (N. Y.) 442, 53 N. Y. Suppl. 598.

Cross on line separating names of two candidates.— Truelsen *v.* Hugo, 81 Minn. 73, 83 N. W. 500.

84. Voorhees *v.* Arnold, 108 Iowa 77, 78 N. W. 795; People *v.* Elmira, 154 N. Y. 750, 49 N. E. 1102 [*affirming* 19 N. Y. App. Div. 457, 46 N. Y. Suppl. 701]; People *v.* Parkhurst, 24 Misc. (N. Y.) 442, 53 N. Y. Suppl. 598; People *v.* Moody, 45 N. Y. Suppl. 606. See also Richardson *v.* Jamison, 55 Kan. 16, 39 Pac. 1050; Taylor *v.* Bleakley, 55 Kan. 1, 39 Pac. 1045, 49 Am. St. Rep. 233, 28 L. R. A. 683.

Distinguishing mark.— So under a provision of the Indiana election law requiring a voter to indicate his choice by stamping the square, and which further declares that the stamp placed upon a ballot which does not touch a square thereon is a distinguishing mark, which will prevent the counting of a ballot, is mandatory; and in order that the voter may have his ballot counted at all he must touch some one of the squares with the stamp. Parvin *v.* Wimberg, 130 Ind. 561, 30 N. E. 790, 30 Am. St. Rep. 254, 15 L. R. A. 775.

85. Patterson *v.* People, 65 Ill. App. 651; Howser *v.* Pepper, 8 N. D. 484, 79 N. W. 1018; *In re* East Coventry, 3 Pa. Dist. 377; McKittrick *v.* Pardee, 8 S. D. 39, 65 N. W. 23; Parmley *v.* Healy, 7 S. D. 401, 64 N. W. 186; Vallier *v.* Brakke, 7 S. D. 343, 64 N. W. 180.

86. Where the printed ticket has a blank space in which to write the name of a candidate, and the voter places a cross in the square opposite such blank, but writes no name therein, the ballot must be rejected. Voorhees *v.* Arnold, 108 Iowa 77, 78 N. W. 795.

A ballot marked with a cross, not in the appropriate place opposite the name of a candidate, but to the right of such candidate's name and between his name and the square opposite the name of the candidate of another party, cannot be counted for that party. Apple *v.* Barcroft, 158 Ill. 649, 41 N. E. 1116; Sweeney *v.* Hjul, 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169.

and illegally marked as follows should be rejected: Where the cross mark is placed above the name of a candidate and not in the appropriate place at the right of it;[87] where there was a cross mark above and also beneath the candidate's name but none at the right of it;[88] where there was a cross mark under the party name at the head of the ticket, and one at the left of defendant's name on another party ticket;[89] where there was no cross mark whatever but a short straight line drawn across the square at the right of the party name at the head of the ticket;[90] where there was a cross mark in the square at the right of the name of each candidate except that for mayor on one party ticket, and a cross mark in the square at the right of the party name on another ticket.[91] A straight diagonal line at the left of the name of a candidate does not constitute a cross and should be disregarded.[92]

d. Instruments Used For Marking. The courts, where they can, regard the provisions of the statute in regard to the instrument used for marking the ballots as merely directory; and it follows that the elector may use either ink or a lead-pencil, and that too of any color.[93] Where the statute merely prescribes that an indelible pencil shall be used in marking the ballots a pencil of any color may be used.[94] But the statute may be so worded that the court must regard it as mandatory; in which case the elector must mark his ballot in the very manner pointed out by the statute.[95]

e. Use of Pasters. If a statute so provides, but not otherwise, the electors may use printed pasters for the insertion of names not on the ballot instead of writing them in the space reserved for their reception.[96]

A ballot marked with two parallel horizontal lines across the circle at the head of one of the party tickets cannot be counted where the statute requires a cross as a designation of the voter's intent. Christopherson *v.* Manistee, 117 Mich. 125, 75 N. W. 445; Atty.-Gen. *v.* Glaser, 102 Mich. 405, 61 N. W. 648.

Ballots marked with a cross to the right of the name of each candidate, not in the proper voting space, but in the portion on the ticket which was provided for the insertion of additional names, will not be counted. People *v.* Morgan, 20 N. Y. App. Div. 48, 46 N. Y. Suppl. 898; Loucks' Case, 3 Pa. Dist. 127.

One or more circles within the circle at the head of a party ticket do not constitute a cross within a circle and should be disregarded. Vallier *v.* Brakke, 7 S. D. 343, 64 N. W. 180.

87. Curran *v.* Clayton, 86 Me. 42, 29 Atl. 930.

88. Curran *v.* Clayton, 86 Me. 42, 29 Atl. 930.

89. Curran *v.* Clayton, 86 Me. 42, 29 Atl. 930; *In re* Pike Tp., 5 Pa. Dist. 519, 18 Pa. Co. Ct. 278.

90. Curran *v.* Clayton, 86 Me. 42, 29 Atl. 930. See also Kelly *v.* State, 79 Miss. 168, 30 So. 49.

91. Curran *v.* Clayton, 86 Me. 42, 29 Atl. 930.

92. Vallier *v.* Brakke, 7 S. D. 343, 64 N. W. 180.

93. Houston *v.* Steele, 98 Ky. 596, 34 S. W. 6, 17 Ky. L. Rep. 1149; Spurgin *v.* Thompson, 37 Nebr. 39, 55 N. W. 297; State *v.* Russell, 34 Nebr. 116, 51 N. W. 465, 33 Am. St. Rep. 625, 15 L. R. A. 740; Grant *v.* McCallum, 12 Can. L. J. 113.

94. Coulehan *v.* White, 95 Md. 703, 53 Atl. 786.

95. People *v.* Sausalito, 106 Cal. 500, 39 Pac. 937.

Lead-pencil.— Thus in New York a ballot bearing a mark made with some other instrument than a pencil is invalid and cannot be counted. People *v.* Richmond County, 156 N. Y. 36, 50 N. E. 425.

Color of lead.— A ballot, all the marks on which were made with a pencil having purple lead, is void, inasmuch as the statute requires the ballot to be marked with a pencil having black lead. People *v.* Bourke, 30 Misc. (N. Y.) 461, 63 N. Y. Suppl. 906. See to the same effect Sweeney *v.* Hjul, 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169; Dennis *v.* Caughlin, 22 Nev. 447, 41 Pac. 768, 58 Am. St. Rep. 761, 29 L. R. A. 731.

A sharp instrument not a pencil.— Under the New York statute, a ballot bearing marks made in the circle at the head of a ticket, as if by a sharp instrument, not a pencil, is thereby vitiated and cannot be counted. People *v.* Richmond County, 156 N. Y. 36, 50 N. E. 425.

Counted by consent of contestant.— State *v.* Conser, 24 Ohio Cir. Ct. 270.

96. Coughlin *v.* McElroy, 72 Conn. 99, 43 Atl. 854, 77 Am. St. Rep. 301; People *v.* Shaw, 64 Hun (N. Y.) 356, 19 N. Y. Suppl. 302; People *v.* Love, 63 Barb. (N. Y.) 535, De Walt *v.* Barkley, 146 Pa. St. 529, 24 Atl. 185, 28 Am. St. Rep. 814, 15 L. R. A. 771; *In re* Foreman, 30 Pittsb. Leg. J. N. S. 318.

Blanket pasters.— But statutory authority to use written pasters in the spaces reserved for the inserting of names does not authorize the elector to make use of a blanket paster,

3. MARKING FOR IDENTIFICATION — a. In General. One purpose of the ballot law was to exclude from the count all ballots containing distinguishing marks designed to destroy the secrecy of the ballot. The courts are strongly inclined to uphold the legality of ballots not entirely conforming to the requirements of the law, if the intention of the voter can be ascertained; but statutes prescribing the form of ballots and kind of paper on which they are to be printed, and prohibiting marks, figures, or devices thereon by which one can be distinguished from another, are designed to preserve the secrecy of the ballot and to prevent fraud, intimidation, or bribery; and they are generally held to be mandatory, and are always so held when such statutes provide that a ballot varying from such requirements shall not be counted; especially if it is clear that it was marked by the voter for the purpose of identification.[97] And the spirit of the law is not confined to marks and devices on the face of the ballot.[98] What constitutes an identifying mark upon a ballot is a question of fact for the trial court

and thus make up the whole ticket. *In re* Little Beaver Tp. School Directors, 165 Pa. St. 233, 30 Atl. 955, 27 L. R. A. 234.

Sticker thrown off by counting the votes.— If a sticker should be thrown off the ticket and fall to the floor when counted, the vote should be counted for the candidate whose name was on the sticker. Dickinson's Case, 2 Leg. Rec. (Pa.) 103.

97. *California.*— People *v.* Campbell, 138 Cal. 11, 70 Pac. 918; Farnham *v.* Boland, 134 Cal. 151, 66 Pac. 200, 366; Smith *v.* Thomas, 121 Cal. 533, 54 Pac. 71; Lauer *v.* Estes, 120 Cal. 652, 53 Pac. 262; Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 49 Am. St. Rep. 68, 29 L. R. A. 673.

Connecticut.— State *v.* Walsh, 62 Conn. 260, 25 Atl. 1, 17 L. R. A. 364; Fields *v.* Osborne, 60 Conn. 544, 21 Atl. 1070, 12 L. R. A. 551; Mallett *v.* Plumb, 60 Conn. 352, 22 Atl. 772.

Illinois.— Roberts *v.* Quest, 173 Ill. 427, 50 N. E. 1073; Parker *v.* Orr, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227.

Indiana.— Tombaugh *v.* Grogg, 156 Ind. 355, 59 N. E. 1060; Zeis *v.* Passwater, 142 Ind. 375, 41 N. E. 796; Sego *v.* State, 136 Ind. 700, 36 N. E. 208; Sego *v.* Stoddard, 136 Ind. 297, 36 N. E. 204, 22 L. R. A. 468; Bechtel *v.* Albin, 134 Ind. 193, 33 N. E. 967.

Iowa.— Kelso *v.* Wright, 110 Iowa 560, 81 N. W. 805; Voorhees *v.* Arnold, 108 Iowa 77, 78 N. W. 795; Cook *v.* Fisher, 100 Iowa 27, 69 N. W. 264; Whittam *v.* Zahorik, 91 Iowa 23, 59 N. W. 57, 51 Am. St. Rep. 317.

Maryland.—Coulehan *v.* White, 95 Md. 703, 53 Atl. 786.

Michigan.—Christopherson *v.* Manister, 117 Mich. 125, 75 N. W. 445; Atty.-Gen. *v.* Howcroft, 107 Mich. 85, 64 N. W. 954; Ellis *v.* Glaser, 102 Mich. 396, 61 N. W. 648, 64 N. W. 828.

Minnesota.— Pennington *v.* Hare, 60 Minn. 146, 62 N. W. 116.

Nebraska.— Mauck *v.* Brown, 59 Nebr. 382, 81 N. W. 313; Spurgin *v.* Thompson, 37 Nebr. 39, 55 N. W. 297.

Nevada.— State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 573; Sweeney *v.* Hjul, 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169; Dennis *v.* Caughlin, 22 Nev. 447, 51 Pac. 768, 58 Am. St. Rep. 761, 29 L. R. A. 731.

New Jersey.— Kearns *v.* Edwards, (Sup. 1894) 28 Atl. 723.

New York.— People *v.* Richmond County, 156 N. Y. 36, 50 N. E. 425; Matter of Holmes, 30 Misc. 127, 61 N. Y. Suppl. 775; People *v.* Parkhurst, 24 Misc. 442, 53 N. Y. Suppl. 598.

North Carolina.— Baxter *v.* Ellis, 111 N. C. 124, 15 N. E. 938, 17 L. R. A. 382.

North Dakota.— Howser *v.* Pepper, 8 N. D. 484, 79 N. W. 1018.

Oregon.— Van Winkle *v.* Crabtree, 34 Oreg. 462, 55 Pac. 831, 56 Pac. 74.

Pennsylvania.— *In re* Fairchance Borough, 8 Pa. Dist. 595.

South Dakota.— Vallier *v.* Brakke, 7 S. D. 343, 64 N. W. 180.

Washington.—State *v.* Peter, 21 Wash. 243, 57 Pac. 814.

West Virginia.—Daniel *v.* Simms, 49 W. Va. 554, 39 S. E. 690.

Wisconsin.— State *v.* Steinborn, 92 Wis. 605, 66 N. W. 798, 53 Am. St. Rep. 938.

Canada.— Cameron *v.* Maclennan, 11 Can. L. J. N. S. 163; Dionne *v.* Gagnon, 9 Quebec 20.

See 18 Cent. Dig. tit. "Elections," § 159 *et seq.*

Voter's name written on ballot.— Where an elector intentionally writes his name upon the ballot for identification, and so casts it, such ballot cannot be counted for any party. Pennington *v.* Hare, 60 Minn. 146, 62 N. W. 116.

Where marking is a penal offense.— Where a voter has marked a ballot to distinguish it, contrary to the provision of the statute making such marking criminal, it cannot be counted, although the statute does not include marked ballots among those which shall not be counted. Parker *v.* Hughes, 64 Kan. 216, 67 Pac. 637.

98. Thus a number of ballots folded or creased precisely alike, and in a strikingly unusual manner, and which can be readily distinguished from other ballots folded in the ordinary manner, should be rejected as distinguishable. State *v.* Walsh, 62 Conn. 260, 25 Atl. 1, 17 L. R. A. 364.

or jury, according as the trial may be had, and the finding of either upon such question is conclusive upon appeal.[99]

b. Examples of Fatal Distinguishing Marks. The following are among the numerous examples[1] of distinguishing marks which have been held to render ballots fatally defective: A ballot containing within the circle at the head of a ticket a mark resembling an imperfect circle;[2] a ballot from which the names of candidates have been erased;[3] a ballot having the name of the voter or that of any person not being voted for on the ticket;[4] a ballot marked with a cross opposite the names of candidates for offices of a township other than that in which the ballot is cast;[5] a ballot marked with a star instead of a cross;[6] a ballot which, in addition to the cross mark in the voting space opposite the name of a candidate, has a black pencil mark in the space occupied by the candidate's name;[7] a ballot which shows erasures, cancellations, and obliterations, apparently made by the voters in attempting to correct their own errors;[8] a cross in a vacant space, not opposite the name of any candidate;[9] a cross mark before or after the words "no

99. Kelso *v.* Wright, 110 Iowa 560, 81 N. W. 805.

1. **Illustrations of distinguishing marks.**— The following are held to be distinguishing marks rendering the ballot invalid: A lead-pencil mark across the name of a candidate on the ballot; a ballot stamped in the small square to the left of the name of a candidate, and the stamp mark partially erased, causing a hole in the ticket, although otherwise properly stamped; a ballot stamped in a square containing a device, and also to the left of the name of a candidate in the list, under such stamped device; a ballot stamped in a square containing a device, and also in the square to the left of each name in the list under such stamped device; a ballot stamped in a square containing a device, and also to the left of two names in another list of candidates, the list under the stamped device being complete; a ballot stamped in the square to the left of the candidates voted for, in the various lists, and also in a square opposite to which there is no candidate's name printed, a stamp in a square opposite no candidate's name being a distinguishing mark; a ballot containing more than one stamp mark in the square containing a device. Sego *v.* Stoddard, 136 Ind. 297, 36 N. E. 204, 22 L. R. A. 468.

Where a letter is written in pencil in a blank space left for the initial of a name, although it may have been the intention of the voter to write a name, and he may have abandoned his intention after setting down an initial letter, yet the mark being one having no lawful right on the ballot, and one which could serve as a distinguishing mark, it renders the ballot void; and his only remedy, after having thus marked his ballot, is to call for the issuance to him of a fresh ticket. Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 49 Am. St. Rep. 68, 29 L. R. A. 673.

Ribald expressions written upon the ballot. — Ballots cannot be counted when they have written thereon names of individuals who are not candidates, or such expressions as "rats" and "don't want any king." State *v.* Fawcett, 17 Wash. 188, 49 Pac. 346.

2. People *v.* Bourke, 30 Misc. (N. Y.) 461, 63 N. Y. Suppl. 906.

3. Perkins *v.* Bertrand, 192 Ill. 58, 61 N. E. 405, 85 Am. St. Rep. 315; Kelly *v.* Adams, 183 Ill. 193, 55 N. E. 837; State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 573; People *v.* Bourke, 30 Misc. (N. Y.) 461, 63 N. Y. Suppl. 906.

4. Tandy *v.* Lavery, 194 Ill. 372, 62 N. E. 774; Caldwell *v.* McElvain, 184 Ill. 552, 56 N. E. 1012; Pennington *v.* Hare, 60 Minn. 146, 62 N. W. 116; Vallier *v.* Brakke, 7 S. D. 343, 64 N. W. 180.

The law does not recognize the writing of a name on the ballot except by inserting it in the space left vacant on the ballot for that purpose. Voorhees *v.* Arnold, 108 Iowa 77, 78 N. W. 795.

Where the voter writes the name of a person below the printed ticket on the margin of the ballot the ballot must be rejected. Voorhees *v.* Arnold, 108 Iowa 77, 78 N. W. 795.

5. Sweeney *v.* Hjul, 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169.

6. Coulehan *v.* White, 95 Md. 703, 53 Atl. 786; Sweeney *v.* Hjul, 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169.

7. People *v.* Parkhurst, 24 Misc. (N. Y.) 442, 53 N. Y. Suppl. 598.

8. *California.*— People *v.* Campbell, 138 Cal. 11, 70 Pac. 918.

Iowa.— Voorhees *v.* Arnold, 108 Iowa 77, 78 N. W. 795.

Maryland.—Coulehan *v.* White, 95 Md. 703, 53 Atl. 786.

Nevada.— State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 573; Sweeney *v.* Hjul, 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169.

New York.— People *v.* Richmond County, 156 N. Y. 36, 50 N. E. 425; People *v.* Bourke, 30 Misc. 461, 63 N. Y. Suppl. 906.

See 18 Cent. Dig. tit. "Elections," § 166.

Contra.— Where the ballot is properly marked, but an erasure appears in the square opposite the name of a candidate, the ballot is nevertheless valid, as there is no mark to indicate an intention to vote for that candidate. *In re* Fairchance, 8 Pa. Dist. 595.

9. Morrison *v.* Pepperman, 112 Iowa 471, 84 N. W. 522; Sweeney *v.* Hjul, 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169.

nomination";[10] a diagonal black line in one of the spaces for writing in the names of candidates;[11] a short line in the circle at the head of the ticket;[12] the name of a candidate already printed upon the ballot for the office, written in the blank column;[13] where the voter makes a cross after the name voted for, but outside of the voting space intended for it;[14] and where the voter attempts to make a cross, but makes some nondescript character upon the ballot.[15]

c. **Harmless Irregularities** — (i) *In General.* But ballots should not be rejected on account of slight irregularity in the manner of marking, unless it is clear that the elector intended it as a mark of identification.[16] Consequently ballots containing blots or marks which were apparently made accidentally or carelessly and not deliberately should not be rejected as containing distinguishing marks;[17] and the same is true of accidental ink blots on the back of a ballot.[18] Marks on ballots, a reason for which is or may be suggested, consistent with honesty and good faith, will rarely be allowed to invalidate them, unless it appears that they were in fact used for corrupt purposes; but marks for the existence of which no such reason can be suggested will if unexplained generally be presumed to be for corrupt purposes.[19] A ballot properly prepared by a legal voter should not be rejected because some one of the election officers, without the connivance of the voter, made an indorsement on the ballot which might serve as a distinguishing mark.[20]

(ii) *Examples of Irregular Marks Held Not Fatal.* The following marks have been held not to invalidate the ballot: A ballot marked with a cross in the square opposite the name of two candidates for the same office;[21] a cross mark after the name of a person inserted in the blank space on the ballot;[22] a straight diagonal line in the space opposite the name of a candidate, where it is apparent that the straight line was part of a cross which the voter forgot to complete;[23] a little dot-like mark close to the end of one of the lines of the cross, evidently made by accident while making the cross mark;[24] very small punctures

10. People *v.* Campbell, 138 Cal. 11, 70 Pac. 918; People *v.* Richmond County, 156 N. Y. 36, 50 N. E. 425.

11. People *v.* Parkhurst, 24 Misc. (N. Y.) 442, 53 N. Y. Suppl. 598.

12. People *v.* Bourke, 30 Misc. (N. Y.) 461, 63 N. Y. Suppl. 906.

13. People *v.* Richmond County, 156 N. Y. 36, 50 N. E. 425.

14. State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 573; People *v.* Parkhurst, 24 Misc. (N. Y.) 442, 53 N. Y. Suppl. 598; Church *v.* Walker, 10 S. D. 90, 72 N. W. 101.

15. State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 573.

16. People *v.* Sausalito, 106 Cal. 500, 39 Pac. 937; Rutledge *v.* Crawford, 91 Cal. 526, 27 Pac. 779, 25 Am. St. Rep. 212, 13 L. R. A. 761; Wyman *v.* Lemon, 51 Cal. 273; Coughlin *v.* McElroy, 72 Conn. 99, 43 Atl. 854, 77 Am. St. Rep. 301; Voorhees *v.* Arnold, 108 Iowa 77, 78 N. W. 795; Coulehan *v.* White, 95 Md. 703, 53 Atl. 786.

Where the mark is of such a character that it may not readily be used for the purpose of identification, and was placed on the ballot without the knowledge or consent of the voter, the ballot should be counted. Cook *v.* Fisher, 100 Iowa 27, 69 N. W. 264.

17. Whittam *v.* Zahorik, 91 Iowa 23, 59 N. W. 57, 51 Am. St. Rep. 317; Houston *v.* Steele, 98 Ky. 596, 34 S. W. 6, 17 Ky. L. Rep. 1149; State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 573; Sweeney *v.* Hjul, 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169; Dennis *v.* Caughlin, 22 Nev. 447, 41 Pac. 768, 58 Am. St. Rep. 761, 29 L. R. A. 731; Church *v.* Walker, 10 S. D. 90, 72 N. W. 101.

18. Bates *v.* Crumbaugh, 71 S. W. 75, 24 Ky. L. Rep. 1205; Coulehan *v.* White, 95 Md. 703, 53 Atl. 786.

19. State *v.* Walsh, 62 Conn. 260, 25 Atl. 1, 17 L. R. A. 364.

20. State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 573. Were it otherwise, it would place it in the power of the election officers to disfranchise electors at their pleasure. Pennington *v.* Hare, 60 Minn. 146, 62 N. W. 116; State *v.* Gay, 59 Minn. 6, 60 N. W. 676, 50 Am. St. Rep. 389.

Words written on a ballot by election officers.— In the absence of fraud ballots on which election officers write words after they are cast are not thereby rendered invalid. Gill *v.* Shurtleff, 183 Ill. 440, 56 N. E. 164.

21. Day *v.* Dunning, 127 Cal. 55, 59 Pac. 196; Borders *v.* Williams, 155 Ind. 36, 57 N. E. 527.

22. *In re* Foreman, 30 Pittsb. Leg. J. N. S. 318.

23. People *v.* Parkhurst, 24 Misc. (N. Y.) 442, 53 N. Y. Suppl. 598.

24. People *v.* Parkhurst, 24 Misc. (N. Y.) 442, 53 N. Y. Suppl. 598.

accidentally made by the point of a sharp lead-pencil while making the cross mark;[25] a ballot marked in the regular manner, but with a cross unusually heavy;[26] a cross mark in each column in which the candidate's name appears;[27] slight parallel streaks, apparently made by a careless movement of the stamp across the ballot;[28] the writing by a voter on his ballot of the party designation of a candidate after the name, which he has also written in;[29] and the making of two crosses instead of one in the circle opposite the name of the party whose ticket the voter intended to vote.[30] And so of making a double cross or a cluster of crosses in the voting space opposite a candidate's name,[31] although it has been held that ballots so marked should be rejected.[32] The presence of cross marks before the name of the same candidate for the same office in two different columns is to be regarded as surplusage merely, and does not render the ballot invalid as a ballot marked for identification.[33]

4. Conflicting Marks. A ballot marked with cross marks in circles at the head of each of several tickets appearing thereon can be counted for no party if all the tickets are complete, as such marks counteract each other, leaving the ballot as if unmarked.[34] But such ballots may be counted for the candidates on either of the tickets upon the other of which there are no opposing candidates.[35] So a ballot should be counted for a candidate whose name is on all the tickets so marked.[36] A ballot marked with a cross in the circle of each of two or more party tickets counteracting each other and leaving the ballot unmarked so far as

25. People *v.* Parkhurst, 24 Misc. (N. Y.) 442, 53 N. Y. Suppl. 598.

26. State *v.* Peter, 21 Wash. 243, 57 Pac. 814.

27. Parker *v.* Hughes, 64 Kan. 216, 67 Pac. 637, 56 L. R. A. 275; People *v.* Richmond County, 156 N. Y. 36, 50 N. E. 425; Sawin *v.* Pease, 6 Wyo. 91, 42 Pac. 750.

28. Tombaugh *v.* Grogg, 156 Ind. 355, 59 N. E. 1060.

29. Jennings *v.* Brown, 114 Cal. 307, 46 Pac. 77, 34 L. R. A. 45.

30. Tandy *v.* Lavery, 194 Ill. 374, 62 N. E. 774; Houston *v.* Steele, 98 Ky. 596, 34 S. W. 6, 17 Ky. L. Rep. 1149.

31. Kelly *v.* State, 79 Miss. 168, 30 So. 49; People *v.* Parkhurst, 24 Misc. (N. Y.) 442, 53 N. Y. Suppl. 598; State *v.* Fawcett, 17 Wash. 188, 49 Pac. 346; Hawkins *v.* Smith, 8 Can. Supreme Ct. 676.

Number of crosses used.— Ballots marked with two or more crosses in one voting space, or with a cross of a peculiar form, should be counted if otherwise regular, as these are not such distinguishing marks as invalidate the ballot, in the absence of evidence of intent to distinguish it. Houston *v.* Steele, 98 Ky. 596, 34 S. W. 6, 17 Ky. L. Rep. 1149.

32. State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 573; Sweeney *v.* Hjul, 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169; Dennis *v.* Caughlin, 22 Nev. 447, 41 Pac. 768, 58 Am. St. Rep. 761, 29 L. R. A. 731.

Two impressions of stamp.— Two entirely separate and distinct impressions of the stamp within the square, on a ballot containing the emblem of the voter's party, constitute a distinguishing mark, within the election law invalidating the ballot. Zeis *v.* Passwater, 142 Ind. 375, 41 N. E. 796.

33. People *v.* Richmond County, 156 N. Y. 36, 50 N. E. 425.

34. Caldwell *v.* McElvain, 184 Ill. 552, 56 N. E. 1012; Bates *v.* Crumbaugh, 71 S. W. 75, 24 Ky. L. Rep. 1205; Little *v.* Hall, 70 S. W. 642, 24 Ky. L. Rep. 1060; Herndon *v.* Farmer, 70 S. W. 632, 24 Ky. L. Rep. 1045; People *v.* Richmond County, 156 N. Y. 36, 50 N. E. 425; People *v.* Bourke, 30 Misc. (N. Y.) 461, 63 N. Y. Suppl. 906; Moody *v.* Davis, 13 S. D. 86, 82 N. W. 410; McKittrick *v.* Pardee, 8 S. D. 39, 65 N. W. 23; Parmley *v.* Healy, 7 S. D. 401, 64 N. W. 186.

35. Caldwell *v.* McElvain, 184 Ill. 552, 56 N. E. 1012; Parker *v.* Orr, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227; People *v.* Richmond County, 156 N. Y. 36, 50 N. E. 425.

Contra.— Ballots marked only with a cross in the circle at the head of each of two tickets cannot be counted for part of the candidates of one of such tickets for office for which there are no candidates on the other ticket, as the Pennsylvania election law of 1893 is mandatory, requiring the voter to place a cross in the circle if he desires to vote for all the candidates on a ticket, but in squares opposite the candidate's name if he desires to vote otherwise. *In re* Fairchance, 8 Pa. Dist. 595. So too the South Dakota statute contemplates the marking of but one ticket, either by placing a cross in a party circle or in the party circle and opposite the names of individual candidates on another ticket for whom the elector desires to vote, or by placing crosses opposite the names of each candidate voted for, and a ballot marked with the crosses in the circle at the head of two tickets cannot be counted for candidates on either ticket, although there be no opposing candidate on the other. Moody *v.* Davis, 13 S. D. 86, 82 N. W. 410.

36. People *v.* Richmond County, 156 N. Y. 36, 50 N. E. 425.

they are concerned is properly counted for a candidate on one of such tickets opposite whose name a cross mark was made.[37] That a ballot is marked with a cross mark opposite the names of two opposing candidates for an office requires its rejection only as to that office, and it is properly counted for other candidates if it is otherwise correctly marked.[38] Where a voter writes the name of a person eligible to the office, but not a candidate, on the ballot in the space provided for writing in the name of a candidate, and places a cross opposite the name of a candidate for the office whose name is printed on the ballot, such ballot cannot be counted for the latter candidate.[39] It has been held, however, that a ballot on which a name has been written opposite a printed name without erasing the latter is not void, but should be counted in favor of the person whose name is so written.[40] It has been held that a general designation by the marking of a ballot with a cross at the head of the ticket, indicating an intention to vote for all its candidates, is controlled by a particular designation by the marking of crosses opposite the names of part of the candidates under the party emblem, and ballots so marked cannot be counted for a candidate of that party opposite whose name no cross appears.[41] According to one view, the general intention to vote a straight ticket by placing a cross in the circle at the head of a party ticket is controlled by making cross marks opposite the names of candidates on another ticket, and such a ballot should be counted only for the candidates on the ticket marked with a cross at the top, whose opponents have not been voted for by placing cross marks opposite their names.[42] But on the other hand some of the statutes are so construed that the making of a cross in the circle at the head of a party ticket is equivalent to voting for all the candidates of that party, and the making of cross marks in the voting spaces opposite the names of candidates on other tickets simply neutralizes that intent, and the vote cannot be counted for either candidate.[43] In other words, when each column on the ballot contains names of candidates for all the offices to be filled or voted for, when the voter marks a cross in the circle at the head of a party column he has

37. Parmley *v.* Healy, 7 S. D. 401, 64 N. W. 186; Vallier *v.* Brakke, 7 S. D. 343, 64 N. W. 180.

38. Pennington *v.* Hare, 60 Minn. 146, 63 N. W. 116; State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 573; People *v.* Richmond County, 156 N. Y. 36, 50 N. E. 425; People *v.* Parkhurst, 24 Misc. (N. Y.) 442, 53 N. Y. Suppl. 598; *In re* East Coventry, 3 Pa. Dist. 377. Where an election law requires a voter to place a mark opposite the name of the candidate voted for, but does not define the character of such mark, a ballot should not be counted for either candidate where it contains a cross at the left of the name of a rival candidate, with a single downward slanting stroke of the pencil from left to right, crossed by a waving or curved line. Van Winkle *v.* Crabtree, 34 Oreg. 462, 55 Pac. 831, 56 Pac. 74. When there are two candidates to be elected to the office, a ballot is not vitiated by containing voting marks opposite the names of two candidates for the office in different columns but not on the same horizontal line. People *v.* Richmond County, 156 N. Y. 36, 50 N. E. 425.

39. Hughes *v.* Upson, 84 Minn. 85, 86 N. W. 782.

40. State *v.* Eagan, 115 Wis. 417, 91 N. W. 984.

41. Heiskell *v.* Landrum, 23 Colo. 65, 46 Pac. 120; Young *v.* Simpson, 21 Colo. 460, 42 Pac. 666, 52 Am. St. Rep. 254; Weidknecht *v.* Hawk, 3 Pa. Dist. 123; *In re* Twentieth Ward, 3 Pa. Dist. 120.

42. Caldwell *v.* McElvain, 184 Ill. 552, 56 N. E. 1012; People *v.* Bourke, 30 Misc. (N. Y.) 461, 63 N. Y. Suppl. 906.

Erasure of name.— Ballots marked with crosses in the circle at the head of a party ticket should be counted for a candidate thereunder whose name is not erased, and opposite whose opponent of another ticket a cross is placed, whether to the left, as required by statute, or to the right, under the South Dakota Ballot Law, which provides that a ticket marked with a cross in a party circle shall be counted throughout except when the name is erased, and that a cross to the left of the name on another ticket shall be taken as a vote for such person, provided the name of the candidate for the same office on the ticket marked at the top by the voter is erased. Church *v.* Walker, 10 S. D. 90, 72 N. W. 101; McKittrick *v.* Pardee, 8 S. D. 39, 65 N. W. 23; Parmley *v.* Healy, 7 S. D. 401, 64 N. W. 186; Vallier *v.* Brakke, 7 S. D. 343, 64 N. W. 180.

43. Where this rule obtains, the only way to vote a split ticket is to make cross marks in voting spaces opposite all the candidates for whom the elector wishes to vote. Heiskell *v.* Landrum, 23 Colo. 65, 46 Pac. 120; Curran *v.* Clayton, 86 Me. 42, 29 Atl. 930; State *v.* Fransham, 19 Mont. 273, 48 Pac. 1;

exhausted his privilege of voting and cannot vote for any other person in another column.[44] But where the party column, in the circle at the head of which the voter makes a cross mark, contains the name of only one candidate for an office, whereas two are to be elected, he may properly mark a cross opposite the name of a candidate on another ticket, as he is entitled to vote for two candidates.[45]

5. INTENTION OF ELECTOR SHOULD GOVERN. The doctrine of all the cases is that the intention of the voter, as gathered from the ballot itself or other surrounding circumstances of a public character, is to control.[46] Where a ballot contains other than legal marks, such marks will be presumed to have been innocently or unintentionally made, and such ballot will be counted, unless it appears from the marks themselves or by evidence *aliunde* that the marks were intended as distinguishing marks.[47]

XIII. CONDUCT OF ELECTIONS.

A. Construction of Statutes — 1. IN GENERAL. The rule that a statute is to be regarded as directory merely if the directions given to accomplish a particular end may be violated, and yet the given end be in fact accomplished and the merits of the case unaffected, applies where the statute gives directions for the manner of holding elections, and such statutes are not regarded as mandatory unless a non-compliance with their terms is expressly declared to be fatal, or will change or render doubtful the result.[48] But where the terms of the statute are absolute, explicit, and peremptory, no discretion is given; and when penalties are imposed against the violation of its respective terms they have the same effect as negative words and render its observance imperative.[49] If the statute simply provides that

Dickerman *v.* Gelsthorpe, 19 Mont. 249, 47 Pac. 999.

44. *In re* Newbury Tp., 187 Pa. St. 297, 40 Atl. 822; Bertolet's Case, 3 Pa. Dist. 643; *In re* Election Instructions, 2 Pa. Dist. 1.

45. *In re* Gearhart Tp., 192 Pa. St. 446, 43 Atl. 972.

46. Ballots which fairly and reasonably indicate the real intention of the elector are to be counted as cast unless to do so runs counter to some positive statutory enactment; in other words the ballot, like a contract, may be read in the light of the surrounding circumstances, in order more perfectly to understand the intention and meaning of the voter.

Illinois.— Tandy *v.* Lavery, 194 Ill. 372, 62 N. E. 774.

Maryland.—Coulehan *v.* White, 95 Md. 703, 53 Atl. 786.

New Jersey.— Kearns *v.* Edwards, (Sup. 1894) 28 Atl. 723.

Pennsylvania.— *In re* Twentieth Ward, 3 Pa. Dist. 120.

Wisconsin.— State *v.* Eagan, 115 Wis. 417, 91 N. W. 984; State *v.* Luy, 103 Wis. 524, 79 N. W. 776; State *v.* Elwood, 12 Wis. 551.

See 18 Cent. Dig. tit. "Elections," § 151 *et seq.*

47. Howser *v.* Pepper, 8 N. D. 484, 79 N. W. 1018.

In other words unless a ballot has been intentionally marked so as to enable a third person to determine from an inspection without other aid that the same was deposited by a particular person the judges of election should presume the marking was inadvertently done, and count the ballot. Church *v.* Walker, 10 S. D. 450, 74 N. W. 198.

48. *Arkansas.*— Willeford *v.* State, 43 Ark. 62.

California.— Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183.

Colorado.— Allen *v.* Glynn, 17 Colo. 338, 29 Pac. 670, 31 Am. St. Rep. 304, 15 L. R. A. 743.

Illinois.— Hodge *v.* Linn, 100 Ill. 397.

Kansas.— Gilleland *v.* Schuyler, 9 Kan. 569; Jones *v.* State, 1 Kan. 273.

Kentucky.— Major *v.* Barker, 99 Ky. 305, 35 S. W. 543, 18 Ky. L. Rep. 104; Varney *v.* Justice, 86 Ky. 596, 6 S. W. 457, 9 Ky. L. Rep. 743.

Louisiana.— Webre *v.* Wilton, 29 La. Ann. 610; Andrews *v.* Saucier, 13 La. Ann. 301.

Mississippi.— Barnes *v.* Pike County, 51 Miss. 305.

Nebraska.— State *v.* Van Camp, 36 Nebr. 91, 54 N. W. 113; State *v.* Russell, 34 Nebr. 116, 51 N. W. 465, 33 Am. St. Rep. 625, 15 L. R. A. 740; State *v.* Thayer, 31 Nebr. 82, 47 N. W. 704.

Pennsylvania.— *In re* Wheelock, 82 Pa. St. 297.

See 18 Cent. Dig. tit. "Elections," § 170.

Elections conducted fairly and honestly where no fraud or illegal voting is charged or shown will not be set aside for mere irregularity in the manner of the appointment of the election officers or in the conduct of the election. Hankey *v.* Bowman, 82 Minn. 328, 84 N. W. 1002.

Ballots improperly prepared.— State *v.* Falk, 89 Minn. 269, 94 N. W. 879.

49. Sego *v.* Stoddard, 136 Ind. 297, 36 N. E. 204, 22 L. R. A. 468; Doores *v.* Varnon, 94 Ky. 507, 22 S. W. 852, 15 Ky. L. Rep. 244;

certain acts or things shall be done within a particular time or in a particular manner, and does not also declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election.[50]

2. GENERAL LAWS NOT APPLICABLE TO CERTAIN ELECTIONS. General election laws which prescribe the form of ballots and the method of conducting elections for state and county officers and members of congress are in the nature of things not applicable to town meetings, neither do they as a rule apply to special local elections to vote on propositions, nor are they applicable to municipal elections held under special charters.[51]

B. Ballot-Boxes. In general it may be said to be the duty of the election officers to see that each precinct is supplied with such ballot-boxes as the law requires.[52] But it would seem that the provision in regard to the number of such boxes is directory provided the facilities offered are ample.[53] Thus it has been held that a statute providing that two ballot-boxes shall be kept at each polling-place, one for the reception of ballots for members of congress and the other for the reception of ballots for state and county officers, is directory only.[54] In case a proposition is to be voted on at a general election, it is customary to provide separate ballot-boxes for the reception of the votes on such proposition.[55]

C. Voting Booths. The fact that election officers fail to have booths erected[56] which comply with the law is a mere irregularity insufficient to vitiate the election.[57]

In re Barber, 10 Phila. (Pa.) 579 [*affirmed* in 32 Leg. Int. 229]; Slaymaker *v.* Phillips, 5 Wyo. 453, 40 Pac. 971, 42 Pac. 1049, 47 L. R. A. 842.

If the statute expressly declares a particular act to be essential to the validity of an election, or that its omission shall render the election void, the courts must so hold, whether the particular act in question goes to the merits or affects the result of the election or not. *In re* Snare, 2 Chest. Co. Rep. (Pa.) 353.

Rule as to mandatory provisions.— Kirkpatrick *v.* Deegans, 53 W. Va. 275, 44 S. E. 465.

50. Parvin *v.* Wimberg, 130 Ind. 561, 30 N. E. 790, 30 Am. St. Rep. 254, 15 L. R. A. 775; Bowers *v.* Smith, 111 Mo. 45, 20 S. W. 101, 33 Am. St. Rep. 491, 16 L. R. A. 754; *In re* Snare, 2 Chest. Co. Rep. (Pa.) 353; Fowler *v.* State, 68 Tex. 30, 3 S. W. 255.

51. *Connecticut.*— State *v.* Avery, 42 Conn. 165.

Florida.— State *v.* Anderson, 26 Fla. 240, 8 So. 1.

Illinois.— Rankin *v.* Cowden, 66 Ill. App. 137.

Iowa.— Pritchard *v.* Magoun, 109 Iowa 364, 80 N. W. 512, 46 L. R. A. 381.

Kentucky.— Hall *v.* Marshall, 4 Ky. L. Rep. 502.

New York.— *In re* Harrisville, 66 Hun 302, 21 N. Y. Suppl. 62.

Oklahoma.— Marion *v.* Territory, 1 Okla. 210, 32 Pac. 116.

Pennsylvania.— Rebman *v.* Crafton School Dist., 25 Pa. Co. Ct. 132.

Rhode Island.— State *v.* Carroll, (1892) 24 Atl. 106.

Tennessee.— Davis *v.* Rogersville, 107 Tenn. 588, 64 S. W. 893.

Texas.— State *v.* Waxahachie, 81 Tex. 626, 17 S. W. 348; Graham *v.* Greenville, 67 Tex. 62, 2 S. W. 742.

See 18 Cent. Dig. tit. "Elections," § 171.

52. Foushee *v.* Christian, 119 N. C. 159, 25 S. E. 793.

53. Chapman *v.* State, 37 Tex. Cr. 167, 39 S. W. 113.

Unauthorized use of too many ballot-boxes see Weil *v.* Calhoun, 25 Fed. 865.

54. Boyden *v.* Shober, 2 Bartl. Cas. Cont. El. 904.

The Louisiana statute does not authorize the use by the commissioners of election of two ballot-boxes, one for the election of state and parish officers, and the other for the election of representatives in congress. U. S. *v.* Nicholson, 27 Fed. Cas. No. 15,877, 3 Woods 215.

55. Atty.-Gen. *v.* Iron County, 64 Mich. 607, 31 N. W. 539; Siedler *v.* Hudson County, 45 N. J. L. 462.

56. **For the purpose of preserving the secrecy of the ballot** the polling-places are required to be provided with compartments or booths, each of sufficient size to accommodate one voter at a time, and so constructed that the voter is screened from observation while preparing his ballot. The voter, after receiving the official ballot from the election officer, retires to one of these booths and there marks his ballot as he desires, refolds it, and returns it to the officer to be deposited in the ballot-box. These compartments as well as the ballot-box are usually protected by guard rails within which no unauthorized persons are permitted to come. McCrary El. (4th ed.) § 713 *et seq.*

57. Moyer *v.* Vandeventer, 12 Wash. 377, 41 Pac. 60, 15 Am. St. Rep. 900, 29 L. R. A. 670.

D. Voting Machines. Notwithstanding a constitutional requirement for written or printed ballots, and the provisions for sorting and counting them, it is competent for the legislature to authorize the use of voting machines,[58] if provision is made to accommodate the voters who may wish to vote for persons other than those named on the official ballot.[59] It appears that when once a voting machine has been adopted by a town or city, under the statute, the voters must thereafter use it at general elections or not vote at all;[60] but this rule does not apply to a special election on a proposition to incorporate a part of a town or parts of towns not before organized for any purpose.[61]

E. Opening and Closing of Polls. The provisions of a statute as to the time of opening and closing the polls is so far directory that an irregularity in this respect which does not deprive a legal voter of his vote or admit a disqualified person to vote will not vitiate the election.[62] But if the departure from the provisions of the statute in regard to the time for opening or closing the polls was so great that it must be deemed to have affected the result, the election must be held invalid.[63]

58. Opinion of Justices, 178 Mass. 605, 60 N. E. 129, 54 L. R. A. 430.

59. *In re* Voting Mach., 19 R. I. 729, 36 Atl. 716, 36 L. R. A. 547.

60. *In re* Taylor, 150 N. Y. 242, 44 N. E. 790.

Cannot return to previous method.— Opinion to Governor, 23 R. I. 630, 50 Atl. 265.

61. *In re* Taylor, 150 N. Y. 242, 44 N. E. 790.

Duty to set voting machines.— Matter of Many, 10 N. Y. App. Div. 451, 41 N. Y. Suppl. 993.

62. *Alabama.*—Patton *v.* Watkins, 131 Ala. 387, 31 So. 93, 90 Am. St. Rep. 43.

Arkansas.— Swepston *v.* Barton, 39 Ark. 549; Holland *v.* Davies, 36 Ark. 446.

California.— People *v.* Prewett, 124 Cal. 7, 56 Pac. 619; Packwood *v.* Brownell, 121 Cal. 478, 53 Pac. 1079.

Illinois.— Cleland *v.* Porter, 74 Ill. 76, 24 Am. Rep. 273; Piatt *v.* People, 29 Ill. 54.

Kentucky.— Clark *v.* Leathers, 5 S. W. 576, 9 Ky. L. Rep. 558.

New York.— People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451; People *v.* Hasbrouck, 21 Misc. 188, 47 N. Y. Suppl. 109.

Ohio.— Fry *v.* Booth, 19 Ohio St. 25.

Oregon.— Cresap *v.* Ray, 10 Oreg. 345.

Pennsylvania.— *Ex p.* Walker, 3 Luz. Leg. Reg. 130; Marks *v.* Park, 7 Leg. Gaz. 70.

Washington.— State *v.* Smith, 4 Wash. 661, 30 Pac. 1064.

See 18 Cent. Dig. tit. "Elections," § 182 *et seq.*

It was no doubt the intention of the legislature that the polls should remain open during the entire day of the election between the hours specified in the statute for opening and closing; and good policy as well as the convenience of voters would seem to require that the legislative intent should be observed; but in the absence of fraud or the violation of any substantial right, it has been held that the closing of the polls for one hour spent at dinner was not sufficient to invalidate the election, inasmuch as the statute might in this respect be regarded as directory. Fry *v.* Booth, 19 Ohio St. 25. But in State *v.* Ritt, 3 Ohio Dec. (Reprint) 475, 7 Am. L. Reg. 88, it was held that the act of the judges in closing the polls and taking the ballot-box away for nearly two hours at noon makes the election void *in toto* whether or not it was shown by the defeated party that the closing influenced the result.

It is a sufficient compliance with a statute providing that the polls must not be opened before nine o'clock A. M. nor kept open less than four hours, if the polls are kept open from two o'clock P. M. until sunset on May 23. People *v.* Lodi High School, 124 Cal. 694, 57 Pac. 660.

A delay of less than an hour in opening the polls, caused by the failure of the inspectors originally appointed to appear, necessitating the selection of others in their stead, will not avoid an election, where it is shown that only one person was prevented from voting by the delay, and it is not shown that his vote would have changed the result. Pickett *v.* Russell, 42 Fla. 116, 634, 28 So. 764.

Absence of evidence that votes were cast after hour for closing.— Soper *v.* Sibley County, 46 Minn. 274, 48 N. W. 1112.

Ballots tendered after premature closing of polls.— Lankford *v.* Gebhart, 130 Mo. 621, 32 S. W. 1127, 51 Am. St. Rep. 585.

Town meeting.— Atty.-Gen. *v.* Folsom, 69 N. H. 556, 45 Atl. 410. See also Conlin *v.* Aldrich, 98 Mass. 557.

63. *California.*— People *v.* Hill, 125 Cal. 16, 57 Pac. 669; Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 49 Am. St. Rep. 68, 29 L. R. A. 673; People *v.* Seale, 52 Cal. 620.

Iowa.— State *v.* Wollem, 37 Iowa 131.

Kentucky.— Banks *v.* Sergent, 104 Ky. 843, 48 S. W. 149, 20 Ky. L. Rep. 1024; Varney *v.* Justice, 86 Ky. 596, 6 S. W. 457, 9 Ky. L. Rep. 743.

New York.— People *v.* Sutphin, 53 N. Y. App. Div. 613, 66 N. Y. Suppl. 49.

Pennsylvania.— Melvin's Case, 68 Pa. St. 333; *In re* Penn Dist., 2 Pars. Eq. Cas. 526.

Wisconsin.— State *v.* Drake, 83 Wis. 257, 53 N. W. 496.

See 18 Cent. Dig. tit. "Elections," § 182 *et seq.*

F. Persons Entitled to Be Present. In addition to the officers of election as a rule the several political parties are entitled to challengers to be present at the polls while they are open, and to watchers to be present in each polling-place during the count;[64] but the presence of unauthorized persons should be prevented, and if tolerated may result in the rejection of the entire vote, especially where there has been opportunity for the practice of fraud.[65] A statute prohibiting electioneering on an election day within a designated distance of any polling-place is a reasonable police regulation to secure good order about the polls.[66] The presence of a police officer at each polling-place is not authorized except by express statutory provision.[67]

G. Registration or Poll-Book Should Be at Hand. The registration or poll-books should be in the possession of the election officers on election day, but in the absence of a mandatory statute an irregularity in this regard will not vitiate an election fairly conducted.[68]

H. Mutilation of Ballots. Where a ballot appears to have been mutilated, it will be presumed to have been done after it was counted by the election officers; as it must be supposed that they know and will perform their duty.[69] At any rate parol evidence is admissible to show that a mutiliated ballot was intact when voted.[70] It may also be proved that the tearing of a ballot was by the voter and intentional, and upon such proof being made the ballot should be held to be canceled.[71]

Uncertainty as to number of votes cast after poll should have been closed.— Matter of Ward, 4 Pa. L. J. 341.

64. State *v.* Kearney County, 42 Kan. 739, 22 Pac. 735; Weaver *v.* Toney, 107 Ky. 419, 54 S. W. 732, 21 Ky. L. Rep. 1157, 50 L. R. A. 105; Oliver *v.* Bode, 6 Ohio S. & C. Pl. Dec. 57, 3 Ohio N. P. 298. A refusal of the judges to allow an elector to be present in the room as a challenger is not ground for throwing out the votes of the precinct, in the absence of evidence that any injustice resulted. Soper *v.* Sibley County, 46 Minn. 274, 48 N. W. 1112. If the watchers appointed by the court are refused admission the court will enforce its order that they be admitted. *In re* Election, etc., Acts, 2 Brewst. (Pa.) 138.

65. *Ex p.* Walker, 3 Luz. Leg. Reg. (Pa.) 130.

Interpreters.— Under a statute which provided that no person should be allowed within the railing of an election room except to vote or assist an elector, and provided that in case of necessity an interpreter might be employed, it was held that where an interpreter of one of the candidates was allowed within the railing and conversed freely with foreigners who understood only their own language, although they had not applied for an interpreter, the vote of the entire township should be excluded. Maynard *v.* Stillson, 108 Mich. 419, 66 N. W. 388.

Instructors.— Where the inspectors of election without authority appointed an instructor to whom the ballots were intrusted, and who had free access to the voters, even after they passed into the booths, and the statute required one inspector to keep possession of the ballots and hand them to the voters, and it appeared that the instructor talked with the voters while in the booths with the door open and himself standing in the door, it was held that the election was illegal, notwithstanding everything was done in good faith, and there was no attempt to influence voters. Atty.-Gen. *v.* Kirby, 120 Mich. 592, 79 N. W. 1009.

Fixer.— Evidence that a fixer appointed under the election law was expelled when the votes were counted is inadmissible in an election contest, inasmuch as the law prohibits his presence at such time. McDonald *v.* Wood, 118 Ala. 589, 24 So. 86.

Presence of peaceable citizen during the count.— The inspectors of election have no right under pretense of keeping order to expel a peaceable and quiet citizen while the vote is being canvassed, when his presence does not interfere with the discharge of their duty. Horton *v.* Weireter, 26 N. Y. Wkly. Dig. 185.

66. State *v.* Black, 54 N. J. L. 446, 24 Atl. 489, 1021, 16 L. R. A. 769.

67. *In re* Police at Polls, 3 Pa. Dist. 243; *In re* Police Safety Director, 34 Wkly. Notes Cas. (Pa.) 476.

68. New Orleans *v.* Cordeviolle, 10 La. Ann. 732; New Orleans *v.* De St. Romes, 9 La. Ann. 573; Edson *v.* Child, 18 Minn. 64; Taylor *v.* Taylor, 10 Minn. 107; State *v.* Elwood, 12 Wis. 551.

Registration book lost.— Hampton *v.* Waldrop, 104 N. C. 453, 10 S. E. 694.

Statute directory.— *In re* Wheelock, 82 Pa. St. 297.

Use of old poll list.— *In re* Rohrkaste, 23 Pittsb. Leg. J. N. S. 375.

Uncertified list.—Pickett *v.* Russell, 42 Fla. 116, 634, 28 So. 764.

69. Bates *v.* Crumbaugh, 71 S. W. 75, 24 Ky. L. Rep. 1205.

70. Lankford *v.* Gebhart, 130 Mo. 621, 32 S. W. 1127, 51 Am. St. Rep. 585.

71. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

I. Ballots Deposited in Wrong Box. Where there is more than one ballot-box in use, as is frequently the case, and some of the ballots are deposited in the wrong box, either by mistake or through the fraud of the election officers, they should nevertheless be counted, for it is unjust that qualified electors should be disfranchised through the carelessness or fraud of election officers.[72]

J. Assisting Disabled Voters. The election law generally authorizes election officers to assist a voter in preparing his ballot when he shall declare on oath that by reason of physical disability he is unable to mark the ballot himself.[73] So also inability to read the English language is made a ground for assisting voters in some jurisdictions;[74] but ignorance as to how to mark the ballot is not good ground for allowing a voter assistance within the voting booth; he must receive his instructions from someone without.[75] It is unlawful for persons other than those authorized by statute either to mark ballots or to see them marked.[76] Where the statute directs that the ballot shall be prepared by two of the judges or inspectors of election, in the presence of the voter and of each other, its prepara-

72. Pavin *v.* Wimberg, 130 Ind. 561, 30 N. E. 790, 30 Am. St. Rep. 254, 15 L. R. A. 775; People *v.* Bates, 11 Mich. 362, 83 Am. Dec. 745; Young *v.* Deming, 9 Utah 204, 33 Pac. 818; State *v.* Horan, 85 Wis. 94, 55 N. W. 157, 39 Am. St. Rep. 826.

In the house of representatives of the United States there has been a complete change of front on this subject. Thus, in Washburn *v.* Ripley, Cl. & H. Cas. Cont. El. 679 (21st congress), it was held that ballots once deposited in the wrong box were lost and could not be changed to the right one either by the voter or officers of election. When the question next came before the house, in Newland *v.* Graham, 1 Bartl. Cas. Cont. El. 5, 8 (24th congress), the question was left to rest where it was, although the committee recommended that the ballots should be counted. But in Campbell *v.* Weaver, Mobl. Cas. Cont. El. 455, 456 (49th congress), it was held that where ballots were deposited in the wrong box by mistake they should be counted. And more recently in Miller *v.* Elliott, Rowell Cas. Cont. El. 461, 520 (51st congress), it was held that the shifting of ballot-boxes for the purpose of deceiving voters and in forcing on them an educational test not permitted by the constitution of the state is an unlawful and fraudulent proceeding.

Names required to be printed on one ballot. — Under a statute which requires that all names of candidates for town offices, including commissioners of excise, shall be on one ballot, and that all ballots cast shall be deposited in the same box, ballots containing the names of candidates for the office of commissioner of excise alone and deposited in a box separate from that in which the ballots for other town officers are deposited should not be counted. Montgomery *v.* O'Dell, 67 Hun (N. Y.) 169, 22 N. Y. Suppl. 412.

73. Gill *v.* Shurtleff, 183 Ill. 440, 56 N. E. 164; Atty.-Gen. *v.* May, 99 Mich. 538, 58 N. W. 483, 25 L. R. A. 325; State *v.* Gay, 59 Minn. 6, 60 N. W. 676, 50 Am. St. Rep. 389; Pearson *v.* Brunswick County, 91 Va. 322, 21 S. E. 483.

A statute is not unconstitutional as depriving such electors of the right to cast secret ballots or as establishing physical and educational qualifications for voters which provides for a sworn officer to assist electors who are physically or educationally unable to prepare their ballots. Pearson *v.* Brunswick County, 91 Va. 322, 21 S. E. 483.

74. Gill *v.* Shurtleff, 183 Ill. 440, 56 N. E. 164; Montgomery *v.* Oldham, 143 Ind. 34, 42 N. E. 474; Atty.-Gen. *v.* May, 99 Mich. 538, 58 N. W. 483, 25 L. R. A. 325; Pearson *v.* Brunswick County, 91 Va. 322, 21 S. E. 483.

75. *In re* Election Instructions, 2 Pa. Dist. 1; *In re* Fadden, 3 Lack. Leg. N. (Pa.) 74.

If a voter evades the law in any way under the guise of obtaining assistance, and introduces a person into the voting compartment for the purpose of having him see how he votes he not only disqualifies himself as a voter, but lays himself liable to such penalties as the statute may have provided for false declarations of disabilities. *In re* Fadden, 3 Lack. Leg. N. (Pa.) 74.

76. Atty.-Gen. *v.* May, 99 Mich. 538, 58 N. W. 483, 25 L. R. A. 325.

Ballots marked in a voting booth, either by the clerk of election or in his presence, are shown to another person, within the meaning of the statute providing for the secrecy of the ballot, and are illegal. Major *v.* Barker, 99 Ky. 305, 35 S. W. 543, 18 Ky. L. Rep. 104.

Qualified voters. — In Pennsylvania an elector who declares that by reason of disability he desires assistance in the preparation of his ballot may select a qualified voter of the district to assist him. *In re* Election Officers, 2 Pa. Dist. 275; *In re* Election Instructions, 2 Pa. Dist. 1; *In re* Beaver County, 12 Pa. Co. Ct. 227.

If a blind man in good faith, believing he is submitting his case to the proper officers, allows his ballot to be marked by an unauthorized person, the ballot is not void, under the Tennessee statute, which provides that only the officer holding the election shall lawfully mark ballots for persons disabled from marking their own ballots. Moore *v.* Sharp, 98 Tenn. 491, 41 S. W. 587.

tion by one of such officers is not a compliance with the statute;[77] but it has been held that the fact that a voter was assisted in preparing his ballot by one judge only is not ground for rejecting the ballot, in the absence of fraud, unless the statute expressly provides for its rejection.[78] Where it is shown that the judges of election were guilty of fraudulent misconduct in booths, with reference to the preparation of ballots for illiterate voters, their entire return may be thrown out.[79] A statute which provides that a voter shall take an oath of disability before his ballot can be marked for him and deposited is mandatory, and a ballot so marked without his declaration on oath being made is illegal and cannot be counted.[80]

K. Challenges to Voters and Proceedings Thereon. Notwithstanding the general prevalence of registration laws an elector is still liable to be challenged at the polls, whereupon it becomes the duty of the inspectors or judges of election to inquire into his qualifications, which is usually done by examining him under oath,[81] although other evidence may be received touching his qualifications.[82] Where unregistered electors are allowed to vote upon production of proof of their qualifications, they stand challenged by statute and must produce the statutory proof of their qualifications without any formal challenge.[83] Although the evidence may tend to show that a person whose right to vote has been challenged is not a qualified elector, yet if he is willing to take the general statutory oath that he is a qualified voter the only safe course open to the election officers is to accept his ballot and leave him to suffer the consequences of his reckless swearing, inasmuch as such general oath is held to be conclusive upon the election officers, who are deemed to act in a ministerial rather than a judicial capacity.[84] A certificate

77. Freeman *v.* Lazarus, 61 Ark. 247, 32 S. W. 680.

78. Hanscom *v.* State, 10 Tex. Civ. App. 638, 31 S. W. 547.

Partisanship of judge who marked ballots.—Hanscom *v.* State, 10 Tex. Civ. App. 638, 31 S. W. 547.

79. Freeman *v.* Lazarus, 61 Ark. 247, 32 S. W. 680.

80. Gill *v.* Shurtleff, 183 Ill. 440, 56 N. E. 164; Major *v.* Barker, 99 Ky. 305, 35 S. W. 543, 18 Ky. L. Rep. 104; Patrick *v.* Runyon, 50 S. W. 538, 20 Ky. L. Rep. 1914; Atty.-Gen. *v.* May, 99 Mich. 538, 58 N. W. 483, 25 L. R. A. 325.

81. **If an elector whose vote is challenged refuses to be sworn** and examined touching his qualifications he has no right to vote. Dwight *v.* Rice, 5 La. Ann. 580; Darragh *v.* Bird, 3 Oreg. 229.

82. *California.*— People *v.* Gordon, 5 Cal. 235.

Illinois.— Spragins *v.* Houghton, 3 Ill. 377.

Louisiana.— Auld *v.* Walton, 12 La. Ann. 129.

Michigan.— Gordon *v.* Farrar, 2 Dougl. 411.

Oregon.— Breding *v.* Williams, 37 Oreg. 433, 61 Pac. 858.

Pennsylvania.— *In re* Farchance Borough, 8 Pa. Dist. 595, 22 Pa. Co. Ct. 451; *In re* Election, etc., Acts, 2 Brewst. 138; Com. *v.* Long, 1 Del. Co. 50.

See 18 Cent. Dig. tit. "Elections," § 192.

Vote rejected by majority of judges.— If a vote is challenged and two of the judges concur in rejecting it as an illegal vote, the presiding officer has no right to receive it, and if he does receive it and it turns out to be an illegal vote it would be evidence of corruption. State *v.* McDonald, 4 Harr. (Del.) 555.

Informality of oath.— Where a voter was a qualified elector, the fact that an informal oath was administered to him is immaterial, since his ballot would have been lawfully received even though he had not been sworn at all. State *v.* O'Day, 69 Iowa 368, 28 N. W. 642.

Failure to require sworn testimony of truth of statements.— The failure of judges of an election to require sworn testimony as to the truth of statements of the person whose right to vote has been challenged does not affect the validity of his vote. Esker *v.* McCoy, 5 Ohio Dec. (Reprint) 573, 6 Am. L. Rec. 694.

Challenge on insufficient ground.— Where voters at a school election were challenged on the ground that they had not been registered, it was held that such challenge need not be met by an affidavit, inasmuch as registration was not required, and the action of the judges of election in excluding the ballots was illegal. Bloome *v.* Hograeff, 193 Ill. 195, 61 N. E. 1071.

83. *In re* Cusick, 136 Pa. St. 459, 20 Atl. 574, 10 L. R. A. 228; Middendorf's Case, 4 Pa. Dist. 78.

Lost affidavits.— Where an unregistered voter has been allowed to vote upon affidavits, and the affidavits have been lost, it will be presumed that the election officers did their duty, and the court will not hold the vote *prima facie* illegal, or require the voter to disclose for whom he voted. *In re* Dunn, 19 Pa. Co. Ct. 149.

84. *California.*— People *v.* Gordon, 5 Cal. 235.

Illinois.—Spragins *v.* Houghton, 3 Ill. 377.

of naturalization establishes a *prima facie* right to vote. The election officers cannot go behind it and demand further proof of citizenship,[85] although they may inquire into the other qualifications of the voter.[86] As a general rule foreigners who have resided in the state, county, and precinct the required length of time are entitled to vote immediately upon being naturalized.[87]

L. Pairing Off. An agreement by voters to "pair off" and absent themselves from the polls is not binding, and if they offer to vote their votes should be received if they are otherwise qualified.[88]

M. Illegal Acts and Practices — 1. Fraud. Where the whole proceedings of election officers are tainted with fraud, and it is shown that they fraudulently admitted illegal votes and excluded legal votes to an extent that cannot be shown with reasonable certainty, the entire return should be rejected.[89] But the entire vote of a precinct should not be rejected where it is possible to ascertain and eliminate the fraudulent vote.[90]

2. Violation of Corrupt Practice Acts. A statute which limits the amount of money which candidates for public offices may expend in the campaign and requires them to file within a certain time after election with the county clerk a verified statement of their expenses, and provides for the failure to file such statements within that time a fine not exceeding a certain amount and costs of prosecution, and that they shall not be entitled to enter into the office to which they have been elected until they have filed such statements, is inoperative so far

Indiana.— State *v.* Robb, 17 Ind. 536; French *v.* Lighty, 9 Ind. 475, 477 note.

Michigan.— Wolcott *v.* Holcomb, 97 Mich. 361, 56 N. W. 837, 23 L. R. A. 215.

New York.— People *v.* Bell, 119 N. Y. 175, 23 N. E. 533; People *v.* Pease, 27 N. Y. 45, 25 How. Pr. 495 [*affirming* 30 Barb. 588]; People *v.* Hochstim, 36 Misc. 562, 73 N. Y. Suppl. 626.

Wisconsin.— Gillespie *v.* Palmer, 20 Wis. 544.

See 18 Cent. Dig. tit. "Elections," § 194.

A board of inspectors of election has no discretionary power to reject the vote of a person who, upon the application of the statutory test, has shown himself to be a qualified voter; the lawfulness of a vote cannot be determined until it has been received, and the elector's right cannot be annulled without a trial. People *v.* Bell, 119 N. Y. 175, 23 N. E. 533; Matter of Hamilton, 80 Hun (N. Y.) 511, 30 N. Y. Suppl. 499.

85. Esker *v.* McCoy, 5 Ohio Dec. (Reprint) 573, 6 Am. L. Rec. 694; Com. *v.* Lee, 1 Brewst. (Pa.) 273; Conway *v.* Carpenter, 11 Wkly. Notes Cas. (Pa.) 169; Fowler *v.* Felthoff, 1 Leg. Rec. (Pa.) 105; Glazier *v.* Merringer, 12 Lanc. Bar (Pa.) 61; *In re* Beamish, 7 L. T. N. S. 17.

86. *In re* Election, etc., Acts, 2 Brewst. (Pa.) 138.

87. Morgan *v.* Dudley, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735; Wood *v.* Fitzgerald, 3 Oreg. 568; Darragh *v.* Bird, 3 Oreg. 229; Anonymous, 1 Brewst. (Pa.) 158; U. S. *v.* McCormick, 26 Fed. Cas. No. 15,663*a*, 2 Hayw. & H. 189.

But in some jurisdictions a probationary term of residence after naturalization is necessary in order to entitle them to vote, and the policy of this is said to be in some degree to check the mischievous struggles on the eve of an election to manufacture votes for the occasion, no matter how. Cook *v.* State, 90 Tenn. 407, 16 S. W. 471, 13 L. R. A. 183; State *v.* Cloksey, 5 Sneed (Tenn.) 482.

Where no record of naturalization can be produced, evidence that a person having the requisite qualifications of becoming a citizen did in fact and for a long time vote and hold office, and exercise the rights belonging to citizens is sufficient to warrant the jury in finding that he had been duly naturalized as a citizen. Boyd *v.* Nebraska, 143 U. S. 135, 12 S. Ct. 375, 36 L. ed. 103. Where the records of naturalization proceedings have been destroyed, secondary evidence is admissible to prove that the party became a citizen. Hogan *v.* Kurtz, 94 U. S. 773, 24 L. ed. 317.

88. Piatt *v.* People, 29 Ill. 54.

89. *Colorado.*—Londoner *v.* People, 15 Colo. 557, 26 Pac. 135.

Idaho.— Chamberlain *v.* Woodin, 2 Ida. (Hasb.) 642, 23 Pac. 177.

Kansas.— State *v.* Fulton, 42 Kan. 164, 22 Pac. 378; State *v.* Malo, 42 Kan. 54, 120, 22 Pac. 349.

Montana.— Heyfron *v.* Mahoney, 9 Mont. 497, 24 Pac. 93, 18 Am. St. Rep. 757.

Pennsylvania.— Matter of Duffy, 4 Brewst. 531; *In re* Clerk Orphans' Ct., 1 Brewst. 162; Matter of City Commissioner, 1 Brewst. 140, 6 Phila. 144; Mann *v.* Cassidy, 1 Brewst. 11, 2 Phila. 320; Conway *v.* Carpenter, 11 Wkly. Notes Cas. 169; Campbell *v.* Leech, 7 Phila. 14.

See 18 Cent. Dig. tit. "Elections," § 198.

90. State *v.* Sullivan, 44 Kan. 43, 23 Pac. 1054; State *v.* Malo, 42 Kan. 54, 120, 22 Pac. 349; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11, 2 Phila. 320; Matter of Dist.-Atty, 2 Phila. (Pa.) 199; Gray's Case, 27 Leg. Int. (Pa.) 181.

Discrepancy between check list and votes declared.— Judkins *v.* Hill, 50 N. H. 140.

as it provides that members of congress shall not enter into office until such statements of their election expenses are filed with the county clerk.[91]

3. BRIBERY. An offer by a town or its citizens to donate money or other property to the county if the county-seat should be located in the town will not invalidate an election.[92] So in an election on a proposition to subscribe for a certain amount of the stock of a railroad company, an agreement between the company and certain electors and taxpayers that the subscription shall be for a less amount if the vote shall be in the affirmative is not in the nature of a bribe.[93] An election to public office secured by a candidate by means of offers to the voters to perform the duties of the office for less than the legal salary or fees is void, inasmuch as a general promise of this kind is a species of bribery;[94] but individual promises of this nature do not constitute bribery unless the voters to whom they are made are also taxpayers.[95] When employment is given to make men vote contrary to what they would do it is bribery, but there must be proof: (1) That the men were employed in order to cause them to change their politics; and (2) that they voted and voted in favor of the party giving the employment.[96]

4. INTIMIDATION AND VIOLENCE — a. In General. The rule as generally laid down is that intimidation and violence in order to avoid an election should be shown to have been sufficient either to change the result or to render it impossible to determine the true result with certainty; and further that, if the progress of the election was not in fact arrested, there must have been such a display of force as ought to have intimidated men of ordinary firmness;[97] but this does not mean

91. For this adds a qualification for members of congress to those provided by the United States constitution, and such provision is therefore void. State *v.* Russell, 20 Ohio Cir. Ct. 551, 11 Ohio Cir. Dec. 299 [*affirming* 10 Ohio S. & C. Pl. Dec. 255, 8 Ohio N. P. 54].

92. State *v.* Elting, 29 Kan. 397.

But an offer by a land company to donate valuable lots to outside voters in case the county-seat is located in their town is a corrupt agreement. Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936. In an action to contest an election locating the seat of a county, it appeared that a committee from a voluntary association, the residents of L, met a committee from an association of the town of A; that it was agreed between them that the latter association should give half of its town lots and a portion of forty acres of land to the former to pay for a certain piece of land purchased by L for county purposes in consideration that L would withdraw from the contest it contemplated making for the county-seat, and its people work for A. It was held that the votes in favor of A by residents of L, not parties to such agreement, were not illegal, when it was not shown that they accepted the illegal promise or bribe, or received anything for their vote. Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936.

The votes of members of a secret society who pledged themselves by signature and oath to vote for that town for county-seat that would pay the most money and who voted for a town whose representative men had promised them a large sum of money so to vote must be rejected. State *v.* Malo, 42 Kan. 54, 120, 22 Pac. 349; State *v.* Dillman, 42 Kan. 96, 22 Pac. 378.

93. Chicago, etc., R. Co. *v.* Ozark Tp., 46 Kan. 415, 26 Pac. 710. And *compare* Hord *v.* Rogersville, etc., R. Co., 3 Head (Tenn.) 208, holding that if, pending an election to decide whether the county shall take stock in a railroad company, prominent citizens enter into an agreement with the citizens of a civil district to subscribe money to improve the public road leading from that district to the terminus of the railroad, upon condition that the proposition to take stock shall receive a majority of the votes of such district, such agreement is not in the nature of a bribe and is not in contravention of public policy.

94. Carrothers *v.* Russell, 53 Iowa 346, 5 N. W. 499, 36 Am. Rep. 222; State *v.* Collier, 72 Mo. 13, 37 Am. Rep. 417; People *v.* Thornton, 25 Hun (N. Y.) 456.

Offer of donation.— A vote given for a candidate for any public office in consideration of his promise in case of his election to donate a sum of money or other valuable thing to a third party, whether such party be an individual or a county or any other corporation, will be rejected as void. State *v.* Purdy, 36 Wis. 213, 17 Am. Rep. 485.

Conviction of officer.— Under the Texas statute merely holding out a promise to serve for less than the legal fees in case of election does not disqualify the promisor from holding office unless he has been actually convicted of such offense. State *v.* Humphries, 74 Tex. 466, 12 S. W. 99, 5 L. R. A. 217.

95. State *v.* Dustin, 5 Oreg. 375, 20 Am. Rep. 746.

96. Platt *v.* Goode, Smith Cas. Cont. El. 650.

In an election on a proposition to erect a public building an argument that workmen should vote for it on the ground that it would give them employment is not in the nature of corruption and bribery. Wayne County Sup'rs *v.* Wayne Cir. Judges, 106 Mich. 166, 64 N. W. 42.

97. Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935; Harrison *v.* Davis, 1 Bartl. Cas.

that citizens are bound to fight their way to the polls;[98] and it should be observed that the test of even ordinary firmness has not in all cases been considered as having any place in the statement of the rule. It has also been laid down that intimidation will vitiate the poll if it has been sufficiently powerful to change the result or render uncertain what the true result would have been without it, regardless of the personal courage of the voters deterred.[99] However this may be, it seems certain that a slight disturbance or a casual breach of the peace at the polls will not be sufficient to vitiate an election.[1] But where by reason of disturbance and intimidation so large a number of voters are prevented from voting that what would have been the result of the election if they had been allowed to vote cannot be ascertained the election will be set aside.[2] When it is alleged that many voters were deterred from voting by violence and intimidation, the testimony of those persons, or some of them at least, should be obtained. The charge cannot be supported solely by hearsay and general reputation, where no witness testifies that he himself was prevented from voting by reason of intimidation.[3]

b. Coercion of Employees. The coercion of employees by their employers by

Cont. El. 341. See also Bruce *v.* Loan, 1 Bartl. Cas. Cont. El. 482; Bromberg *v.* Haralson, Smith Cas. Cont. El. 355.

Violence such as to intimidate men of ordinary firmness.— Wallace *v.* Simpson, 2 Bartl. Cas. Cont. El. 742.

98. Mudd *v.* Compton, Rowell Cas. Cont. El. 158.

99. Patton *v.* Coates, 41 Ark. 111. See also Jones *v.* Glidewell, 53 Ark. 161, 13 S. W. 723, 7 L. R. A. 831.

1. Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935; *In re* Contested Elections, 2 Brewst. (Pa.) 1. Where there had been disturbances and a collision between a colored procession and certain white men the night before election, but there was no evidence to show what persons, if any, were deterred from voting and what efforts they made to vote, and the full vote appeared to have been cast, the committee refused to reject the vote of the precinct. Niblack *v.* Walls, Smith Cas. Cont. El. 101, 105. In considering the question of intimidation, the first inquiry is, How many voters failed to vote? Although there may have been efforts to intimidate, and although outrages may have been committed with this view, yet if these efforts were unavailing, and those who were sought to be intimidated did in fact vote, there is an end of controversy. Norris *v.* Handley, Smith Cas. Cont. El. 68, 76.

Coarse and threatening language is not sufficient to throw out the whole vote of a precinct. Chavis *v.* Clever, 2 Bartl. Cas. Cont. El. 467.

Inflammatory language not affecting the result is not sufficient to reject the vote of a precinct. Bromberg *v.* Haralson, Smith Cas. Cont. El. 355, 366.

Noise, confusion, and threats.— To invalidate an election upon the ground of intimidation the burden is upon the assailant to show that voters were kept from voting or compelled to vote otherwise than they would; mere noise, confusion, or threats will not suffice. Roberts *v.* Calvert, 98 N. C. 580, 4 S. E. 127.

Voluntary withdrawal of voters without sufficient justification.— Lee *v.* Richardson, 2 Ellsw. Cas. Cont. El. 520.

Small number of voters intimidated.— Where a small and known number of voters were intimidated from voting at a precinct, where in any event the contestee would have had a considerable majority, the return should not be rejected. Bowen *v.* Buchanan, Rowell Cas. Cont. El. 451.

Violence before election.— Where there had been riots, violence, and threats before the election, but a truce was declared on the day of election, and, although both parties came to the polls armed, there was no violence at the polls and substantially a full vote of both parties was cast, the committee of the house of representatives refused to reject the poll. Barnes *v.* Adams, 2 Bartl. Cas. Cont. El. 760, 763.

2. Hodge *v.* Jones, 17 Tex. Civ. App. 511, 43 S. W. 41.

Return of whole county thrown out.— Where violence was prevalent throughout a county, the canvassing and counting of the vote involving inextricable confusion and fraud, and the record was illegally suppressed, the returns from the whole county were thrown out. Smalls *v.* Tillman, 2 Ellsw. Cas. Cont. El. 430, 435.

Rioting at the polls.— Where there was rioting at the polls, and voters wishing to vote for the contestant were intimidated, and United States supervisors were interfered with, all with the aid and connivance of the election officers, the whole vote was rejected. Bisbee *v.* Finley, 2 Ellsw. Cas. Cont. El. 172, 190.

Allegation as to effect on result.— In a suit contesting an election on account of violence used in keeping voters from the polls, it should be alleged that there was a sufficient number prevented from voting to have varied the result; and the absence of such material allegations is fatal to the suit. State *v.* Mason, 14 La. Ann. 505.

3. Norris *v.* Handley, Smith Cas. Cont. El. 68, 75.

threats of loss of occupation unless they vote in a particular way, if effectual to the extent of affecting the result of the election or rendering it uncertain, will invalidate the election;[4] but to justify the disfranchisement of an entire precinct on this ground there ought to be some evidence to show its influence on the election,[5] and in such case the burden is on the contestant to prove that the attempt of the employer to coerce his employees was effectual.[6]

c. Display of Military Force. Although there may be a case where it is necessary to quell a riot at the polls by military force, it has always been considered dangerous to the freedom of elections to have an organized military force stationed at or near the polls.[7] In the United States also the presence of an armed force at or near the polls has always been regarded with great disfavor, particularly if it is under the command of a partisan of a candidate or set of candidates.[8]

d. Religious Influence. While the clergy cannot be denied an equal right with laymen to influence voters by argument and persuasion, yet priests have no right, in the pulpit or out of it, by threats of excommunication, refusal of the sacraments, and the like, so to restrain the liberty of voters as to compel or frighten them into voting or abstaining from voting otherwise than as they freely will.[9]

5. Illegal Votes. It is not a valid objection to an election that illegal votes

The test of the right of a contestant for office is whether a majority of legal voters preferred him for the office, and therefore as against his competitor who received the certificate of election he must prove that qualified votes were rejected or illegal ballots received which would change the result, or that such disorder and tumult prevailed as interfered with the voting and prevented balloting to such a degree as to vitiate the election. Pradat *v.* Ramsey, 47 Miss. 24.

4. Blackburne's Case, 1 O'Mal. & H. El. Cas. 198; Westbury's Case, 1 O'Mal. & H. El. Cas. 47.

5. Hurd *v.* Romeis, Mobl. Cas. Cont. El. 423, 425.

A mere idle rumor or common report that men would lose their jobs if they did not vote as their superiors directed can hardly furnish evidence of coercion sufficient to constitute the overthrow of men's wills and determinations in their exercise of the elective franchise. Anderson *v.* Reed, 2 Ellsw. Cas. Cont. El. 284, 286; Duffy *v.* Mason, 1 Ellsw. Cas. Cont. El. 361, 364; Bowen *v.* Buchanan, Rowell Cas. Cont. El. 451.

6. Hurd *v.* Romeis, Mobl. Cas. Cont. El. 423, 425.

7. Thus in the Westminster election, as early as 1741, an attempt was made to interfere with an election by stationing a body of armed soldiers near the poll. When this was brought to the attention of the house of commons it was by that body resolved "that the presence of a regular body of armed soldiers at an election of members to serve in Parliament is a high infringement of the liberties of the subject, a manifest violation of the freedom of elections, and an open defiance of the laws and constitution of this kingdom." McCrary El. (4th ed.) § 554.

8. Although the fact that such a force was so stationed will not of itself avoid an election, yet an armed force in the neighborhood of the polls is almost necessarily a menace to voters; and if it is made to appear that a number sufficient to change the result or render it doubtful was thereby deterred from voting, the election ought to be set aside. Trigg *v.* Preston, Cl. & H. Cas. Cont. El. 78; Giddings *v.* Clark, Smith Cas. Cont. El. 91.

The stationing of a small squad of soldiers in the neighborhood of the polls does not of itself justify the rejection of the return. Bromberg *v.* Haralson, Smith Cas. Cont. El. 355.

Where result evidently not affected.— McHenry *v.* Yeaman, 1 Bartl. Cas. Cont. El. 550.

Peaceful presence of individual soldiers.— Koontz *v.* Coffroth, 2 Bartl. Cas. Cont. El. 149.

Committee not sustained.— In the following cases the committee recommended that the seat be declared vacant on account of military interference with elections, but in each case was overruled by the house. Bruce *v.* Loan, 1 Bartl. Cas. Cont. El. 482, 520; Trigg *v.* Preston, Cl. & H. Cas. Cont. El. 78.

Districts in military occupation of Confederate soldiers.— During the Civil war a number of attempted congressional elections were declared futile by the house of representatives on the ground that the districts where such elections were attempted were within the military control of the Confederate army. McKenzie *v.* Kitchen, 1 Bartl. Cas. Cont. El. 468; *In re* Hawkins, 1 Bartl. Cas. Cont. El. 466; *In re* Grafflin, 1 Bartl. Cas. Cont. El. 464; *In re* Pigott, 1 Bartl. Cas. Cont. El. 463; *In re* McKenzie, 1 Bartl. Cas. Cont. El. 460.

9. If they do so it is in the eye of the law an undue influence which may avoid the election. Mayo's Case, 2 O'Mal. & H. El. Cas. 191; Trench *v.* Nolan, Ir. R. 6 C. L. 464, 27 L. T. Rep. N. S. 69, 20 Wkly. Rep. 833; The Galway Case, 2 O'Mal. & H. El. Cas. 53; Brassard *v.* Langevin, 1 Can. Supreme Ct. 145.

Religious influence and social ostracism.— Efforts on the part of black citizens to enforce unanimity in politics among voters of their race, through the influence of the church, ostracism from society, and indignities which

were received if their number was not sufficient to change the result.[10] In order to reject illegal votes it must appear for whom they were polled. They cannot be taken from the majority candidate unless it is proved that they were polled for him.[11] But it has been held that the rule obtains in elections as in other affairs that a man shall not profit by his own wrong or by that of others done to allow him to reap the benefit.[12] In the absence of evidence that illegal votes cast at an election were given for any particular candidate, it is not error to apportion them among the several candidates and deduct them *pro rata* from their respective scores.[13] Where it is conclusively shown that more than enough illegal votes were received to change the result, and it is impossible to determine what candidate had a fair majority, the election must be considered void.[14]

N. Irregularities and Errors — 1. In General. Where an election appears to have been fairly and honestly conducted, it will not be invalidated by mere irregularities which are not shown to have affected the result, for in the absence of fraud the courts are disposed to give effect to elections when possible.[15] And it has even been held that gross irregularities not amounting to fraud do not

fall short of intimidation, will not avoid an election. Jones *v.* Glidewell, 53 Ark. 161, 13 S. W. 723, 7 L. R. A. 831.

10. *Arkansas.*— Sepstrom *v.* Barton, 39 Ark. 549.

Indiana.— Hacker *v.* Conrad, 131 Ind. 444, 31 N. E. 190.

Kansas.— Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935.

Massachusetts.— School Dist. No. 3 *v.* Gibbs, 2 Cush. 39; Sudbury First Parish *v.* Stearns, 21 Pick. 148.

Michigan.— People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141.

Missouri.— Shields *v.* McGregor, 91 Mo. 534, 4 S. W. 266.

New Hampshire.—Judkins *v.* Hill, 50 N. H. 140.

North Carolina.— State *v.* Rogers, 86 N. C. 357.

Pennsylvania.— Thompson *v.* Ewing, 1 Brewst. 67, 5 Phila. 102.

See 18 Cent. Dig. tit. "Elections," § 201.

In other words, if the true result can be ascertained by eliminating the illegal votes, the election will be upheld. Woolley *v.* Louisville Southern R. Co., 93 Ky. 223, 19 S. W. 595, 15 Ky. L. Rep. 13; Matter of Duffy, 4 Brewst. (Pa.) 531; Ferguson *v.* Allen, 7 Utah 263, 26 Pac. 570.

Withdrawal of legal voters.—If legal voters withdraw and refuse to vote on the ground that illegal votes are being received they do so at their peril and take their chances of being able to show that enough illegal votes were received to change the result. Sudbury First Parish *v.* Stearns, 21 Pick. (Mass.) 148.

11. People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141; Lehlbach *v.* Haynes, 54 N. J. L. 77, 23 Atl. 422; *Ex p.* Murphy, 7 Cow. (N. Y.) 153; McDaniel's Case, 2 Pa. L. J. Rep. 82, 3 Pa. L. J. 310; Brightly Lead. Cas. El. 238.

12. Consequently that the only means by which approximate justice may be reached when the illegal acts render the result doubtful is to require the party for whose benefit they inured to purge the poll of their effect or suffer the penalty of having its majority excluded from the count of his votes. Jones *v.* Glidewell, 53 Ark. 161, 175, 15 S. W. 723, 7 L. R. A. 831.

Burden of purging the poll.— Where legal and illegal votes have been counted indiscriminately, and a majority has resulted in various districts embracing the general return, whether for one candidate or the other, the only means whereby even approximate justice can be reached is to require him for whose advantage such majority districts inure to lift the curse which the law has imposed upon the illegal ballots, otherwise they will be deducted from his count. *Ex p.* Barber, 10 Phila. (Pa.) 579 [*affirmed* in 32 Leg. Int. 229].

13. Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183; Atty.-Gen. *v.* May, 99 Mich. 538, 38 N. W. 483, 25 L. R. A. 325; Heyfron *v.* Mahony, 9 Mont. 497, 24 Pac. 93, 18 Am. St. Rep. 757.

14. Atcheson, etc., R. Co. *v.* Jefferson County Com'rs, 17 Kan. 29; Cornish *v.* Strutton, 8 B. Mon. (Ky.) 586.

The vote of a precinct containing a large number of ballots cast by disqualified persons must be rejected when it is impossible to ascertain the legal number of votes cast for each candidate. People *v.* Hanna, 98 Mich. 515, 57 N. W. 738. See also Banks *v.* Sergent, 104 Ky. 843, 48 S. W. 149, 20 Ky. L. Rep. 1024.

15. *Arizona.*—Territory *v.* Mohave County, (1887) 12 Pac. 730.

California.— Sprague *v.* Norway, 31 Cal. 173.

Florida.— State *v.* Burbridge, 24 Fla. 112, 3 So. 869.

Illinois.—Bacon *v.* Malzacher, 102 Ill. 663; Hodge *v.* Linn, 100 Ill. 397; Piatt *v.* People, 29 Ill. 54.

Indiana.—Irwin *v.* Lowe, 89 Ind. 540; Gass *v.* State, 34 Ind. 425.

Kansas.— Jones *v.* Caldwell, 21 Kan. 186; Gilleland *v.* Schuyler, 9 Kan. 569.

Louisiana.— Webre *v.* Wilton, 29 La. Ann. 610.

New Jersey.— Lehlbach *v.* Haynes, 54 N. J. L. 77, 23 Atl. 422; State *v.* Hudson County, 35 N. J. L. 269.

vitiate an election.[16] Where the legislature declares a certain irregularity in election procedure to be fatal to the validity of the returns, the courts will effectuate that command.[17] And the whole conduct of election officers may, although actual fraud be not apparent, amount to such gross negligence and such a disregard of their official duties as to render their return unintelligible or unworthy of credence.[18] But the power to throw out an entire division is one which ought to be exercised with the greatest care and only under circumstances which demonstrate beyond all reasonable doubt that the disregard of the law has been so fundamental or so persistent and continuous that it is impossible to distinguish what votes are lawful and what are unlawful, or to arrive at any certain result whatever, or where the great body of the voters have been prevented by violence, intimidation, and threats from exercising their franchise.[19]

2. **Absence of Election Officers.** It is essential to the validity of an election that it be presided over by the officers appointed to conduct it.[20] But although in contemplation of law all election officers should be present from the opening of the polls to the closing of the same, an election will not be vitiated by the temporary absence of one or more officers, or the fact that one of them left before the completion of the count.[21]

3. **Failure to Open Polls in Certain Precincts.** The failure to open and hold an election in each precinct of the civil division in which the election is being conducted will vitiate the election if it appears that the votes of the precincts in which no polls were opened might have changed the result,[22] otherwise such

New York.— People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451 [*affirming* 14 Barb. 259].

North Carolina.— State *v.* Nicholson, 102 N. C. 465, 9 S. E. 545, 11 Am. St. Rep. 767.

Pennsylvania.— Thompson *v.* Ewing, 1 Brewst. 67, 5 Phila. 102; Skerrett's Case, 2 Pars. Eq. Cas. 509.

South Carolina.— Trimmier *v.* Bomar, 20 S. C. 354.

Texas.— McKinney *v.* O'Connor, 26 Tex. 5; Hannah *v.* Shepherd, (Civ. App. 1894) 25 S. W. 137.

West Virginia.— Loomis *v.* Jackson, 6 W. Va. 613.

See 18 Cent. Dig. tit. "Elections," § 197.

16. Morris *v.* Vanlansingham, 11 Kan. 269.

17. Bowers *v.* Smith, 111 Mo. 45, 20 S. W. 101, 33 Am. St. Rep. 491, 16 L. R. A. 754.

Although it may have been conducted fairly and honestly when the statutory provisions and regulations in respect to public elections are not substantially observed, the election is void. Van Amringe *v.* Taylor, 108 N. C. 196, 12 S. E. 1005, 23 Am. St. Rep. 51, 12 L. R. A. 202.

The return of the whole election district may be stricken out on showing an entire disregard of conformity to the law in holding the election either by design or ignorance. Melvin's Case, 68 Pa. St. 333; Matter of Duffy, 4 Brewst. (Pa.) 531.

Uncertain of result.— Where the court cannot determine with certainty which candidate received a majority, the entire poll should be rejected. *In re* Contested Election, 2 Brewst. (Pa.) 1; *In re* Orphans' Ct., 1 Brewst. (Pa.) 67, 5 Phila. (Pa.) 102.

18. *In re* Orphans' Ct., 1 Brewst. (Pa.) 67, 5 Phila. (Pa.) 102.

19. Daly *v.* Petroff, 10 Phila. (Pa.) 389; *In re* Conroy, 2 Leg. Rec. (Pa.) 27.

When return can be purged of corruption. — The poll of one entire division will not be thrown out on the ground of negligence or misconduct of the election officers, when the vote purged of its corruption can be fairly counted. Matter of School Directors, 12 Phila. (Pa.) 572.

20. U. S. *v.* Carbery, 25 Fed. Cas. No. 14,720, 2 Cranch C. C. 358.

21. *Alabama.*— Lee *v.* State, 49 Ala. 43.

California.— Packwood *v.* Brownell, 121 Cal. 478, 53 Pac. 1079.

Georgia.— Tanner *v.* Deen, 108 Ga. 95, 33 S. E. 832.

Kentucky.— Anderson *v.* Lickens, 104 Ky. 699, 47 S. W. 867, 19 Ky. L. Rep. 1001; Major *v.* Barker, 99 Ky. 305, 35 S. W. 543, 18 Ky. L. Rep. 104.

North Carolina.— State *v.* Nicholson, 102 N. C. 465, 9 S. E. 545, 11 Am. St. Rep. 767.

Pennsylvania.— *In re* Contested Election, 2 Brewst. 1; *In re* Orphans' Ct., 1 Brewst. 67, 5 Phila. 102.

United States.— Fearson *v.* U. S., 8 Fed. Cas. No. 4,712, 1 Hayw. & H. 48.

Votes deposited before arrival of judges.— Where two persons who were qualified voters appeared at the polls very early in the morning while one of the judges of election was absent, and before the judge who was present and the clerk had been sworn, and the two voters cast their votes with the understanding that when the absent judge arrived and all had been sworn they would ratify the act, and this the two judges and the clerk afterward did, it was held that the votes were valid and were properly counted. Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307, 8 Ky. L. Rep. 181.

22. Marshall *v.* Kerns, 2 Swan (Tenn.) 68; *Ex p.* Kennedy, 23 Tex. App. 77, 3 S. W. 144.

omissions will be considered as mere irregularities which will not vitiate the election.[23]

O. Election Held Under Statute Before It Goes Into Effect. An election purporting to have been held under a statute which by its terms had not gone into effect at the time of the election is void.[24]

XIV. COUNT, RETURNS, CANVASS, AND CERTIFICATE OF ELECTION.

A. Counting Votes — 1. TIME FOR COUNTING. The officers should count the votes at the time directed by statute.[25] In order to avoid cheating by tampering with the ballots after they are cast and before they are counted, it is greatly desirable and usually provided by statute that the inspectors or judges of election in each precinct shall immediately upon the closing of the polls publicly count the votes cast.[26] In the absence of any showing of fraud, however, an adjournment or postponement of the count will not of itself be sufficient to vitiate the return.[27]

2. PLACE OF COUNTING. Unless there is a mandatory statute requiring it, it is not essential that after the polls are closed the ballot-box be opened and the ballots counted at the place where the election was held.[28]

3. COUNT IN PUBLIC. Where the statute requires that the ballots shall be publicly counted, it is unlawful to count them in a private room from which bystanders are excluded.[29]

4. REPRESENTATION OF POLITICAL PARTIES. Where the statute authorizes the executive committee of each political party to appoint an inspector to be present during the count, the officers have no authority to exclude inspectors so appointed.[30]

5. PARTICIPATION IN COUNT BY CANDIDATES. Although the candidates have a right to be present at the count of the ballots, it is grossly improper for any candidate

23. Hobart *v.* Butte County Sup'rs, 17 Cal. 23; McCraw *v.* Haralson, 4 Coldw. (Tenn.) 34; Louisville, etc., R. Co. *v.* Davidson County Ct., 1 Sneed (Tenn.) 637, 62 Am. Dec. 424.

24. State *v.* Little Rock, etc., R. Co., 31 Ark. 701; Munroe *v.* Wells, 83 Md. 505, 35 Atl. 142. Where the act by its own terms was not to go into effect until a certain day named, and one of its sections provided for an election on a day prior to that time, it was held that the election was a nullity, there being no law in existence authorizing it. People *v.* Johnston, 6 Cal. 673.

25. Taft *v.* Adams, 3 Gray (Mass.) 126.

Commencing count before close of polls.— A county election is not invalid because the election officers began to count the vote before the close of the polls, although the statute provides the votes shall be counted after the polls close. *Ex p.* Williams, 35 Tex. Cr. 75, 31 S. W. 653.

26. Where the law permits it the officers are apt to take a recess after the closing of the polls, which offers an opportunity to persons so disposed to change the ballots, or rifle the ballot-box of its contents; hence it is deemed of the utmost importance that the votes be counted before the separation of the officers, in order that no temptation may be offered to tamper with the ballot-box. U. S. *v.* Baldridge, 11 Fed. 552. See also U. S. *v.* Badinelli, 37 Fed. 138. In People *v.* Sackett, 14 Mich. 320, 325, Campbell, J., said: "There is no excuse for the conduct of the inspectors of Sterling in adjourning the canvass of the ballots, contrary to the plain directions of the statutes, which were expressly designed to guard against fraudulent tampering with votes before counting. This conduct was probably the chief cause of the present litigation, and we think it gave rise to a necessity for subjecting the vote of that town to a very careful scrutiny."

27. Powell *v.* Holman, 50 Ark. 85, 6 S. W. 505; Atkinson *v.* Lorbeer, 111 Cal. 419, 44 Pac. 162; Atty.-Gen. *v.* Glaser, 102 Mich. 396, 405, 61 N. W. 648, 64 N. W. 828; People *v.* Sackett, 14 Mich. 320.

28. U. S. *v.* Brewer, 139 U. S. 278, 11 S. Ct. 538, 35 L. ed. 190.

Ballot-box removed to another room.— Where the election officers after closing the polls take the ballots to another room and there canvass them, but it appears that the irregularity was not fraudulent and did not affect the result, the ballots should not therefore be discredited. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

Adjournment to house of an officer.— Daly *v.* Petroff, 10 Phila. (Pa.) 389.

29. U. S. *v.* Badinelli, 37 Fed. 138.

The exclusion of bystanders in the absence of fraud, it seems, is not such a violation of law as will warrant the rejection of the return. Atkinson *v.* Lorbeer, 111 Cal. 419, 44 Pac. 162.

30. Com. *v.* Miller, 98 Ky. 446, 33 S. W. 401, 17 Ky. L. Rep. 1033, and it is immaterial that a challenger remains during the count.

to participate in the count;[31] and if he does so, although this will not disqualify him to hold the office if elected, it will invalidate all votes cast for him which he participated in counting.[32]

6. COUNT BY OUTSIDERS. The fact that persons other than the judges of the election counted or assisted in counting the ballots as they were taken from the ballot-box will not of itself if they were truly counted destroy the validity of an election.[33] So also the fact that the ballots were read and canvassed by the clerk of election and not by the judges will not invalidate the election;[34] and although an unauthorized bystander thoughtlessly interferes with the count of the votes by attempting to assist, the election will not for that reason be set aside, there being no fraud or mistake.[35]

7. MANNER OF COUNTING. A mere irregularity in the manner of counting votes is not sufficient to sustain an election contest, where no fraud is alleged and it is not charged that the votes were incorrectly counted.[36] Where the statute prescribes that the ballots shall be deliberately taken out of the box, and each counted as it is taken from the box, it is irregular and improper for election officers, when about to proceed with the count, to empty the contents of the ballot-boxes and separate the tickets into distinct lots.[37]

8. TIME FOR SCRUTINIZING BALLOTS. Where the law requires an officer personally to scrutinize, count, and canvass each ballot, he has a right to have each ballot in his hands for such reasonable time as may be necessary for him to scrutinize it with care.[38]

9. COUNTING BALLOTS NOT CAST. It rarely occurs that votes not cast can be counted for one or the other of the candidates.[39] An exclusion of legal votes, not fraudulently, but through error of judgment, will not defeat an election, notwithstanding the error in such case is one which there is no mode of correcting, even by the aid of the court.[40]

B. Returns — 1. TIME OF MAKING. It is the duty of election officers, imme-

31. Grelle *v.* Pinney, 62 Conn. 478, 26 Atl. 1106.

Act not amounting to participation.—Grelle *v.* Pinney, 62 Conn. 478, 26 Atl. 1106.

32. Grelle *v.* Pinney, 62 Conn. 478, 26 Atl. 1106.

33. Roberts *v.* Calvert, 98 N. C. 580, 4 S. E. 127.

Illiterate officers.— If the judges and inspector of an election cannot read, and for that reason a person who is not a member of the election board takes the ballots from the box and reads them to the tellers at the request of the judges, it is not an irregularity which will vitiate the election. Sprague *v.* Norway, 31 Cal. 173.

Agreement of candidates that outsiders may count votes.— Brown *v.* Watterson, 96 Ga. 598, 24 S. E. 141.

34. State *v.* Bernier, (Minn. 1888) 38 N. W. 368.

35. Boileau's Case, 2 Pars. Eq. Cas. (Pa.) 503.

36. Hartzell *v.* Smith, 18 Pa. Co. Ct. 551.

37. *In re* Zacharias, 3 Pa. Co. Ct. 656.

38. U. S. *v.* Clark, 22 Fed. 387.

39. **Ballots irregularly cast and preserved.** — Where votes in a school election were improperly rejected, but nevertheless irregularly cast and preserved, so that there was no question as to the number of votes excluded or for whom they were intended, the excluded ballots should be counted. Bloome *v.* Hograeff, 193 Ill. 195, 61 N. E. 1071.

The rule in the house of representatives of the United States is that when a legal voter offers to vote and is prevented by fraud, violence, or intimidation from depositing his ballot, his vote should be counted when it is shown by his affidavit that he offered to vote and for whom. Bisbee *v.* Finley, 2 Ellsw. Cas. Cont. El. 172; Niblack *v.* Walls, Smith Cas. Cont. El. 101.

40. For it cannot be known with certainty afterward how the excluded electors would have voted, and it would obviously be dangerous to receive and rely upon their subsequent statements as to their intentions after it was ascertained precisely what effect their votes would have upon the result.

Alabama.— State *v.* Judge Ninth Judicial Cir., 13 Ala. 805.

California.— Webster *v.* Byrnes, 34 Cal. 273.

Illinois.— Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

New York.— Hartt *v.* Harvey, 19 How. Pr. 245.

North Carolina. — Boyer *v.* Teague, 106 N. C. 576, 627, 11 S. E. 665, 19 Am. St. Rep. 547.

The temptation to actual fraud and corruption on the part of the candidates and their political supporters is never so great as when it is known precisely how many votes it will take to change the result; and men who are willing to sell their votes before election will quite as readily sell their testi-

diately after the conclusion of the count, to make and certify to the proper officer or board a written return showing the number of votes cast for each office in their precinct, and the number received by each candidate or proposition;[41] and where the returns bear date as of the day of election it will be presumed that they were made out forthwith, without recess or adjournment, as the law requires.[42]

2. OF WHAT RETURNS CONSIST. The question as to what papers constitute the official returns is purely a matter of statutory regulation, but it may be said generally that the returns consist of the poll-book in which is entered the certificate of the officers conducting the election, together with a list of voters and one or more of the tally-sheets, all of which are to be carefully enveloped, sealed, and delivered to the officer or board designated by statute.[43] Only such papers as the statute requires may be regarded as election returns. If the officers go further and make statements on their own responsibility such statements should be disregarded.[44]

3. NATURE OF RETURNS. The returns of election inspectors are ministerial and not judicial acts.[45] But they are quasi-records and must stand as evidence establishing the result of the vote, until they are impeached and overcome by affirmative proof that they do not speak the truth.[46]

4. AUTHENTICATION. The return should always be authenticated by the official certificate and signatures of the clerk and inspectors or judges of election, and according to the weight of authority it is essential to the validity of the return that it bear the signatures of a majority at least of the officers who conducted the election.[47] But in other cases it has been held that the absence of official signa-

mony afterward, especially as the means of detecting perjury and falsehood is not always at hand. Young *v.* Deming, 9 Utah 204, 33 Pac. 818.

41. Franklin County *v.* State, 24 Fla. 55, 3 So. 471, 12 Am. St. Rep. 183; Belknap *v.* Board of State Canvassers, 95 Mich. 155, 54 N. W. 696; State *v.* Stein, 35 Nebr. 848, 53 N. W. 999.

42. Gidding *v.* Wells, 99 Mich. 221, 58 N. W. 64.

43. People *v.* Ruyle, 91 Ill. 525; State *v.* Eastman, 46 Nebr. 675, 65 N. W. 805; State *v.* McFadden, 46 Nebr. 668, 65 N. W. 800.

Tally-sheets.— In Missouri tally-sheets are unknown to the law, and, although they are convenient and perhaps necessary for the judges and clerks of election in casting up the votes polled for the several candidates, they constitute no part of the official return. State *v.* Trigg, 72 Mo. 365; State *v.* Stuckey, 78 Mo. App. 533. And the same is true in North Dakota. State *v.* McKenzie, 10 N. D. 132, 86 N. W. 231.

Names of candidates.— It has been held that the returns of precinct election officers stating the number of votes received by the democratic and republican candidates respectively for a particular office are sufficient without stating the names of the candidates. Tunks *v.* Vincent, 106 Ky. 829, 51 S. W. 622, 21 Ky. L. Rep. 475.

Votes of parties.— The returns of election ought to show not only the votes for candidates, but also definitely the votes of parties. *In re* McKinley-Citizens Party, 6 Pa. Dist. 109.

44. Pacheco *v.* Beck, 52 Cal. 3; *Ex p.* Heath, 3 Hill (N. Y.) 42. On the trial of a mandamus proceeding to compel the county board of canvassers to reassemble and complete the canvass of an election, defendants offered in evidence a paper taken from the sealed envelope with the poll-book, and signed by the judges of the election, stating that certain persons (naming them), offered to vote, they being men enlisted as soldiers in Fort Sully, and entitled to vote, under the statutes of the United States, at the nearest voting precinct, the officers stated that they accepted their votes in a separate ballot-box, canvassed the same separately, put them back in the same box, and returned the same inclosed in the larger box, under seal and lock. It was held that such paper was properly excluded, as the judges of election had no right to make such statements, it not being one of their prescribed duties. Smith *v.* Lawrence, 2 S. D. 185, 49 N. W. 7.

Superfluous certificate.—No other certificate of the officers of election than that provided by statute should be made and if made should be disregarded. State *v.* Stuckey, 78 Mo. App. 533.

45. Their character is shown by the freedom with which they are scrutinized in proceedings by mandamus or information in the nature of a quo warranto. State *v.* McFadden, 46 Nebr. 668, 65 N. W. 800; *Ex p.* Heath, 3 Hill (N. Y.) 42.

46. Powell *v.* Holman, 50 Ark. 85, 6 S. W. 505.

47. *Illinois.*—Lawrence County *v.* Schmaulhausen, 123 Ill. 321, 14 N. E. 255; People *v.* Nordheim, 99 Ill. 553.

Maine.— Opinion of Justices, 70 Me. 560; Opinions of Justices, 68 Me. 582.

Massachusetts.— Luce *v.* Mayhew, 13 Gray 83.

Oregon.— Simon *v.* Durham, 10 Oreg. 52.

Texas.— McKinney *v.* O'Connor, 26 Tex. 5.

tures will not of itself be sufficient to authorize the rejection of returns, the authenticity of which is established by other legal and competent evidence.[48] In the absence of any showing or suspicion of fraud where the inspectors or judges of election discover their omission before the canvass is completed and offer to certify their return in due form, it is the duty of the board of canvassers to permit them to do so.[49]

5. Forwarding and Custody. The manner of forwarding or transmitting election returns is purely a matter of statutory regulation; but these statutes are directory merely unless a non-compliance with them is expressly declared to be fatal, and in the absence of fraud or any suspicion of fraud a mere irregularity in forwarding the returns will not warrant their rejection.[50] Thus where it is the duty of the election officers to return the votes sealed, it has been held that a return of them unsealed, in the absence of any proof or suspicion of fraud, is good.[51] A statute which requires the inspectors of election to canvass the vote cast and to make due return of the same to the county commissioners or some

United States.— Chrisman *v.* Anderson, 1 Bartl. Cas. Cont. El. 328.

See 18 Cent. Dig. tit. "Elections," § 223 *et seq.*

Signatures of a majority sufficient.—Tanner *v.* Deen, 108 Ga. 95, 33 S. E. 832.

Name signed by unauthorized person.— State *v.* Conness, 106 Wis. 425, 82 N. W. 288.

Certificate of minority of canvassers.— A certificate of nomination is invalid which is based upon the action of a minority of the members of a party committee whose duty it is to receive and canvass the returns of a primary election, and who became dissatisfied with the action of the majority, withdrew from the meeting, organized at another place, and, after going through the form of canvassing the vote of the primary election and declaring themselves the body duly organized to certify nominations, issued the certificate of nomination in question. *In re* Black, 9 Pa. Dist. 164.

48. Clark *v.* McKenzie, 7 Bush (Ky.) 523; Smith *v.* Jackson, Rowell Cas. Cont. El. 436. In Rich *v.* Board of State Canvassers, 100 Mich. 453, 59 N. W. 181, it was held that a return rejected by the state board showing only a want of due authentication would be accepted by the court without reconvening the board. Where no question is made as to the right of electors to vote or as to the correctness of the returns made by the inspectors of the election, it has been held that an omission through thoughtlessness to certify to the returns as required by law will not justify the exclusion of the votes. Stinson *v.* Sweeney, 17 Nev. 309, 30 Pac. 997.

Supplied by parol evidence.—*In re* Dunn, 19 Pa. Co. Ct. 146.

49. Such permission may be ordered by court. Rummel *v.* Dealy, 112 Iowa 503, 84 N. W. 526.

Signature of clerk only.— Where election returns from one precinct were signed only by the clerk of the election representing the democratic party which was in the minority, and the officers representing the other party appeared the following day and demanded the right to sign, and the rest of the democratic officials admitted the correctness of the vote at the time it was taken, and the ballots confirmed the accuracy of the count and gave no evidence of having been tampered with, it was held that the failure of the officials to sign the return as required by statute did not invalidate the vote. Bates *v.* Crumbaugh, 71 S. W. 75, 24 Ky. L. Rep. 1205. See also Collins *v.* Masden, 74 S. W. 720, 25 Ky. L. Rep. 81.

50. Fowler *v.* State, 68 Tex. 30, 3 S. W. 255.

Carried by unauthorized persons.— The board of canvassers cannot reject a poll-book on account of its being transmitted to the clerk through one not an election officer as directed by statute. Willeford *v.* State, 43 Ark. 62. Where the returns, ballots, and other election papers of a county had disappeared, and it was sought to prove the vote of a precinct by one of the original returns presented by an unauthorized person, but identified, and its correctness was sworn to by the judges of the election, the committee of the house of representatives threw out the vote of the precinct, there being other evidence indicating fraudulent action on the part of one of the judges of election. Spencer *v.* Morey, Smith Cas. Cont. El. 437.

Returns transmitted to wrong officer.—The mere fact that oaths of inspectors and poll lists may have been transmitted to an officer not authorized to receive them is an irregularity which does not affect the result of the election or the legality of the canvass of returns duly made of votes cast at the election. Stockton *v.* Powell, 29 Fla. 1, 11 So. 688, 15 L. R. A. 42.

Box opened for purpose of signing return.— Kellogg *v.* Hickman, 12 Colo. 256, 21 Pac. 325.

51. Mallary *v.* Merrill, Cl. & H. Cas. Cont. El. 328; Platt *v.* Goode, Smith Cas. Cont. El. 650.

No appearance of tampering.— The fact that a poll box was not sealed as required by statute will not invalidate it if it has no appearance of having been tampered with. Patton *v.* Coates, 41 Ark. 111.

Sealing required.— State *v.* Randall, 35 Ohio St. 64.

like board imposes by implication upon the latter the duty of receiving such return when so made into their official custody and keeping.[52]

6. Irregularities and Errors. It may be laid down as a general proposition that in the absence of fraud affecting the result mere irregularities in the return will not necessarily be sufficient ground for rejecting it.[53] Thus an irregularity in the jurat attached to the oath of the judges and clerks of the election will not vitiate the return, where it sufficiently appears that all the judges and clerks actually took the proper oath.[54] The returns must state the offices for which votes have been cast for candidates; otherwise they are void for uncertainty and should be rejected by the board of canvassers.[55] Where mere clerical errors appear upon the face of the returns, it is the duty of the board of canvassers either to correct them themselves, or order the inspectors of election to do so.[56]

7. Failure to Make Return. A failure to make returns from one or more precincts, no matter for what cause, will not invalidate the election unless it be

52. Franklin County *v.* State, 24 Fla. 55, 3 So. 471, 12 Am. St. Rep. 183.

But election returns cannot be canvassed or counted if the irregular way in which they have been transmitted has resulted in their being changed after they were made out by the officers; and returns which have been tampered with by reason of a failure to secure and properly forward them should be rejected. Fowler *v.* State, 68 Tex. 30, 3 S. W. 255.

53. *Colorado.*— Kellogg *v.* Hickman, 12 Colo. 256, 21 Pac. 325.

Florida.— State *v.* Board of State Canvassers, 17 Fla. 29; State *v.* Alachua County, 17 Fla. 9.

Indiana.—Mustard *v.* Hoppess, 69 Ind. 324.

Iowa.— Casady *v.* Lowry, 49 Iowa 523; State *v.* Cavers, 22 Iowa 343; Dishon *v.* Smith, 10 Iowa 212; State *v.* Bailey, 7 Iowa 390.

Kansas.— Privett *v.* Stevens, 25 Kan. 275; State *v.* Sillon, 24 Kan. 13; Gilleland *v.* Schuyler, 9 Kan. 569.

Kentucky.— Clark *v.* McKenzie, 7 Bush 523; Clark *v.* Leathers, 5 S. W. 576, 9 Ky. L. Rep. 558.

Louisiana.— Webre *v.* Wilton, 29 La. Ann. 610.

Maine.— Opinion of Justices, 70 Me. 560.

Michigan.— Atty.-Gen. *v.* Glaser, 102 Mich. 396, 61 N. W. 648, 64 N. W. 828; Rich *v.* Board of State Canvassers, 100 Mich. 453, 59 N. W. 181.

Montana.— State *v.* Choteau County, 13 Mont. 23, 31 Pac. 879.

Nevada.— Stinson *v.* Sweeney, 17 Nev. 309.

Ohio.— Lehman *v.* McBride, 15 Ohio St. 573.

Oregon.— Cresap *v.* Gray, 10 Oreg. 345; Day *v.* Kent, 1 Oreg. 123.

Texas.— Fowler *v.* State, 68 Tex. 30, 3 S. W. 255; *Ex p.* Towles, 48 Tex. 413.

See 18 Cent. Dig. tit. "Elections," § 229.

Failure to attach ballots and other documents required by statute.—Taylor *v.* Taylor, 10 Minn. 107; Bush *v.* McKenzie, 66 Hun (N. Y.) 265, 21 N. Y. Suppl. 279; *In re* Chemung County, 12 N. Y. Suppl. 174; People *v.* Board of Sup'rs, 58 How. Pr. (N. Y.) 141; Day *v.* Kent, 1 Oreg. 123.

Harmless irregularities.— In an election for county officers a failure to comply with the requirements of the election law on the following points was shown: (1) No tally-sheets of the votes cast or poll lists of the voters by whom they were cast were kept or returned by the presiding officers and managers of the election. (2) The election returns contained no more than a mere statement of the result of the voting, and the ballot-box containing the tickets voted was sent to the county judge and clerk through the United States mails instead of by the presiding officer or any manager of the election. (3) Non-reception of the returns sent him by the county judge. (4) The returns not made in triplicate. (5) The box used at the election and in which the returns were made to the county court was not a proper one. It was held that these defects would not vitiate the election, provided it was made to appear that the neglect or misconduct of the officers had not prevented an honest and fair election. Fowler *v.* State, 68 Tex. 30, 3 S. W. 255.

54. State *v.* Sillon, 24 Kan. 13.

Jurat to oath not signed.— Where the jurat to the oath of inspectors of election is not signed, or when the inspectors have not been sworn, but have acted as such and made proper return, their acts are valid and their return of election should be counted. State *v.* Alachua County, 17 Fla. 9.

55. Moore *v.* Kessler, 59 Ind. 152.

56. State *v.* Hill, 20 Nebr. 119, 29 N. W. 258; Esker *v.* McCoy, 5 Ohio Dec. (Reprint) 573, 6 Am. L. Rec. 694; Com. *v.* Emminger, 74 Pa. St. 479.

The power of the court should not be invoked to correct a mere clerical error in the returns, unless the board of canvassers refuse to order the election inspectors to make the correction. *In re* First Ward, 49 N. Y. Suppl. 241.

Arithmetical error.— An arithmetical error in the count and declaration of votes in a town meeting may be corrected by the moderator in a supplemental public declaration before the close of the meeting, but not by the clerk in his record and return, without such correctional action taken by the moderator. Felker *v.* Chesley, 66 N. H. 381, 29

shown that the votes not returned would have changed the result.[57] The failure to return the result of a certain poll within the time prescribed by law does not of itself authorize the rejection of the vote of that poll.[58]

8. COMPELLING RETURN. Inspectors and judges of election are ministerial officers, and where they neglect or refuse to make a return or make an erroneous or improper one they may be compelled by mandamus to perform their duty.[59]

9. DOUBLE RETURNS. Where two sets of returns are sent in, both in due form, that which is first received should be canvassed;[60] and where double returns are sent in, one set authenticated by a minority and the other by a majority of the election officers, that authenticated by the majority is the official return and should be canvassed.[61]

10. NEW OR AMENDED RETURN. By statute in some jurisdictions, where the return is so informal and defective that it cannot be canvassed, it is made the duty of the board of canvassers to send down for a new or amended return;[62] and if through error or fraud the returns do not correctly state the number of votes cast the inspectors of election may be required by mandamus to correct them according to the tally-sheets, which are the original records of the votes cast; and the county canvassers may likewise be required to canvass such corrected returns.[63] By statute the canvassers may be required to allow an erroneous, defective, or informal return to be aided and corrected by an attested copy of the record of the votes made at the same time with the return.[64]

C. Canvass — 1. POWERS AND DUTIES OF COUNTY CANVASSERS — a. In General. County canvassers have the quasi-judicial power to determine whether the papers transmitted to them are genuine election returns signed by the duly appointed officers in the various precincts; but beyond this their duties are purely ministerial, involving simply the labor of counting the votes returned to them and determining the number of votes received by each candidate or proposition. They are governed by the returns made by the inspectors of the several precincts as to the

Atl. 540; Hill *v.* Goodwin, 56 N. H. 441; Opinion of Justices, 53 N. H. 640; Bell *v.* Pike, 53 N. H. 473.

57. *Ex p.* Heath, 3 Hill (N. Y.) 42.

Failure to make returns from certain precincts will not vitiate an election where it appears that the whole number of votes cast in such missing precincts could not change the result as shown by the votes returned and canvassed. Lafayette, etc., R. Co. *v.* Geiger, 34 Ind. 185.

58. Webre *v.* Wilton, 29 La. Ann. 610.

59. Enos *v.* State, 131 Ind. 560, 31 N. E. 357; People *v.* Syracuse, 88 Hun (N. Y.) 203, 34 N. Y. Suppl. 661; Gleason *v.* Blanc, 14 Misc. (N. Y.) 620, 36 N. Y. Suppl. 938.

Clerical errors.— *In re* Stewart, 24 N. Y. App. Div. 201, 48 N. Y. Suppl. 957.

Peremptory writ of mandamus to compel the inspectors of a precinct to make a return of the votes cast at that precinct should be denied upon the answer of the inspectors that they had forwarded the returns which had been stolen from the messenger and were still unrecovered and that they had no means whereby they could make another return. State *v.* Election Inspectors, 17 Fla. 26.

60. Opinion of Justices, 70 Me. 560.

61. State *v.* Barber, 4 Wyo. 56, 32 Pac. 14.

62. Luce *v.* Dukes County, 153 Mass. 108, 26 N. E. 419.

Under the Michigan statute.— When the board of state canvassers meets to canvass the vote of the state, and the election returns from any county are not executed according to law, it is the duty of the board to order from the county clerk a correct return and not to reject the vote of the county. Rich *v.* Board of State Canvassers, 100 Mich. 453, 59 N. E. 181.

Under the Montana statute.—Where it was shown that no check list of the voters of a certain precinct or surrendered certificates of registration were sent to the county clerk by the judges, and that the board of canvassers acted upon the poll-book alone, it was held that it was the duty of the board to procure the check list and surrendered certificates before the returns were rejected. State *v.* Choteau County, 13 Mont. 23, 31 Pac. 879.

Officers summoned to amend return.— McKinney *v.* Peers, 91 Va. 684, 22 S. E. 506.

Statute mandatory — "May" construed to mean "must."— State *v.* Baker, 38 Wis. 71; State *v.* Board of State Canvassers, 36 Wis. 498.

63. *In re* Stewart, 155 N. Y. 545, 59 N. E. 51 [*affirming* 24 N. Y. App. Div. 201, 48 N. Y. Suppl. 957].

64. Opinion of Justices, 70 Me. 560. Where the return of votes is defective by reason of an informality, for instance for want of the signature of the city clerk, and a duly attested copy of the record is offered as a substitute, the canvassing board are under a legal obligation to receive the substitute. Rounds *v.* Smart, 71 Me. 380.

number of votes cast and for whom cast, and if these returns be in due form they have not the power to go behind them and ascertain the qualifications of voters or otherwise to inquire into the regularity of the election. They must simply add together the votes of the several precincts cast for each candidate as the same are shown in the certified returns and declare the result, and the declaration of the result made by them establishes a *prima facie* case of election.[65] And if they attempt to travel beyond the limit of their ministerial duties, and enter upon a judicial investigation of the regularity of the election, they may be compelled by mandamus to canvass the returns as they have them before them.[66] So also state boards of canvassers can act only on the returns made to them by the county clerk, and it is their duty to canvass the entire vote as shown by such returns.[67]

65. *Alabama.*— Hudmon *v.* Slaughter, 70 Ala. 546; Leigh *v.* State, 69 Ala. 261.
Arkansas.— Willeford *v.* State, 43 Ark. 62; Patton *v.* Coates, 41 Ark. 111; Howard *v.* McDiarmid, 26 Ark. 100.
Colorado.— People *v.* Grand County, 6 Colo. 202.
Delaware.— McCoy *v.* State, 2 Marv. 543, 36 Atl. 81.
District of Columbia.— Mead *v.* Carrol, 6 D. C. 338.
Florida.— State *v.* Alachua County, 17 Fla. 9; State *v.* McLin, 16 Fla. 17.
Georgia.— Harris *v.* Perryman, 103 Ga. 816, 30 S. E. 663.
Illinois.— People *v.* Hilliard, 29 Ill. 413; People *v.* Head, 25 Ill. 325; People *v.* Kilduff, 15 Ill. 492, 60 Am. Dec. 769.
Indiana.— Moore *v.* Kessler, 59 Ind. 152; State *v.* Jones, 19 Ind. 356, 81 Am. Dec. 403; Brower *v.* O'Brien, 2 Ind. 423.
Iowa.— State *v.* Cavers, 22 Iowa 343; Dishon *v.* Smith, 10 Iowa 212.
Kansas.— Brown *v.* Jeffries, 42 Kan. 605, 22 Pac. 578; Lewis *v.* Marshall County Com'rs, 16 Kan. 102, 22 Am. Rep. 275; State *v.* Marston, 6 Kan. 524.
Kentucky.— Clark *v.* McKenzie, 7 Bush 523.
Maine.— Opinion of Justices, 38 Me. 597; Bacon *v.* York County Com'rs, 26 Me. 491.
Massachusetts.—Clark *v.* Hampden County, 126 Mass. 282.
Michigan.— McQuade *v.* Furgason, 91 Mich. 438, 51 N. W. 1073; Atty.-Gen. *v.* Iron County, 64 Mich. 607, 31 N. W. 539; Green *v.* Graves, 1 Dougl. 351.
Minnesota.— State *v.* St. Paul, 25 Minn. 106; Taylor *v.* Taylor, 10 Minn. 107; O'Ferrall *v.* Colby, 2 Minn. 180.
Missouri.— State *v.* Steers, 44 Mo. 223; State *v.* Rodman, 43 Mo. 256; Mayo *v.* Freeland, 10 Mo. 629.
Montana.— State *v.* Choteau County, 13 Mont. 23, 31 Pac. 879; Pigott *v.* Cascade County, 12 Mont. 537, 31 Pac. 536; Chumasero *v.* Potts, 2 Mont. 242.
Nebraska.— State *v.* McFadden, 46 Nebr. 668, 65 N. W. 800; State *v.* Van Camp, 36 Nebr. 9, 91, 54 N. W. 113; State *v.* Elder, 31 Nebr. 169, 47 N. W. 710, 10 L. R. A. 796; State *v.* Kavanagh, 24 Nebr. 506, 39 N. W. 431; Long *v.* State, 17 Nebr. 60, 22 N. W. 120; State *v.* Peacock, 15 Nebr. 442, 19 N. W. 685; State *v.* Stearns, 11 Nebr. 104, 7 N. W. 743; State *v.* Hill, 10 Nebr. 58, 4 N. W. 514; Hagge *v.* State, 10 Nebr. 51, 4 N. W. 375.
New Hampshire.— Opinion of Court, 58 N. H. 621.
New Jersey.— Williams *v.* Rahway, 33 N. J. L. 111; Gledhill *v.* Passaic County, 25 N. J. L. 354; Gledhill *v.* Governor, 25 N. J. L. 331.
New Mexico.— Bull *v.* Southwick, 2 N. M. 321.
New York.— People *v.* Rice, 129 N. Y. 461, 29 N. E. 358; People *v.* State Bd. of Canvassers, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 646; Hartt *v.* Harvey, 32 Barb. 55; Morgan *v.* Quackenbush, 22 Barb. 72; Kortz *v.* Greene County, 12 Abb. N. Cas. 84; People *v.* Wayne County, 12 Abb. N. Cas. 77, 64 How. Pr. 534; Felt's Case, 11 Abb. Pr. N. S. 203; *Ex p.* Heath, 3 Hill 42; People *v.* Van Slyck, 4 Cow. 297.
North Carolina.— Peebles *v.* Davie County Com'rs, 82 N. C. 385; Moore *v.* Jones, 76 N. C. 182.
North Dakota.— State *v.* McKenzie, 10 N. D. 132, 86 N. W. 231.
Ohio.— State *v.* Tanzey, 49 Ohio St. 656, 32 N. E. 750; Dalton *v.* State, 43 Ohio St. 652, 3 N. E. 685; Phelps *v.* Schroder, 26 Ohio St. 549.
Pennsylvania.— Com. *v.* Emminger, 74 Pa. St. 479; *In re* Orphans' Ct., 1 Brewst. 67, 5 Phila. 102; Com. *v.* Tree, 4 Phila. 362; Lawrence *v.* Knight, 4 Phila. 355; *In re* Twenty-Ninth Ward, 1 Wkly. Notes Cas. 114.
South Carolina.— State *v.* Hayne, 8 S. C. 367; State *v.* Charleston, 1 S. C. 30.
South Dakota.— Smith *v.* Lawrence, 2 S. D. 185, 49 N. W. 7.
Tennessee.—State *v.* Wright, 10 Heisk. 237; Marshall *v.* Kerns, 2 Swan 68.
Utah.— Page *v.* Utah Commission, 11 Utah 119, 39 Pac. 499.
Virginia.— McKinney *v.* Peers, 91 Va. 684, 22 S. E. 506.
Washington.— State *v.* Trimbell, 12 Wash. 440, 41 Pac. 183.
West Virginia.— Brazie *v.* Fayette County Com'rs, 25 W. Va. 213.
Wisconsin.— Atty.-Gen. *v.* Barstow, 4 Wis. 567; Atty.-Gen. *v.* Ely, 4 Wis. 420.
See 18 Cent. Dig. tit. "Elections," § 232 *et seq.*

66. Clark *v.* McKenzie, 7 Bush (Ky.) 523; State *v.* Choteau County, 13 Mont. 23, 31 Pac. 879.

67. State *v.* Barber, 4 Wyo. 56, 32 Pac. 14.

The object and purpose of the canvass is to determine the result of the election as shown by the official returns and not to determine judicially who received the most votes in fact. In case the official returns do not truly recite the votes as cast the remedy provided for those who are aggrieved is by contesting the election.[68]

b. Applications of Rule. Thus canvassers have no power to determine whether or not the votes cast at the election were legal or illegal,[69] or to inquire into the validity of the certificates of nomination of candidates.[70] Nor have they power to withhold their certificate of election, on the ground that fraud and bribery were used in obtaining votes for the successful candidate.[71] So the ballots of the electors as shown by the statements of the inspectors of election are the only evidence upon which the board of canvassers can act.[72] They have no authority to pass upon the eligibility of a candidate to office.[73] They have no authority to pass by the returns made to them by the judges of election and undertake to count the ballots themselves.[74] So where a proposition on some question is submitted to the voters at a general election, in a state where such proposition in order to be carried must receive a majority of all the votes cast at such election for any candidate or question, the county canvassers have no authority to find and declare the total vote polled at the election, and a finding in that respect made by them will be rejected as surplusage.[75] It is the duty of the canvassers to receive and count all returns sent to them which are not obviously spurious, however false and fraudulent they may be in fact.[76] But where election returns are false on their face, showing that the election officers, in positive disregard of the mandatory election laws and of their oaths, received and counted many votes in reckless disregard of the terms of the statutes, they carry no favorable presumption whatsoever, and should be stricken from the election returns altogether.[77] And if a paper purporting to be a return is obviously a forgery the canvassers should dis-

68. State *v.* McKenzie, 10 N. D. 132, 86 N. W. 231.

69. Franklin County *v.* State, 24 Fla. 55, 3 So. 471, 12 Am. St. Rep. 183; State *v.* McLin, 16 Fla. 17; State *v.* Gibbs, 13 Fla. 55, 7 Am. Rep. 233; Gatling *v.* Boone, 98 N. C. 573, 3 S. E. 392; State *v.* Tanzey, 49 Ohio St. 656, 32 N. E. 750.

Ballots shown by the record to be illegal. — In counting the votes for county officers the governor and counsel are not authorized to reject ballots shown by the records to be illegal for having distinguishing marks upon them. Opinion of Justices, 54 Me. 602.

Under the Mississippi statute it is held to be the duty of the commissioners in canvassing the returns to cast out all ballots which appear illegal on inspection. Oglesby *v.* Sigman, 58 Miss. 502.

Constitutionality of law.— A county board of canvassers cannot reject any votes which may come to it duly certified, on the ground that the statute which authorized such votes to be cast is unconstitutional. Matter of Woods, 5 Misc. (N. Y.) 575, 26 N. Y. Suppl. 169.

In South Carolina the state board of canvassers has the power to throw out ballots which do not meet all the requirements of the statute. *Ex p.* Riggs, 52 S. C. 298, 29 S. E. 645.

70. Pigott *v.* Cascade County, 12 Mont. 537, 31 Pac. 536; Chamberlain *v.* Hedger, 12 S. D. 135, 80 N. W. 178.

71. Com. *v.* Emminger, 74 Pa. St. 479.

72. They have no power to examine witnesses or receive other evidence to prove for whom a ballot was intended. People *v.* Tisdale, 1 Dougl. (Mich.) 59; Kortz *v.* Greene County, 12 Abb. N. Cas. (N. Y.) 84.

73. State *v.* Finley, 74 Mo. App. 213; Matter of Atkinson, 28 Misc. (N. Y.) 694, 59 N. Y. Suppl. 792 [*affirmed* without opinion in 45 N. Y. App. Div. 628, 61 N. Y. Suppl. 1131].

Where a candidate has been nominated by more than one party the canvassers should reckon the total number of votes cast for him and not the number cast for him by each party. People *v.* Erie County, 79 N. Y. App. Div. 514, 80 N. Y. Suppl. 25.

74. Holt *v.* People, 102 Ill. App. 276.

75. State *v.* Clark, 59 Nebr. 702, 82 N. W. 8.

Special election.— Young *v.* Hendersonville, 129 N. C. 422, 40 S. E. 89; Rigsbee *v.* Durham, 99 N. C. 341, 6 S. E. 64. See also Smallwood *v.* Newbern, 90 N. C. 36.

76. *Missouri.*— State *v.* Steers, 44 Mo. 223.

North Carolina.— McDonald *v.* Morrow, 119 N. C. 666, 26 N. E. 132.

Ohio.— Dalton *v.* State, 43 Ohio St. 652, 3 N. E. 685.

South Dakota.— Woods *v.* Sheldon, 9 S. D. 392, 69 N. W. 602.

Wisconsin.— State *v.* Board of State Canvassers, 36 Wis. 498.

See 18 Cent. Dig. tit. "Elections," § 234.

Omission of list of voters.— Tanner *v.* Deen, 108 Ga. 95, 33 S. E. 832.

Missing return.— People *v.* Stewart, 132 Cal. 283, 64 Pac. 285.

77. Matter of Barber, 10 Phila. (Pa.) 579 [*affirmed* in 32 Leg. Int. 229].

regard it.[78] But if it is doubtful they cannot judge of its validity and must include it in the count.[79] In short their duties are confined to a pure, inflexible mathematical calculation and they have no authority to hear evidence upon any matters of discretion.[80]

2. PAPERS TO BE CONSIDERED. It is the duty of the canvassing board in making the abstract of the vote of an election to consider the entire returns, to wit, the certificate of the election officers, the list of voters, and the tally list; and where there is a discrepancy or conflict between the certificate of the officers conducting the election and the tally list as regards the number of votes cast for a particular person or proposition, the canvassers, after comparing the certificate and tally list with the list of voters returned, must decide which is correct and make an abstract of the vote accordingly.[81] It has been held, however, that the canvassers have no right to regard as election returns mere loose tally-sheets which bear no marks of authentication;[82] and where the tally lists are not deemed to be a part of the returns the canvassers have no right to consider them.[83]

3. ALTERATION OF RETURNS. The canvassers must cast up and count the votes as returned by the officers of election, and where there has been an alteration of the returns after they have been sent in it is the duty of the canvassers to disregard the alteration and make the count according to the true returns.[84]

4. IRREGULARITIES AND ERRORS. Inasmuch as the duties of canvassing boards are merely ministerial, the omissions or mistakes of such boards can have no controlling influence on the election.[85] The fact that the returns were canvassed on the second day after election instead of the third day as provided by statute is

78. *In re* Orphans' Ct., 1 Brewst. (Pa.) 67, 5 Phila. (Pa.) 102; Lawrence *v.* Knight, 4 Phila. (Pa.) 355.

79. *In re* Orphans' Ct., 1 Brewst. (Pa.) 67, 5 Phila. (Pa.) 102; Lawrence *v.* Knight, 4 Phila. (Pa.) 355.

80. Clark *v.* Hampden County, 126 Mass. 282; Luce *v.* Mayhew, 13 Gray (Mass.) 83; *In re* Strong, 20 Pick. (Mass.) 484.

81. People *v.* Ruyle, 91 Ill. 525; State *v.* Eastman, 46 Nebr. 675, 65 N. W. 805; State *v.* McFadden, 46 Nebr. 668, 65 N. W. 800.

Not to rely on judge's certificate alone.— In arriving at the result of an election the canvassing board is not to consider the judge's certificate alone or any other constituent of the returns as a controlling force, but all are to be considered. Patton *v.* People, 63 Ill. App. 617.

Poll-books.— The clerk and county commissioners should satisfy themselves that the poll-books returned are genuine, and when the only irregularity in returning them is that they were brought to the clerk's office in a sealed envelope with the ballots cast at the election indorsed as containing all the ballots cast, they ought to receive other evidence than such indorsement that the poll-books are in the envelope and should open it, take out the poll-books, and canvass the returns as shown by them. Patten *v.* Florence, 38 Kan. 501, 17 Pac. 174.

Certificate to returns not required.— Where the statute does not require judges of election to attach to the election returns a certificate showing the number of votes cast for the respective candidates, the board of canvassers should rely upon the tally-sheets returned to them, even though the judges certified their returns. Epley *v.* Moore, 11 Okla. 335, 66 Pac. 337.

Tally-sheet used to correct poll-book.— State *v.* Hill, 20 Nebr. 119, 29 N. W. 258.

Tally-sheets control.— Hughes *v.* Parker, 63 Kan. 297, 65 Pac. 265.

Tally-sheets to show long and short terms.— Com. *v.* Fletcher, 180 Pa. St. 456, 36 Atl. 917.

82. Simon *v.* Durham, 10 Oreg. 52.

83. State *v.* McKenzie, 10 N. D. 132, 86 N. W. 231.

84. State *v.* Garesche, 65 Mo. 480; State *v.* McFadden, 46 Nebr. 668, 65 N. W. 800; State *v.* Kavanagh, 24 Nebr. 506, 39 N. W. 431; State *v.* Matley, 17 Nebr. 564, 24 N. W. 200; State *v.* Dalton, 1 Ohio Cir. Ct. 161, 1 Ohio Cir. Dec. 93.

Where returns are duly prepared and signed by the proper officers, but before they are delivered to the county clerk they are tampered with by unauthorized persons and changed in respect to the votes cast for some particular office, nevertheless it is the duty of the canvassers to receive the returns and canvass the votes cast for candidates for all other offices. Lewis *v.* Marshall County Com'rs, 16 Kan. 102, 22 Am. Rep. 275.

85. People *v.* Van Cleve, 1 Mich. 362, 53 Am. Dec. 69. Thus where the returns of an election are duly canvassed by the county board acting as a board of canvassers and an abstract of the vote is made, the mere failure of the clerk to certify and sign such abstract will not render the election invalid. State *v.* Pratt County, 42 Kan. 641, 22 Pac. 722.

Votes given twice.— A return by election inspectors in which the votes cast for a person are given twice or repeated constitutes no ground for refusing to include such return in the statement or certificate by the county canvassers, it being on its face a mere verbal repetition. State *v.* Alachua County, 17 Fla. 9.

immaterial.[86] In the absence of injury or fraud it is not a valid objection to a canvass that it was made in a place other than that provided by law.[87] But if the canvassers meet at an unusual time and place with a fraudulent intent, this will render their whole proceeding illegal and void.[88]

5. RECANVASS OF RETURNS. When a board of canvassers has fully performed its duty, proclaimed the result of the count according to law, and adjourned *sine die* its duty must be considered as having been performed once and for all time. The board is *functus officio* and the persons who composed it have no power or authority voluntarily to reassemble and recanvass the returns;[89] and upon the theory that the existence of the board as such has terminated, it has been held that mandamus will not lie to compel the former members to reassemble for the purpose of recanvassing the returns, although it be alleged that they did not fully or accurately perform their duty.[90] But on the other hand it has been repeatedly

86. Claybrook *v.* Rockingham County, 114 N. C. 453, 19 S. E. 593.

87. Puckett *v.* Springfield, 97 Tenn. 264, 37 S. W. 2.

Lawful place in use for another purpose.— McCraw *v.* Harralson, 4 Coldw. (Tenn.) 34.

Interruption by disorderly crowd.—It is not a sufficient reason for invalidating the election that some of the return judges refused to meet on that day, or that those who did meet met at an unusual place, where it was shown that the duties of the return judges were so interfered with by a disorderly crowd that they could not be performed at the usual place. Hulsemen *v.* Rems, 41 Pa. St. 396.

88. A secret canvass of votes by part of the county commissioners at three o'clock in the morning by moonlight upon a town site without the official poll-books, ballots, or tally-sheets, and without notice of such proceedings to the rest of the commissioners, is illegal and void. State *v.* Seward County, 36 Kan. 236, 13 Pac. 212.

89. *Kansas.*— Sumner County High School *v.* Sumner County, 61 Kan. 796, 60 Pac. 1057.

Louisiana.— Ramsey *v.* Callaway, 15 La. Ann. 404.

Massachusetts.— See Opinion of Justices, 117 Mass. 599.

Michigan.— People *v.* Benzie County, 34 Mich. 211.

Minnesota.— State *v.* Lamberton, 37 Minn. 362, 34 N. W. 336.

Missouri.— Bowen *v.* Hixon, 45 Mo. 340.

Nebraska.— Kane *v.* People, 4 Nebr. 509.

New York.— Hadley *v.* Albany, 33 N. Y. 603, 88 Am. Dec. 412; Morgan *v.* Quackenbush, 22 Barb. 72; People *v.* Greene County, 12 Barb. 217.

Ohio.— State *v.* Donnewirth, 21 Ohio St. 216.

Tennessee.— State *v.* Gossett, 9 Lea 644.

Virginia.— McKinney *v.* Peers, 91 Va. 684, 22 S. E. 506.

United States.— Chrisman *v.* Anderson, 1 Bartl. Cas. Cont. El. 328; Gooding *v.* Wilson, Rowell Cas. Cont. El. 276.

See 18 Cent. Dig. tit. "Elections," § 239.

Board cannot resolve itself into contest court. Keeler *v.* Shaw, 24 Pa. Co. Ct. 337.

Complete canvass prevented by restraining order.— State *v.* Kearny County, 42 Kan. 739, 22 Pac. 735.

Successors in office.— In Morgan *v.* Quackenbush, 22 Barb. (N. Y.) 72, it appeared that the common council of the city of Albany in making their canvass of the returns from the election received affidavits tending to show fraudulent practices at the polls, and omitted to canvass the votes of two election districts on that ground, thus transcending their authority and assuming to exercise a judicial power which the legislature had not vested in them. Immediately upon the assembling of the new council they proceeded to recanvass the returns and declared a result different from that declared by the old council, but it was held that the old council having canvassed the returns and declared the result, however illegally they might have acted, their power over the subject as canvassers was spent and the action of the new common council in attempting to recanvass the returns and to determine and declare who was elected mayor was unauthorized and void.

90. Clark *v.* Buchanan, 2 Minn. 346; Swain *v.* McRae, 80 N. C. 111; State *v.* Berry, 14 Ohio St. 315.

After result of canvass transmitted to secretary of state.— Under the Mississippi statute it is held that when the commissioners of election have canvassed the returns, declared the result, and transmitted to the secretary of state as required by statute a statement of the vote, their connection with the returns has terminated and they cannot be compelled to reassemble and recanvass such returns. Oglesby *v.* Sigman, 58 Miss. 502.

Board functus officio.— In People *v.* Greene County, 12 Barb. (N. Y.) 217, which has often been cited, it was broadly laid down that after a board of county canvassers has met and organized according to law, has proceeded to estimate the votes of the county, to make the statement prescribed by statute, and to determine who had been elected county officers, and a copy of their determination, etc., has been published and filed and has become a matter of record and the board has dissolved, a mandamus will not lie requiring them to reconvene and correct the estimate of the votes of the county, and the several statements and determinations made thereupon by such board by allowing, counting, canvassing, and estimating the votes of a particular election district which it is alleged were improp-

decided and seems to be the better doctrine that after canvassers have made one canvass, declared the result, and adjourned, they may be compelled by mandamus to reassemble and make a correct canvass of all the returns, where it appears that upon the first canvass they neglected or refused fully to perform their duty. It is settled by abundant authority that where the board refused to canvass any of the votes it may be compelled so to do by mandamus, even though it has adjourned *sine die*, and there can be no difference in principle between a refusal to canvass any and a refusal to canvass a part only of the returns.[91]

6. DESTRUCTION OF RETURNS — PAROL EVIDENCE. In case the official returns are destroyed before they are canvassed secondary evidence of their contents may be received.[92]

7. ABOLITION OF BOARD BEFORE CANVASS. A law which abolishes a canvassing board after an election authorized by the constitution has been held, but before the result of the election has been determined, and provides no other method for determining the result, is unconstitutional.[93]

8. MANDAMUS TO COMPEL CANVASS. If the canvassers neglect or refuse to canvass the returns sent to them mandamus will lie to compel them to do so,[94] and that too without previous actual demand, for where the law imposes a duty it

erly omitted by such board at its former meeting, and commanding them to make corrected statements of the votes and deliver them to the county clerk, and to correct in accordance with such statements the determinations made by such board as to the person or persons duly elected to any county office. But see New York cases cited *infra*, note 91.

91. *Delaware.*— State *v.* McCoy, 2 Marv. 576, 43 Atl. 270.

Florida.— State *v.* McLin, 16 Fla. 17.

Illinois.— People *v.* Nordheim, 99 Ill. 553.

Iowa.— State *v.* Hardin County Judge, 13 Iowa 139; State *v.* Bailey, 7 Iowa 390; State *v.* Marshall County Judge, 7 Iowa 186.

Kansas.— State *v.* Hodgeman County, 23 Kan. 264; Lewis *v.* Marshall County Com'rs, 16 Kan. 102, 22 Am. Rep. 275. In Rice *v.* County Bd. of Canvassers, 50 Kan. 149, 32 Pac. 134, the general right to such relief was clearly recognized, but for reasons appearing in that case it was denied.

Kentucky.— Steele *v.* Meade, 98 Ky. 614, 33 S. W. 944, 17 Ky. L. Rep. 1158.

Michigan.— Rich *v.* Board of State Canvassers, 100 Mich. 453, 59 N. W. 181; Roemer *v.* Board of City Canvassers, 90 Mich. 27, 51 N. W. 267; Coll *v.* Detroit, 83 Mich. 367, 47 N. W. 227.

Missouri.— State *v.* Stuckey, 78 Mo. App. 533.

Montana.— State *v.* Choteau County, 13 Mont. 23, 31 Pac. 879.

Nebraska.— State *v.* McFadden, 46 Nebr. 668, 65 N. W. 800; State *v.* Howe, 28 Nebr. 618, 44 N. W. 874; State *v.* Peacock, 15 Nebr. 442, 19 N. W. 685; State *v.* Stearns, 11 Nebr. 104, 7 N. W. 743; State *v.* Hill, 10 Nebr. 58, 4 N. W. 514; State *v.* Dinsmore, 5 Nebr. 145.

New York.— People *v.* Onondaga County, 129 N. Y. 395, 29 N. E. 327, 14 L. R. A. 624; People *v.* Buffalo, 31 N. Y. App. Div. 438, 52 N. Y. Suppl. 643; People *v.* Albany County, 46 Hun 300.

Oregon.— Simon *v.* Durham, 10 Oreg. 52.

West Virginia.—Daniel *v.* Simms, 49 W. Va. 554, 39 S. E. 690; Alderson *v.* Commissioners, 32 W. Va. 454, 9 S. E. 863.

See 18 Cent. Dig. tit. "Elections," § 239.

Mandamus against town board.— Mandamus will not lie to compel a town board of inspectors to reassemble and recount ballots cast for supervisors at a town meeting in the manner prescribed by the general election law, where such general election law is not applicable to town meetings and another mode of canvassing the votes is provided for under the town election law. *In re* Larkin, 163 N. Y. 201, 57 N. E. 404 [*reversing* 46 N. Y. App. Div. 366, 61 N. Y. Suppl. 597].

Ambiguous returns.— Hughes *v.* Parker, 63 Kan. 297, 65 Pac. 265.

Change in personnel of board.— Belknap *v.* Board of State Canvassers, 95 Mich. 155, 54 N. W. 696.

Aliter if duty fully performed.— After the board of state canvassers has canvassed all the returns from all the counties of the state, has declared the result, and has ordered certificates as prescribed by the statute and then, having fully completed its labors, adjourned without day, it is *functus officio*, and the courts have no power to compel the board to reassemble and recount any returns. Rosenthal *v.* State Bd. of Canvassers, 50 Kan. 129, 32 Pac. 129, 19 L. R. A. 157.

92. State *v.* Nerland, 7 S. C. 241.

Extrinsic evidence in aid of return.— Howard *v.* Shields, 16 Ohio St. 184.

93. State *v.* McCoy, 2 Marv. (Del.) 576, 43 Atl. 270.

94. *Delaware.*— McCoy *v.* State, 2 Marv. 543, 36 Atl. 81.

Florida.— State *v.* Alachua County, 17 Fla. 9; State *v.* Gibbs, 13 Fla. 55, 7 Am. Rep. 233.

Georgia.— Tanne *v.* Deen, 108 Ga. 95, 33 S. E. 832.

Kansas.— Shellabarger *v.* Jackson County, 50 Kan. 138, 32 Pac. 132.

supplies the demand in case of an omission to perform such duty.[95] And this remedy is available against a state board of canvassers as well as against county canvassers;[96] but it is not available until the returns have all been sent in;[97] and the petition for the writ should allege that the returns have been duly made out and sent in as required by law.[98] A peremptory writ will not issue to compel officers to canvass returns which are obvious forgeries,[99] although in a proceeding to compel the canvassing of the returns the question as to whether or not such returns have been fraudulently altered cannot be tried.[1] So a peremptory mandamus will not be awarded where the returns are so informal and defective that no intelligent canvass can be made of them.[2] But the court cannot direct canvassing officers what result to ascertain or declare, or by any process ascertain for them a result by which they will be bound to make a return.[3] In other words the court is not authorized to consider questions which the canvassing board itself has no power to consider and to compel action by the board based upon its decision of such questions.[4]

9. Powers and Duties of State Canvassers — a. In General. The state canvassers can act only upon the certified statements of the county canvassers returned by the several county clerks to the secretary of state, and have no authority to procure corrected returns or to go behind the returns thus made, or to receive testimony *aliunde* either to sustain or to invalidate them.[5] So also the duties of the secretary of state in promulgating the returns of the election are purely and exclusively ministerial.[6] When the board of county canvassers in making their returns to the state canvassers include in their statement of the votes cast in their county for any office any tabulated statement of the votes by towns and wards or

Kentucky.— Houston *v.* Steele, 98 Ky. 596, 34 S. W. 6, 17 Ky. L. Rep. 1149.

Michigan.— Hilton *v.* Grand Rapids, 112 Mich. 500, 70 N. W. 1043; Vance *v.* St. Clair County, 95 Mich. 462, 54 N. W. 1084; Atty.-Gen. *v.* Iron County, 64 Mich. 607, 31 N. W. 539.

Missouri.— State *v.* Garesche, 65 Mo. 480; State *v.* Stuckey, 78 Mo. App. 533.

Nebraska.— State *v.* Hill, 10 Nebr. 58, 4 N. W. 514.

New Mexico.— *In re* Sloan, 5 N. M. 590, 25 Pac. 930.

New York.— People *v.* Schiellein, 95 N. Y. 124.

Pennsylvania.— *In re* Orphans' Ct., 1 Brewst. 67, 5 Phila. 102; Com. *v.* Tree, 4 Phila. 362.

Utah.— Page *v.* Utah Commission, 11 Utah 119, 39 Pac. 499.

Wisconsin.— State *v.* Board of State Canvassers, 36 Wis. 498.

Mandamus generally see Mandamus.

Action for damages.— See Chamberlain *v.* Wood, 15 S. D. 216, 88 N. W. 109, 91 Am. St. Rep. 674, 56 L. R. A. 187, where plaintiff brought an action for damages against the board of county commissioners for refusing to canvass a vote, by reason whereof he was deprived of an office to which he claimed to have been elected. The case, however, went off on demurrer, as plaintiff failed to show that he was legally elected, and the point as to the liability of the canvassers to respond in damages in such case was not decided.

95. State *v.* Stuckey, 78 Mo. App. 533; Smith *v.* Lawrence, 2 S. D. 185, 49 N. W. 7; Lyman *v.* Martin, 2 Utah 136.

96. State *v.* Barber, 4 Wyo. 56, 32 Pac. 14.

97. McCoy *v.* State, 2 Marv. (Del.) 543, 36 Atl. 81.

98. McCoy *v.* State, 2 Marv. (Del.) 543, 36 Atl. 81.

99. State *v.* Kavanagh, 24 Nebr. 506, 39 N. W. 431.

1. People *v.* Board of Sup'rs, 58 How. Pr. (N. Y.) 141.

2. Luce *v.* Dukes County, 153 Mass. 108, 26 N. E. 419.

3. Barnes *v.* Gottschalk, 3 Mo. App. 222.

4. Matter of Woods, 5 Misc. (N. Y.) 575, 26 N. Y. Suppl. 169.

5. State *v.* Board of State Canvassers, 17 Fla. 29; Opinion of Justices, 64 Me. 596; *In re* Hart, 161 N. Y. 507, 55 N. E. 1058 [*denying* rehearing in 159 N. Y. 278, 54 N. E. 44]; People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451; State *v.* Board of State Canvassers, 36 Wis. 498.

Duties purely ministerial.— People *v.* State Bd. of Canvassers, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 646.

6. He has no power to question or inquire into the accuracy or regularity of the returns sent up to him from the several counties. State *v.* State Secretary, 44 La. Ann. 1065, 11 So. 711.

When a board of supervisors has canvassed the returns of a county and the record thereof is made and entered in the minutes, and has been authenticated by the signature of the chairman of the board and the clerk, a copy of such record is to be transmitted to the secretary of state, upon which he must act in estimating the number of votes cast in the county for each person voted for as a representative in congress. Pacheco *v.* Beck, 52 Cal. 3.

other election precincts, such tabulated statement is no part of the return required by law, and cannot be resorted to to contradict the return itself.[7]

b. Mandamus to Compel Estimate of Returns From County Boards. If the secretary of state refuses to estimate the votes given for members of congress as shown in the records of the counties transmitted to him by the clerks, and to issue a certificate to the person having the highest number of votes, he will be compelled to do so by a writ of mandamus;[8] in a proper case[9] the supreme court will require the board of state canvassers to determine in accordance with law which one of the candidates for representative in congress is entitled to their certificate.[10]

D. Certificate of Election — 1. Duty to Issue. It is the duty of the canvassers to issue a certificate of election to the person having the highest number of votes on the face of the returns.[11] So where some question or proposition is submitted to the vote of the people, it is the duty of the canvassers to issue a certificate declaring the result of the election. This certificate or statement carries with it a like force as a certificate of election furnished to the successful candidate for an office, and it makes a *prima facie* case of the correctness of the matters therein contained.[12]

2. Mandamus to Compel Issuance. Inasmuch as the duties of canvassing boards, including the issuance of certificates of election, are purely ministerial, it follows that if the canvassers neglect or refuse to perform their duties mandamus will lie to compel them to issue a certificate to the person having the greatest number of votes as shown by the returns.[13] It has been thought that the court should go no further, and should not put itself in the attitude of deciding in advance who has the greatest number of votes by compelling the issuance of a certificate of election to any particular individual.[14] But in a number of cases where the result of the election as shown by the returns does not seem to have been questioned, but the certificate was arbitrarily withheld on account of alleged

7. State *v.* Board of State Canvassers, 36 Wis. 498; Atty.-Gen. *v.* Barstow, 4 Wis. 567.

8. Pacheco *v.* Beck, 52 Cal. 3.

Mandamus generally see MANDAMUS.

It is not a valid objection to the jurisdiction of state courts in such proceedings relating to the canvass of election returns that the office affected is that of representative in congress. State *v.* Alachua County, 17 Fla. 9.

9. **Where the state canvassers have acted upon the returns** transmitted to them and issued a certificate of election to the person elected to the house of representatives as shown by the face of the returns, the only remedy open to the contestant is by a contest before the house of representatives. O'Hara *v.* Powell, 80 N. C. 103.

10. State *v.* Board of State Canvassers, 36 Wis. 498.

11. State *v.* Stein, 35 Nebr. 848, 53 N. W. 999.

Duty of clerk of board of supervisors.— Atty.-Gen. *v.* Elderkin, 5 Wis. 300.

Entry in minutes of town meeting.— The statement of the result of the canvass of the votes given at a town meeting held for the election of town officers and entered by the clerk of the meeting in the minutes of the proceedings kept by him as required by statute is intended by statute as the certificate and evidence of election. Matter of Baker, 11 How. Pr. (N. Y.) 418.

12. State *v.* Prather, 41 Mo. App. 451.

13. *Alabama.*— State *v.* Judge Ninth Judicial Cir., 13 Ala. 805; State *v.* Mobile Cir. Judge, 9 Ala. 338.

Florida.— State *v.* Gibbs, 13 Fla. 55, 7 Am. Rep. 233.

Illinois.— People *v.* Hilliard, 29 Ill. 413; People *v.* Rives, 27 Ill. 242.

Indiana.— Kisler *v.* Cameron, 39 Ind. 488.

Kentucky.— Howes *v.* Walker, 92 Ky. 258, 17 S. W. 576, 13 Ky. L. Rep. 530; Clark *v.* McKenzie, 7 Bush 523.

Michigan.— Coll *v.* Detroit, 83 Mich. 367, 47 N. W. 227.

Pennsylvania.— Com. *v.* Emminger, 74 Pa. St. 479.

Utah.— Page *v.* Utah Commission, 11 Utah 119, 39 Pac. 499.

West Virginia.— Burke *v.* Monroe County Sup'rs, 4 W. Va. 371.

See 18 Cent. Dig. tit. "Elections," § 241.

Mandamus generally see MANDAMUS.

14. McCrary El. (4th ed.) § 421.

When certificate has been awarded to any candidate.— Where the board of supervisors has canvassed the return of an election, and in the exercise of their discretion declared the result of the election adversely to a party claiming to have been elected, a mandamus will not lie upon the application of such party to compel the board to issue to him a certificate of election. Magee *v.* Calaveras County, 10 Cal. 376.

facts which the canvassers had no jurisdiction to investigate, the writ has been awarded to compel a certifying officer or canvassing board to issue a certificate of election to an individual by name;[15] and in cases where the court has gone this length, it is held to be no defense that a certificate has already been issued to another person,[16] or that the relator may be obliged to resort to quo warranto to remove an incumbent from the office.[17]

3. Prima Facie Evidence Only. A certificate of election given by the proper officer or board is *prima facie* evidence that the holder is entitled to the office,[18] however erroneous may be the canvass upon which such certificate is founded.[19] But it is only *prima facie* evidence, and in case of a contest or proceedings in the nature of a quo warranto the relator may go behind the certificate into the facts.[20] So also a defendant in a quo warranto proceeding is not bound to confine the controversy to the single question as to the effect of the certificate of the election officers, but has a right to go into the merits of the case and show that he was the eligible candidate who received the highest number of votes.[21] The right to an office dependent on an election by the people is to be determined ultimately by the number of legal votes received at the election and not by the certificate of the returning officer;[22] and this is so even though his certificate be issued under a mandamus from the court.[23] It is always open to proof that the official canvass and certificate were not correct, and that the person so certified was not in fact elected to the office.[24] So in an election upon some proposition submitted to the vote of the people the certificate of the result made by the canvassing officers is not conclusive, but is open to investigation in the courts.[25] But until in some legitimate and conclusive way the election is declared void or the result thereof is changed the certificate is conclusive.[26]

4. Not Open to Collateral Attack. A certificate of election, whether rightfully or wrongfully given by the board of canvassers, confers upon the person holding it the *prima facie* right to the office and must stand until it is set aside

15. People *v.* Hilliard, 29 Ill. 413; People *v.* Rives, 27 Ill. 242; Brower *v.* O'Brien, 2 Ind. 423; *In re* Strong, 20 Pick. (Mass.) 484; State *v.* Trimbell, 12 Wash. 440, 41 Pac. 183.

16. People *v.* Hilliard, 29 Ill. 413; Ellis *v.* Bristol County, 2 Gray (Mass.) 370; Smith *v.* Lawrence, 2 S. D. 185, 49 N. W. 7; State *v.* Trimbell, 12 Wash. 440, 41 Pac. 183.

17. *In re* Strong, 20 Pick. (Mass.) 484.

18. *California.*— People *v.* Jones, 20 Cal. 50.

Illinois.— People *v.* Callaghan, 83 Ill. 128.

Michigan.— People *v.* Miller, 16 Mich. 56.

Minnesota.— Taylor *v.* Taylor, 10 Minn. 107.

New Hampshire.— Atty.-Gen. *v.* Megin, 63 N. H. 378.

New York.— People *v.* Thacher, 7 Lans. 274, 1 Thomps. & C. 158; People *v.* Van Slyck, 4 Cow. (N. Y.) 297.

Pennsylvania.— Kerr *v.* Trego, 47 Pa. St. 292; Com. *v.* Baxter, 35 Pa. St. 263.

Rhode Island.— State *v.* Smith, 17 R. I. 415, 22 Atl. 1020.

West Virginia.— Swinburn *v.* Smith, 15 W. Va. 483.

See 18 Cent. Dig. tit. "Elections," § 242 *et seq.*

Presumption that canvass was duly made. — State *v.* Kersten, 118 Wis. 287, 95 N. W. 120.

19. People *v.* Miller, 16 Mich. 56; People *v.* Stevens, 5 Hill (N. Y.) 616.

20. Moulton *v.* Reid, 54 Ala. 320; State *v.* Churchill, 15 Minn. 455; State *v.* Sutton, 3 Mo. App. 388.

21. State *v.* Shay, 101 Ind. 36; Henderson *v.* Albright, 12 Tex. Civ. App. 368, 34 S. W. 992.

22. Reid *v.* Moulton, 51 Ala. 255; People *v.* Jones, 20 Cal. 50; State *v.* Shay, 101 Ind. 36; Reynolds *v.* State, 61 Ind. 392; Hadley *v.* Gutridge, 58 Ind. 302; Dobyns *v.* Weadon, 50 Ind. 298.

23. Reid *v.* Moulton, 51 Ala. 255.

24. *California.*—People *v.* Jones, 20 Cal. 50.

Minnesota.— Taylor *v.* Taylor, 10 Minn. 107.

New York.— People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451; People *v.* McGuire, 2 Hun 269 [*affirmed* in 60 N. Y. 640]; People *v.* Thacher, 7 Lans. 274, 1 Thomps. & C. 158; Hartt *v.* Harvey, 32 Barb. 55; Morgan *v.* Quackenbush, 22 Barb. 72; People *v.* Vail, 20 Wend. 12.

Ohio.— State *v.* Goodale, 7 Ohio Dec. (Reprint) 707, 4 Cinc. L. Bul. 1065.

Tennessee.— Marshall *v.* Kerns, 2 Swan 68.

Virginia.— *Ex p.* Ellyson, 20 Gratt. 10.

Wisconsin.— State *v.* Avery, 14 Wis. 122.

See 18 Cent. Dig. tit. "Elections," § 242.

25. Riggs *v.* Stevens, 92 Ky. 393, 17 S. W. 1016, 13 Ky. L. Rep. 631.

26. Crouse *v.* State, 57 Md. 327.

by a competent tribunal, in a proceeding in which its validity may be directly inquired into.[27] It is conclusive in all cases in which its validity is not drawn directly in question.[28] Its validity cannot be questioned in an application for a mandamus to compel the issuance of a certificate of election to another person.[29]

5. CONFLICTING CERTIFICATES. Where canvassers award certificates of even date to opposing candidates, the court must determine on the merits who is entitled to the office.[30]

6. DISPUTE AS TO VACANCY IN OFFICE. Where there is a dispute as to whether a vacancy exists, the canvassers should issue their certificate to the candidate entitled thereto on the face of the returns and leave the question of vacancy to be decided by a competent tribunal.[31]

XV. VOTE NECESSARY TO A CHOICE.

A. Plurality. In the absence of any statute expressly requiring more, a plurality of votes is sufficient to elect.[32] And *a fortiori*, in the absence of any provision in the constitution requiring a civil officer to be elected by a majority of votes, a state legislature may lawfully provide that a plurality of votes shall be sufficient to elect any officer.[33] And where there is a provision in a state constitution requiring a majority to elect, this cannot control the action of the legislature in this regard, so far as the election of members of congress and presidential electors is concerned.[34]

B. Majority Required by Constitution or Statute. When a constitution or a statute requires that an officer shall be chosen or a question decided by a majority of the votes of a county or other civil division, this does not mean that a majority of all the persons entitled to vote shall actually vote in the affirmative, but that the result shall be determined by a majority of the votes cast. All qualified voters who absent themselves from an election duly called are presumed to assent to the express will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive

27. *Michigan.*— People *v.* Miller, 16 Mich. 56.

Minnesota.— State *v.* Churchill, 15 Minn. 455.

Montana.— State *v.* Kenney, 9 Mont. 223, 23 Pac. 733.

Oregon.— Warner *v.* Myers, 4 Oreg. 72.

Pennsylvania.— Ewing *v.* Thompson, 43 Pa. St. 372.

Wisconsin.— The person holding a certificate of election to a public office will be considered as entitled thereto as against any intruder or against all the world, except a *de facto* officer in possession of the office under color of authority until steps are taken to subject the determination of his election by the canvassing officers to inquiry and revision. State *v.* Kersten, 118 Wis. 287, 95 N. W. 120.

See 18 Cent. Dig. tit. "Elections," § 242 *et seq.*

28. State *v.* Churchill, 15 Minn. 455; Love *v.* Hudson County, 35 N. J. L. 269; Hadley *v.* Albany, 33 N. Y. 603, 88 Am. Dec. 412; People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451; Morgan *v.* Quackenbush, 22 Barb. (N. Y.) 72.

29. State *v.* Churchill, 15 Minn. 455. It is settled that neither the canvassing board nor the court in a mandamus proceeding will go behind the returns and inquire into the legality of the votes. State *v.* Van Camp, 36 Nebr. 91, 54 N. W. 113; State *v.* Elder, 31 Nebr. 169, 47 N. W. 710; State *v.* Wilson, 24 Nebr. 139, 38 N. W. 31; State *v.* Peacock, 15 Nebr. 442, 19 N. W. 685; State *v.* Stearns, 11 Nebr. 104, 7 N. W. 743; Hagge *v.* State, 10 Nebr. 51, 4 N. W. 375.

30. Thompson *v.* Ewing, 1 Brewst. (Pa.) 67.

When a board of canvassers has completed the count and awarded a certificate of election, it is *functus officio*, and consequently a certificate of election awarded to an opposing candidate based upon a voluntary recanvass by the board is a nullity. Bowen *v.* Hixon, 45 Mo. 340.

31. *In re* Twenty-fifth Ward, 17 Wkly. Notes Cas. (Pa.) 373; *In re* Brightly, 14 Wkly. Notes Cas. (Pa.) 208; *In re* Nineteenth Ward, 11 Wkly. Notes Cas. (Pa.) 268.

32. For where, as in the United States, the candidates may be numerous, and the votes distributed among many candidates, to require a majority to elect would frequently be to prevent a choice. McCrary El. (4th ed.) § 206; Cooley Const. Lim. (7th ed.) p. 931; Lathen *v.* Campbell, 7 Kan. App. 388, 51 Pac. 931.

33. *In re* Plurality Elections, 15 R. I. 617, 8 Atl. 881.

34. For in respect to the election of these officers, the legislature acts under the direct authority of the constitution of the United

of the greatest inconvenience and ought not to be adopted,[35] unless the legislative will to that effect is clearly expressed.[36] This question has frequently been before the courts under constitutional and statutory provisions authorizing counties, towns, and cities to contract debts for special purposes, by the vote of a specified majority, usually two thirds, of the qualified voters of such counties, towns, and cities at special elections called for the purpose of submitting propositions to incur such debts; and it has generally been held that the requisite majority of the vote actually cast is sufficient, irrespective of the number of persons entitled to vote;[37] although there are cases in which it has been held that an affirmative assent must be given by the requisite majority of voters by going to the polls and voting.[38]

States. *In re* Plurality Elections, 15 R. I. 617, 8 Atl. 881.

35. *Florida.*—State *v.* Padgett, 19 Fla. 518.

Illinois.— People *v.* Wiant, 48 Ill. 263; People *v.* Garner, 47 Ill. 246; People *v.* Warfield, 20 Ill. 159.

Kansas.—*In re* Osage County, 16 Kan. 296; *In re* Linn County, 15 Kan. 500.

Kentucky.— Talbot *v.* Dent, 9 B. Mon. 526.

Louisiana.— Elections are to be determined by the majority of the ballots cast, and are not to be set aside on account of the meagerness of the vote without distinct and circumstantial allegations of error, fraud, violence, or illegality affecting the result. Augustus *v.* Eggleston, 12 La. Ann. 366.

Maryland.— Walker *v.* Oswald, 68 Md. 146, 11 Atl. 711.

Minnesota.— Everett *v.* Smith, 22 Minn. 53; Bayard *v.* Klinge, 16 Minn. 249; Taylor *v.* Taylor, 10 Minn. 107.

Missouri.— Richardson *v.* McReynolds, 114 Mo. 641, 21 S. W. 901; State *v.* Renick, 37 Mo. 270.

North Carolina.— Reiger *v.* Beaufort, 70 N. C. 319.

North Dakota.— State *v.* Barnes, 3 N. D. 319, 55 N. W. 883.

Tennessee.— Louisville, etc., R. Co. *v.* Davidson County Ct., 1 Sneed 637, 62 Am. Dec. 424.

Washington.— Yester *v.* Seattle, 1 Wash. 308, 25 Pac. 1014.

United States.— Cass County *v.* Johnston, 95 U. S. 360, 24 L. ed. 416; St. Joseph Tp. *v.* Rogers, 16 Wall. 644, 21 L. ed. 328.

See 18 Cent. Dig. tit. "Elections," § 210 *et seq.*

Majority vote for that office.— The statutory requirement that an officer shall be elected by a majority of those present and voting means a majority of those present and voting for a candidate for that office, and not of all the voters who happen to vote. McNees *v.* McGill, 4 Ky. L. Rep. 632.

36. Braden *v.* Stumph, 16 Lea (Tenn.) 581; Bouldin *v.* Lockhart, 3 Baxt. (Tenn.) 262.

Assessment of polls.— Vance *v.* Austell, 45 Ark. 400; Patterson *v.* Temple, 27 Ark. 202.

Assessor's books.— The legislature having power to remove a county-seat may authorize the qualified voters of the county to vote on that question, and may make the assessor's books the test to determine whether the majority had voted in favor of removal. Hall *v.* Marshall, 4 Ky. L. Rep. 502.

The registry lists.— Where the constitution prohibits the removal of a county-seat unless two thirds of the qualified voters shall vote for such removal, and a statute requires a two-thirds vote of the legally registered voters to warrant the removal, two thirds of the votes cast at an election will be insufficient to authorize the change, unless they number two thirds of all the qualified voters of the county. State *v.* Sutterfield, 54 Mo. 391.

Taxable property as a basis.— Wilson *v.* Florence, 39 S. C. 397, 17 S. E. 835, 20 L. R. A. 720.

37. *California.*— Howland *v.* San Joaquin County, 109 Cal. 152, 41 Pac. 864.

Illinois.— People *v.* Harp, 67 Ill. 62; Donnovan *v.* Green, 57 Ill. 63.

Iowa.— Taylor *v.* McFadden, 84 Iowa 262, 50 N. W. 1070.

Nebraska.— State *v.* Cornell, 53 Nebr. 556, 74 N. W. 59, 68 Am. St. Rep. 629, 39 L. R. A. 513.

Tennessee.— Louisville, etc., R. Co. *v.* Davidson County, 1 Sneed 637, 62 Am. Dec. 424.

Texas.— Werner *v.* Galveston, 72 Tex. 22, 7 S. W. 726, 12 S. W. 159; Day *v.* Austin, (Civ. App. 1893) 22 S. W. 757.

Washington.— Yester *v.* Seattle, 1 Wash. 308, 25 Pac. 1014; State *v.* Snodgrass, 1 Wash. 305, 25 Pac. 1014; Metcalfe *v.* Seattle, 1 Wash. 297, 25 Pac. 1010.

Wisconsin.— Sanford *v.* Prentice, 28 Wis. 358.

United States.— Carroll County *v.* Smith, 111 U. S. 556, 28 L. ed. 517; Cass County *v.* Johnston, 95 U. S. 360, 24 L. ed. 416; St. Joseph Tp. *v.* Rogers, 16 Wall. 644, 21 L. ed. 328; Madison County *v.* Priestly, 42 Fed. 817; Mobile Sav. Bank *v.* Oktibbeha County, 22 Fed. 580, 24 Fed. 110.

See 18 Cent. Dig. tit. "Elections," § 210 *et seq.*

Effect of illegal votes.— Scott *v.* Twombly, 20 Misc. (N. Y.) 652, 46 N. Y. Suppl. 1084.

38. Hawkins *v.* Carroll County, 50 Miss. 735; State *v.* Harris, 96 Mo. 29, 8 S. W. 794; State *v.* Walker, 85 Mo. 41; Ranney *v.* Bader, 67 Mo. 476; Webb *v.* Lafayette County, 67 Mo. 353.

A majority of the qualified voters, and not merely of those voting, is necessary to enable a municipal corporation to loan its credit, or contract a debt. Lynchburg, etc., R. Co. *v.* Person County, 109 N. C. 159, 15 S. E. 783; Rigsbee *v.* Durham, 98 N. C. 81, 3 S. E. 749; Wood *v.* Oxford, 97 N. C. 227, 2 S. E. 653;

So too where some proposition is to be decided by a majority vote at a general election, it has been held that those who being present abstain from voting on the question are considered as acquiescing in the result declared by a majority of those actually voting, even though in point of fact but a minority of those entitled to vote really do vote on the question.[39] But according to the weight of authority, when a question is referred to a vote of the people, to be decided by a majority of the legal voters at a general election, the requirement calls for the requisite majority of those who vote on any ticket, nomination, or question at that election, and not merely a majority of those who vote on the particular question presented.[40] This, however, is largely a matter of statutory construction. These propositions are usually submitted to the vote of the people by special statutes, and even in the same jurisdiction we find cases holding that a bare majority of the votes cast on the question of the proposition itself is sufficient;[41] while under other statutes differently worded we find the same courts holding that a majority of all the votes cast at the election is necessary to carry the proposition.[42] Ballots which are so marked that they cannot be counted as votes should be excluded from the aggregate number and not considered in determining whether or not a special question has been carried by the requisite majority,[43] unless the statute under which the proposition is submitted to the vote of the people is so worded as to require the consideration of all ballots cast, whether valid or invalid, in determining the percentage of the vote necessary to carry the proposition.[44]

McDowell *v.* Massachusetts, etc., Constr. Co., 96 N. C. 514, 2 S. E. 351; Duke *v.* Brown, 96 N. C. 127, 1 S. E. 873; Southerland *v.* Goldsboro, 96 N. C. 49, 1 S. E. 760; Norment *v.* Charlotte, 85 N. C. 387.

39. *Indiana.*— South Bend *v.* Lewis, 138 Ind. 512, 37 N. E. 986.

Louisiana.— De Soto Parish *v.* Williams, 49 La. Ann. 422, 21 So. 647, 37 L. R. A. 761.

Maryland.— Walker *v.* Oswald, 68 Md. 146, 11 Atl. 711.

North Dakota.— State *v.* Langlie, 5 N. D. 594, 67 N. W. 958, 32 L. R. A. 723; State *v.* Barnes, 3 N. D. 319, 55 N. W. 883.

Oregon.— State *v.* Grace, 20 Oreg. 154, 25 Pac. 382.

See 18 Cent. Dig. tit. "Elections," § 211 *et seq.*

40. *California.*— People *v.* Berkeley, 102 Cal. 298, 36 Pac. 591, 23 L. R. A. 838.

Illinois.— Chestnutwood *v.* Hood, 68 Ill. 132; People *v.* Wiant, 48 Ill. 263; People *v.* Brown, 11 Ill. 478.

Michigan.— Stebbins *v.* Grand Rapids, 108 Mich. 693, 66 N. W. 594.

Minnesota.— State *v.* Hugo, 84 Minn. 81, 86 N. W. 784.

Missouri.— State *v.* Francis, 95 Mo. 44, 8 S. W. 1; State *v.* St. Louis, 73 Mo. 435.

Nebraska.—State *v.* Clark, (1900) 82 N. W. 8; State *v.* Roper, 46 Nebr. 724, 61 N. W. 753; State *v.* Van Camp, 36 Nebr. 91, 54 N. W. 113; State *v.* Anderson, 26 Nebr. 517, 42 N. W. 421; State *v.* Babcock, 17 Nebr. 188, 22 N. W. 372; State *v.* Lancaster County Com'rs, 6 Nebr. 474.

Ohio.— Enyart *v.* Hanover Tp., 25 Ohio St. 618.

See 18 Cent. Dig. tit. "Elections," § 211 *et seq.*

41. State *v.* Echols, 41 Kan, 1, 20 Pac. 523; Marion County *v.* Winkley, 29 Kan. 36; Rush *v.* Com., 47 S. W. 586, 20 Ky. L. Rep. 775.

Proposition for contraction of county debt. — Under the Kentucky constitution providing that no county shall be permitted to become indebted to an amount exceeding in any year the income and revenue provided for such year without the assent of two thirds of the voters thereof voting at an election to be held for that purpose, to authorize an indebtedness in excess of the limit prescribed, the assent of two thirds of the voters voting on that question is sufficient, it not being necessary to have the assent of two thirds of the voters voting at the same time for public officers. Montgomery County Fiscal Ct. *v.* Trimble, 47 S. W. 773, 20 Ky. L. Rep. 827, 42 L. R. A. 738 [*overruling* McGoodwin *v.* Franklin, 38 S. W. 481, 18 Ky. L. Rep. 752; Owensboro *v.* Baker, 37 S. W. 1129, 18 Ky. L. Rep. 324, and *overruling* in part Belknap *v.* Louisville, 99 Ky. 474, 36 S. W. 1118, 18 Ky. L. Rep. 313, 59 Am. St. Rep. 478, 34 L. R. A. 256].

Proposition for county division.— Where several competing propositions for county division are submitted at the same election, the electors are authorized to vote upon one only, which must be carried by an affirmative vote of a majority on that issue and by a plurality over its competitors. State *v.* Falk, 89 Minn. 269, 94 N. W. 879 [*following* State *v.* Red Lake County, 67 Minn. 352, 69 N. W. 1083].

42. *In re* Davis, 62 Kan. 231, 61 Pac. 809; Bullock *v.* O'Mahoney, 37 S. W. 1129, 18 Ky. L. Rep. 286; Hogg *v.* Baker, 31 S. W. 726, 17 Ky. L. Rep. 577.

Legislative intent to control.— Sumner County High School *v.* Sumner County, 61 Kan. 796, 60 Pac. 1057.

43. Hopkins *v.* Duluth, 81 Minn. 189, 83 N. W. 536.

44. In determining the result of a county-

C. Doctrine of Next Highest Vote — 1. Ineligibility of Candidate Chosen. According to the English rule, if a candidate who received the highest number of votes is ineligible and the electors had sufficient notice of his ineligibility at the time of voting for him, their votes are thrown away, and the candidate having the next highest number of votes, if he is eligible, must be declared elected;[45] and in one American jurisdiction the English rule has been adopted.[46] But it is a fundamental idea in American politics that the majority shall rule, and that no person can be elected to office unless he shall receive a majority or at least a plurality of all the votes. It has accordingly been settled by the house of representatives of the United States that the ineligibility of the candidate receiving the highest number of votes gives no title to the candidate receiving the next highest number,[47] even though the election was held in a state where the contrary rule obtains.[48] The same rule has been adopted by the United States senate[49] and has the support of the great weight of judicial authority in the United States.[50] It may be well to add in this connection that it is not within the power of a state to add to the qualifications prescribed for representatives in congress and senators of the United States by the constitution of the United States, so as to render ineligible candidates who would otherwise be eligible under the federal constitution.[51]

seat election, all the ballots cast, unintelligible as well as intelligible, must be considered in ascertaining the required percentage of votes. Smith *v.* Renville County, 64 Minn. 16, 65 N. W. 956. But under the provisions of the Nebraska act for the relocation of county-seats, there being no requirement that abortive ballots shall be certified to the county canvassing board, such ballots cannot be counted for the purpose of making up the grand total, of which a place other than the existing county-seat must receive three fifths to be entitled to the relocation of the county-seat, merely because in the certified return of the county election board such ballots are referred to as "ballots not reported or accounted for," or as "rejected," or "blank" ballots. State *v.* Roper, 47 Nebr. 417, 66 N. W. 539.

45. Rex *v.* Monday, 1 Cowp. 530; Rex *v.* Parry, 14 East 549; Rex *v.* Hawkins, 10 East 211. In Reg. *v.* Coaks, 2 C. L. R. 947, 3 E. & B. 249, 254, 18 Jur. 378, 23 L. J. Q. B. 133, 77 E. C. L. 249, 28 Eng. L. & Eq. 304, Lord Campbell, C. J., said: "Now it is the law, both the common law and parliamentary law, and it seems to me also common sense, that, if an elector will vote for a man who he knows is ineligible, it is as if he did not vote at all, or voted for a non-existent person; as it has been said, as if he gave his vote for The Man in the Moon."

46. Copeland *v.* State, 126 Ind. 51, 25 N. E. 866; Vogel *v.* State, 107 Ind. 374, 8 N. E. 164; State *v.* Johnson, 100 Ind. 489; Price *v.* Baker, 41 Ind. 572, 12 Am. Rep. 346; Carson *v.* McPhetridge, 15 Ind. 327; Gulick *v.* New, 14 Ind. 93, 77 Am. Dec. 49.

47. Smith *v.* Brown, 2 Bartl. Cas. Cont. El. 395, 400; Cannon *v.* Campbell, 2 Ellsw. Cas. Cont. El. 604, 613; Maxwell *v.* Cannon, Smith Cas. Cont. El. 182, 190.

48. Lowry *v.* White, Mobl. Cas. Cont. El. 623, 638.

49. Abbott's Case [*cited* in McCrary El. (4th ed.) § 331].

50. *Arkansas.*— Swepston *v.* Barton, 39 Ark. 549.

California.— Crawford *v.* Dunbar, 52 Cal. 36; Saunders *v.* Haynes, 13 Cal. 145.

Georgia.— State *v.* Swearingen, 12 Ga. 23.

Kentucky.— Stevens *v.* Wyatt, 16 B. Mon. 542.

Louisiana.— Fish *v.* Collens, 21 La. Ann. 289; State *v.* Gastinel, 18 La. Ann. 517, 20 La. Ann. 114.

Michigan.— People *v.* Molitor, 23 Mich. 341.

Minnesota.— Barnum *v.* Gilman, 27 Minn. 466, 8 N. W. 375, 38 Am. Rep. 304.

Mississippi.— Sublett *v.* Bedwell, 47 Miss. 266, 12 Am. Rep. 338.

Missouri.— State *v.* Vail, 53 Mo. 97; State *v.* Boal, 46 Mo. 528.

Nebraska.—Gardner *v.* Burke, 61 Nebr. 534, 84 N. W. 541; State *v.* Boyd, 31 Nebr. 682, 48 N. W. 739, 51 N. W. 602 [*reversed* on other grounds in 143 U. S. 135, 12 S. Ct. 375, 36 L. ed. 103].

New Jersey.— State *v.* Anderson, 1 N. J. L. 366; Chandler *v.* Wartman, 6 N. J. L. J. 301.

New York.— People *v.* Clute, 50 N. Y. 451, 10 Am. Rep. 508; People *v.* Thornton, 60 How. Pr. 457.

Pennsylvania.— Com. *v.* Cluley, 56 Pa. St. 270, 94 Am. Dec. 75.

Rhode Island.— *In re* Corliss, 11 R. I. 638, 23 Am. Rep. 538.

South Dakota.—Batterton *v.* Fuller, 6 S. D. 257, 60 N. W. 1071.

Vermont.— State *v.* McGeary, 69 Vt. 461, 38 Atl. 165, 44 L. R. A. 446.

West Virginia.— Dryden *v.* Swinburne, 20 W. Va. 89.

Wisconsin.— State *v.* Smith, 14 Wis. 497; State *v.* Giles, 2 Pinn. 166, 1 Chandl. 112, 52 Am. Dec. 149.

See 18 Cent. Dig. tit. "Elections," § 207.

51. Turney *v.* Marshall, 1 Bartl. Cas. Cont. El. 167. To the same effect is Wood *v.* Peters, Mobl. Cas. Cont. El. 79. The United States senate adopted the same rule in the case of

2. DEATH OF SUCCESSFUL CANDIDATE ON ELECTION DAY. Upon a like principle if the candidate who receives a majority or plurality of the votes cast for an office dies on election day, the candidate receiving the next highest vote for the same office is not elected thereto and acquires no right to be inducted into office.[52]

D. Tie Votes. In case of a tie vote, where no one is authorized to give a casting vote, there is no election.[53] In one state it appears to be the rule that the legislature has no authority to provide for the decision of a tie vote in the absence of an express constitutional grant of power.[54] But the fallacy in this is that a state constitution is not a grant, but a limitation of the power of the legislature; and in the absence of any constitutional inhibition the better opinion is that it is competent for the legislature in elections of state and county officers to provide for the decision of tie votes by the casting of lots or some like means in order to determine to which of the opposing candidates the certificate of election shall be given,[55] although the election officers have no power to decide a tie vote by lot or otherwise, in the absence of statutory authority.[56]

XVI. DUTY TO ACCEPT OFFICE.

A. Indictment at Common Law For Refusal to Accept. It is a doctrine of the common law that every citizen in peace as well as in war owes his services to the state when they are required; and persons are liable to indictment if they refuse to take the oath and qualify themselves as public officers after having been regularly elected or duly appointed;[57] but the indictment may be

the election of Mr. Trumbull to be a member of that body. *In re* Trumbull, 1 Bartl. Cas. Cont. El. 618.

52. Howes *v.* Perry, 92 Ky. 260, 17 S. W. 575, 13 Ky. L. Rep. 483; State *v.* Walsh, 7 Mo. App. 142; State *v.* Spiedel, 62 Ohio St. 156, 56 N. E. 871.

53. State *v.* Adams, 2 Stew. (Ala.) 231; State *v.* Geiger, 65 Mo. 306; People *v.* Van Horne, 18 Wend. (N. Y.) 515; State *v.* Adams, 58 Vt. 694, 4 Atl. 228.

Contest of the tie.— Where in an election a tie vote is returned, either party may contest the election; but in such an event the proceedings must be against and the notice given to the other party and not to the incumbent holding over, who, although indirectly interested, is in no way a party to the contest. Erdman *v.* Barrett, 89 Pa. St. 320.

Successful contestant not concluded by subsequent election.— State *v.* Herndon, 23 Fla. 287, 2 So. 4.

54. State *v.* Kramer, 150 Mo. 89, 51 S. W. 716, 47 L. R. A. 551 [*overruling* Lewis *v.* State, 12 Mo. 128].

55. *Illinois.*— Webster *v.* Gilmore, 91 Ill. 324; Allen *v.* Patterson, 85 Ill. App. 256; Patterson *v.* People, 65 Ill. App. 651.

Indiana.— Kimerer *v.* State, 129 Ind. 589, 29 N. E. 178; Wills *v.* State, 128 Ind. 359, 27 N. E. 423; Johnston *v.* State, 128 Ind. 16, 27 N. E. 422, 25 Am. St. Rep. 412, 12 L. R. A. 235.

Michigan.— People *v.* Sutherland, 41 Mich. 177, 1 N. W. 927.

North Dakota.— Howser *v.* Pepper, 8 N. D. 484, 79 N. W. 1018.

Oregon.— Dunham *v.* Hyde, 30 Oreg. 385, 48 Pac. 422; State *v.* McKinnon, 8 Oreg. 493.

Pennsylvania.— *In re* Clarion Borough, 189 Pa. St. 79, 41 Atl. 995; *In re* Watson, 3 Pa. Co. Ct. 486.

What certificate should show.— Where one claims office by virtue of a tie vote, and a determination by lot in his favor, his certificate of election should show specifically the manner in which such lot was determined; and where the other candidate was not present the certificate should show that the county clerk drew for him, that such clerk was an actor equally with the relator, and that such lot was conducted and determined so as to preclude the possibility of forethought or design on the part of any of the actors or officers. State *v.* Wilkinson, 23 Nebr. 710, 37 N. W. 617.

Decision by township committee.— Under the New Jersey statute where there are two or more candidates for office having an equal number of votes at an annual township meeting, the township committee at their next meeting thereafter shall elect between them or call a special town meeting for that purpose, but having failed to elect and having ordered a special election and caused notice to be posted, the committee cannot at a subsequent meeting rescind that action. It is held that this statute is not an unconstitutional limitation of the right of voting for any candidate, but merely a method of determining the result of the former election. Brown *v.* Boden, 51 N. J. L. 114, 16 Atl. 58.

Representatives in congress.— A state has no constitutional power to provide that in case of a tie between two candidates for representative in congress, the question as to which of the two shall be representative shall be determined by lot; inasmuch as these officers are to be elected by the people, and if they fail to make a choice no other authority can do so for them. Reed *v.* Cosden, Cl. & H. Cas. Cont. El. 353.

56. Hammock *v.* Barnes, 4 Bush (Ky.) 390.

57. State *v.* Ferguson, 31 N. J. L. 107;

quashed if it does not show in what manner defendant was elected, in order that it may appear that the election was such as obliged him to accept the office.[58]

B. Statutory Compulsion to Accept Office. There is no doubt but that it is competent for a legislature to require any person elected or appointed to office, in any manner prescribed by law, to serve therein, under pain of indictment or any pecuniary penalty.[59]

C. Defenses. There is nothing to prevent a defendant from showing that he was not duly elected or appointed,[60] that he is legally disqualified to hold the office,[61] or that he holds or has been elected to an incompatible office.[62]

D. Mandamus to Compel Acceptance. Mandamus will lie to compel one who has been duly elected to a municipal office to accept and serve in the same.[63]

XVII. CONTESTS.

A. Jurisdiction and Nature of Remedy — 1. Quo Warranto — Only Remedy at Common Law. In the absence of any statutory proceeding the only remedy in the nature of a contest known to the common law is quo warranto or in modern times an information in the nature of quo warranto whereby upon proper applica-

Prigg's Case, Aleyn 78; Rex *v.* Routledge, 1 Dougl. (3d ed.) 531; Rex *v.* Harpur, 5 Mod. 96; Rex *v.* Vaws, 1 Mod. 24; Fletcher *v.* Ingram, 1 Salk. 175; Rex *v.* Larwood, 1 Salk. 167; Rex *v.* Holbeche, 4 T. R. 778; 2 Hawkins P. C. c. 25, § 59. In London *v.* Vanacker, 1 Ld. Raym. 496, it appears that the city enacted a by-law that any freeman of the city who should be elected sheriff and who failed or refused to give his services as such should forfeit four hundred pounds, unless he had a reasonable excuse. Defendant, who was elected, refused to serve, and was imprisoned for the penalty, and the by-law was held valid. The same point was adjudged in Rex *v.* Larwood, 1 Salk. 167, 168, and the reason assigned was "that the king hath an interest in every subject, and a right to his service, and no man can be exempt from the office of sheriff, but by act of parliament or letters patent." See also Rex *v.* Bower, 1 B. & C. 585, 2 D. & R. 842, 1 L. J. K. B. O. S. 110, 8 E. C. L. 247.

58. Prigg's Case, Aleyn 78; Rex *v.* Harpur, 5 Mod. 96; Rex *v.* Vaws, 1 Mod. 24; 2 Hawkins P. C. c. 25, § 59.

59. Conner *v.* New York, 2 Sandf. (N. Y.) 355; Haywood *v.* Wheeler, 11 Johns. (N. Y.) 432; London *v.* Headen, 76 N. C. 72; State *v.* McEntyre, 25 N. C. 171; Reg. *v.* Hungerford, 11 Mod. 142; Anonymous, 11 Mod. 132. In London *v.* Headen, *supra*, it is held that an act prescribing a penalty of twenty-five dollars against any person who is duly elected or appointed town constable and who refuses to qualify was not in conflict with the constitution. In State *v.* McEntyre, *supra*, it was held that under Act of Assembly (1840), c. 57, to incorporate the town of Rutherfordton, persons elected town magistrates and commissioners were not indictable for refusing to accept such offices, even if duly elected, inasmuch as the act contained no such provision.

60. State *v.* McEntyre, 25 N. C. 171.

61. London *v.* Headen, 76 N. C. 72.

62. London *v.* Headen, 76 N. C. 72. When a citizen is elected to the office of constable, but refuses to serve, and an action is brought against him for the statutory penalty provided for such refusal, and his answer sets up that at the same election he was elected to the office of supervisor, and that he accepted the latter office, and qualified and entered upon the discharge of its duties, such answer on demurrer discloses a sufficient defense to the action; a citizen will not in such case be compelled to accept both offices. Hartford Tp. *v.* Bennett, 10 Ohio St. 441.

63. In People *v.* Williams, 145 Ill. 573, 33 N. E. 849, 36 Am. St. Rep. 514, 24 L. R. A. 492, the court awarded a peremptory mandamus to compel defendant to accept and execute the office of town clerk. About the beginning of the eighteenth century the English courts adopted mandamus as an appropriate remedy in such cases, as it would seem, and the practice has since been followed. The case of Reg. *v.* Hungerford, 11 Mod. 142, decided in 1708, was an information in the nature of quo warranto against a common councilman of Bristol for refusing to take upon himself the office. The remedy was denied, but it was said that "if they had applied to the Court for a mandamus, they should have had it." Rex *v.* Bower, 1 B. & C. 585, 2 D. & R. 842, 1 L. J. K. B. O. S. 110, 8 E. C. L. 247, was mandamus to compel defendant to take the oath, and to take upon himself and execute the office of common councilman of the borough and town of Lancaster. The court said: "It is an offence at common law to refuse to serve an office when duly elected," and refused to hold that the payment of a fine, imposed by a by-law of the corporation, discharged the obligation to accept and serve in the office; and a peremptory writ was awarded. See also Vintners' Co. *v.* Passey, 1 Burr. 235, 1 Ld. Ken. 500; Rex *v.* Bedford Corp., 1 East 79; London Barber Surgeons *v.* Pelson, 2 Lev. 252; Rex *v.* Leyland, 3 M. & S. 184; Rex *v.* Grosvenor, 2 Str. 1193, 1 Wils. C. P. 18; Clark *v.* Sarum, 1 Str. 1082; Rex *v.* Whitwell, 5 T. R. 85.

Mandamus generally see Mandamus.

tion made the court will inquire into the authority by which any person assumes to exercise the functions of a public office, and will oust him in case no authority be shown.[64] Elections belong to the political branch of the government and are beyond the control of the judicial power.[65] The determination of election contests is a judicial function only so far as authorized by statute.[66] A proceeding by quo warranto is not strictly speaking an election contest between two persons claiming the same office; such proceeding determines only that the person holding the office is or is not a usurper; it does not adjudge the right to hold an office to be in any one else.[67] Although by statute in some jurisdictions where the proceeding may be brought upon the relation of the contesting candidate,[68] if the relator succeed, the proper judgment is that defendant be ousted and the relator placed in possession of the office.[69] There can be no remedy by quo warranto in contesting an election on a proposition, for that remedy is employed only to test the right to an office or franchise.[70] Consequently if the statute makes no provision for contesting such election,[71] the issues may be determined upon mandamus to compel the proper officers to execute the supposed will of the voters.[72] The granting or withholding of leave to file an information in the nature of a quo warranto at the instance of a private relator rests in the sound discretion of the court.[73]

2. STATUTORY MODES OF CONTEST — a. Held Exclusive. It has been held that where a specific mode of contesting elections has been provided by statute that

64. *California.*— People *v.* Holden, 28 Cal. 123.

Illinois.—Snowball *v.* People, 147 Ill. 260, 35 N. E. 538; Linegar *v.* Rittenhouse, 94 Ill. 208.

Indiana.— State *v.* Shay, 101 Ind. 36.

Massachusetts.— Com. *v.* Swasey, 133 Mass. 538.

New Jersey.— State *v.* Passaic County, 25 N. J. L. 354.

See 18 Cent. Dig. tit. "Elections," § 245 *et seq.*

Quo warranto generally see QUO WARRANTO.

65. *Georgia.*— Caldwell *v.* Barrett, 73 Ga. 604.

Illinois.— Dickey *v.* Reed, 78 Ill. 261.

Kentucky.— Clarke *v.* Rogers, 81 Ky. 43.

Louisiana.— State *v.* Judge Second Judicial Dist. Ct., 13 La. Ann. 89.

Texas.— Williamson *v.* Lane, 52 Tex. 335.

See 18 Cent. Dig. tit. "Elections," § 245 *et seq.*

66. Taxpayers *v.* O'Kelly, 49 La. Ann. 1039, 22 So. 311.

In the absence of special statutory authorization the courts are without jurisdiction *ratione materiæ* to entertain cases of contested elections strictly so called. Reynolds, etc., Constr. Co. *v.* Police Jury, 44 La. Ann. 863, 11 So. 236; State *v.* Police Jury, 41 La. Ann. 846, 6 So. 777; State *v.* Judges Civil Dist. Ct., 40 La. Ann. 598, 4 So. 482; Fowler *v.* Gable, 3 Pa. Dist. 23.

The courts cannot go into the business of inquiring into and determining the qualifications of voters, the correction of poll-books, and like questions without some constitutional or statutory warrant giving them jurisdiction. State *v.* Dubuclet, 28 La. Ann. 698.

A statutory mode of contesting elections is in every sense a special proceeding, and is subject to the well settled rule that the tribunal exercising jurisdiction does not proceed according to the course of the common law, but must resort to the statute alone to ascertain its powers and mode of procedure. Dorsey *v.* Barry, 24 Cal. 449; Linegar *v.* Rittenhouse, 94 Ill. 208; Dickey *v.* Reed, 78 Ill. 261; Batman *v.* Megowan, 1 Metc. (Ky.) 533; Garrard *v.* Gallagher, 11 Nev. 382.

67. People *v.* Londoner, 13 Colo. 303, 22 Pac. 764, 6 L. R. A. 444; Snowball *v.* People, 147 Ill. 260, 35 N. E. 538; State *v.* Francis, 88 Mo. 557.

68. In these jurisdictions the ancient writ of quo warranto or information in the nature thereof against persons alleged to be usurping, intruding into, or unlawfully holding and executing an office or franchise, has either been superseded entirely by statutory remedy of much greater remedial vigor, or has been so modified by statute as to become substantially a proceeding in equity, carrying along with it all the vast remedial instances of the court of equity by injunction and otherwise. State *v.* Wright, 10 Heisk. (Tenn.) 237; Hyde *v.* Trewhitt, 7 Coldw. (Tenn.) 59.

69. State *v.* Hamilton, 29 Nebr. 198, 45 N. W. 279; State *v.* Stein, 13 Nebr. 529, 14 N. W. 481; State *v.* Owens, 63 Tex. 261.

70. People *v.* Grand County, 6 Colo. 202; People *v.* Whitcomb, 55 Ill. 172.

71. Where, however, a proposition of any sort is submitted to a vote of the people under a special statute which makes no provision for a contest of the election, there can be no contest if the provisions of the general election law regulating contested elections are confined to the election of persons to office. Savage *v.* Wolfe, 69 Ala. 569; Clarke *v.* Jack, 60 Ala. 271.

72. Calaveras County *v.* Brockway, 30 Cal. 325; People *v.* Grand County, 6 Colo. 202.

Mandamus generally see MANDAMUS.

73. Even where a valid objection to the title of a person whose right to the office is

mode alone can be resorted to, and that the common-law mode of inquiry by proceedings in quo warranto or a writ in the nature thereof will not be entertained.[74] Where a mode of contest has been provided in a city charter for contesting the election of city officers before a statutory tribunal, it excludes any other remedy, and takes from the courts all supervisory power over such contests.[75] So where by statute a special remedy is provided in the case of a disputed election, the courts will not interfere by injunction even to prevent the perpetration of a fraud;[76] but although the courts cannot assume jurisdiction of contests under such circumstances they may interfere by mandamus to compel the special statutory tribunal having jurisdiction of the contest to act, if it neglects or refuses to do so without good cause.[77] But the court will not determine the rights of candidates in mandamus proceedings against the canvassers,[78] or enter into an investigation of the matters in contention by the ordinary forms of legal or equitable proceedings.[79]

b. Held Cumulative. But it will be found upon examination that the decisions which hold thus are based upon peculiar constitutional and statutory provisions;[80] and the better opinion, as supported by the apparent weight of authority, is that a special remedy given by statute is merely cumulative and not exclusive of the

called in question is shown. People *v.* Keeling, 4 Colo. 129; State *v.* Tolan, 33 N. J. L. 195; Rex *v.* Dawes, 4 Burr. 2120.

74. *Alabama.*— Parks *v.* State, 100 Ala. 634, 13 So. 756.

Arkansas.— Baxter *v.* Brooks, 29 Ark. 173; State *v.* Baxter, 28 Ark. 129.

Kentucky.— Steele *v.* Meade, 98 Ky. 614, 33 S. W. 944, 17 Ky. L. Rep. 1158; Batman *v.* Megowan, 1 Metc. 533.

Massachusetts.— Peabody *v.* Boston, 115 Mass. 383.

Nevada.— Garrard *v.* Gallagher, 11 Nev. 382.

North Carolina.— O'Hara *v.* Powell, 80 N. C. 103.

Ohio.— Dalton *v.* State, 43 Ohio St. 652, 3 N. E. 685; State *v.* Marlow, 15 Ohio St. 114.

Pennsylvania.— Com. *v.* Leech, 44 Pa. St. 332; Hulseman *v.* Rems, 41 Pa. St. 396; Com. *v.* Baxter, 35 Pa. St. 263; Com. *v.* Garrigues, 28 Pa. St. 9, 70 Am. Dec. 103; Glazier *v.* Merringer, 12 Lanc. Bar 61.

Tennessee.— State *v.* Gossett, 9 Lea 644; Hyde *v.* Trewhitt, 7 Coldw. 59.

See 18 Cent. Dig. tit. "Elections," § 245 *et seq.*

Thus a legislature may make a city counsel sole judge of the eligibility and election of its own members, and in such case the decision cannot be revised in a proceeding by quo warranto.

California.— People *v.* Metzker, 47 Cal. 524.

Iowa.— *Ex p.* Strahl, 16 Iowa 369.

New Jersey.— Kendell *v.* Camden, 47 N. J. L. 64, 54 Am. Rep. 117.

Pennsylvania.—Com. *v.* Henszey, 81* Pa. St. 101; Com. *v.* Meeser, 44 Pa. St. 341; Com. *v.* Leech, 44 Pa. St. 332.

Texas.— Seay *v.* Hunt, 55 Tex. 545.

Where a special statutory proceeding is provided for contesting the election of members of the legislature that mode is exclusive and the courts have no jurisdiction. Garrard *v.* Gallagher, 11 Nev. 382.

75. Stine *v.* Berry, 96 Ky. 63, 27 S. W. 809, 16 Ky. L. Rep. 279.

The general election law regulating contests does not apply in such case. Easly *v.* Badenhausen, 59 Miss. 580.

Where the legislature makes the common council the final judge of the election returns and of the validity of the election and qualifications of its own members the rule stated in the text applies. Selleck *v.* South Norwalk, 40 Conn. 359.

Where, however, a municipal charter provides that the city council shall be the judges of the election and qualifications of their own members, but no ordinance has been passed providing any method for trying contested election cases, it seems that a claimant may contest an election by an information filed under the general election law. State *v.* Funck, 17 Iowa 365.

76. Peck *v.* Weddell, 17 Ohio St. 271; Hulseman *v.* Rems, 41 Pa. St. 396.

77. Batman *v.* Megowan, 1 Metc. (Ky.) 533.

78. Dalton *v.* State, 43 Ohio St. 652, 3 N. E. 685.

In mandamus to compel the board to canvass the votes and issue a certificate of election, the relator's title to the office claimed and the legality of the election cannot be inquired into. McCoy *v.* State, 2 Marv. (Del.) 543, 36 Atl. 81.

79. Hulseman *v.* Rems, 41 Pa. St. 396.

80. For, although the ancient writ of quo warranto and proceedings by information in the nature thereof may have been abolished, yet the remedies heretofore had in the forms of that writ and that information may now be obtained by civil action. It is only the form of the proceeding that is done away with. The jurisdiction and power of the courts are not touched in that regard, nor is the right to seek and reach through them every remedy which that writ or information once afforded. People *v.* Hall, 80 N. Y. 117; People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

remedy by quo warranto.[81] For the right to inquire by quo warranto or a writ in the nature thereof into the authority by which any person assumes to exercise the functions of a public office or franchise belongs to the people as a part of their sovereignty.[82] The general law regulating election contests applies to contests between candidates at an election and not to disputes about the title to an office, where one of the parties claims by appointment of the executive and the other by election of the people.[83]

c. Jurisdiction of Congress and State Legislatures. The constitution of the United States provides that each house of congress shall be the sole judge of the election and qualifications of its own members; and the state constitutions contain similar provisions in respect to the election and qualifications of state legislators; and as these bodies are supreme within their respective spheres of action, it follows that the courts are without jurisdiction to hear and determine contested elections of their members.[84]

d. Jurisdiction of Municipal Councils. It is a common provision to be found in the charters of municipal corporations that the common council or other governing body shall be the judge of the election and qualifications of its own members. This presents the important question as to whether such a provision with nothing more is sufficient to give a city council or other similar body sole jurisdiction of the contested elections of its members to the exclusion of the jurisdiction vested in the courts. It must be conceded that there are cases which seem to

81. The general principle is that in the absence of any controlling constitutional restrictions upon the subject the jurisdiction of the courts to proceed by quo warranto or by information in the nature thereof is not taken away by a statute which prescribes a special proceeding, unless there are express words in the statute taking away such jurisdiction, or unless it appears to have been the manifest intention of the legislature to confine the remedy to the prescribed proceedings and to the very tribunal designated.

California.— People *v.* Holden, 28 Cal. 123.

Colorado.— People *v.* Londoner, 13 Colo. 303, 22 Pac. 764, 6 L. R. A. 444.

Illinois.— Snowball *v.* People, 147 Ill. 260, 35 N. E. 538; Stephens *v.* People, 89 Ill. 337.

Indiana.— State *v.* Shay, 101 Ind. 36; State *v.* Gallagher, 81 Ind. 558.

Iowa.— State *v.* Funck, 17 Iowa 365.

Kansas.— Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935.

Minnesota.— State *v.* Gates, 35 Minn. 385, 28 N. W. 927.

Missouri.— State *v.* Fitzgerald, 44 Mo. 425.

Nebraska.— State *v.* Boyd, 31 Nebr. 682, 48 N. W. 739, 51 N. W. 602; State *v.* Frazier, 28 Nebr. 438, 44 N. W. 471; Kane *v.* People, 4 Nebr. 509.

New Jersey.— State *v.* Passaic County, 25 N. J. L. 354.

New York.— People *v.* Hall, 80 N. Y. 117; People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451; People *v.* Seaman, 5 Den. 409; *Ex p.* Heath, 3 Hill 42; People *v.* Van Slyck, 4 Cow. 297.

Oregon.— State *v.* McKinnon, 8 Oreg. 493.

Wisconsin.— State *v.* Messmore, 14 Wis. 115; Atty.-Gen. *v.* Barstow, 4 Wis. 567.

See 18 Cent. Dig. tit. "Elections," § 246 *et seq.*

Gilfillan, C. J., in State *v.* Gates, 35 Minn. 385, 386, 28 N. W. 927, said: "This is an order to show cause why proceedings by quo warranto shall not be instituted to determine whether the relator or the respondent was elected to the office of alderman of the city of Red Wing, at the city election, April 26, 1886. The charter of the city (chapter 4, § 1; Sp. Laws, 1876, c. 28, § 5, p. 97) provides that the city council shall 'be judges of the election and qualification of their own members.' The charter of the city of St. Paul contains a similar provision, and in the case of State *v.* Dowlan, 33 Minn. 536, 24 N. W. 188, the judges of this court who heard the case (one of the judges being absent) were unable to agree whether this made the council the sole judge of the election of a member, so as to exclude the jurisdiction of the courts to try and determine the question of his election. On further considering the point, we are now agreed that such a provision, without the use of the word 'sole' or 'exclusive,' or some similar form of expression, to indicate an intention to shut out the jurisdiction of the courts, does not affect such jurisdiction."

82. Snowball *v.* People, 147 Ill. 260, 35 N. E. 538.

The rights of the people are not in any way impaired by statutes granting to electors, in their private capacity as citizens, the right to contest the election of any person assuming to exercise the functions of an office. Snowball *v.* People, 147 Ill. 260, 35 N. E. 538.

83. Magruder *v.* Swann, 25 Md. 173.

84. State *v.* Judge Civil Dist. Ct., 40 La. Ann. 598, 4 So. 482; Belknap *v.* Ionia County, 94 Mich. 516, 54 N. W. 376; Wheeler *v.* Manistee County, 94 Mich. 448, 53 N. W. 914; Naumann *v.* Detroit, 73 Mich. 252, 41 N. W. 267; State *v.* Peers, 33 Minn. 81, 21 N. W.

answer this question in the affirmative;[85] but according to the weight of authority such language will be construed to afford a cumulative or primary tribunal only, and not an exclusive one.[86] Where, however, a city charter expressly declares the common council to be the sole judges of the election and qualification of its members, the courts are without jurisdiction in the premises.[87] Where a city council are by law the sole judges of the election of their members, mandamus will not lie to compel them to admit a member whom they do not think duly elected;[88] but mandamus will lie to compel them to judge of the returns according to law.[89]

e. Jurisdiction in Equity. Courts of equity have no inherent power to try contested elections, and they have never exercised such power, except in cases where it has been conferred by express enactment, or by necessary implication therefrom.[90] If the question of the legality of an election or whether a person holds an office rightfully arises incidentally in the course of a suit in which equity

860; *In re* Nineteenth Ward, 1 Wkly. Notes Cas. (Pa.) 114.

Mandamus will not lie to compel a recanvass of the votes cast for a member of congress or of a state legislature, the only remedy in such cases is a contest before the house to which the party was elected. Wheeler *v.* Manistee County, 94 Mich. 448, 53 N. W. 914; O'Hara *v.* Powell, 80 N. C. 103.

85. *California.*— People *v.* Metzker, 47 Cal. 524.

Iowa.— *Ex p.* Strahl, 16 Iowa 369.

Louisiana.— New Orleans *v.* Morgan, 7 Mart. N. S. 1, 18 Am. Dec. 232.

Massachusetts.— Peabody *v.* Boston, 115 Mass. 383.

Pennsylvania.— Com. *v.* Meeser, 44 Pa. St. 341; Lamb *v.* Lynd, 44 Pa. St. 336; Com. *v.* Leech, 44 Pa. St. 332.

Where council has provided no machinery for contest.— Where the charter of a municipal corporation provided that the council thereof should be the judge of the election and qualification of its own members, but no ordinance was ever adopted defining the method by which an election of such officers should be contested, it was held that a claimant was not precluded from having his right to such an office determined upon information in the method prescribed by statute. State *v.* Funck, 17 Iowa 365.

86. Accordingly the jurisdiction of the courts remains, unless the language used be such as to show in positive terms or by necessary implication a legislative intent that the jurisdiction of the council should be exclusive. It must be remembered also that the common-law courts of general original jurisdiction have inherent power by quo warranto or information in the nature thereof to inquire into the regularity of elections municipal as well as others, and by a well known rule of interpretation they are not to be shorn of this jurisdiction, except in accordance with the unmistakable intent of the legislature.

Florida.— State *v.* Anderson, 26 Fla. 240, 8 So. 1.

Illinois.— People *v.* Bird, 20 Ill. App. 568.

Minnesota.— State *v.* Gates, 35 Minn. 385, 28 N. W. 927.

Missouri.— State *v.* Fitzgerald, 44 Mo. 425.

New York.— People *v.* Hall, 80 N. Y. 117; *Ex p.* Heath, 3 Hill 42.

Oregon.— State *v.* Kraft, 18 Oreg. 550, 23 Pac. 663; State *v.* McKinnon, 8 Oreg. 493.

Washington.— State *v.* Morris, 14 Wash. 262, 44 Pac. 266.

Wisconsin.— State *v.* Kempf, 69 Wis. 470, 34 N. W. 226, 2 Am. St. Rep. 753.

Constitutionality of act.— Where the jurisdiction to issue writs of quo warranto is conferred upon the courts directly by the constitution, the legislature has no power to deprive them of the same by making a municipal council the sole judge of the election and qualification of its own members. People *v.* Bingham, 82 Cal. 238, 22 Pac. 1039.

87. *Connecticut.*— Selleck *v.* South Norwalk, 40 Conn. 359.

Illinois.— Linegar *v.* Rittenhouse, 94 Ill. 208.

Michigan.— Naumann *v.* Detroit, 73 Mich. 352, 41 N. W. 267; Weston *v.* Kent County Probate Judge, 69 Mich. 600, 37 N. W. 698; People *v.* Harshaw, 60 Mich. 200, 26 N. W. 879, 1 Am. St. Rep. 498; Alter *v.* Simpson, 46 Mich. 138, 8 N. W. 724; People *v.* Witherell, 14 Mich. 48.

New Jersey.— Kendell *v.* Camden, 47 N. J. L. 64, 54 Am. Rep. 117.

Oregon.— Simon *v.* Portland, 9 Oreg. 437.

Texas.— Seay *v.* Hunt, 55 Tex. 545.

88. New Orleans *v.* Morgan, 7 Mart. N. S. (La.) 1, 18 Am. Dec. 232.

Mandamus generally see MANDAMUS.

89. State *v.* Wilmington, 3 Harr. (Del.) 294.

90. *Alabama.*— Moulton *v.* Reid, 54 Ala. 320.

Illinois.— Jennings *v.* Joyce, 116 Ill. 179, 5 N. E. 534; Dickey *v.* Reed, 78 Ill. 261; People *v.* Wiant, 48 Ill. 263; Moore *v.* Hoisington, 31 Ill. 243.

Kentucky.— Clarke *v.* Rogers, 4 Ky. L. Rep. 929.

Maryland.— Hamilton *v.* Carroll, 82 Md. 326, 33 Atl. 648.

Tennessee.— Conner *v.* Conner, 8 Baxt. 11.

See 18 Cent. Dig. tit. "Elections," § 256.

Fraud on the part of the election officers is not sufficient to give jurisdiction in equity. Hartt *v.* Harvey, 32 Barb. (N. Y.) 55.

has jurisdiction, that court will inquire into and decide it as it would any other question in the cause.[91] And to the general rule that courts of equity have no jurisdiction in election cases there are some apparent exceptions.[92]

B. Grounds of Contest. In every contested election whatever may be the cause of contest the true gravamen of the case is to determine who received the highest number of votes.[93] Consequently mere irregularities and misconduct on the part of the election officers which do not tend to affect the result are not of themselves proper grounds for a contest or proper matters of inquiry.[94] A defeated candidate has the right to contest the election of his successful opponent upon the ground of his ineligibility,[95] unless the contest rests upon a supposed criminal act which has not been tried and determined.[96] A mistake in the count of votes received by a candidate for an office made by the board of canvassers, whether innocently or otherwise, is good ground for contesting an election.[97] A contest should be confined to one or more of the grounds enumerated in the statute.[98]

C. Notice or Process — 1. In General. In an election contest the notice is the foundation of the proceeding;[99] and in some jurisdictions it is not only the foundation of the proceeding, but also serves the double purpose of writ and declaration, or of summons and complaint or petition, as the case may be.[1]

2. Form of Notice. No particular form of notice or citation is required in a contested election case;[2] but notice in some form setting forth one or more of the

91. Nolde *v.* Madlem, 4 Lanc. L. Rev. 347, but the decision is only for the purposes of the suit, and it does not settle the right to an office or vacate it if the party is in actual possession.

92. Thus, where a state constitution specifically provides for an election to determine the policy of creating a bonded indebtedness and prohibits the issuance of bonds without the consent of a certain number of voters, and neither the constitution nor the statute authorizing the election provides any method of enforcing the provision and contesting the election, it has been held that the constitution by implication confers upon the court of chancery jurisdiction to determine the validity of such election. Gibson *v.* Trinity County, 80 Cal. 359, 22 Pac. 225.

So also in county-seat elections, where the constitution has provided that county-seats shall not be removed except upon a vote of the majority in favor of the removal, and where the legislature in providing for such elections fails to provide any means of contesting them and protecting the rights of the majority intended to be secured to them, it has been held that the fundamental law by implication confers the power on courts of chancery to hear and determine such cases. Calaveras County *v.* Brockway, 30 Cal. 325; Dickey *v.* Reed, 78 Ill. 261; People *v.* Wiant, 48 Ill. 263; Boren *v.* Smith, 47 Ill. 482. But on the other hand it has been held that a court of equity has no jurisdiction either in a direct or a collateral proceeding to hear and determine the validity of a county-seat election, and that upon the broad principle that a court of equity has no jurisdiction to determine an election contest of any kind. Hamilton *v.* Carroll, 82 Md. 326, 33 Atl. 648.

93. Dobyns *v.* Weadon, 50 Ind. 298.

94. Dobyns *v.* Weadon, 50 Ind. 298; Lehlbach *v.* Haynes, 54 N. J. L. 77, 23 Atl. 422.

95. Grinstead *v.* Scott, 82 Ky. 88; Stevens *v.* Wyatt, 16 B. Mon. (Ky.) 542; Lewis *v.* Watkins, 3 Lea (Tenn.) 174.

96. Grinstead *v.* Scott, 82 Ky. 88.

If the contest point to a supposed criminal charge the party charged is entitled to his trial before a jury. Grinstead *v.* Scott, 82 Ky. 88.

97. Hadley *v.* Gutridge, 58 Ind. 302.

The right to contest an election for fraud or mistake has always been held an invaluable one as a matter of public policy, and a statute will not be construed as repealing or abridging this privilege unless such an intention is clearly expressed. State *v.* Conser, 24 Ohio Cir. Ct. 270.

Where an election is contested on the ground of a mistake in counting the votes, it is not material, whether the cause of the mistake is proved as alleged or not. The question to be determined is, Was there a mistake in counting the votes and if so to what extent? The cause of the mistake is unimportant. Talkington *v.* Turner, 71 Ill. 234.

98. A contestant cannot be allowed to travel beyond the statute and contest an election upon general principles. Meredith *v.* Christy, 64 Cal. 95, 27 Pac. 863; Ellingham *v.* Mount, 43 N. J. L. 470.

99. Vance *v.* Gaylor, 25 Ark. 32; Whitney *v.* Blackburn, 17 Oreg. 564, 21 Pac. 879, 11 Am. St. Rep. 857.

1. Vance *v.* Gaylor, 25 Ark. 32; Whitney *v.* Blackburn, 17 Oreg. 564, 21 Pac. 874, 11 Am. St. Rep. 857.

Notice operates as petition.— State *v.* Smith, 104 Mo. 661, 16 S. W. 503.

2. Norwood *v.* Kenfield, 30 Cal. 393.

Contents of notice.— Where the notice performs the office of summons and complaint, it should contain the title of the cause specifying the name of the court and the parties to

statutory grounds of contest is jurisdictional, and is absolutely essential to the validity of the proceedings.[3]

3. Statement of Ground of Contest — a. In General. While it is the duty of the courts to disregard mere technical rules or defects and to construe liberally the statute concerning contested elections, that the rights of the people may be preserved, and that no protection may be afforded to fraud, yet he who undertakes to contest the right of another to an office to which such other has been declared elected by a tribunal authorized by the people ought to have some well defined cause, and to be able to state it with sufficient certainty to notify and inform the other party of the substance of the facts upon which he relies to defeat his title and to authorize the court to make the inquiry.[4]

b. In Congressional Cases. It is provided by act of congress that a contestant for a seat in the house of representatives shall within thirty days after the election give notice in writing to the member whose seat he intends to contest, and in such notice shall specify particularly the grounds on which he relies in said contest.[5]

4. Time of Giving Notice — a. In General. The intention of the contested election laws is to furnish a summary remedy and to secure a speedy trial, that the title to the office in dispute may be determined before the official term expires in whole or in large part, and that the will of the people may not be defeated in the choice of their officers.[6] Consequently the statutes generally provide that any one desiring to contest an election must file a notice and statement of the grounds of contest within a certain number of days after the election, or

the contest as well as the grounds thereof. Whitney *v.* Blackburn, 17 Oreg. 564, 21 Pac. 874, 11 Am. St. Rep. 857.

3. State *v.* Billings, 23 La. Ann. 798; Baberick *v.* Magner, 9 Minn. 232; Crisler *v.* Morrison, 57 Miss. 791; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11.

Statement of grounds jurisdictional.— Taliaferro *v.* Lee, 97 Ala. 92, 12 So. 125, construing Ala. Code, §§ 396, 397, 428.

Error as to term of court.— A notice of contest of an election of a collector at the next term of the county court to be held on the first Monday in January, 1877, was held to be insufficient, where the next term was in February and none was held in January. Adcock *v.* Lecompt, 66 Mo. 40.

4. Taylor *v.* Taylor, 10 Minn. 107; Whitney *v.* Blackburn, 17 Oreg. 564, 21 Pac. 874, 11 Am. St. Rep. 857.

As the object of the notice is to inform the other party of the substance of the facts relied upon to defeat his claim, certainty is required, but not technical precision of averment; and when the words used therein taken in their ordinary sense fairly serve this purpose it is sufficient. Whitney *v.* Blackburn, 17 Oreg. 564, 21 Pac. 874, 11 Am. St. Rep. 857.

A notice of a contest is sufficient if it apprises the contestee of the general nature of the objections to be made so as to enable him to meet them without unnecessary expense and labor, and if the points specified in the notice are not reasonably certain the remedy is by objecting to testimony taken under them and not by motion to dismiss. Howard *v.* Shields, 16 Ohio St. 184.

A notice of contest on the ground that voters were improperly influenced in casting their votes must give the names of the persons alleged to have been so influenced. Applegate *v.* Eagan, 74 Mo. 258.

Although a notice of contest of an election is so indefinite that an objection would lie if made in proper time, it is sufficient if the parties take issue without objection and go to trial. Lunsford *v.* Culton, 23 S. W. 946, 15 Ky. L. Rep. 504.

Notice too indefinite.— Soper *v.* Sibley County, 46 Minn. 274, 48 N. W. 1112.

5. From this no specific rule can be deduced as to what is a sufficient specification of the grounds of contest; but the house has held to the general rule that the intent of the law is to prevent any surprise being practised upon the sitting member and to put him upon a proper defense, and all that can be said is that a notice which does this is sufficient and one which does not is insufficient, and it must be left to the house to decide each particular case on its own merits. Wright *v.* Fuller, 1 Bartl. Cas. Cont. El. 152. See also Duffy *v.* Mason, 1 Ellsw. Cas. Cont. El. 361; Thobe *v.* Carlisle, Mobl. Cas. Cont. El. 523.

Of this provision Judge McCrary remarks: "A good deal of discussion has arisen as to what is to be understood by the words 'specify particularly the grounds on which he relies.' It is evident, however, that these words are not easily defined by any others. They are as plain and clear as any terms which we might employ to explain them. Cases have arisen, and will again arise, giving rise to controversy as to whether a given allegation comes up to the requirement of the statute, and it must be for the House in each case to decide upon the case before it." McCrary El. (4th ed.) § 429.

6. Whitney *v.* Blackburn, 17 Oreg. 564, 21 Pac. 874, 11 Am. St. Rep. 857; Loomis *v.* Jackson, 6 W. Va. 613.

the official declaration of the result. These statutes are mandatory and a strict compliance with them is jurisdictional.[7] The notice and statement required to be served by the contestant on the contestee constitute the predicate upon which the power of the court is set in motion, and unless served within the time required by the statute the court has no jurisdiction to hear and determine the contest.[8]

b. When Period of Limitation Begins to Run. The time when the period begins to run must depend upon the wording of the statute undergoing construction. Thus it has been variously held that the notice and statement must be filed within the required number of days after the election day, or the day on which the ballots are deposited,[9] or after the return-day, which is the day on which the canvass begins,[10] or after the official declaration of the result.[11]

7. *Indiana.*— Farlow *v.* Hougham, 87 Ind. 540.

Louisiana.— Deslonde *v.* Lozano, 23 La. Ann. 794.

Minnesota.— Seeley *v.* Killoran, 53 Minn. 290, 35 N. W. 132; Borer *v.* Kolars, 23 Minn. 445; Baberick *v.* Magner, 9 Minn. 232.

Missouri.— Bowen *v.* Hixon, 45 Mo. 340; Wilson *v.* Lucas, 43 Mo. 290; Castello *v.* St. Louis Cir. Ct., 28 Mo. 259.

Ohio.— Ingerson *v.* Marlow, 14 Ohio St. 568.

Pennsylvania.— Collings' Case, 2 Luz. Leg. Obs. 57, Brightly Lead. Cas. El. 503.

Texas.— Lindsey *v.* Luckett, 20 Tex. 516. See 18 Cent. Dig. tit. "Elections," § 264.

Parol evidence to show that declaration of result was antedated.— Parol evidence cannot be admitted to show that the declaration of the result by the canvassers was actually signed on a day later than it bears date, where no one was misled by it, and the only effect would be to make a contest valid which without it would be invalid, because filed too late. Taylor *v.* Wallace, 31 Ohio St. 151 [*affirming* 7 Ohio Dec. (Reprint) 328, 2 Cinc. L. Bul. 115]; Kienborth *v.* Berhard, 7 Ohio Dec. (Reprint) 359, 2 Cinc. L. Bul. 171.

Second count.— Within eight days after an election the county clerk cast up the votes and gave a certificate of election to plaintiff. Afterward, defendant having given notice that he would contest the election, the clerk made a second count and gave a certificate to defendant. Within twenty days after the second count, but more than twenty days after the first, plaintiff gave notice that he would contest the election. It was held under a statute providing that no election for any county office shall be contested unless legal notice of such contest be given to the opposite party within twenty days after the votes shall be officially counted, that the notice given by plaintiff was insufficient as not having been given within twenty days from the first count, and his only remedy was by quo warranto. Bowen *v.* Hixon, 45 Mo. 340.

Petition filed too late to prevent issuance of commission.— A petition for contest of an election of a county office if filed within thirty days of the election, although so near the expiration of the same that no notice of it is received by the governor in time to prevent the issuing of a commission by him on the thirty-first day, duly raises an issue under the law, until the determination of which the commission is suspended. Com. *v.* Lathrop, 13 Wkly. Notes Cas. (Pa.) 170.

Filing protest.— Under a statute providing that in a contest of an election the petition for a recount shall be made on or before the last day of the session of the canvassing board, a contestant cannot by filing a protest which the law does not recognize, on what would be in the usual course of the session the last day of the board, thus inducing an unlawful adjournment of the board, extend the time within which to file his petition for a recount. Drennar *v.* Wyandotte, 106 Mich. 117, 63 N. W. 898.

8. Rogers *v.* Johns, 42 Tex. 339; Wright *v.* Fawcett, 42 Tex. 203; Lindsey *v.* Luckett, 20 Tex. 516; Roach *v.* Malotte, 23 Tex. Civ. App. 400, 50 S. W. 701.

9. Belden *v.* Sherburne, 27 La. Ann. 305; *In re* Meendsen, 5 Pa. Co. Ct. 198; *In re* McMenamin, 6 Wkly. Notes Cas. (Pa.) 460, 13 Phila. (Pa.) 422; Collings' Cas, 2 Luz. Leg. Obs. (Pa.) 57, Brightly Lead. Cas. El. 503.

Return of soldiers' vote.— Although the statute provides that a contest must be filed within ten days after the election, where the return of soldiers' votes which change the result is received more than ten days after the election, a petition filed within ten days of the time when the soldiers' votes can be enumerated is in time. *In re* Contested Elections, 2 Brewst. (Pa.) 1 [*reversed* in 65 Pa. St. 20]; Thompson *v.* Ewing, 1 Brewst. (Pa.) 67; Stevenson *v.* Lawrence, 4 Phila. (Pa.) 267.

10. Carlson *v.* Burt, 111 Cal. 129, 43 Pac. 583; Day *v.* Jones, 31 Cal. 261.

In Utah it has been held that the statute requiring the contestant to file a written statement of election contest within forty days after the return-day of the election requires the filing of such statement within such time after the board of canvassers meets to canvass the returns on the Monday next after the election as required by statute and not from the time the result is declared and recorded. Carbis *v.* Dale, 23 Utah 463, 65 Pac. 204.

11. Broaddus *v.* Mason, 95 Ky. 421, 25 S. W. 1060, 16 Ky. L. Rep. 38; Batman *v.* Megowan, 1 Metc. (Ky.) 533; Bynum *v.* Burke County Com'rs, 101 N. C. 412, 8 S. E. 136; Taylor *v.* Wallace, 31 Ohio St. 151;

c. Computation of Time. Where a statute provides that notice of contest of an election shall be given within a certain number of days after the official declaration of the final result, the true rule is to include the first day and exclude the last;[12] and when the last day for filing the notice falls on Sunday it must be filed on Saturday. Monday is too late.[13] Although the service of process upon a legal holiday is irregular and may be pleaded in abatement or set aside upon motion, a notice of contest of election is not technically process, but is more in the nature of a mere personal notice, informing defendant that an action has been commenced against him and that he is required to answer it within a specified time.[14]

d. Time as Affecting Amendments. The time within which a notice of contest and a statement of the grounds of contest must be filed under the statute does not operate to prevent any and all amendments after that time has expired.[15] But a statement so defective as to confer no jurisdiction on the court is incapable of amendment after the time has expired within which the notice and statement might have been filed.[16] Neither can a statement be so amended as to incorporate

Bowler *v.* Eisenhood, 1 S. D. 577, 48 N. W. 136, 12 L. R. A. 705.

Expiration of time allowed for canvass.— In an election contest over a county office, where the statute requires the complaint to be filed within twenty days after the votes of the county are canvassed and the statute also requires the county clerk to canvass the votes within six days after the closing of the polls, it was held that where neither the pleading nor proof showed when the votes were canvassed the twenty days would be taken not to have commenced until the expiration of the six days after the election. Sawyer *v.* Sweet, 33 Nebr. 630, 50 N. W. 954.

12. Misch *v.* Mayhew, 51 Cal. 514.

Ten days' notice.— Batman *v.* Megowan, 1 Metc. (Ky.) 533.

Delivery to clerk after office hours.— The delivery of the notice of appeal to the clerk of the court at his residence in the evening of the last day allowed for that purpose is not a sufficient filing, although the clerk indorsed the papers as filed on that day and entered the case in the appearance docket as of that day. Taylor *v.* Wallace, 7 Ohio Dec. (Reprint) 328, 2 Cinc. L. Bul. 115.

Handing a paper to a janitor of the clerk's office after office hours, although in the office, is not a sufficient filing of a notice of contest to toll the limitation. Taylor *v.* Wallace, 31 Ohio St. 151 [*affirming* 7 Ohio Dec. (Reprint) 328, 2 Cinc. L. Bul. 115]; Kienborth *v.* Bernard, 7 Ohio Dec. (Reprint) 359, 2 Cinc. L. Bul. 171.

13. Vailes *v.* Brown, 16 Colo. 462, 27 Pac. 495, 14 L. R. A. 120; Taylor *v.* Wallace, 7 Ohio Dec. (Reprint) 328, 2 Cinc. L. Bul. 115.

14. Whitney *v.* Blackburn, 17 Oreg. 564, 21 Pac. 874, 11 Am. St. Rep. 857.

15. Brown *v.* McCollum, 76 Iowa 479, 41 N. W. 197, 14 Am. St. Rep. 228.

Failure to state return-day of election.— In an election contest the statement provided for in the statute omitted to allege the return-day of the election. An amended complaint was filed alleging the return-day as of a date more than forty days prior to the filing of the amended complaint, but less than forty days prior to the filing of the original complaint. It was held that the amended complaint, not alleging a cause of action against any new party, related to the commencement of the contest. Preston *v.* Culbertson, 58 Cal. 198.

New facts discovered by return notice or answer.— The West Virginia statute relating to contested elections provides that in contesting the election of a judge of the circuit court the contesting party shall give notice with specifications to the party declared elected within sixty days after the election. The return of the notice of the respondent must be given to the contestant within thirty days after the service of his notice upon the respondent and the depositions taken must be concluded within forty days after the service of the return notice. It was held that as new facts or the clue to the discovery of them may for the first time be disclosed by the return notice itself, new notices with additional specifications and new facts discovered after the service of the original notice and specifications and after the expiration of the sixty days may be given by the contestant within the forty days allotted for the taking of depositions. Loomis *v.* Jackson, 6 W. Va. 613.

But a motion to strike out an entire petition on the sole ground that a new cause of contest was incorporated into the amended petition after the expiration of the statutory period within which an original petition could be filed is properly denied. Such motion should be limited definitely to the new ground of contest, where that is the only objection to the petition. Southerland *v.* Sandlin, (Fla. 1902) 32 So. 786.

16. *In re* Butler Tp., 4 Pa. Dist. 350; *In re* First Ward, 11 Phila. (Pa.) 380.

Failure to show that contestant is an elector.— Gillespie *v.* Dion, 18 Mont. 183, 44 Pac. 954, 33 L. R. A. 703.

Failure to allege that petitioners are qualified electors.— Where the petition is defective in not alleging that the signers are qualified electors who voted at the election con-

an entirely new ground of contest after the time for filing the original statement has expired.[17]

5. SERVICE OF NOTICE — a. In General. The statutory requirements for service of notice or process must be strictly complied with, and the return of the officer should show such compliance, otherwise the court will not acquire jurisdiction.[18] Where the statute is silent as to the manner of serving the notice, it will be presumed that the legislature must have intended it to be done in the manner provided for the service of notices generally.[19]

b. In Contest of Election on Proposition. In a contest of an election on a proposition submitted to the people, there being no adverse candidate upon whom the notice can be served, it should be served on the board or official body authorized to submit such proposition to the electors.[20]

D. Parties — 1. IN QUO WARRANTO. In the absence of any statute prescribing the mode of contesting elections the only remedy is an information in the nature of a quo warranto filed on behalf of the state by the attorney-general or other prosecuting officer at the instance of a private citizen or citizens, known as the relator or relators.[21] In some jurisdictions a party claiming to have been elected to an office may contest his right thereto by information filed in court in the name of the state upon his own relation against the party holding the office.[22]

2. IN STATUTORY CONTESTS. The ordinary statutory election contest is an adversary proceeding, wherein the candidate defeated on the face of the returns becomes the contestant and the candidate returned as elected becomes defendant or contestee,[23] and it is competent for the legislature to dispense with the necessity of

tested, the court acquires no jurisdiction, and hence the petition cannot be amended in that regard, after the statutory period has elapsed within which a contest may be filed. *In re* Welti, 3 Wkly. Notes Cas. (Pa.) 165, 22 Pittsb. Leg. J. (Pa.) 197.

Affidavit fatally defective.— Where the affidavit verifying a contested election petition does not specify the essential prerequisites to jurisdiction specified in the statute, it cannot be amended after the time for filing the petition has expired and the petition should be dismissed. Barnes' Case, 13 Lanc. Bar (Pa.) 183.

Inserting new name in petition.— An amendment to the petition and affidavit by inserting after the time prescribed by the statute the name of a qualified elector in the place of one who is found to be disqualified will not be allowed. Williams *v.* Johnson, 16 Wkly. Notes Cas. (Pa.) 223.

17. Southerland *v.* Sandlin, (Fla. 1902) 32 So. 786.

Statement of new cause of action.— An amended notice of an election contest in which the contestant states that he is an incumbent of the office under an appointment thereto made to fill a vacancy occurring prior to the election, and that he claims the office by being such incumbent at the time of the election, taken in connection with the statement in the original notice of contest that defendant was ineligible, states a new cause of action, and is barred if not filed within the time allowed for instituting a contest. Batterton *v.* Fuller, 6 S. D. 257, 60 N. W. 1071.

18. Cavanaugh *v.* McConochie, 134 Ill. 516, 25 N. E. 674; Hadley *v.* Gutridge, 58 Ind. 302; State *v.* Hudson, 37 Ind. 198.

By reading notice to contestee.— Where the statute provided that in election contests process should be served as in chancery cases, and in such cases the law required service of process to be made by delivering a copy to defendant or leaving such copy at his place of abode, it was held that a return of a summons in an election contest that it was served by reading it to the contestee was insufficient to confer jurisdiction of the person. Greenwood *v.* Murphy, 131 Ill. 604, 23 N. E. 421.

As prerequisite to a hearing.— Sailer *v.* Keating, 11 Phila. (Pa.) 382.

Waiver of objection by appearance.— The fact that the writ directing the clerk to recount the ballots and the notice thereof to the contestee were not served in the manner or by the person required by law is not prejudicial, where the clerk obeyed the writ and the contestee was present at the recount. Lankford *v.* Gebhart, 130 Mo. 621, 32 S. W. 1127, 51 Am. St. Rep. 585.

19. Broaddus *v.* Mason, 95 Ky. 421, 25 S. W. 1060, 16 Ky. L. Rep. 38.

20. Truelson *v.* Duluth, 60 Minn. 132, 61 N. W. 911.

21. Although this proceeding is brought in the name of the state it is not criminal in its nature but is designed for the determination of purely civil rights. McCrary El. (4th ed.) § 425. For matters relating to quo warranto generally see QUO WARRANTO.

22. State *v.* Adams, 65 Ind. 393.

23. Boring *v.* Griffith, 1 Heisk. (Tenn.) 456.

Death of party.— Hargett *v.* Parrish, 114 Ala. 515, 21 So. 993.

Relocation of county-seat.— Burke *v.* Perry, 26 Nebr. 414, 42 N. W. 401.

making the state a party to such contest, for the legislature, representing the state, has power to waive its rights in such matters.[24]

3. JOINT ACTIONS. The court can acquire no jurisdiction by a single petition to contest the right of different persons to different offices. There must be a separate petition for each office.[25] But where several candidates are voted for on the same ballot or ticket, as where several persons are candidates for the common council from the same ward, and the contestants of the election allege fraud or mistake calculated to affect the entire ticket and to destroy the returns as to each one of the set returned as elected it is not necessary for the contestants to file as many copies of their petition as there are persons upon the ticket returned elected.[26] If there are reasons why any of the respondents would suffer from being joined with the others in one petition, such respondents when they come to answer may set out these reasons and so sever in their answers and ask the court to allow them to sever in their trials.[27]

4. IN CONTESTING TIE. In case of a tie vote returned either party may contest the election, and in such an event the proceedings must be against, and the notice given to, the other party and not to the incumbent holding over who, although indirectly interested, is in no way a party to the contest.[28]

5. IN ELECTION ON PROPOSITIONS. It is necessary that the public be made a party in the contest of an election on any subject submitted to popular vote.[29] It has been held that where a citizen of a township representing a class may bring an action for the purpose of testing the validity of a certain township election, another citizen for himself and others of the same class, upon the same principle, may be allowed to come in and defend.[30]

6. INCUMBENT OF OFFICE. An incumbent of an office who is entitled to hold

24. Boring *v.* Griffith, 1 Heisk. (Tenn.) 456.

Constitutionality of statute.— In State *v.* Lewis, 51 Conn. 113, it was contended that the statute authorizing election contests under which the action was brought was unconstitutional, because it made no provision for making the state a party; but the court held that the statute was not invalid for this reason, and, although the public had an interest, the legislature representing the state having power to waive its rights might authorize proceedings of this nature to which it should not be a party.

Joinder of state and contestant.— Under the Arkansas statute providing that either the state or the party entitled to an office may bring proceedings against the usurper thereof, it has been held that there is no error in the state, and the party claiming the office joining as plaintiffs in an action against another in possession of the office. Whittaker *v.* Watson, 68 Ark. 555, 60 S. W. 652.

25. Vance *v.* Gaylor, 25 Ark. 32; *In re* Butler Tp., 4 Pa. Dist. 350; *In re* Coopersdale, 13 Pa. Co. Ct. 62; *In re* Cass Tp., 2 Leg. Chron. (Pa.) 307; *In re* Mahanoy, 1 Leg. Chron. (Pa.) 314.

26. Moock *v.* Conrad, 155 Pa. St. 586, 26 Atl. 700; *In re* Mahanoy, 1 Leg. Chron. (Pa.) 314.

Complaint against several for different offices.— The Virginia statute commands that returns of county elections be upon complaint of fifteen or more voters of undue election and false return, and counter complaint if any be filed, subject to the inquiry, determination, and judgment of the county court which shall proceed without a jury and on the testimony, to decide the same upon the merits according to the constitution and the laws. It was held that a complaint by the requisite number of voters of a county, contesting as fraudulent the election of certain candidates for county treasurer, sheriff, and commissioner of the revenue, was not demurrable on the ground of misjoinder of parties. Richardson *v.* Farrar, 88 Va. 760, 15 S. E. 117.

27. Moock *v.* Conrad, 155 Pa. St. 586, 26 Atl. 700.

28. Erdman *v.* Barrett, 89 Pa. St. 320. The fact that an election has been declared to be a tie and has been decided by lot according to statute does not deprive the unsuccessful candidate of his right to contest the tie. Imboden *v.* Cully, 94 Ky. 45, 21 S. W. 339, 14 Ky. L. Rep. 701; People *v.* Robertson, 27 Mich. 116. For the fact that the tie has been decided by lot by the canvassing board in accordance with the provisions of the statute is not such an adjudication of the votes canvassed as will estop the defeated candidate from contesting the ballots counted for his opponent. Nicholls *v.* Barrick, 27 Colo. 432, 62 Pac. 202.

29. Metamora *v.* Eureka, 163 Ill. 9, 45 N. E. 209.

In a proceeding to contest an election for organizing certain territory into a village the public must be made a party; it is not sufficient to make certain private individuals residing in the territory alleged to have been the principal promoters of the scheme parties defendant, as they cannot represent the public. Lusk *v.* Thatcher, 102 Ill. 60.

30. Perry *v.* Whitaker, 71 N. C. 477.

over, in case of the ineligibility of the candidate elected, has sufficient interest in the matter to invoke a decision of the court as to the legality of the election.[31] So such an incumbent may be permitted to offer legal opposition to the investment with an office of one who claims it under a void election.[32] It has been held, however, that a former officer claiming to hold an office until his successor is duly qualified is not a party having an interest to be affected, so as to authorize him to prosecute an election contest.[33] An action cannot be maintained by an individual claiming to hold a municipal office to determine his right thereto, when it does not appear that any person claims the office in hostility to him, or that there has been any interference by defendant with his legal rights as an officer.[34]

7. Next Highest Candidate. Where the gravamen of the contest is the ineligibility of the candidate elected, the candidate receiving the next highest number of votes has no such interest as entitles him to be heard.[35]

E. Pleading — 1. Complaint, Petition, or Notice and Statement — a. Nature of Proceeding. An election contest is a special statutory proceeding, not a civil action subject to the rules of pleading in actions at law.[36] But as in a civil action a demurrer admits all facts well alleged in the complaint or petition and relieves the contestant from the necessity of proving them.[37]

b. General Requisites of Complaint or Petition. While it is not necessary that the contestant set forth the grounds of complaint with every degree of particularity, it is necessary that the facts be stated with clearness and precision. And moreover the claimant must set forth a meritorious case, that is, he must allege material facts, which if established by the evidence will change the result of the election, otherwise an investigation would be a useless proceeding.[38] Certainty to a common intent is all that is required in an election petition.[39]

31. Taylor *v.* Sullivan, 45 Minn. 309, 47 N. W. 802, 22 Am. St. Rep. 729, 11 L. R. A. 272.

32. Marshall *v.* Kerns, 2 Swan (Tenn.) 68.

33. Com. *v.* West, 5 Pa. Co. Ct. 219.

34. Demarest *v.* Wickham, 63 N. Y. 320.

35. Com. *v.* Cluley, 56 Pa. St. 270, 94 Am. Dec. 75.

36. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; Gonzales *v.* Gallegos, 10 N. M. 372, 62 Pac. 1103.

There is a broad distinction between a suit for an office and a mere contest of the election as declared by the officer or officers to whom the duty of certifying the fact is primarily intrusted. In one case the immediate right of plaintiff to the office and its fees and emoluments is the purpose and direct subject-matter of the suit; while in the other the right to the office may result as a consequence from the contest, but is not its primary object and may not follow from it, although the contestant may prove successful. Williamson *v.* Lane, 52 Tex. 335.

37. Lewis *v.* Boynton, 25 Colo. 486, 55 Pac. 732.

38. Taliaferro *v.* Lee, 97 Ala. 92, 13 So. 125; Territory *v.* Mohave County, (Ariz. 1887) 12 Pac. 730; Weaver *v.* Given, 6 Phila. (Pa.) 65.

What contestant must allege. — A contestant either in his petition or notice of the grounds of contest and specifications must by direct averments substantially show what was the result of the election as declared by the returning officers; in what manner and to what extent that result will be affected by the errors complained of in the specifications; and unless it further appears upon the face of the petition, notice and specifications that the result of said election will be so changed by proof of said allegations as to overcome the majority of the person who has been declared duly elected, or to show that it is impossible to ascertain the true result, it will be the duty of the court on motion to quash the same. Loomis *v.* Jackson, 6 W. Va. 613.

39. *In re* Election Cases, 65 Pa. St. 20 [*reversing* 2 Brewst. 1].

Ballot cast for candidate by wrong name. — A petition to contest an election of a borough assessor alleged that the election was undue and illegal in that the returns showed that William H. Hargrave had received two hundred and fifty-five votes and Ellsworth Kochersperger two hundred and fifty-four and Ellsworth Koch one vote, whereas there was no such person as Ellsworth Koch in the election district and the petitioners believed that this last vote was intended for Ellsworth Kochersperger and prayed for a hearing. It was held that the petition was sufficient to move the court to order a contest. Kochersperger *v.* Hargrave, 6 Pa. Co. Ct. 510.

The degree of certainty required in a statement of the cause of contest in an election case is not the highest degree of certainty known in pleading, but only such as will suffice to inform defendant of the particular proceeding or cause upon which the contest is founded. Minor *v.* Kidder, 43 Cal. 229.

The statement need not detail the particular means or measures resorted to for the purpose of accomplishing a miscount, but the

c. **Particular Facts Must Be Averred** — (i) *In General.* In a statutory proceeding to contest an election the contestant's initial pleading, whether it be termed a declaration, complaint, petition, or notice and statement, must set forth the particular facts relied upon as invalidating the election of his opponent in order that the latter may be apprised of the case he has to meet.[40] Thus an allegation that the contestant received more votes than the contestee is an averment of a conclusion, and is but tantamount to a general averment that the judgment of the county board of canvassers was erroneous, and when pleaded as an independent ground of contest will be regarded as surplusage;[41] and the facts and circumstances set out must be of such a character upon the face of the pleading as reasonably to establish that some other person than the incumbent was legally elected to the office which the incumbent holds.[42] General averments of fraud, mistake, intimidation, and the like are but conclusions of law. The particular facts relied on must be set forth.[43] In a contest of an election on the ground that voters were intimidated, the petition should set forth the names of the persons

ultimate fact. Minor *v.* Kidder, 43 Cal. 229.

40. *Indiana.*— Borders *v.* Williams, 155 Ind. 36, 57 N. E. 527.

Louisiana.— Augustin *v.* Eggleston, 12 La. Ann. 366.

Missouri.— State *v.* Spencer, 166 Mo. 271, 65 S. W. 981.

New Jersey.— Lehlbach *v.* Haynes, 54 N. J. L. 77, 23 Atl. 422.

West Virginia.— Harrison *v.* Lewis, 6 W. Va. 713.

See 18 Cent. Dig. tit. "Elections," § 266 *et seq.*

Allegation too indefinite.— An allegation that the county canvassing board made grave errors in the count of the vote, and that many voters of the opposite political faith crossed over and voted for plaintiff, and that in counting such votes it was easy to make mistakes to plaintiff's hurt, is not sufficiently specific to be considered by the court or to authorize a recount of the ballots. Edwards *v.* Logan, 69 S. W. 800, 24 Ky. L. Rep. 678.

Allegation that ballots were not in conformity with the law.— An allegation in an election contest petition that several hundred ballots cast and counted for the incumbent were not in conformity with law is too vague. Lehlbach *v.* Haynes, 54 N. J. L. 77, 23 Atl. 422.

Use of the words "and upward."— Where a contested election petition alleges that a specified number "and upward" of illegal votes were polled, and the specified number of votes given would be sufficient if their illegality was proved to change the result of the election, the use of the words "and upward" was held not to make the petition general, vague, and indefinite. Mann *v.* Cassidy, 1 Brewst. (Pa.) 11; *In re* Beamish, 6 L. T. N. S. (Pa.) 71.

Statement of election.— A petition which states that the relator was elected by a plurality of the legal votes over and above all other candidates for the same office is not objectionable as being too general, because a mere statement that he was elected would be sufficient. State *v.* Dalton, 1 Ohio Cir. Ct. 119, 1 Ohio Cir. Dec. 71.

Districts in which the irregularities occurred.— Where the grounds of contest are that legal votes were rejected and illegal votes received, the petition should state in what precincts these irregularities occurred. Lehlbach *v.* Haynes, 54 N. J. L. 77, 23 Atl. 422.

Allegation of conclusion of law.— *Ex p.* Burke, 22 Pittsb. Leg. J. (Pa.) 193.

The notice in a contested election case must set forth with reasonable certainty the facts on which the contest is founded. A notice which states as the sole ground of complaint that the county court commissioners failed and refused to count the votes at a certain precinct which had been duly certified by the commissioners of election at such precinct, and that if these votes had been counted the contestant would have been duly elected, is insufficient. Halstead *v.* Rader, 27 W. Va. 806. Although the specifications in a petition contesting an election do not in so many words set out that any illegal votes were received and counted for the respondent, or that the illegal conduct of the election officers in the district named changed the result of the election, yet where each specification contains a distinct charge that, for causes therein recited at length, the election in such districts was unlawful, fraudulent, and void, it is sufficient. *In re* Barber, 10 Phila. (Pa.) 579 [*affirmed* in 7 Leg. Gaz. 126].

Statement charging merely negligence.— A statement of a contestant charging not more than simple negligence, and a failure to exercise that degree of care to the end that the votes should be duly counted and returned and the true result declared, is insufficient to give the court jurisdiction. Taliaferro *v.* Lee, 97 Ala. 92, 13 So. 125.

41. Borders *v.* Williams, 155 Ind. 36, 57 N. E. 527.

42. Suspicious circumstances are not sufficient; mere suspicions do not establish the legality of the election of the petitioner, or the defeat of the incumbent. Groth *v.* Schlemm, 65 N. J. L. 431, 47 Atl. 502.

43. People *v.* Glenn County, 100 Cal. 419, 35 Pac. 302, 38 Am. St. Rep. 305; Smith *v.* Harris, 18 Colo. 274, 32 Pac. 616; Todd *v.* Stewart, 14 Colo. 286, 23 Pac. 426; Carpenter's Case, 2 Pars. Eq. Cas. (Pa.) 537.

deterred from voting, and allege that they would have voted for the defeated candidate, or on the losing side of the question submitted to the voters at the election, and that the number of voters so intimidated was such that the result of the election would have been different if they had voted.[44] The complaint must set forth one or more of the grounds of contest enumerated in the statute, otherwise it will be bad on demurrer.[45] But it is not necessary to allege the particular fact as to each individual ballot the rejection of which is complained of.[46]

(II) *In Quo Warranto.* Where an information in the nature of a quo warranto may be filed by a private citizen to oust his adversary and test his own right to the office, he must allege facts showing his right to the office; otherwise the court will not inquire into the rights of the incumbent.[47] But if the information be filed by the attorney-general the court will inquire whether or not the incumbent is a *de jure* officer.[48]

d. Specification of Mere Irregularities. Specifications of mere irregularities not affecting the result of the election will be stricken out on motion.[49]

e. Time of Election. The time of the election at which the contestant claims to have been elected to the office should be stated in the complaint in direct terms and should not be left to mere inferences.[50]

f. Names of Illegal Voters. A complaint or petition in a contest on the ground that the election was carried by illegal votes should allege who the illegal voters were.[51] And if the statute requires the contestant to serve a list of alleged illegal

Allegation that legal voters were prevented from voting.— A notice that an election will be contested on the ground that a large number of legal voters desired and attempted to cast their votes, but with the knowledge, consent, and connivance of the judges of the election were by violence and threats prevented from so doing, is too general and indefinite as a specification of a ground of contest. Soper *v.* Sibley County, 46 Minn. 274, 48 N. W. 1112.

Fraud is never to be presumed, it must be particularly alleged, especially when the act charged as a fraud may be innocent. Consequently a contestant charging fraud in an election must by apt words allege in his petition every act, fact, and intent which necessarily enter into and constitute that particular fraud, and these essentials must be alleged with such precision and certainty as to exclude every construction except the fraudulent and wrongful purpose complained of. Loomis *v.* Jackson, 6 W. Va. 613.

It is not sufficient for a complaint or petition in a contested election case to aver that votes were fraudulently received, unless it is also stated for whom they were polled and the number of them. Mann *v.* Cassidy, 1 Brewst. (Pa.) 11; Matter of Dist.-Atty., 2 Phila. (Pa.) 199. In a complaint of an undue election or a false return, the facts must be stated with clearness and precision and must appear to be material and sufficient if proved to change the result. Weaver *v.* Given, 1 Brewst. (Pa.) 140, 6 Phila. (Pa.) 65, 114.

44. Cole *v.* McClendon, 109 Ga. 183, 34 S. E. 384.

45. Powers *v.* Hitchcock, 129 Cal. 325, 61 Pac. 1076.

46. Roberson *v.* Hubler, 11 Okla. 297, 67 Pac. 477.

47. State *v.* Hamilton, 29 Nebr. 198, 45 N. W. 279.

48. State *v.* Hamilton, 29 Nebr. 198, 45 N. W. 279.

49. Mann *v.* Cassidy, 1 Brewst. (Pa.) 11; Matter of Dist.-Atty., 2 Phila. (Pa.) 199.

Mere irregularities.— Where some of the grounds alleged are mere irregularities, which if sustained by proof would not be sufficient cause for setting aside the election, they will be stricken out. Kneass' Case, 2 Pars. Eq. Cas. (Pa.) 553, Brightly Lead. Cas. El. 260, 337.

50. People *v.* Ryder, 16 Barb. (N. Y.) 370.

51. *California.*— Preston *v.* Culbertson, 58 Cal. 198; Norwood *v.* Kenfield, 30 Cal. 393.

Colorado.— Schwarz *v.* Garfield County Ct., 14 Colo. 44, 23 Pac. 84.

Georgia.— Paulk *v.* Lee, 117 Ga. 6, 43 S. E. 368.

Kentucky.— Lunsford *v.* Culton, 23 S. W. 946, 15 Ky. L. Rep. 504.

Mississippi.— State *v.* Laizer, 77 Miss. 146, 25 So. 153.

Missouri.—Applegate *v.* Eagan, 74 Mo. 258.

See 18 Cent. Dig. tit. "Elections," § 266 *et seq.*

Ballots cast by fictitious persons in names of registered electors.— In the contested election case, where an order is made on motion of the respondent to require the relator to furnish a list of the names of persons alleged to have voted illegally, he may give the names of persons legally registered whose ballots were cast by others whose identity cannot be shown. Londoner *v.* People, 15 Colo. 557, 26 Pac. 135.

In quo warranto by the state.— In contesting an officer's election the parties cannot go behind the official returns unless the specific objections thereto, for instance designating the number and names of alleged illegal voters, be stated in the pleadings. State *v.* Townsley, 56 Mo. 107.

votes on defendant, evidence offered by the contestant to prove the illegality of a vote not so specified should be excluded.[52] But it has been held that a statement of the number of illegal votes polled, for whom polled, and when and where polled is sufficient, without specifying the names of the illegal voters, at least in the absence of a motion to make more definite and specific.[53] A complaint which states that a certain number of illegal votes were cast and counted and gives the reason why they were illegal and should have been thrown out is sufficient;[54] and where it is alleged that divers persons named voted illegally and also that other persons unknown to the complainant had voted at the election illegally and fraudulently, it is not error to admit evidence of illegal voting by persons other than those named in the pleadings.[55] It has also been held that the contestant is not obliged to set out the name of every illegal voter and specify the reason why his vote is illegal.[56] So also it seems to be settled in the house of representatives that it is not necessary in a notice of contest to give the names of illegal voters objected to, or to furnish a list of them to the sitting member.[57] In a contest on the ground that certain votes were cast by persons who were not qualified voters, fraud on the part of the election officers is not a necessary allegation.[58]

g. Allegation That Contestant Was Elected. In a complaint or petition in an election contest case, it is prudent to allege that the contestant was elected; but in the absence of such specific allegation it is sufficient if facts be alleged from which the court can see that if they be proved the contestant was in fact elected.[59] It should be alleged in the complaint or petition that the alleged illegal votes given to the contestee if taken from him would reduce the number of his legal votes to or below the number of legal votes given to the contestant.[60] It is not sufficient to allege that enough illegal votes were cast at the election to have changed the result.[61] The contestant must allege in his complaint or petition that he received

Where objection is to counting blanks.— Where the objection is not to the voters, but to the action of the officers of election in counting blanks as votes, the requirement of the statute that the notice of contest shall state the names of the voters objected to does not apply. Moffatt *v.* Montgomery, 68 Mo. 162.

52. Smith *v.* Thomas, 121 Cal. 533, 54 Pac. 71.

53. Tunks *v.* Vincent, 106 Ky. 829, 51 S. W. 622, 21 Ky. L. Rep. 475; Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936; *In re* Orphans' Ct., 1 Brewst. (Pa.) 162; State *v.* Hilmantel, 21 Wis. 566.

54. Greeley *v.* Holland, 14 Nev. 320.

55. Berry *v.* Hall, 6 N. M. 643, 30 Pac. 936.

56. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; Burke *v.* Perry, 26 Nebr. 414, 42 N. W. 401; *In re* Election Cases, 65 Pa. St. 20; Bertolet's Case, 2 Pa. Dist. 849, 13 Pa. Co. Ct. 353; *In re* Contested Elections, 2 Brewst. (Pa.) 1, 7 Phila. (Pa.) 41; *In re* Orphans' Ct., 1 Brewst. (Pa.) 162; *In re* Orphans' Ct., 1 Brewst. (Pa.) 67; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11; *In re* Gressang, 5 Pa. Co. Ct. 251; Whitehouse *v.* Schalck, 5 Wkly. Notes Cas. (Pa.) 122; Matter of Dist.-Atty., 2 Phila. (Pa.) 199; Fowler *v.* Felthoff, 1 Leg. Rec. (Pa.) 105; *In re* Beamish, 6 L. T. N. S. (Pa.) 71.

57. Vallandigham *v.* Campbell, 1 Bartl. Cas. Cont. El. 233; Otero *v.* Gallegos, 1 Bartl. Cas. Cont. El. 177; Wright *v.* Fuller, 1 Bartl. Cas. Cont. El. 152; Varnum's Case, Cl. & H. Cas. Cont. El. 112.

58. Kelly *v.* State, 79 Miss. 168, 30 So. 49.

59. *Indiana.*— Dobyns *v.* Weadon, 50 Ind. 298; Nickols *v.* Ragsdale, 28 Ind. 131.

Kentucky.— Leeman *v.* Hinton, 1 Duv. 37.

North Carolina.— Oden *v.* Bates, 98 N. C. 594, 3 S. E. 491; Hahn *v.* Stinson, 98 N. C. 591, 3 S. E. 490; Hancock *v.* Hobbs, 98 N. C. 589, 3 S. E. 489.

Pennsylvania.— Miller *v.* Milligan, 12 Phila. 575.

Wisconsin.— State *v.* Brunner, 20 Wis. 62.

To authorize a person to institute an election contest in his own name under the statute, such person must state in his notice of contest such facts as would *prima facie* entitle him to the office himself. Merely stating that he was a candidate for the office is not sufficient. Batterton *v.* Fuller, 6 S. D. 257, 60 N. W. 1071.

60. It is not enough to say the contestant would have received a majority; that majority may also have consisted of illegal votes in whole or in part. Wade *v.* Oates, 112 Ala. 325, 20 So. 495; Lehlbach *v.* Haynes, 54 N. J. L. 77, 23 Atl. 422.

Must state that illegal votes were cast for candidate declared elected.— Zerby *v.* Snare, 107 Pa. St. 183.

61. It must also be averred that the majority of the legal votes were cast in favor of the contestant, or of tne proposition for which he stands as contestant. Hannah *v.* Shepherd, (Tex. Civ. App. 1894) 25 S. W. 137.

a greater number of legal votes than any other candidate for the same office voted for at that election.[62]

h. Non-Election of Contestee. Where facts sufficient to authorize an investigation are well stated, a complaint or petition is not objectionable for a failure to allege that the contestee was not elected.[63]

i. Allegation That Contestee Was Declared Elected. Until the vote has been canvassed and a certificate of election has been issued by the proper officer, there can arise no cause for a contested election, because until that time it cannot be known who is officially declared elected.[64] An election contest is a statutory proceeding to obtain a recanvass of the votes cast at an election, as the result of which some person has been declared elected; and where the court finds that no one has been declared elected it has no jurisdiction of the contest and cannot declare the contestant elected.[65] Hence the complaint or petition should allege who was declared to be elected by the canvassers;[66] but an averment that the contestee was the successful candidate is equivalent to an averment that he had been declared elected, within the meaning of the statute.[67]

j. Averment of Contestant's Eligibility. An averment that the contestant was a candidate and was duly elected to the office in question is sufficient, without any express averment of his eligibility to the office.[68]

k. Allegation as to Change of Result of Election. The better opinion is that the complaint or petition must allege that the irregularities complained of changed the result of the election.[69] Although under some statutes it is held not to be necessary to state that the result would have been different had the irregularities

62. Fish *v.* Collens, 21 La. Ann. 289. *Compare* Roberson *v.* Hubler, 11 Okla. 297, 67 Pac. 477.

63. Bragunier *v.* Penn, 79 Md. 244, 24 Atl. 12.

64. Barnes *v.* Gottschalk, 3 Mo. App. 111.

65. Austin *v.* Dick, 100 Cal. 199, 34 Pac. 655.

66. Andrews *v.* Otsego County Probate Judge, 74 Mich. 278, 41 N. W. 923.

67. Griffen *v.* Wall, 32 Ala. 149.

The omission to recite in a notice of election contest that the contestee received the certificate of election will not invalidate such notice (Sone *v.* Williams, 130 Mo. 530, 32 S. W. 1016), and it has been held that a petition in a contested election case will not be quashed because it does not formally state that the candidates having the highest number of votes were returned as elected (Marks *v.* Park, 7 Leg. Gaz. (Pa.) 55).

68. *California.*— Rutledge *v.* Crawford, 91 Cal. 526, 27 Pac. 779, 25 Am. St. Rep. 212, 13 L. R. A. 761.

Colorado.— Nicholls *v.* Barrick, 27 Colo. 432, 62 Pac. 202.

Kentucky.— Tunks *v.* Vincent, 106 Ky. 829, 51 S. W. 622, 21 Ky. L. Rep. 475.

Maine.— Rounds *v.* Smart, 71 Me. 380.

Missouri.— Ledbetter *v.* Hall, 62 Mo. 422.

South Dakota.— Church *v.* Walker, 10 S. D. 450, 74 N. W. 198.

See 18 Cent. Dig. tit. "Elections," § 273.

Allegation of citizenship.— In an action to try title to a county office, an allegation that the relator at the time of the election under which he claims was a legal and qualified elector of the county and eligible to the office is sufficient, without an allegation that he was a citizen of the United States. State *v.* Hœflinger, 35 Wis. 393.

69. Lanier *v.* Gallatas, 13 La. Ann. 175. In a suit contesting an election on account of violence used in keeping voters from the polls, it should be alleged that there was a sufficient number prevented from voting to have varied the result; and the absence of such material allegation is fatal to the suit. State *v.* Mason, 14 La. Ann. 505. A petition in an election contest averred generally that in four election precincts corruption, fraud, and intimidation were practised and mentioned specifically: (1) The striking off of twenty-seven or twenty-eight names from the poll-books, but with no averment that the parties thus prevented from voting would have cast their ballots for the contestor; (2) the action of certain mine-owners and managers who endeavored to turn their employees' votes against the contestor by unfair argument and implied threats of discharge from employment; (3) circulation by the contestee of the report that a certain independent ticket containing the name of the contestor was fraudulent, whereby numerous persons were prevented from exercising their free choice. The petition did not state the total number of votes cast in the county for the office in controversy, or the total vote polled in the precincts complained of. It did not state the number of candidates for such office or the number of votes given for either candidate; nor was there any averment tending to show that the matters complained of altered the result of the election. It was held that a demurrer to the petition was properly sustained. Todd *v.* Stewart, 14 Colo. 286, 23 Pac. 426.

Allegation of fraud.— An allegation of a fraud permitted by election officers is immaterial, unless it is also stated that the result has been affected. Mann *v.* Cassidy, 1

not occurred.[70] At all events the complaint or petition must plainly and succinctly state facts which if sustained by proof will render it the duty of the court either to vacate the election or to declare the other party elected, otherwise it should be quashed on motion.[71]

l. **Reason For Rejection of Ballots.** It is not necessary that the complaint or petition should set forth the reasons for the rejection of ballots complained of.[72]

m. **Allegation of Bribery.** An allegation that a majority of those voting in favor of a proposition were not unbribed is not equivalent to an allegation that a majority of those voting in favor of the proposition were bribed.[73]

n. **Allegation That Contestant Was an Elector.** Where the statute permits a contest to be instituted by an elector only, the omission of a contestant to show by positive averment on the face of his pleading that he is an elector is fatal.[74]

o. **Allegation of Contestant's Candidacy.** Where an election is contested by the defeated candidate, he should allege that he was a candidate for election to the office in controversy.[75]

p. **Inconsistent Averments.** If a complaint or petition contains inconsistent averments the contradictory parts should be stricken out.[76]

q. **Petition of Electors.** A statutory provision requiring a contestant to file with his suit a petition signed by at least a designated number of voters of the county or parish praying the court to examine the facts and decide thereon is imperative.[77] It is not necessary that the petitioners in a contested election case or any of them should be electors of the particular district or districts in which

Brewst. (Pa.) 11; Matter of Dist.-Atty., 2 Phila. (Pa.) 199.

Agreed statement of facts.— In a contested election in which the right of certain persons to vote was disputed, and the facts were agreed on and submitted to the court in a case stated, which, however, contained no allegation that a rejection of the votes if illegal would change the result of the election, it was held that the court properly refused to open the ballots regardless of the question whether or not they were legal. Courtright *v.* Broderick, 11 Wkly. Notes Cas. (Pa.) 393.

The ballots are admissible in evidence under an allegation that illegal votes in a number sufficient to change the result were cast, without any averment that the returns of the election officers are fraudulent. Gray *v.* State, 19 Tex. Civ. App. 521, 49 S. W. 699.

The allegation that certain persons named voted for the contestant but that their votes were not counted for him is sufficient if the number of votes not counted is sufficient to change the result of the election. Raney *v.* Ratcliff, 5 Ky. L. Rep. 471.

70. Steele *v.* Martin, 6 Kan. 430; Ledbetter *v.* Hall, 62 Mo. 422. An averment that election returns are false and that a true count and return of the votes as cast would show a smaller vote for the respondent, and that one of the officers because of drunkenness could not and did not count certain votes cast for the relator is, in the absence of a special exception, sufficient to permit the contradiction of the return of the canvassers by the introduction of the ballots. Gray *v.* State, 19 Tex. Civ. App. 521, 49 S. W. 699.

71. *In re* Skerrett, 2 Pars. Eq. Cas. (Pa.) 509; Carpenter's Case, 2 Pars. Eq. Cas. (Pa.) 537; Kneass' Case, 2 Pars. Eq. Cas. (Pa.) 553; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11; Matter of Dist.-Atty., 2 Phila. (Pa.) 199.

It is not enough to show that illegal votes were received in number greater than the plurality returned for the contestee. Circumstances must also be shown which if true raise a presumption that these illegal votes were cast for the contestee. Lehlbach *v.* Haynes, 54 N. J. L. 77, 23 Atl. 422.

72. Even if such reasons were stated they would be unimportant, for the issue at the trial would still be, not whether the reasons were good, but whether the rejection of the ballots was illegal. Hackett *v.* Mayhew, 62 N. J. L. 481, 41 Atl. 688.

73. Woolley *v.* Louisville Southern R. Co., 93 Ky. 223, 19 S. W. 595, 15 Ky. L. Rep. 13.

74. Gillespie *v.* Dion, 18 Mont. 183, 44 Pac. 954, 33 L. R. A. 703; Todd *v.* Devlin, 23 Wkly. Notes Cas. (Pa.) 110; *In re* Welti, 3 Wkly. Notes Cas. (Pa.) 165, 22 Pittsb. Leg. J. (Pa.) 197.

Quashed unless amended.— A petition in a contested election case which does not aver that the petitioners were qualified voters and voted at the election contested will be quashed unless the defect be cured by amendment. Sailor *v.* Keating, 11 Phila. (Pa.) 402.

Mere allegation of candidacy will not do. Masterson *v.* Reed, 172 Ill. 37, 49 N. E. 488.

Statement as to candidacy.— The contestant must show in his notice of contest that he was a candidate or an elector at the election. Edwards *v.* Knight, 8 Ohio 375.

75. Gillespie *v.* Dion, 18 Mont. 183, 44 Pac. 954, 33 L. R. A. 703.

76. Ewing *v.* Filley, 43 Pa. St. 384; Marshall *v.* Baldwin, 1 Wkly. Notes Cas. (Pa.) 356, 11 Phila. (Pa.) 393.

77. A certified copy of such a petition, the original of which was filed by the contestant in another suit, will not support his case. Ducote *v.* Gremillion, 32 La. Ann. 540.

the alleged cause of contest arose. It is sufficient that they are qualified electors of that political division.[78]

r. Prayer For Relief. It is not necessary that the statement in a contested election case should contain a prayer for relief.[79]

s. Signatures. A complaint or petition in the nature of a pleading may be signed by an attorney the same as any other pleading.[80] But in the case of a statutory petition by electors presented to the court for the purpose of setting a contest in motion, the signatures must as a rule be affixed by the petitioners themselves,[81] although a petitioner may authorize another to sign his name to the petition if it is done in his presence and by his express direction;[82] and a petitioner may sign a petition to contest an election by his mark without witnesses.[83] The signers of a petition to contest an election will not be permitted to withdraw their names therefrom and thus divest the jurisdiction of the court after the statutory time for filing the petition has passed.[84]

t. Verification. In some jurisdictions it is required by statute that the written statement of the grounds of contest shall be verified by the affidavit of the contestant,[85] or by that of a specified number of the petitioners who are also qualified electors.[86] If the statute prescribes the form of affidavit that form should be followed.[87] But if the statute is silent on the form of the affidavit, it may be in the form of any ordinary affidavit of verification to a pleading;[88] and unless otherwise required by statute the petition is sufficiently verified on information and belief.[89] But if the statute requires it the petition must be verified by the oath of persons who are actually cognizant of the facts of the case.[90] The affidavit of verification need not set forth the facts and circumstances of the case.[91]

2. Pleas, Answers, and Subsequent Pleadings — a. In General. Under some of the statutes it is not necessary that an incumbent in a contested election case

78. *Ex p.* Burke, 22 Pittsb. Leg. J. (Pa.) 193.

Polls without geographical limits of district.— Qualified electors who voted at the polls designated by the court and the sheriff's proclamation for their respective districts and presided over by the officers properly chosen for the purpose have all the qualifications to contest the election required by statute, notwithstanding the polls were without the geographical limits of the districts. *In re* Prothonotary, 5 Kulp (Pa.) 179.

79. Norwood *v.* Kenfield, 30 Cal. 393.

80. Bragunier *v.* Penn, 79 Md. 244, 29 Atl. 12.

81. Swain *v.* Haynes, 54 N. J. L. 600, 27 Atl. 239; *In re* Swain, 54 N. J. L. 82, 23 Atl. 421; *In re* Twentieth Ward, 3 Pa. Dist. 118; Matter of Orphans' Ct., 1 Phila. (Pa.) 446.

82. *In re* Foster Tp., 2 Leg. Rec. (Pa.) 22.

83. *In re* Conroy, 2 Leg. Rec. (Pa.) 27.

84. *In re* Grim, 14 Wkly. Notes Cas. (Pa.) 303; *In re* Clinton County, 1 Pa. L. J. Rep. 489, 3 Pa. L. J. 160.

85. Holton *v.* Brown, 46 Ind. 122; Curry *v.* Miller, 42 Ind. 320; Curry *v.* Baker, 31 Ind. 151; Wheat *v.* Ragsdale, 27 Ind. 191; Garrett *v.* Higgins, 27 Ind. 162; Albee *v.* May, 8 Blackf. (Ind.) 310.

86. Johnson *v.* Allen, 55 N. J. L. 400, 27 Atl. 1014; Acker *v.* Conrad, 2 Pa. Dist. 469, 13 Pa. Co. Ct. 97; Williams *v.* Johnson, 16 Wkly. Notes Cas. (Pa.) 223; *In re* Leisenring, 11 Phila. (Pa.) 400; Barnes' Case, 13 Lanc. Bar (Pa.) 183; Nelms *v.* Vaughan, 84 Va. 696, 5 S. E. 704. A petition presented by the requisite number of citizens, but not sworn to by any of the petitioners, although sworn to by other voters, residents in the ward, should be quashed, where the statute requires that the facts be verified by two qualified voters who are also petitioners. Clark's Case, 2 Pars. Eq. Cas. (Pa.) 521.

Leave to amend.— A petition in a contested election case will not be quashed because certain of the specifications are not signed by the petitioner or verified. Leave will be given to amend. *In re* Barber, 10 Phila. (Pa.) 579, 3 Luz. Leg. Reg. (Pa.) 153 [*affirmed* in 7 Leg. Gaz. 126].

87. Matter of First Ward, 11 Phila. (Pa.) 380.

Amendment.— Where the jurat to a petition contesting an election avers that the facts contained therein are true, it may be amended so as to state that the affiants verily believe them to be true according to the form prescribed by the statute. Battis *v.* Price, 2 Pearson (Pa.) 456.

88. Kirk *v.* Rhoads, 46 Cal. 398.

89. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; *In re* Election Cases, 65 Pa. St. 20 [*reversing* 2 Brewst. 1, 7 Phila. 41].

90. Johnson *v.* Allen, 55 N. J. L. 400, 27 Atl. 1014.

91. It is enough that the particulars are set forth in the complaint or petition. Hackett *v.* Mayhew, 62 N. J. L. 481, 41 Atl. 688.

That signers of petition were qualified voters.— In New Jersey the affidavit must not only verify the facts and circumstances stated in the petition, but also the fact that

should file a plea or answer.[92] But although the election law may not require the incumbent whose election to an office is contested to file an answer, it is proper to file a written denial of the complaint or petition.[93] In other jurisdictions, however, the contestee is required to answer as in civil actions.[94]

b. Matter in Abatement. Where the only pleading authorized by defendant in an election contest is an answer, matter in abatement need not be pleaded as such, but may be set up in an answer to the merits and the contestee may receive the benefit thereof at the trial.[95]

c. Counter Contest. Although under the statute the contestee may traverse the allegations of the contestant and also set up grounds of contest against the contestant in his answer, it is not necessary that these should be styled a counterclaim as in a civil action.[96]

d. Particularity of Statement in Answer. In a proceeding to contest an election less particularity is required in the answer of defendant than in the petition of the contestant.[97] That ballots were altered may be shown without any allegation of alteration.[98]

e. Service of Answer. When the contestee becomes actor and sets up affirmative matter in defense, he must serve his answer and notice of grounds with the same strictness required of the contestant in serving his papers.[99] Where the answer is not served at the time and in the manner provided by statute, it is not error to strike it from the files upon motion.[1] Where application is made for leave to serve an answer after the statutory period for such service has expired, it is not error to deny the application.[2] It would appear to be the better rule that statutes providing that answers and replies may be served or filed within a certain

the signers of the petition are qualified voters. Smith *v.* Smith, (Sup. 1898) 41 Atl. 753.

92. Griffin *v.* Wall, 32 Ala. 149; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11; Matter of Dist.-Atty., 2 Phila. (Pa.) 199.

No answer required.— In a contest under the New Jersey statute the incumbent is not bound to file any answer to the contestant's petition, and his failure to do so cannot be treated as a default entitling the contestant to judgment. Lippincott *v.* Felton, 61 N. J. L. 291, 39 Atl. 646.

93. Burrough *v.* Branning, 9 N. J. L. J. 110.

94. Talkington *v.* Turner, 71 Ill. 234; Vigil *v.* Pradt, 4 N. M. 375, 20 Pac. 795; Bull *v.* Southwick, 2 N. M. 321.

No verification required.— Under the Indiana statute prescribing proceedings to contest an election the answer of the contestee need not be verified. Allen *v.* Crow, 48 Ind. 301.

95. State *v.* Spencer, 166 Mo. 279, 65 S. W. 984.

96. Preston *v.* Price, 70 S. W. 623, 24 Ky. L. Rep. 1090.

97. Thus when the petitioner alleges that he was elected and this is denied, it is competent for defendant to show that persons voting for the contestant whose names are not given in the answer were not legal voters. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232. 8 Am. St. Rep. 349.

98. Furguson *v.* Henry, 95 Iowa 439, 64 N. W. 292.

99. Griffin *v.* Wall, 32 Ala. 149; Stewart *v.* Hargrove, 23 Ala. 429; Petty *v.* Walker, 10 Ala. 379; Dobyns *v.* Weadon, 50 Ind. 298; Burrough *v.* Branning, 9 N. J. L. J. 110.

Allegation of general disregard of election law.— Allegations in an answer of a general disregard of the election law alone are not sufficient; but if coupled with a deliberate charge of fraudulent conduct preventing a fair election they will be investigated. Weaver *v.* Given, 1 Brewst. (Pa.) 140, 6 Phila. (Pa.) 114.

Same strictness as in petition.— In the answer to a contest petition, the same strictness is required as in the petition itself and no greater. Weaver *v.* Given, 1 Brewst. (Pa.) 140, 6 Phila. (Pa.) 144.

Names of illegal voters not required.— In the answer to a contest petition it is sufficient to state specifically that illegal votes in number sufficient to affect the result were received, and the reason of the alleged illegality and names of the illegal voters need not be stated. Shepard *v.* Allen, (Ill. 1888) 17 N. E. 756; Weaver *v.* Given, 1 Brewst. (Pa.) 140, 6 Phila. (Pa) 144.

1. Gonzales *v.* Gallegos, 10 N. M. 372, 62 Pac. 1103 [*citing* with approval Vigil *v.* Pradt, 5 N. M. 161, 20 Pac. 795].

Under the Texas statute.—It has been held that in an action to contest a local option election, the failure of the contestee to deliver to the contestant within ten days after receiving notice of the contest the reply in writing stating the grounds of defense is not *per se* cause for striking out the contestant's answer at the trial, as the statute is in this respect merely directory and the failure should not have such effect, unless it would delay the trial. Roach *v.* Malotte, 23 Tex. Civ. App. 400, 56 S. W. 701.

2. Gonzales *v.* Gallegos, 10 N. M. 372, 62 Pac. 1103.

number of days after the service of the last preceding pleading are so far mandatory as to require compliance, unless good excuse is shown.[3]

3. Proper Rule in Disposing of Objections to Pleadings. The same strict technical accuracy in pleading is not required in election cases as in civil actions *inter partes*.[4] Statutes providing for contesting elections should be liberally construed by the courts to the end that the will of the people in the choice of public officers may not be defeated by any mere formal or technical objections.[5]

4. Amendments — a. In General. In the absence of any statute regulating the matter the court may in its discretion under its general common-law power permit amendments to the pleadings in election contests.[6] In some of the states an amendment may be made under the provisions of the statute applicable to the amendment of pleadings in civil actions,[7] although it has been held that an election contest is a special proceeding and that amendments cannot be made under the statute applicable to pleadings in civil actions.[8] There are strong reasons resting in public policy why election contests should be brought to trial as speedily as possible, and if a contestant gives additional notice, specifying new facts, it must affirmatively appear in the notice that such facts are new, that they were first discovered after the service of the original notice, and that by the use of due diligence they could not have been discovered before the service of the original notice.[9] If a complaint or petition contesting an election be defective in matter of form or substance, it may be amended, provided the application to amend be made at the earliest opportunity.[10] Where the petitioners in a proceeding to contest an election have in fact the qualifications required by statute, the failure of the petition so to allege is not jurisdictional and it is amendable.[11] If the statement of the cause of contest lack the clearness and distinctness of allegation

3. Preston *v.* Price, 70 S. W. 623, 24 Ky. L. Rep. 1090.

4. Leonard *v.* Woolford, 91 Md. 626, 46 Atl. 1025; Bragunier *v.* Penn, 79 Md. 244, 29 Atl. 12; Handy *v.* Hopkins, 59 Md. 157; *In re* Election Cases, 65 Pa. St. 20; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11.

General allegations of irregularity.— A petition in an election contest alleging that the returns of the board of canvassers were fraudulent in setting forth that defendant received a greater number of votes than the petitioner; that on the contrary the petitioner received a larger number of votes than defendant; that ballots improperly marked and ballots not marked at all were counted for defendant; and that legal ballots cast for the petitioner were rejected in sufficient numbers to change the result of the election was held sufficient in law as against a demurrer. Muir *v.* Beauchamp, 91 Md. 650, 47 Atl. 821.

5. Hadley *v.* Gutridge, 58 Ind. 302; *In re* Barber, 10 Phila. (Pa.) 579, 3 Luz. Leg. Reg. (Pa.) 153 [*affirmed* in 7 Leg. Gaz. 126].

6. Dale *v.* Irwin, 78 Ill. 170; *In re* Election Cases, 65 Pa. St. 20; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11; Marshall *v.* Baldwin, 11 Phila. (Pa.) 383; *In re* Dist.-Atty., 2 Phila. (Pa.) 199; *In re* Wolverton, 1 Walk. (Pa.) 48; *In re* Barber, 7 Leg. Gaz. (Pa.) 126 [*affirming* 10 Phila. 579, 3 Luz. Leg. Reg. 153]; Ralston *v.* Meyer, 34 W. Va. 737, 12 S. E. 783; Sawin *v.* Pease, 6 Wyo. 91, 42 Pac. 750.

Where fraud is charged.— Kneass' Case, 2 Pars. Eq. Cas. (Pa.) 553.

By striking out admitted facts.—The court in the exercise of a sound discretion should not permit the amendment of a verified election petition by striking out a part of it, which admits material facts, where the effect of such amendment would be to throw the burden of proving those facts upon the other party. Matter of Dauphin County, 11 Phila. (Pa.) 645.

7. Wilson *v.* Hines, 99 Ky. 221, 35 S. W. 627, 37 S. W. 148, 18 Ky. L. Rep. 233; Nash *v.* Craig, 134 Mo. 347, 35 S. W. 1001; Sawin *v.* Pease, 6 Wyo. 91, 42 Pac. 750.

In Montana it has been held that the provisions of the code of civil procedure relating to amendments to pleadings apply to election contests and the permitting of an amendment to a statement of contest in correcting the spelling of the names of persons and the addition of other names to conform to the proof is not an abuse of judicial discretion, when it does not appear that the adverse party was misled thereby. Heyfron *v.* Mahoney, 9 Mont. 497, 24 Pac. 93, 18 Am. St. Rep. 757.

8. Ford *v.* Wright, 13 Minn. 518.

9. Harrison *v.* Lewis, 6 W. Va. 713.

Two methods of amendments permissible.— In West Virginia in the trial of contested elections, two methods of amendments to the notice required by statute are permissible: (1) The statutory method, which is always based on new facts discovered after the original notice has been given; (2) the method incident to common-law procedure. Ralston *v.* Meyer, 34 W. Va. 737, 12 S. E. 783.

10. Kneass' Case, 2 Pars. Eq. Cas. (Pa.) 553.

11. *In re* Jordan Tp., 5 Pa. Dist. 669, 18 Pa. Co. Ct. 153.

desirable in judicial proceedings, it should not for that reason be peremptorily dismissed, but an opportunity to amend should be afforded.[12] The power to allow all necessary and proper amendments is within the sound discretion of the court and is not reviewable on appeal.[13]

b. Insertion of New Matter. New matter cannot be introduced by way of amendment, although it be shown that it was omitted by mistake.[14] The new matter here alluded to is an omitted prerequisite necessary to confer jurisdiction or matter essential to the frame of the petition. The rule does not preclude the introduction of a new specification of a fact comprehended within the general terms of the complaint and belonging only to the proof.[15] Where it is made to appear that new facts not within the knowledge of the contestant at the time of serving the original notice have been brought to light, that they are such that the contestant could not have learned them at that time by the exercise of due diligence, and that they are also material and relevant to the main question in controversy, a new or supplementary notice may be served.[16]

c. Time to Amend. Where the petition contains averments sufficient to give the court jurisdiction, amendments may be allowed at any time,[17] as after the testimony is closed,[18] or even after argument,[19] unless there is a statute directing that all applications for amendments be made before any progress is made in the hearing of the case.[20] But where the contestant's statement fails to allege a jurisdictional fact, no amendment offered or made after the lapse of the time allowed by the statute for instituting the contest can cure the defect or give the court jurisdiction to act.[21]

5. Bills of Particulars. Where the complaint or petition is general in form and questions the legality of votes in numerous districts without any specific information a bill of particulars may be required;[22] and if the answer puts in issue the validity of votes of other election districts, a bill of particulars may likewise be demanded from the respondent or contestee, until the questions in dispute

12. Minor *v.* Kidder, 43 Cal. 229.

13. *In re* Election Cases, 65 Pa. St. 20.

14. Thompson *v.* Ewing, 1 Brewst. (Pa.) 67.

A point of contest entirely foreign to the charge contained in the petition as originally filed should not be permitted to be set up for the first time by way of amendment if the time has elapsed in which a contest may be inaugurated. Sawin *v.* Pease, 6 Wyo. 91, 42 Pac. 750.

15. *In re* Election Cases, 65 Pa. St. 20; Marshall *v.* Baldwin, 11 Phila. (Pa.) 383. Amendments to an election petition cannot be allowed of an omitted prerequisite necessary to confer jurisdiction, or of a written essential to the frame of the petition. Barnes' Case, 13 Lanc. Bar (Pa.) 183. But a defect in a petition which does not go to the jurisdiction of the court on the statutory requirements may be amended and the amendment filed *nunc pro tunc*. *Ex p.* Roesler, 3 L. T. N. S. (Pa.) 80.

Amendment of answer alleging tampering with ballots.— Edwards *v.* Logan, 70 S. W. 852, 24 Ky. L. Rep. 1099.

Computation of time.—Under the Kentucky election law providing that within twenty days after the service of summons on him the contestee shall answer, the day on which the summons is served is included in the twenty days. Combs *v.* Eversole, 70 S. W. 638, 24 Ky. L. Rep. 1063.

16. Loomis *v.* Jackson, 6 W. Va. 613.

17. Acker *v.* Conrad, 2 Pa. Dist. 469, 13 Pa. Co. Ct. 97.

No statute authorizing amendment.— Where it does not appear that any attempt has been made to comply with the statutory requirement by furnishing a list of the persons alleged to have voted illegally and no excuse is offered for failing to do so, amendment of the petition for that purpose at a late day in the proceedings is unwarrantable in the absence of a statute directly authorizing amendment. Schwarz *v.* Garfield County Ct., 14 Colo. 44, 23 Pac. 84.

18. Rodenbough *v.* Wolverton, 2 Lehigh Val. L. Rep. (Pa.) 285 [*affirmed* in 1 Walk. 48].

19. Marshall *v.* Baldwin, 11 Phila. (Pa.) 583.

20. Fowler *v.* Felthoff, 1 Leg. Rec. (Pa.) 105.

21. Gillespie *v.* Dion, 18 Mont. 183, 44 Pac. 954, 33 L. R. A. 703; Halstead *v.* Rader, 27 W. Va. 806.

22. *In re* Northampton County, 6 Pa. Dist. 150.

Where the petition for contest is drawn in general terms without naming the alleged illegal voters, the contestants should by a bill of particulars or otherwise specify them by name and by election district before the respondent is called on to put in his testimony. *Ex p.* Griffiths, 1 Kulp (Pa.) 157.

are limited by these pleadings, as in other litigated issues, before evidence is presented.[23]

6. DEMURRERS, EXCEPTIONS, AND MOTIONS — a. When Demurrer to Answer Unnecessary. When the answer admits the facts alleged by the contestant, but denies that they are unlawful, a demurrer to the answer is not called for, inasmuch as the case can be disposed of upon the complaint and answer alone.[24]

b. Sufficiency of Affidavit Not Raised by Demurrer. In a proceeding to contest an election a demurrer to the statement of grounds of contest, assigning for cause that sufficient facts are not stated, does not raise any question as to the sufficiency of the affidavit.[25]

c. Waiver of Formal Objections. Proceeding to the taking of the testimony is always regarded as a waiver of formal objections to the petition in a contested election case,[26] although a specification may be struck out after evidence has been offered under it if the right of objection was reserved.[27]

d. Objections Going to Right of Action. But an objection to a contested election petition going to the very right of action or proceeding may, like a plea to the jurisdiction, be made at any stage, and if sustained it defeats the proceeding itself, and this upon the ground that where no right is shown the court can give no remedy.[28]

e. Objection That Complaint Was Not Filed in Time. The objection that the complaint was not filed in time cannot be taken by demurrer, where the statute does not require that the statement shall show by averment that it was filed in time.[29]

f. Motion to Quash. On a motion to quash there can be but one question before the court, namely, whether the petition is sufficient in its frame and sets forth a proper ground of contest.[30]

7. ISSUES, PROOF, AND VARIANCE — a. In General. There can be no doubt of the right of a party to a contest for office to show by the testimony of a voter that the ballot accredited to him does not speak the truth as to his vote, but in order to authorize the introduction of such testimony by the contestant there should be allegations corresponding with the proof offered.[31] There is, however, no rule of pleading requiring the contestee to assail by averment the kind or character of the evidence to be offered by the contestant. Consequently he may without a corresponding averment in his answer show that the ballots offered in evidence by the contestant have been fraudulently altered.[32] Where the complaint or petition alleges specifically that certain illegal votes were cast in certain precincts, and then adds that other illegal votes were cast for the contestee, this allegation in regard to other illegal votes is too general and would be bad on demurrer; but if the contestee instead of demurring by answer puts the allegation in issue, the contestant may prove illegal votes other than those specifically alleged

23. *In re* Northampton County, 6 Pa. Dist. 150.

24. Wright *v.* Barber, 6 Luz. Leg. Reg. (Pa.) 137.

25. Curry *v.* Miller, 42 Ind. 320.

26. Thomson's Case, 2 Leg. Rec. (Pa.) 100.

Objection after contestant's evidence is in. — Gumm *v.* Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312.

Objection after hearing on merits too late. — Davis *v.* Gatliff, 6 Ky. L. Rep. 738.

27. Thompson *v.* Ewing, 1 Brewst. (Pa.) 67.

28. Matter of Leisenring, 11 Phila. (Pa.) 400.

Objection which goes to the jurisdiction of the court. — *In re* Contested Election, 2 Lanc. L. Rev. 44.

An objection to the affidavit of verification comes too late after a hearing on the merits, inasmuch as such affidavit is not a jurisdictional paper. Thomson's Case, 2 Leg. Rec. (Pa.) 100.

29. Preston *v.* Culbertson, 58 Cal. 198.

30. *Ex p.* Roesler, 3 L. T. N. S. (Pa.) 80.

Good faith of petitioners. — A motion to quash proceedings contesting an election on the ground that the petition was not made in good faith will be refused; the law presumes good faith. *In re* Tracy, 5 L. T. N. S. (Pa.) 22.

31. Owens *v.* State, 64 Tex. 500.

32. Furguson *v.* Henry, 95 Iowa 439, 64 N. W. 292.

in his complaint or petition.[33] Where the contestant alleges fraud in certain election districts he is of course confined to those particular districts in the presentation of his evidence.[34] But if the respondent alleges that illegal votes were received and counted in other election districts in the county, this puts those districts also in issue, and the contestant is entitled to the benefit of any evidence to his advantage in those districts also, for the respondent cannot utilize so much of the evidence as will serve his turn and reject the remainder.[35] A mistake in the count of votes received by a candidate for an office made by the board of canvassers, whether innocently or otherwise, is good ground for contesting the election, and evidence of the same is admissible either under a special plea of such mistake or under a general allegation that the contestant received a greater number of legal votes than his opponent, for under this latter allegation any evidence tending to show the actual number of legal votes received by either of the parties is admissible.[36] Where a mistake in counting the votes is alleged, it is not material that the cause of the mistake be proved as alleged; the question to be determined is, Was there a mistake in counting the votes, and if so to what extent? The cause of the mistake is unimportant.[37] An averment that the contestant is an elector of the county is material, and if denied by the answer must be proved or the contest as such must fail.[38] The court in trying a contested election case acts not as a canvassing board but in a judicial capacity, and cannot throw out or inquire into the legality of votes, unless those votes are attacked by the pleadings.[39]

b. Counter Contests. Where a statute requires the contestee to give a written notice to the contestant of his intention to show that illegal votes were cast for the contestant, or that legal votes were offered for the contestee and rejected, he need not file a special plea setting up the facts, but may make the necessary proof to substantiate the defense under the general denial of the allegations of the complaint.[40] Although there be no counter contest the inquiry in a court for the trial of contested elections is not necessarily limited to the matters presented by the contestor's statement.[41]

F. Abatement by Death of Party.[42] Where an election for governor and lieutenant-governor is contested and the contestant for the office of governor dies pending the contest, the contestant for the office of lieutenant-governor may continue the governorship contest for his own benefit, because if he is successful in his own contest he will succeed to the office of governor in case the deceased was elected to that office.[43] Where the statute makes the contestant personally liable

33. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

34. *In re* Cusick, 136 Pa. St. 459, 20 Atl. 574, 10 L. R. A. 228.

35. *In re* Cusick, 136 Pa. St. 459, 20 Atl. 574, 10 L. R. A. 228.

36. Hadley *v.* Gutridge, 58 Ind. 302.

37. Talkington *v.* Turner, 71 Ill. 234.

38. Clanton *v.* Ryan, 14 Colo. 419, 24 Pac. 258.

39. *Ex p.* Griffiths, 1 Kulp (Pa.) 157. The court in a contested election case is not necessarily precluded from receiving evidence that illegal votes were cast for the contestant by the fact that the other party has not raised the question by a notice. Newman *v.* McManis, 10 Ohio Dec. (Reprint) 730, 23 Cinc. L. Bul. 25.

40. Wade *v.* Oates, 112 Ala. 325, 20 So. 495.

Counter notice.— Griffin *v.* Wall, 32 Ala. 149.

41. The real inquiry is whether the contestant or the respondent received the greater number of legal votes, and it is not confined to the grounds specified in the notice of contest. The contest puts in question the validity of the election of the person holding the certificate of election and having a *prima facie* title to the office, and although the contestant may be able to prove the grounds specified in his notice, the person declared elected ought to be admitted to show, if he can, in support of his title to the office from which the contestant seeks to oust him, that the contestant was notwithstanding not elected. Govan *v.* Jackson, 32 Ark. 553; Baker *v.* Long, 17 Kan. 341.

42. **Abatement** generally see ABATEMENT AND REVIVAL.

43. Taylor *v.* Beckham, 108 Ky. 278, 56 S. W. 177, 21 Ky. L. Rep. 1735, 49 L. R. A. 258. This case came before the supreme court of the United States upon a writ of error to the supreme court of Kentucky which was dismissed. Taylor *v.* Beckham, 178 U. S. 548, 20 S. Ct. 890, 1009, 44 L. ed. 1187, Fuller, C. J., delivering the opinion of the court.

for the costs in case the contest fails, neither he nor his estate can escape liability for the costs in case the contest is unsuccessful, and the action does not abate by the death of the contestant after a judgment annulling the election of the contestee, nor can the contestee be deprived thereby of his right of appeal.[44]

G. Discontinuance.[45] The contestant has not the right after issue joined and pending a trial thereon to terminate the case by entering a discontinuance, since the public are interested in such proceedings, and under the statute if the complaint is filed without probable cause the costs may be imposed on the petitioner.[46] But where the contest is purely an adversary proceeding, it is not easy to see why the contestant should not have the same liberty to dismiss as in other civil actions.[47] Where a proceeding contesting an election has been dismissed the court is without jurisdiction, until the dismissal is set aside to allow another party to intervene,[48] and the court has no authority to set the dismissal aside without notice to the contestant.[49] If the contestant is allowed to discontinue his suit and the contestee is thereupon commissioned, the contestant cannot thereafter renew the action.[50]

H. Burden of Proof — 1. In Statutory Contests — a. In General. In a statutory contest at the suit of a defeated candidate, the certificate of the board of canvassers is *prima facie* evidence of the result, and the contestant, whatever may be his ground of complaint, has the burden of establishing it.[51]

b. Not Enough to Show That Illegal Votes Were Cast. Where the validity of the returns is not attacked on the ground of fraud, it is not enough to show that illegal votes were cast; it must be shown that a sufficient number of such votes were cast for the successful candidate to change the result.[52]

c. Presumption as to Legality of Votes. When an elector is permitted to

44. Upon the death of the contestant pending the appeal the administrator of his estate may be substituted upon motion in the supreme court and the case will be heard upon its merits. Snibley *v.* Palmtag, 127 Cal. 31, 59 Pac. 200.

45. Discontinuances generally see Dismissal and Nonsuit.

46. Mann *v.* Cassidy, 1 Brewst. (Pa.) 11.

Next highest candidate.— Since the complaint in a contested election case is made not by the next highest candidate, but by a specified number of qualified electors, the next highest candidate cannot discontinue the proceedings. He may depart at any time he chooses but cannot interfere with the people's right to investigate. Mann *v.* Cassidy, 1 Brewst. (Pa.) 11; Matter of Dist.-Atty., 2 Phila. (Pa.) 320. In People *v.* Holden, 28 Cal. 123, 138, the court said: "Moreover, it is very doubtful whether these stipulations were ever binding upon the people, who were the real plaintiffs in the case. They were not made by the Attorney-General by whom the suit was instituted, but only by the private counsel of the relator. Theoretically the people alone are interested in the determination of the controversy involved in this case, and no Court would be justified in enforcing as against them a stipulation made by the relator or his counsel to their prejudice. The action is in no legal sense under the control of the relator. It was brought in the name of the people and to enforce their will as expressed through the ballot-box, and not merely to redress the wrongs or enforce the rights of the relator."

47. Moore *v.* Waddington, (Nebr. 1903) 96 N. W. 279.

48. Moore *v.* Waddington, (Nebr. 1903) 96 N. W. 279.

49. Moore *v.* Waddington, (Nebr. 1903) 96 N. W. 279.

50. Borgstede *v.* Clarke, 5 La. Ann. 291.

51. In other words he must show by a preponderance of evidence the existence of the alleged irregularities and that they affected the result of the election.

California.— Whipley *v.* McKune, 12 Cal. 352.

Colorado.—Price *v.* Archuleta, 17 Colo. 288, 29 Pac. 460.

Connecticut.—State *v.* Walsh, 62 Conn. 260, 25 Atl. 1, 17 L. R. A. 364.

Georgia.— Crawley *v.* Knight, 108 Ga. 132, 32 S. E. 948.

Illinois.— Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

Kansas.— Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935.

Minnesota.— Taylor *v.* Taylor, 10 Minn. 107.

Mississippi.— Pradat *v.* Ramsey, 47 Miss. 24.

North Carolina.— Boyer *v.* Teague, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547.

Pennsylvania.— Ewing *v.* Filley, 43 Pa. St. 384.

See 18 Cent. Dig. tit. "Elections," § 286.

The burden of proof is always upon the contestant or the party attacking the official return. Roberts *v.* Calvert, 98 N. C. 580, 4 S. E. 127; Bromberg *v.* Haralson, Smith Cas. Cont. El. 355.

52. *Kansas.*— Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935.

Michigan.— People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141.

deposit his ballot the presumption is in favor of the legality of the vote and the burden is on the attacking party to show a lack of qualification in the elector or a forfeiture of right.[53] Where an election is contested on the ground of illegal voting the contestant has the burden, not only of proving that illegal votes in sufficient number to change the result were cast, he must also show by whom and for whom they were cast.[54] The production of the ballots cast for the contestant raises a presumption that they were legal votes;[55] but defendant may rebut the presumption by showing that the ballots are not what they purport to be.[56] But where the alleged illegality of ballots cast at an election is not clearly proved it is proper to dismiss the contest.[57] Where defendant seeks to reject votes returned as correct by the canvassers, he holds the affirmative and must show that the certificate does not truly state the will of the voters.[58]

d. Where Return Is Thrown Out on Ground of Fraud. Where the return of a ward or precinct fails on the ground of fraud, the legal votes cast are not invalidated by the fraud, but either party who claims to have received any of them has the burden of proving it.[59] An offer by a contestant to show that the returns of a certain ward or precinct are false and fraudulent and without the vote of that ward or precinct the contestee would not be elected should not be rejected, because if the contestant establishes his contention, it throws upon the contestee the burden of producing other evidence that he received a sufficient number of legal votes to elect him.[60]

2. In Quo Warranto. In quo warranto a defendant may be summoned to show by what authority he holds an office. The burden of showing his title to the office is upon him.[61] So also in the proceeding by information in the nature of

New Hampshire.— Judkins *v.* Hill, 50 N. H. 140.

New York.— People *v.* Thornton, 25 Hun 456; *Ex p.* Murphy, 7 Cow. 153.

South Carolina.— Johnston *v.* Charleston, 1 Bay 441.

See 18 Cent. Dig. tit. "Elections," § 286 *et seq.*

53. *Illinois.*—Clark *v.* Robinson, 88 Ill. 498.

Kansas.— Carr *v.* Stafford, 62 Kan. 868, 63 Pac. 737.

Missouri.— Gumm *v.* Hubbard, 97 Mo. 311, 17 S. W. 61, 10 Am. St. Rep. 312.

North Carolina.— People *v.* Teague, 106 N. C. 576, 11 S. E. 665.

North Dakota.— Kadlec *v.* Pavik, 9 N. D. 278, 83 N. W. 5.

Pennsylvania.— *In re* White, 4 Pa. Dist. 363; Conway *v.* Carpenter, 11 Wkly. Notes Cas. 169.

See 18 Cent. Dig. tit. "Elections," § 286 *et seq.*

Presumption as to qualification of voter.— If women are allowed to vote it will be presumed that they belong to the class which the statute declares to be legal voters. Sisk *v.* Gardiner, 74 S. W. 686, 25 Ky. L. Rep. 18.

Laborers on railroads.— The Alabama statute prescribes as qualifications of voters that they must have resided at least one year in the state, in the county for three months, and in the precinct for thirty days next preceding the election, and that no person shall lose or acquire a residence by temporary absence from his place of residence without the intention of remaining. In an election contest the evidence showed that certain railroad laborers had been working as such within the state from 1896 down to the election in August, 1900, that they came into the county in December or January previous and had resided in the precinct for more than thirty days before the election, and failed to show that they had ever resided in any other state. It was held that there being no affirmative proof by the contestant of disqualification the laborers were qualified voters. Black *v.* Pate, 136 Ala. 601, 34 So. 844.

54. Lippincott *v.* Felton, 61 N. J. L. 291, 39 Atl. 646.

55. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 80 Am. St. Rep. 341.

56. In other words that they are not the ballots of legal voters; and this he may do without having stated in his answer the names of the persons so illegally voting. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

57. Blake *v.* Hogan, 57 Minn. 45, 58 N. W. 867.

58. People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451.

59. Rhodes *v.* Driver, 69 Ark. 501, 64 S. W. 272; Atty.-Gen. *v.* Newell, 85 Me. 273, 27 Atl. 156; Lloyd *v.* Sullivan, 9 Mont. 577, 24 Pac. 218. In other words when a return is proved to be so uncertain and unreliable that its value as evidence is wholly destroyed and justice requires its rejection, each claimant can be allowed only such votes as the other evidence in the case shows that he received. People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

60. Atty.-Gen. *v.* Newell, 85 Me. 273, 27 Atl. 156.

61. He usually sustains it by producing his certificate of election, commission, or other

quo warranto the burden is upon the incumbent to establish his title and if he fails to do so judgment of ouster will go against him.[62] And where the ancient writ of quo warranto and proceedings by information in the nature thereof have been abolished by statute and a remedy by action given, which may be brought by the attorney-general in the name of the state or people upon his own information, or upon the complaint of any private party, the incumbent against whom the action is brought still has the burden of establishing his title.[63] Even where this action is brought in the name of the state or people upon the relation of the attorney-general, at the instance of a private party, which is in reality an election contest, defendant must still establish his title as against the public or be ousted.[64] But a judgment of ouster against defendant does not establish the title of the complainant to the office. He still has the burden of proving his own title.[65]

I. Evidence[66] — **1. Rules Applicable.** On the contest of an election the court will apply the same rules of evidence and draw the same deductions from the facts as would apply and be drawn in an ordinary contest over property rights.[67]

2. Returns — a. Prima Facie Evidence of Result When Unimpeached. The returns are *prima facie* but not conclusive evidence of the result of an election.[68]

b. When Impeached For Fraud. An election return is *prima facie* evidence of everything the law requires it to contain, until it is shown to be fraudulent and false and then it falls to the ground; for although there is great danger of disfranchising innocent legal voters a return which is shown to be utterly untrustworthy must be rejected as evidence of the result.[69] Although there may have

document under which he claims the office. When these proofs are shown, regular in form, coming from the proper authority, the title to the office is *prima facie* shown; and until such evidence is impeached it stands good. State *v.* Gleason, 12 Fla. 190; Atty.-Gen. *v.* Newell, 85 Me. 273, 27 Atl. 156; People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

62. *Illinois.*— Clark *v.* People, 15 Ill. 213.

Michigan.— People *v.* Mayworm, 5 Mich. 146.

Missouri.— State *v.* McCann, 88 Mo. 386.

New York.— People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

Ohio.— State *v.* Beecher, 15 Ohio 723.

63. People *v.* Hall, 80 N. Y. 117; People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242.

64. People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

In an action in the nature of a quo warranto as between the relator and defendant the burden is upon the former to make out a better title to the office than that of the latter, while as between the people and defendant the latter may be called upon to show that his possession of the office is lawful. The production of a certificate of election from the proper officer is, however, sufficient. People *v.* Perley, 80 N. Y. 624.

65. People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

66. Evidence generally see Evidence.

67. Bates *v.* Crumbaugh, 71 S. W. 75, 24 Ky. L. Rep. 1205.

68. Hence the courts and legislative bodies which have the power to judge of the election and qualifications of their own members do not hesitate in cases of contests to look beyond the returns and determine the question on its merits. The whole question is thrown open and extrinsic evidence is freely admitted to show what was the true state of the votes.

Arkansas.— Merritt *v.* Hinton, 55 Ark. 12, 17 S. W. 270.

Minnesota.— Taylor *v.* Taylor, 10 Minn. 107.

New Hampshire.— Atty.-Gen. *v.* Megin, 63 N. H. 378.

New York.— People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; People *v.* Minck, 21 N. Y. 539; People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451; Morgan *v.* Quackenbush, 22 Barb. 72.

Ohio.— Phelps *v.* Schroder, 26 Ohio St. 549.

Pennsylvania.— Ewing *v.* Filley, 43 Pa. St. 384.

Texas.— State *v.* Owens, 63 Tex. 261.

United States.— U. S. *v.* Carbery, 25 Fed. Cas. No. 14,720, 2 Cranch C. C. 358.

See 18 Cent. Dig. tit. "Elections," § 287.

69. *Arkansas.*— Patton *v.* Coates, 41 Ark. 111.

Kansas.— Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442; State *v.* Hamilton County, 35 Kan. 640, 11 Pac. 902; Russell *v.* State, 11 Kan. 308.

Michigan.— Atty.-Gen. *v.* McQuade, 94 Mich. 439, 53 N. W. 944.

Pennsylvania.— Weaver *v.* Given, 1 Brewst. 140, 6 Phila. 114.

United States.— Washburn *v.* Voorhis, 2 Bartl. Cas. Cont. El. 54; Knox *v.* Blair, 1 Bartl. Cas. Cont. El. 521; Blair *v.* Barrett, 1 Bartl. Cas. Cont. El. 308.

been some fraudulent voting at an election, yet where the officers who conducted it did not participate in the fraud, but endeavored to hold the election according to law, their returns are *prima facie* evidence of all they contain, subject, however, to be corrected by proof; but where their returns are successfully impeached for fraud in them they are unworthy of credit and are evidence of nothing except that a poll was opened.[70] But while the exercise of the power to discard the entire return of an election precinct is a public necessity and is sustained by abundant authority, it should be exercised with great caution and only as the last resort.[71]

3. POLL-BOOKS AND CERTIFICATES OF OFFICERS. Where the poll-books and certificates of election officers have been preserved by the clerk, they are admissible in evidence in a contest, although there is no statutory provision in respect to their preservation.[72]

4. REGISTRATION LISTS AND POLL LISTS. After proper identification the registration lists and poll lists of an election are admissible as evidence when the contents tend to establish facts material to the issues involved in a contest.[73] They may also be used as memoranda when necessary to refresh the memory of a witness about such facts, where it is shown that the witness made the lists and knows of their correctness.[74]

5. TALLY-SHEETS. In quo warranto the original tally-sheets duly certified by the officers of election are *prima facie* evidence of the result.[75] The court may admit in evidence not only the ballots but also the poll lists and tally-sheets, when properly identified.[76] But it would seem that the entire poll list should not be introduced in evidence. If there were illegal voters they should be named and the evidence should be confined to them.[77]

6. WEIGHT OF EVIDENCE REQUIRED TO DEDUCT VOTES. In an election contest clear evidence must be furnished as to how an illegal voter cast his ballot, before his vote can be deducted from the total of the contestee.[78] Mere evidence of his former party affiliation is not sufficient to justify the deduction of his vote from a candidate of that party.[79]

7. PAROL EVIDENCE TO SHOW CONTENTS OF BALLOTS. The contents of ballots can best be shown by the instruments themselves if in existence, but if it be shown

See 18 Cent. Dig. tit. "Elections," § 298 *et seq.*

Return of the entire division.— In a proper case the court may reject the election returns of an entire division. *In re* Election Cases, 65 Pa. St. 20.

A canvassing officer has no power to reject a return. His duties and powers are confined to summing up the returns made to him by the judges of the various precincts, announcing the result, and issuing a certificate to the candidate receiving the greatest number of votes. State *v.* Wright, 10 Heisk. (Tenn.) 237.

A recount of the ballots by the board of inspectors of election is not conclusive evidence of the ballots cast and does not prevent a party in a subsequent contest from showing that ballots were illegally cast or that the boxes were tampered with after the result was officially declared and before such recount. Andrews *v.* Otsego County Probate Judge, 74 Mich. 278, 41 N. W. 923.

Circumstances showing fraud.— Combs *v.* Eversole, 70 S. W. 638, 24 Ky. L. Rep. 1063.

70. Knox County *v.* Davis, 63 Ill. 405.

71. Londoner *v.* People, 15 Colo. 557, 26 Pac. 135. See also Washburn *v.* Voorhis, 2 Bartl. Cas. Cont. El. 54, where the dangers which may attend the injudicious application of this rule are forcibly pointed out in the report of the committee.

72. Patton *v.* Coates, 41 Ark. 111.

Poll-book not destroyed as required by law. — Reed *v.* Jugenheimer, 118 Iowa 610, 92 N. W. 859.

73. Black *v.* Pate, 130 Ala. 514, 30 So. 434; Echols *v.* State, 56 Ala. 131.

74. Black *v.* Pate, 130 Ala. 514, 30 So. 434.

75. State *v.* Donnewirth, 21 Ohio St. 216.

76. Packard *v.* Craig, 114 Cal. 95, 45 Pac. 1033; Blankinship *v.* Israel, 132 Ill. 514, 24 N. E. 615.

Tally-sheet unauthenticated.—Jones *v.* Freeman, 49 La. Ann. 565, 21 So. 719.

77. Davis *v.* Harper, 17 Tex. Civ. App. 88, 42 S. W. 788.

78. Smith *v.* Thomas, 121 Cal. 533, 54 Pac. 71.

79. Edwards *v.* Logan, 70 S. W. 852, 24 Ky. L. Rep. 1099; Moore *v.* Sharp, 98 Tenn. 491, 41 S. W. 587.

Objection to testimony by contestee.— Where an illegal voter testified that he was a republican, and he was prevented only by the objection of the contestee, the republican candidate, from testifying as to how he voted, it was held that this afforded *prima facie*

that they are not in existence then their contents may be proved by parol evidence the same as those of any other document that has been lost or destroyed.[80] But where it appears that the ballots have been tampered with and that the identical ballots voted are not before the court, it seems that parol evidence of the contents of the ballots that were voted should not be received.[81] Where the statute requires ballots after being counted to be destroyed, oral testimony cannot be received to show how such ballots were marked.[82]

8. Parol Evidence Contradicting Ballots — a. In General. A voter cannot be allowed to testify that he voted for one person when he admits that he cast a ballot which has not since been changed, showing that he voted for another person.[83] But there can be no objection to permitting a voter to contradict his ballot in an election contest, where it is shown in evidence that the ballot was prepared for him by but one judge of election instead of two as required by statute;[84] and the testimony of the voters that they voted for a certain candidate and that the ballots purporting to have been cast by them have been substituted for or changed from those actually cast is admissible,[85] for where it is contended that a fraudulent substitution has been made the elector may be asked for whom he voted.[86]

b. Where Fraud Is Alleged. In election contests as in all other cases the rule excluding parol evidence to contradict, vary, or modify written instruments is much relaxed when fraud is alleged.[87]

9. Showing For Whom Votes Were Intended. An inquiry by the court to determine whether votes cast for a name similar to that of one of the candidates were in fact intended for such candidate involves no violation of the secrecy of the ballot, and there is nothing in the policy of the law which forbids it.[88] Where there is no other candidate to be voted for of the same name a vote for a candi-

ground for concluding that he voted for the contestee. Tunks *v.* Vincent, 106 Ky. 829, 51 S. W. 622, 21 Ky. L. Rep. 475.

80. State *v.* Luy, 103 Wis. 524, 79 N. W. 776.

81. For when the ballots are not before the court in the condition in which they were voted the court cannot upon any other evidence reverse or disturb the returns made by the canvassing board. Oakes *v.* Finley, (Ariz. 1898) 53 Pac. 173.

82. Weakley *v.* Wolf, 148 Ind. 208, 47 N. E. 466; Anderson *v.* Likens, 104 Ky. 699, 47 S. W. 867, 20 Ky. L. Rep. 1001.

83. This is merely an application of the principle that a writing cannot be contradicted by parol evidence. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

84. Freeman *v.* Lazarus, 61 Ark. 247, 32 S. W. 680.

85. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

86. McDonald *v.* Wood, 118 Ala. 589, 24 So. 86.

87. *California.*— Lord *v.* Dunster, 79 Cal. 477, 21 Pac. 865.

Indiana.— Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700.

Kansas.— Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442.

Mississippi.— Word *v.* Sykes, 61 Miss. 649.

Pennsylvania.— Kneass' Case, 2 Pars. Eq. Cas. 553.

Secondary evidence of fraudulent alteration of the returns cannot be admitted without proof of the loss or destruction of the official returns. Fletcher *v.* Jeter, 32 La. Ann. 401.

Fraudulent attempts.— In an election contest testimony as to frustrated attempts to commit frauds is inadmissible. Word *v.* Sykes, 61 Miss. 649.

Declarations and acts at another election. — Declarations and acts of a candidate and his supporters at another election held two years before the one contested are not admissible in an election contest on the ground of fraud. Word *v.* Sykes, 61 Miss. 649.

Disavowal of fraud, whether a candidate gave money to an election officer, cannot be shown by the contestant, when the offer is accompanied by a disavowal of any intention to show fraud. *In re* Dist.-Atty., 1 Phila. (Pa.) 159.

While in the absence of evidence of fraud or corruption the ballots of the electors constitute the best evidence, yet where fraud is alleged parol evidence that ballots found in the box are not those cast by the electors is competent. Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700.

88. State *v.* Gates, 43 Conn. 533; McKinnon *v.* People, 110 Ill. 305; Wimmer *v.* Eaton, 72 Iowa 374, 34 N. W. 170, 2 Am. St. Rep. 250.

Wrong initial printed on ballot.— Where it was alleged that a mistake had been made in printing and voting certain tickets containing the name of "J H H" instead of "J R H," it was held that testimony to establish the allegation was admissible over an objection merely that parol evidence was not admissible to vary the ballot. Davis *v.* Harper, 17 Tex. Civ. App. 88, 42 S. W. 788.

date by his surname alone should be counted,[89] unless the statute provides that the full christian name and surname and the initials or letters of the middle name of persons voted for shall appear on the ballot.[90] It has been held that where the name on the ballot is *idem sonans* with that of a candidate parol evidence is admissible to show that the vote was intended for that candidate.[91] But on the other hand it has been held that the intention of the voter must be gathered from the ballot as cast.[92] Ballots cast at an election like other writings are construed in the light of the surrounding facts and circumstances, in view of which the elector used the language found on his ballot, and parol evidence of those facts and circumstances is admissible.[93] Parol evidence is also admissible even of certain facts tending to show the intent of the voter.[94] Thus, where there is a variance in the abbreviations and initials prefixed to the surname of a candidate which appears on a number of ballots, parol evidence is admissible to show for what person the elector intended to vote.[95] But if an elector has placed on his ballot the name of a person other than the candidate who is eligible to the office, parol evidence is not admissible to show that he intended to vote for the candidate.[96] It has been held, however, that the ballots of the electors are the only evidence admissible to show the intent of the voters.[97]

89. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; Talkington *v.* Turner, 71 Ill. 234; Reifsnyder *v.* Musser, 12 Wkly. Notes Cas. (Pa.) 155; Rodenbough *v.* Wolverton, 2 Lehigh Val. L. Rep. (Pa.) 285 [*affirmed* in Walk. 48]. *Contra*, State *v.* Bayonne, (N. J. Sup. 1894) 30 Atl. 430; People *v.* Stevens, 5 Hill (N. Y.) 616.

90. State *v.* Francham, 19 Mont. 273, 48 Pac. 1. At an election three votes were cast for E. Everett Colburn. It was held that the moderator properly counted the votes, as he was not a judicial officer with power to determine whether the letter E did or did not constitute the whole of a person's christian name. Atty.-Gen. *v.* Colburn, 62 N. H. 70.

91. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349.

92. Thus in an election contest it was held that parol evidence was not admissible to show that a ballot reading for "Samuel Toley" was intended for "Samuel Tobey." People *v.* McNeal, 63 Mich. 294, 29 N. W. 728.

93. State *v.* Goldthwaite, 16 Wis. 146.

Evidence that paster had been detached.— People *v.* McNeal, 63 Mich. 294, 29 N. W. 728.

94. People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451.

To correct errors of the canvassers.— State *v.* Griffey, 5 Nebr. 161.

Intention as to erasure.— Davis *v.* State, 75 Tex. 420, 12 S. W. 957.

95. Atty.-Gen. *v.* Ely, 4 Wis. 420. In an action of quo warranto to determine title to office the court may receive testimony that votes cast for B W and B C W, Jr., were intended for B W, Jr. People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451. A voter who casts a vote for H F Yates may show that he intended the vote for Henry F. Yates. People *v.* Ferguson, 8 Cow. (N. Y.) 102. Where the justices of the peace of a town had made an appointment of supervisor on the supposition that there had been a failure to elect one at the preceding town meeting, and on the trial of an information in the nature of a quo warranto against the person so appointed it appeared that the presiding officers of the town meeting had declared at the close of their canvass that there was a tie vote between the two candidates for supervisor, it was held that it was competent for the people to prove on such trial that a vote had been given intended for the relator in which only the initials of his two christian names with the whole of his surname were inserted and which if allowed would have elected him. People *v.* Seaman, 5 Den. (N. Y.) 409.

Where the name on a ballot differs from that of a candidate only in the initial of the middle name, but there is a man in the county whose name is exactly like the one written on the ballot, oral testimony is admissible to show for which man the elector voted. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

96. State *v.* Steinborn, 92 Wis. 605, 66 N. W. 798, 53 Am. St. Rep. 938.

Ballot not unambiguous on its face.— Coughlin *v.* McElroy, 72 Conn. 99, 43 Atl. 854, 77 Am. St. Rep. 301.

97. People *v.* Higgins, 3 Mich. 233, 61 Am. Dec. 491; People *v.* Tisdale, 1 Dougl. (Mich.) 59.

Candidate's name misspelled.— Weeks *v.* Kip, 64 N. J. L. 61, 44 Atl. 856.

Where a ballot is so defective that it cannot be counted an elector cannot be allowed to testify that he cast the ballot and intended it for a particular candidate. Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307, 9 Ky. L. Rep. 181.

Where a ballot contains the names of two or more candidates for the same office, or of more candidates than there are officers to be elected, parol evidence is not admissible to show for whom the elector intended to vote. State *v.* Foxworthy, 29 Nebr. 341, 45 N. W. 632; People *v.* Seaman, 5 Den. (N. Y.) 409.

10. DECLARATIONS OF VOTERS — a. In General. In a number of cases evidence of the unsworn declarations of voters tending to show their disqualification has been admitted. This has been put upon the ground that the declarations were so intimately connected with the act of voting as properly to be receivable as a part of the *res gestæ*.[98] But the rule as generally stated is that after first showing that a person voted against a contestant or proposition, or offering any evidence tending to show that he so voted, he is considered a party in interest as against the latter, and any declarations of his own showing his want of qualification to vote are admissible, like those of a party made against his own interest, although it is held that such declarations when made any considerable time after the vote has been cast are not competent.[99] But the tendency in the more recent decisions is to exclude such declarations as merely hearsay,[1] especially if they were made some

98. Patton *v.* Coates, 41 Ark. 111; Beardstown *v.* Virginia, 81 Ill. 541.

Declaration made at the time of voting.— Sharp *v.* McIntire, 23 Colo. 99, 46 Pac. 115.

Declarations and conduct about the time of voting.— Black *v.* Pate, 130 Ala. 514, 30 So. 434.

Proof of domicile by reputation and declarations.— Griffin *v.* Wall, 32 Ala. 149.

Contradictory statements.— In Norwood *v.* Kenfield, 30 Cal. 393, it was considered doubtful whether statements of one who voted at one election precinct as to his right to vote were competent evidence for either party in a contest concerning an office filled at that election; but at all events it was held that a party could not claim as competent evidence for himself the statement of a voter made at one election precinct as to his right to vote, and at the same time ask to strike out as incompetent the statement of the same person made at another precinct as to the same subject-matter.

No effort made to take deposition.— Evidence of the declarations of one who voted at a county-seat election as to his qualifications as to residence and the town he voted for is by itself inadmissible, as is also an affidavit made by him some time afterward as to the fact of his citizenship by naturalization, especially in the absence of any evidence that any effort was made to take his deposition. Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936.

Declarations applicable to no particular election.— Declarations of a voter that he had voted, but had no citizen's papers, when confined to no time, place, or election, are not admissible in evidence to show that he was not a qualified voter at a specified time and election. Kadlec *v.* Pavik, 9 N. D. 278, 83 N. W. 5.

99. Beardstown *v.* Virginia, 76 Ill. 34; Boyer *v.* Teague, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547; State *v.* Stumpf, 23 Wis. 630. See also French *v.* Lighty, 9 Ind. 475; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242. In the note, par. 22, to Coate *v.* Speer, 3 McCord (S. C.) 227, 15 Am. Dec. 627, it is said: "The Declarations of a voter may be given in evidence, to set aside the election; as to diminish the poll, by taking an incompetent vote off, or to prove bribery, &c., but they are not admissible on a charge against the candidate for bribery, &c. They are admitted to annul votes; but not to set aside the election by disqualifying the member on account of his bribery, &c."

Not in derogation of any existing right.— In quo warranto to oust a sheriff from office the declarations of a voter after he had voted and after the election has closed in regard to his qualifications are not in derogation of any existing right and cannot be admitted in evidence as against interest. Davis *v.* State, 75 Tex. 420, 12 S. W. 957.

Declarations against interest.— In an action to contest an election to locate a county-seat all persons who voted at such election are parties to the suit, although not named as such, to the extent of rendering admissible evidence of the declarations of such persons against the interests of the town for which they voted, as to the legality of their votes, when the fact that they voted for the particular town is first established *aliunde*. Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936.

1. People *v.* Grand County, 7 Colo. 190, 2 Pac. 912; Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935. In Arkansas the declarations as to his qualifications may be so contemporaneous with his voting as to be part of the *res gestæ* and as such competent evidence. Patton *v.* Coates, 41 Ark. 111. But in all other cases they are excluded as merely hearsay. Rucks *v.* Renfrow, 54 Ark. 409, 16 S. W. 6, 12 L. R. A. 362. In Gilleland *v.* Schuyler, 9 Kan. 569, 583, Brewer, J., said: "That so much of this testimony as purports to give the statements of third parties as to the number of times and the names under which they had voted is hearsay and incompetent, seems to us clear. It is the testimony of what other persons told the witness, persons not parties to the suit, so that their admission could be receivable. These declarations were not made at the polls by persons conducting the election, and so as to make part of the *res gestæ*, nor do they accompany a principal fact which they serve to qualify or explain. They are simply statements concerning past transactions by strangers to the record. They come within none of the exceptions to the rule which excludes hearsay testimony. It was perfectly legitimate and competent to prove the casting of fraudulent votes, but it was not competent to prove that fact by the statements of parties who claimed to have cast them." See also Cessna *v.* Meyers, Smith

time after the election.[2] The declarations of a legal voter as to how he voted, unless accompanied by an exhibition of the contents of his ballot, are not admissible in evidence.[3] But inasmuch as an illegal voter is not entitled to the privilege of secrecy his declarations as to the contents of his ballot are admissible in evidence.[4] On the other hand the declarations of an illegal voter as to the person for whom he voted have been regarded as much hearsay as his declarations concerning his own qualifications.[5] If the voter be an idiot or a lunatic, his statements made as to the contents of his ballot cannot be received in evidence, for he would be incompetent to testify as a witness even in court under oath.[6]

b. To Impeach Witness. If an illegal voter goes on the stand and testifies that he voted for a certain candidate, evidence of contradictory statements made by him out of court is admissible to impeach his testimony, as in other cases, after laying the proper foundation for its reception.[7]

11. Testimony of Voters as to How They Voted — a. Secrecy of Ballot. The practice of swearing the voters and compelling them to disclose for whom they voted was long ago condemned as a kind of inquisitorial power unknown to the principles of a free government.[8] There can be no doubt but that one important object of the system of voting by ballot is secrecy, so that the voter may freely exercise his choice without being subjected to intimidation or any other manner of control by others, and without fear of ill-will or persecution on account of his vote. It is considered by the authorities that this protection ought to be perpetual, unless the voter shall voluntarily raise the veil of secrecy, and it is accordingly held that a legal voter cannot be compelled to disclose for whom he voted;[9] and the purpose of the common provision in election laws that no mark or indorsement shall be placed on a ballot other than that directed by the statute is to protect legal voters in the secrecy of the ballot.[10] Statutes designed to secure complete and inviolable secrecy of ballots cast at public elections should be construed under established rules with reference to the mischief to be remedied and

Cas. Cont. El. 60, in which serious objections are presented to the admission of such evidence.

2. Black *v.* Pate, 130 Ala. 514, 30 So. 434.

3. People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141.

4. State *v.* Hilmantel, 23 Wis. 422; State *v.* Olin, 23 Wis. 309.

Affidavit made shortly after election.— Where one who had voted illegally at an election refused to testify in a contest, his affidavit voluntarily made three days after the election in which he said that he had voted twice at the election and each time had voted the republican ticket was held admissible to show that fact. Eggers *v.* Fox, 177 Ill. 185, 52 N. E. 269.

5. Lauer *v.* Estes, 120 Cal. 652, 53 Pac. 262; Tunks *v.* Vincent, 106 Ky. 829, 51 S. W. 622, 21 Ky. L. Rep. 475; Edwards *v.* Logan, 70 S. W. 852, 24 Ky. L. Rep. 1099.

Res gestæ.— In a proceeding to test the validity of an election, where it has been shown that illegal votes were cast, declarations of illegal voters as to the nature of the votes cast by them cannot be received in evidence, unless such declarations are strictly a part of the *res gestæ*. Dean *v.* Miller, 56 Nebr. 301, 76 N. W. 555.

6. Edwards *v.* Logan, 70 S. W. 852, 24 Ky. L. Rep. 1099.

7. Smith *v.* Thomas, 121 Cal. 533, 54 Pac. 71.

8. Johnston *v.* Charleston, 1 Bay (S. C.) 441.

9. *Alabama.*— Black *v.* Pate, 130 Ala. 514, 30 So. 434.

Arkansas.— Dixon *v.* Orr, 49 Ark. 238, 4 S. W. 774, 4 Am. St. Rep. 42.

Indiana.— Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700.

Louisiana.— Tullos *v.* Lane, 45 La. Ann. 333, 12 So. 508.

Michigan.— Atty.-Gen. *v.* McQuade, 94 Mich. 439, 53 N. W. 944; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141.

North Carolina.— Boyer *v.* Teague, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547.

Pennsylvania.— Kneass' Case, 2 Pars. Eq. Cas. 553, Brightly Lead. Cas. El. 260, 363; *In re* Orphans' Ct., 1 Brewst. 67; *In re* Locust Ward, 3 Pa. L. J. Rep. 11, 4 Pa. L. J. 341; Fowler *v.* Felthoff, 1 Leg. Rec. 105.

See 18 Cent. Dig. tit. "Elections," § 291 *et seq.*

But see People *v.* Thacher, 55 N. Y. 525, 535, where it is stated without qualification in a head-note that a voter may be required to disclose for whom he voted; no such point was decided in the case, for it appears that the witnesses all testified voluntarily and without objection. But *compare* head-notes of this case reported in 14 Am. Rep. 312.

10. Gill *v.* Shurtleff, 183 Ill. 440, 56 N. E. 164.

the object to be accomplished, and interpreted, if practicable, so as to promote and not destroy the purpose of their enactment.[11] And it would seem that the same considerations of public policy which relieve the voter himself from being compelled to testify for whom he voted should prevent other proof of that fact.[12] But this protection is extended to legal voters only. When it has been established that a voter was not a legal elector, any person having requisite knowledge may testify as to the person for whom he voted, and he may be compelled himself to disclose for whom he voted, unless he claims the other and different privilege of refusing to criminate himself.[13] And inasmuch as the legality of a vote is always presumed, a voter cannot be compelled to disclose the character of his vote, so long as his qualification as an elector is an open question.[14] The disqualification of the voter may be proved as an independent fact and also as a predicate or foundation for showing who received his vote.[15] But the voter cannot be compelled to disclose the fact that he voted without the requisite qualifications, for that would tend to criminate himself.[16]

b. Exemption Deemed Personal Privilege. According to the weight of authority the exemption from obligation to disclose the character of his vote can be claimed only by the voter himself.[17] But on the other hand it has

11. Curran *v.* Clayton, 86 Me. 42, 29 Atl. 930.

12. It is altogether idle to expect that there can be any such protection, where the voter is only allowed to withhold his own oath concerning the ticket he has voted, while any other prying meddler can be permitted in a court of justice to guess under oath at its contents. If the law could permit an inquiry at all there is no reason whatever for preventing an inquiry from the voter himself who alone can actually know how he voted and who can suffer no more by being compelled to answer than by having the fact established otherwise. People *v.* Cicott, 16 Mich. 283, 297, 97 Am. Dec. 141. Judge Cooley says: "The courts have held that a voter, even in case of a contested election, cannot be compelled to disclose for whom he voted; and for the same reason we think others who may accidentally, or by trick or artifice, have acquired knowledge on the subject should not be allowed to testify to such knowledge, or to give any information in the courts upon the subject. Public policy requires that the veil of secrecy should be impenetrable, unless the voter himself voluntarily determines to lift it; his ballot is absolutely privileged; and to allow evidence of its contents when he has not waived the privilege is to encourage trickery and fraud, and would in effect establish this remarkable anomaly, that, while the law from motives of public policy establishes the secret ballot with a view to conceal the elector's action, it at the same time encourages a system of espionage, by means of which the veil of secrecy may be penetrated and the voter's action disclosed to the public." Const. Lim. (7th ed.) 912.

13. Black *v.* Pate, 130 Ala. 514, 30 So. 434; State *v.* Kraft, 18 Oreg. 550, 20 Oreg. 28, 23 Pac. 663; *In re* Locust Ward, 3 Pa. L. J. Rep. 11, 4 Pa. L. J. 341; *In re* McDaniels, 2 Pa. L. J. Rep. 82, 3 Pa. L. J. 310; Vallier *v.* Brakke, 7 S. D. 343, 64 N. W. 180.

Form of question of witness.— *In re* Orphans' Ct., 1 Brewst. (Pa.) 67.

Testifying without objection.— In an election contest persons not qualified electors who voted in good faith, believing themselves to be qualified, may testify as to the candidates they voted for, and the ballots so cast by them may be deducted from the votes received by such candidates. Van Winkle *v.* Crabtree, 34 Oreg. 462, 55 Pac. 831, 56 Pac. 74.

Testimony of election officers.— Tunks *v.* Vincent, 106 Ky. 829, 51 S. W. 622, 21 Ky. L. Rep. 475.

14. Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141.

15. For the latter purpose the fact of illegality must be determined by the court as in other cases, where the admission of evidence depends upon the establishment of a preliminary fact. Black *v.* Pate, 130 Ala. 514, 30 So. 434; Boyer *v.* Teague, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547.

16. That information must be drawn from other sources unless the witness voluntarily discloses it. State *v.* Olin, 23 Wis. 309.

17. The question may therefore properly be put to the witness, and if he sees fit to answer it there can be no objection to the testimony.

Alabama.— Black *v.* Pate, 130 Ala. 514, 30 So. 434.

Indiana.— Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700.

New York.— People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

Oregon.— State *v.* Kraft, 18 Oreg. 550, 20 Oreg. 28, 23 Pac. 663.

Pennsylvania.— Kneass' Case, 2 Pars. Eq. Cas. (Pa.) 553, Brightly Lead. Cas. El. 260, 366.

United States.— Reid *v.* Julian, 2 Bartl. Cas. Cont. El. 822; Bell *v.* Snyder, Smith Cas. Cont. El. 247; Loyall *v.* Newton, Cl. & H. Cas. Cont. El. 520, 522.

been held that in an election contest voters cannot testify at all as to how they voted.[18]

12. **Circumstantial Evidence.** Where it does not appear from direct testimony for what candidate an unqualified voter voted, the fact may be shown by circumstantial evidence.[19] It may be shown for what ticket an unqualified voter asked at the polls.[20] So also it may be shown that a ticket voted by one not qualified had a mark on it by which it can be identified.[21] So also the fact that a voter was not a legal elector may be shown by circumstantial as well as by direct evidence.[22]

13. **Ballots as Evidence — a. When Properly Preserved.** While the certificates of the various canvassing boards are conclusive on all collateral inquiries they are only *prima facie* evidence in direct proceedings to contest an election. Hence in all cases where the right to an elective office is the subject-matter of an action, whether the right is to be determined in and by the statutory proceeding to contest an election, or in and by an action in the nature of a quo warranto, the ballots of the electors, if they have been properly preserved, are the primary and original evidence of the result of the election, and should prevail over the returns, where there is a difference.[23]

See 18 Cent. Dig. tit. "Elections," § 292.

Parol evidence as to contents of missing ballot.— Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

Where one ballot was defective and counted for a name not known in the district under circumstances which rendered it probable that the voter meant it for one of the candidates, the court ordered the ballot-box to be opened privately by a master, the number of the doubtful ballots examined, a comparison made of the number of the ballot with that upon the tally-sheet opposite the name of the voter who cast it, and the voter privately notified so that he might voluntarily appear and testify if he desired. Kochersperger *v.* Hargrove, 6 Pa. Co. Ct. 510.

18. In Major *v.* Barker, 99 Ky. 305, 35 S. W. 543, 18 Ky. L. Rep. 104.

Upon an indictment for making a false return the voters cannot be permitted to testify as to how they voted. Com. *v.* Barry, 98 Ky. 394, 33 S. W. 400, 17 Ky. L. Rep. 1018.

19. People *v.* Teague, 106 N. C. 576, 11 S. E. 665.

For whom elector intended to vote.— A voter called as a witness may be asked for whom he voted, and if he declines or is unable to state, circumstantial evidence may be used to ascertain the fact, and he may be asked for whom he intended to vote, as one of the circumstances bearing upon the question. People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242.

What a distributer of tickets said at the polls as to the tickets he was handing out is not evidence to show for whom persons voted who got tickets from him. *In re* Orphans' Ct., 1 Brewst. (Pa.) 67.

20. *In re* Orphans' Ct., 1 Brewst. (Pa.) 67.

21. *In re* Orphans' Ct., 1 Brewst. (Pa.) 67.

22. The appearance of the voter may be testified to as an indication of his age. Black *v.* Pate, 130 Ala. 514, 30 So. 434.

That voters were engaged in temporary work.— Black *v.* Pate, 130 Ala. 514, 30 So. 434; People *v.* Teague, 106 N. C. 576, 11 S. E. 665.

23. *California.*— *Ex p.* Brown, 97 Cal. 83, 31 Pac. 840; Gibson *v.* Trinity County, 80 Cal. 359, 22 Pac. 225; Coglan *v.* Beard, 67 Cal. 303, 7 Pac. 738; People *v.* Burden, 45 Cal. 241; People *v.* Holden, 28 Cal. 123.

Illinois.— Caldwell *v.* McElvain, 184 Ill. 552, 56 N. E. 1012; Dooley *v.* Van Hohenstein, 170 Ill. 630, 49 N. E. 193; Catron *v.* Craw, 164 Ill. 20, 46 N. E. 3; Beall *v.* Albert, 159 Ill. 127, 42 N. E. 166; Murphy *v.* Battle, 155 Ill. 182, 40 N. E. 470; Blankinship *v.* Israel, 132 Ill. 514, 34 N. E. 615; Kingerly *v.* Berry, 94 Ill. 515.

Indiana.— Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700; State *v.* Shay, 101 Ind. 36; Reynolds *v.* State, 61 Ind. 392.

Kansas.— Searle *v.* Clark, 34 Kan. 49, 7 Pac. 630; Dorey *v.* Lynn, 31 Kan. 758, 3 Pac. 557; Hudson *v.* Solomon, 19 Kan. 177.

Kentucky.— Edwards *v.* Logan, 70 S. W. 852, 24 Ky. L. Rep. 1099.

Maryland.— Leonard *v.* Woolford, 91 Md. 626, 46 Atl. 1025.

Nebraska.—Albert *v.* Twohig, 35 Nebr. 563, 53 N. W. 582.

Nevada.— Schneider *v.* Bray, 22 Nev. 272, 39 Pac. 326.

New York.— People *v.* Livingston, 79 N. Y. 279.

North Dakota.— Howser *v.* Pepper, 8 N. D. 484, 79 N. W. 1018.

Oregon.— Hughes *v.* Holman, 23 Oreg. 481, 32 Pac. 298; Fenton *v.* Scott, 17 Oreg. 189, 20 Pac. 95, 11 Am. St. Rep. 801; Hartman *v.* Young, 17 Oreg. 150, 20 Pac. 17, 11 Am. St. Rep. 787, 2 L. R. A. 596.

Pennsylvania.— *In re* Zacharias, 3 Pa. Co. Ct. 656.

Texas.— In Owens *v.* State, 64 Tex. 500, 505, the court conservatively remarked: "In a proper case the ballot-boxes may be opened and the tickets counted to rebut the presumption in favor of the returns; and in case of a disagreement between the returns and

b. Statutes Prescribing Mode of Preservation. It is well settled that statutes prescribing the mode of preservation of the ballots are directory merely, and if it be clearly and satisfactorily proved that they have been kept intact and inviolate in the same condition as when counted, the ballots are admissible in evidence, although not preserved in the manner required by statute. The object of all such provisions is to secure the safe-keeping of the ballots, so that they may be easily identified in case there is need to resort to them as evidence in a judicial inquiry; and if they have been safely kept and protected from any tampering the chief object of the law is subserved, although omissions and irregularities may have occurred. Under such circumstances the weight of the ballots as evidence may be weakened to a greater or less extent, but such irregularities do not render them inadmissible as evidence.[24] Where the statute makes no provision as to the mode of preserving the ballots, they are admissible in evidence, if it is shown that they have been preserved inviolate in some safe custody.[25]

c. Burden of Proving Their Genuineness. One who relies upon overcoming the *prima facie* correctness of the official canvass by a resort to the ballots must first show that the ballots as presented to the court are intact and genuine; and where a mode of preservation is enjoined by the statute proof must also be made of a substantial compliance with the requirements of that mode;[26] and according

the ballots, the latter must prevail as the best evidence of the will of voters."

See 18 Cent. Dig. tit. "Elections," § 294.

Where the ballot-box comes from the proper custody the ballots contained in it cannot be excluded from evidence until facts are proved which cast suspicion on them. Hunnicutt *v.* State, 75 Tex. 233, 12 S. W. 106.

Not produced in time.— The statute providing for the security and custody of ballots makes such ballots primary evidence in an election contest, and when such contest is filed the ballots become evidence for all proper purposes, although they were not produced and proved within the time provided by statute for the taking of proof in the case. Edwards *v.* Logan, 70 S. W. 852, 24 Ky. L. Rep. 1099.

Court must be sure of integrity of ballots. Rhode *v.* Steinmetz, 25 Colo. 308, 55 Pac. 814.

Evidence showing proper custody.— After counting the ballots the officers returned them to the ballot-box, sealed the hole with a piece of paper signed by the presiding officer, and delivered them to the mayor who deposited them in a bank vault. The officers and employees of the bank testified that they had been safely kept, and they were produced in court apparently intact and opened in the presence of the jury. It was held that such evidence being uncontradicted an instruction that each party had received the number of votes shown by the count had in the presence of the jury, and that from such numbers the jury should deduct any illegal ballots, was warranted. Gray *v.* State, 19 Tex. Civ. App. 521, 49 S. W. 699.

Not produced in open court.— Ballots in a contested election case can under no circumstances be produced in open court and be made a record of. Donnell *v.* Lee, 101 Mo. App. 191, 73 S. W. 997.

24. *Alabama.*— State *v.* Judge Ninth Judicial Cir., 13 Ala. 805.

California.— Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 49 Am. St. Rep. 68, 29 L. R. A. 673.

Connecticut.— Mallett *v.* Plumb, 60 Conn. 352, 22 Atl. 772.

Illinois.— Murphy *v.* Battle, 155 Ill. 182, 40 N. E. 470; Blankinship *v.* Israel, 132 Ill. 514, 24 N. E. 615.

Kansas.— Dorey *v.* Lynn, 31 Kan. 758, 3 Pac. 557.

Michigan.— People *v.* Higgins, 3 Mich. 233, 61 Am. Dec. 491.

Minnesota.— O'Gorman *v.* Richter, 31 Minn. 25, 16 N. W. 416.

Missouri.— Sone *v.* Williams, 130 Mo. 530, 32 S. W. 1016.

New York.— People *v.* Livingston, 79 N. Y. 279.

Oregon.— Hartman *v.* Young, 17 Oreg. 150, 20 Pac. 17, 11 Am. St. Rep. 787, 2 L. R. A. 596.

See 18 Cent. Dig. tit. "Elections," § 231.

Keeping ballots in an unlocked bureau drawer at the town clerk's house after they had been strung and sealed up as required by statute, it appearing that the seal had not been broken and that the ballots had not been tampered with, was held not to prevent them from being the best evidence of the result of the election as against the return of the judges of election. Apple *v.* Barcroft, 158 Ill. 649, 41 N. E. 1116.

Proof that ballot-box had not been opened. — Word *v.* Sykes, 61 Miss. 649.

25. Gray *v.* State, 19 Tex. Civ. App. 521, 49 S. W. 699.

26. *California.*— Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 49 Am. St. Rep. 68, 29 L. R. A. 673; Coglan *v.* Beard, 65 Cal. 58, 2 Pac. 737; People *v.* Holden, 28 Cal. 123.

Colorado.— Rhode *v.* Steinmetz, 25 Colo. 308, 55 Pac. 814.

Iowa.— Davenport *v.* Olerich, 104 Iowa 194, 73 N. W. 603.

Oregon.— Fenton *v.* Smith, 17 Oreg. 189, 20 Pac. 95, 11 Am. St. Rep. 801; Hartman *v.*

to some of the cases the party who offers the ballots in evidence must also show that they have not been tampered with.[27] But on the other hand it has been held that when a substantial compliance with the provisions of the statute respecting the preservation of the ballots has been shown, the burden of proof is upon the party contesting the use of the ballots in evidence to establish that they have in fact been tampered with or that they have been exposed under such circumstances that a violation of them might have taken place.[28] However this may be, if the ballots have been placed in a position to be tampered with by interested parties, the burden of proof is on the party offering them in evidence to show that they are in the same condition as when sealed up by the several election boards.[29] It may be added that the fact that ballots had been in the custody of the proper officer is only *prima facie* evidence that they have not been altered, and it is competent to prove that they have nevertheless been in fact tampered with.[30]

d. Weight as Evidence When Not Properly Kept. So much depends upon the circumstances of each particular case and the terms of the statute to be construed that it is impossible to lay down any general rule as to the evidential value of the ballots when there has been a deviation from the statutory mode of preserving them. If the deviation has been such as necessarily to place them in a position where they might have been tampered with by interested persons, they should receive little or no consideration, and it seems that the courts should exclude them.[31] For where ballots have been so exposed as to have offered opportunity to be tampered with and have not been guarded with that zealous care which will contravene all suspicion of substitution or change, they lose their presumptive purity and are no longer to be relied on as evidence in a contest or judicial inquiry as to the result of the election, and cannot be allowed to prevail over the

Young, 17 Oreg. 150, 20 Pac. 17, 11 Am. St. Rep. 787, 2 L. R. A. 596.

Utah.— Farrell *v.* Larsen, 26 Utah 283, 73 Pac. 227.

In Archer *v.* Allen, 1 Bartl. Cas. Cont. El. 169, there was a recount of the ballots after the election and a discovery of a mistake of two votes — just enough to change the result. The committee of the house of representatives held that the supplementary return was entitled to be received, inasmuch as there appeared to be satisfactory proof that the ballot-boxes had not been interfered with, and the house accordingly vacated the seat, but refused to give it to the contestant and left it vacant.

27. Fenton *v.* Scott, 17 Oreg. 189, 20 Pac. 95, 11 Am. St. Rep. 801; Hartman *v.* Young, 17 Oreg. 150, 20 Pac. 17, 11 Am. St. Rep. 787, 2 L. R. A. 596; Fishback *v.* Bramel, 6 Wyo. 293, 44 Pac. 840.

Not promptly delivered to officer.— Where election judges left the ballots after they were counted in the town hall to which others had access until the second day after the election instead of sealing them up and delivering them to the officer to whom the poll-books are required to be delivered, the burden is on a candidate who seeks to introduce them in evidence in an election contest to prove that they were not altered before they were in fact properly delivered to the officer. Eggers *v.* Fox, 177 Ill. 185, 52 N. E. 269.

28. Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 49 Am. St. Rep. 68, 29 L. R. A. 673.

29. Albert *v.* Twohig, 35 Nebr. 563, 53 N. W. 582.

30. Rhode *v.* Steinmetz, 25 Colo. 308, 55 Pac. 814; Furguson *v.* Henry, 95 Iowa 439, 64 N. W. 292.

Contestee the custodian of ballot-box.— Windes *v.* Nelson, 159 Mo. 51, 60 S. W. 129.

31. *Arkansas.*— Powell *v.* Holman, 50 Ark. 85, 6 S. W. 505.

Illinois.— Murphy *v.* Battle, 155 Ill. 182, 40 N. E. 470.

Nebraska.— Albert *v.* Twohig, 35 Nebr. 563, 53 N. W. 582.

Oregon.— Hughes *v.* Holman, 23 Oreg. 481, 32 Pac. 298; Fenton *v.* Scott, 17 Oreg. 189, 20 Pac. 95, 11 Am. St. Rep. 801.

Utah.— Farrell *v.* Larsen, 26 Utah 283, 73 Pac. 227.

May be received if all reasonable doubts are removed.— Newton *v.* Newell, 26 Minn. 529, 6 N. W. 346.

When it appears that the ballots have been tampered with and there is nothing to contradict the returns except the discredited ballots the returns are conclusive. Spidle *v.* McCracken, 45 Kan. 356, 25 Pac. 897 [*citing* Dorey *v.* Lynn, 31 Kan. 758, 3 Pac. 557].

Ballots deposited in a grain sack merely tied with a string.— In an election contest the fact that the ballots had been sent by the county clerk to the secretary of state and afterward returned by him in a grain sack merely tied with a string without a seal renders the ballots inadmissible as evidence in the absence of evidence negativing the possibility of their having been tampered with in their return. Martin *v.* Miles, 40 Nebr. 135, 58 N. W. 732.

official canvass.[32] But where the deviation has been slight and there is little probability that they have been molested they are to be considered by the court or jury as the case may be, in the light of all the other evidence in the case.[33] And even when the ballots are objects of suspicion by reason of a want of proper preservation and by reason of undue exposure, yet the returns should not be accepted as conclusive, if the judges of the election have been so careless in the performance of their duty as to cast discredit upon their returns.[34]

e. Not Necessary to Plead Improper Care. The inadmissibility of ballots in evidence on the ground that they have not been properly preserved as directed by statute may be urged at the trial, notwithstanding the fact that their improper preservation is not alleged in the pleadings.[35]

f. After They Should Have Been Destroyed. After the date when the statute requires that ballots shall be destroyed they have no legal existence and are not admissible in evidence, no steps having been taken to have a lawful recount.[36]

g. Only Ballots Within Issue Joined Admissible. Where the issue joined is the failure of the board of canvassers to count all of the votes received by plaintiff in

32. *Arkansas.*— Powell *v.* Holman, 50 Ark. 85, 6 S. W. 505.

Illinois.— Beall *v.* Albert, 159 Ill. 127, 42 N. E. 166; Kingery *v.* Berry, 94 Ill. 515.

Iowa.— De Long *v.* Brown, 113 Iowa 370, 85 N. W. 624.

Kansas.— Hudson *v.* Solomon, 19 Kan. 177.

Kentucky.— Edwards *v.* Logan, 70 S. W. 852, 24 Ky. L. Rep. 1099.

Nevada.— Dennis *v.* Caughlin, 23 Nev. 188, 44 Pac. 818; 22 Nev. 447, 41 Pac. 768, 59 Am. St. Rep. 761, 29 L. R. A. 731.

North Dakota.— Howser *v.* Pepper, 8 N. D. 484, 79 N. W. 1018.

Oregon.— Hartman *v.* Young, 17 Oreg. 150, 20 Pac. 17, 11 Am. St. Rep. 787, 2 L. R. A. 596.

Pennsylvania.— *In re* Jenkins, 6 L. T. N. S. 33.

Texas.— Owens *v.* State, 64 Tex. 500.

Custodian's reëlection in contest.— Where the ballot-box containing the ballots voted at an election was in possession of the county clerk, whose reëlection was also in contest, and the ballot-box, although locked, could have been entered by taking off the hinges, which were exposed, the ballots should not be used to rebut the presumption of the correctness of the official returns, until it is satisfactorily proved that they have not been tampered with since the election, and that those offered in evidence are the identical ones cast. Edwards *v.* Logan, 70 S. W. 852, 24 Ky. L. Rep. 1099.

33. Mallett *v.* Plumb, 60 Conn. 352, 20 Atl. 772; People *v.* Livingston, 79 N. Y. 279.

Question for the jury.— The return of the inspectors is *prima facie* evidence of the result of an election; and where the ballots have not been preserved in the manner required by law, but have been left in an unsafe and exposed condition, the presumption which would otherwise exist of their correctness is not raised, and the jury may properly be governed by the return, unless fully convinced by proof of the integrity of the ballots. People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141.

Possibility of tampering with ballots.— A recount of the ballots in an election contest should not be rejected merely because there was possible opportunity to tamper with the ballots. Sone *v.* Williams, 130 Mo. 530, 32 S. W. 1016.

Returns slightly altered.— In State *v.* Adams, 2 Stew. (Ala.) 231, it was held that the original election returns are admissible as evidence of the number of votes given, although they have been exposed and somewhat altered, but that their fairness and alteration were to be left to the jury to determine.

Rule for guidance of jury.— On the trial of a right to an office it is proper for the jury to base their estimate of the result of an election upon the official returns, when satisfied by evidence that the ballot-boxes have been tampered with after the official count, and upon the ballots, when there is not satisfactory evidence of such tampering. Owens *v.* State, 64 Tex. 500.

34. In other words the evidence may be such as to discredit as evidence to some extent at least both the ballots and the returns; and to adopt an inflexible rule that either should be conclusive of the result in such cases would tie the hands of the court and put it in the power of designing persons to carry out their fraudulent schemes to change the actual result of an election.' Dooley *v.* Van Hohenstein, 170 Ill. 630, 49 N. E. 193; Catron *v.* Craw, 164 Ill. 20, 46 N. E. 3.

Return also discredited.— Discredit is cast on the return of the judges of election, it showing a larger number of votes cast than there were voters on the poll list, although the election law provides that if there are too many ballots the excess shall be drawn out and destroyed; so that in an election contest the ballots may be considered, although they may be objects of suspicion, because of undue exposure and want of proper preservation, they not being more discredited than the returns. Collier *v.* Anlicker, 189 Ill. 34, 59 N. E. 615.

35. De Long *v.* Brown, 113 Iowa 370, 85 N. W. 624.

36. State *v.* Bate, 70 Wis. 409, 36 N. W. 17.

a certain precinct, it is error for the court to admit in evidence and count for plaintiff rejected ballots from other precincts.[37]

J. Recount of Ballots — 1. Duty of Custodian of Ballot-Box. It is the duty of the custodian of the ballot-box to preserve it as containing the ballots, and in the same state in which he received it, and he has no such discretion as to permit it to be opened by any person or for any purpose except in case of a contest.[38] But ballots from boxes which have been opened before a legislative committee since the election are admissible in evidence, where it appears that the opportunity for the ballots to have been tampered with was a mere possibility only.[39]

2. Petition For a Recount. A petition by a candidate desiring a recount under the statute must show who the board of canvassers have decided is elected to the office, in order that notice of the contest may be given to him.[40] A petition which avers no fraud or mistake or facts from which they may be inferred, but simply that full justice can be done only by a recount of the votes, is not sufficient to authorize a recount.[41] An application for a recount of ballots not offered as part of a party's proofs must conform to the statutory requirements governing such applications, and a mere oral request is not sufficient.[42]

3. Recount as Matter of Course. It has been held that in a statutory contest, where the contestant alleges error, mistake, fraud, misconduct, or corruption in counting the ballots or declaring the result of an election, a recount of the ballots should be ordered as a matter of course upon the request of the complaining party, because the ballots themselves, if properly preserved, are the highest and best evidence of the expression of the will of the voters.[43]

4. Evidence Calling For Recount. According to the weight of authority, however, a resort to the ballots themselves cannot be had until the contestant produces evidence making a *prima facie* case which indicates at least a probability that a recount would decide the election in his favor, that there were frauds, irregularities, or mistakes committed in the acceptance of the ballots and return of their count, or that there is error in the record declaring the result of the election.[44] A party has no right to demand a recount of the ballots as a mere fishing excursion. He should be required to produce some evidence furnishing ground for supposing that a miscount might have been made by the inspectors or judges of election.[45] But when the state of evidence is such as to throw uncertainty

37. Borders *v.* Williams, 155 Ind. 36, 57 N. E. 527.

38. Govan *v.* Jackson, 32 Ark. 553.

39. Henderson *v.* Albright, 12 Tex. Civ. App. 368, 34 S. W. 992.

40. Andrews *v.* Otsego County Probate Judge, 74 Mich. 278, 41 N. W. 923.

41. *In re* Twentieth Ward, 3 Pa. Dist. 118.

42. McCoy *v.* Boyle, 51 N. J. L. 53, 15 Atl. 15.

43. Clanton *v.* Ryan, 14 Colo. 419, 24 Pac. 258; Caldwell *v.* McElvain, 184 Ill. 552, 53 N. E. 1012; Catron *v.* Craw, 164 Ill. 20, 46 N. E. 3; State *v.* Shay, 101 Ind. 36.

Where returns fail to show office for which ballots were cast.— Although the election returns made to the canvassing board fail to designate the office for which the votes for the contesting candidates were cast, the court in quo warranto proceedings may look behind the returns to ascertain the truth, as by an inspection of the ballots. State *v.* Nicholson, 102 N. C. 465, 9 S. E. 545, 11 Am. St. Rep. 767.

44. Bertolet's Case, 3 Pa. Dist. 643.

Fraud and mistake.— Kindel *v.* Le Bert, 23 Colo. 385, 48 Pac. 641, 58 Am. St. Rep. 234.

Cannot operate as bill of discovery.— *In re* Northampton County, 6 Pa. Dist. 150.

Evidence of probable mistake.— *In re* McCarthy, 2 Pa. Co. Ct. 561.

No evidence that ballots not counted were illegal.— *In re* Twentieth Ward, 2 Pa. Dist. 635, 13 Pa. Co. Ct. 609.

Ballots as to which no evidence is offered.— The commissioner in an election contest has no authority to examine ballots as to which no testimony is produced showing their illegality. *In re* Foreman, 30 Pittsb. Leg. J. N. S. 318.

45. O'Gorman *v.* Richter, 31 Minn. 25, 16 N. W. 416; *In re* Jenkins, 6 L. T. N. S. (Pa.) 33.

Affidavit required.— Thompson *v.* Ewing, 1 Brewst. (Pa.) 67.

Charge that ballots cast for contestant were counted for contestee.— State *v.* Spencer, 166 Mo. 271, 65 S. W. 981.

Where a design to require the court without the exercise of judgment upon any question of law or fact to order a recount merely because it is desired by one of the candidates is not plainly expressed in the statute, a recount will not be ordered for the mere purpose of quieting the public mind or enabling

upon the accuracy of the count by the inspectors or judges of election a judicial count is properly ordered.[46]

5. **Recount of All Ballot-Boxes.** In order to induce the court to order a recount of all the ballot-boxes of a county something definite must be preferred against each.[47]

6. **Ballots That Have Been Tampered With.** Where the evidence is clear that the ballots have been tampered with since the original count, and the evidence is positive that the original count was accurate, the original count must control;[48] and the fact that some of the ballots in a box have been tampered with impeaches the integrity of all in that box on a recount.[49]

7. **Delegation of Recount to Committee of Legislative Body.** The examination and recount of ballots may be delegated to a committee of a legislative body.[50]

8. **Sufficiency of Illegal Votes to Affect Result.** The court will not order the ballot-box to be opened to ascertain for whom illegal votes were cast, unless the illegal votes proved are sufficient in number to alter the result of the election.[51]

9. **Where Term Would Expire Before Recount Could Be Had.** An examination of the ballots and a recount will not be ordered where the term of the office contested for will expire before such recount can be completed and substantial justice can be done the contestant from the face of the return.[52]

10. **Second Recount.** Although the court may upon just cause shown order a second recount in a contested election case, it is proper to refuse to do so on a motion supported merely by affidavits alleging that the affiants are informed and believe that the ballots have been changed since the official count.[53]

11. **Preservation of Secrecy of Ballot.** Where it is provided by constitution or statute that the ballots voted shall be numbered in the order in which they are cast and corresponding numbers placed opposite the names of the voters who cast them, the court may order the ballot-box to be opened and the ballots correspond-

a candidate to discover whether it would be expedient for him to contest an election. Pearson *v.* Norton, 63 N. H. 379.

46. People *v.* Sausalito, 106 Cal. 500, 39 Pac. 937.

47. For the court cannot on a mere general allegation of errors believed to exist in all authorize the perilous experiment of testing every election return by the recount of the ballot-box of every district in the county. Leonard *v.* Woolford, 91 Md. 626, 46 Atl. 1025.

Showing as to which box the alleged fraud or mistake is in.— The court will not on general request order the ballot-boxes to be recounted without some specific charge of fraud or mistake showing which box the fraud or mistake is in. Kneass' Case, 2 Pars. Eq. Cas. (Pa.) 553; Mann *v.* Cassidy, 1 Brewst. (Pa.) 11.

48. Rhode *v.* Steinmetz, 25 Colo. 308, 55 Pac. 814.

49. Rhode *v.* Steinmetz, 25 Colo. 308, 55 Pac. 814.

50. The uniform practice in all legislative bodies to act through committees of their own members and the universal understanding of the people that such duties may be discharged by a committee are evidence on the question of the legality of such a proceeding. The proceeding is one of convenience merely and not a delegation of authority, the convention reserving to itself the right of final action. Gregg *v.* Goodrich, 67 N. H. 543, 42 Atl. 240.

51. *In re* McCullough, 12 Phila. (Pa.) 570; Daly *v.* Petroff, 10 Phila. (Pa.) 389; *In re* Northup, 5 L. T. N. S. (Pa.) 1; Fowler *v.* Felthoff, 1 Leg. Rec. (Pa.) 105; James *v.* McKibbin, 1 Leg. Rec. (Pa.) 77.

Uncertainty as to effect on result.— Where it appears that a number of illegal votes were cast, and it cannot be shown without opening the ballot-box for whom they were cast, and if such votes may influence the result of the election, the court should order the ballot-box to be opened and such illegal votes to be opened, counted, and examined and the remaining votes to be counted but not opened. Glazier *v.* Merringer, 12 Lanc. Bar (Pa.) 61. The vote of an elector who was upwards of twenty-two years of age, and who had not paid the tax for which he had been assessed, being illegal, an order should be made to open the ballot-box to ascertain how he voted, when the result of the election may be thereby changed. *In re* Northup, 5 L. T. N. S. (Pa.) 1.

52. Rink *v.* Barr, 12 Wkly. Notes Cas. (Pa.) 497, 16 Phila. (Pa.) 445.

53. Sone *v.* Williams, 130 Mo. 530, 32 S. W. 1016.

After submission and announcement of decision.— Sweeney *v.* Hjul, 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169.

No prospect of changing result.— Hope *v.*

ing to the number of persons proved to be illegal voters examined for the purpose of ascertaining for whom they voted, with the proviso that the ballots of legal voters shall not be disturbed, in order that the secrecy of the ballot may be preserved so far as they are concerned.[54] So also in a contested election the court may in a proper case order the ballot-box to be opened for the purpose of adding to the count legal votes which were cast but not counted, with the qualification that the recount shall be so conducted as not to reveal by a comparison of the numbers on the ballots with the poll list how any other legal elector voted.[55] Under a constitutional provision that ballots cast may be counted, compared with the list of voters, and examined under such safeguards as may be prescribed by law, it is held improper to permit the ballots to be compared with the poll-books and thus disclose how each elector has voted and thereby destroy the secrecy of the ballot when the legislature has not prescribed any safeguards.[56] A statute permitting parties and their attorneys to examine the ballots does not authorize them to compare the ballots with the list of voters or to be present when such comparison is made.[57]

12. Restriction to Contested Elections. Where it is provided by the constitution that the ballot-boxes may be opened and the votes recounted only in case of contested elections, it is held that this relates only to statutory contests, in which the contestant seeks not only to oust the intruder but to have himself inducted into the office, and that a recount cannot be had in a proceeding in the nature of a quo warranto.[58]

13. Certificate of Recount. The certificate of a recount by the officer authorized by statute or by commissioners appointed by the court to make it is *prima facie* evidence of the facts therein stated and constitutes the basis on which the court is to act.[59] But where enough illegal votes are properly shown by the evidence either of the contestant or the incumbent or both together to change the result, it is the duty of the court to ascertain by inspection of the ballots for whom they were cast and to take them from the count.[60]

14. Court May Correct Errors of Law in Record. A statutory provision relating to the recount of ballots cast at an election that the records so amended shall stand as the true records of the election does not take away the jurisdiction of the court to correct errors of law appearing upon the face of the record.[61]

Flentge, 140 Mo. 390, 41 S. W. 1002, 47 L. R. A. 806.

54. *In re* McCullough, 12 Phila. (Pa.) 570.

Clerk not to certify names of voters.— Funkhouser *v.* Spencer, 164 Mo. 23, 63 S. W. 1112.

Ballot of illegal voter indorsed by certain words.— The ballot of one who is not a qualified voter may be identified and rejected in an election contest on evidence that his ballot was indorsed by certain words, although such indorsement and identification would be unlawful if made on the ballot of a qualified voter, since the privilege of secrecy of elections appertains to qualified voters only. Gill *v.* Shurtleff, 183 Ill. 440, 56 N. E. 164.

Legal voter unlawfully assisted in marking his ballot.— Although a person suffering from physical disability is illegally assisted by election officers in the preparation of his ballot without his making oath of his disability, yet such officers will not be allowed in an election contest to identify the ballot so that it can be rejected, since the secrecy of elections should not be destroyed, because officers and voters make honest mistakes in trying to carry out the law in regard to aiding qualified electors to vote, even though they acted illegally in doing so. Gill *v.* Shurtleff, 183 Ill. 440, 56 N. E. 164.

55. *In re* Zacharias, 3 Pa. Co. Ct. 656.

Recount as to the office for which the contest is made.— Where it was established by evidence that there was either fraud or mistake on the part of the election canvassers in making their official return, that such return as a whole is not correct, that unless the ballot-box be opened and a recount made the contestant may suffer irremediable wrong, and that there is a high degree of probability that votes of qualified electors cast for the contestant were not counted, the court will order that the ballots be recounted as to the office for which the contest is made. *In re* Zacharias, 3 Pa. Co. Ct. 656.

56. Windes *v.* Nelson, 159 Mo. 51, 60 S. W. 129.

57. Funkhouser *v.* Spencer, 164 Mo. 23, 63 S. W. 1112; Young *v.* Oliver, 163 Mo. 679, 64 S. W. 128.

58. State *v.* Francis, 88 Mo. 557.

59. State *v.* Shay, 101 Ind. 36; Nash *v.* Craig, 134 Mo. 347, 35 S. W. 1001.

60. *In re* Griffith, 1 Kulp (Pa.) 157.

61. Flanders *v.* Roberts, 182 Mass. 524, 65 N. E. 902.

K. Continuances.[62] It is very desirable that election contests be decided as speedily as possible, and the summary nature of the proceedings is inconsistent with the exercise of the general discretionary power of granting discontinuances possessed by courts in civil actions.[63] Brief adjournment, however, may be had where it is apparent that the ends of justice will thereby be subserved.[64] But an unauthorized continuance will work a discontinuance of the proceeding;[65] and where the statute authorizes adjournments from time to time, not exceeding a certain number of days in all, a continuance beyond the time authorized by statute will work a discontinuance,[66] unless such continuance was had by stipulation of the parties; for in that case a hearing within the statutory period is waived by the contestee.[67]

L. Trial[68]— **1. In General.** The proceedings at the trial of contested election cases are regulated almost entirely by local statutes, and in legislative bodies sometimes by rules and orders of the body before which the contest is tried. In case, however, the practice is not regulated by statute the court having jurisdiction of the case may adopt its own practice.[69]

2. Right of Trial by Jury. It is only in cases at common law and other analogous cases that the right of trial by jury is guaranteed by the constitution, and since at common law a party to a proceeding to try title to a public office had no right to have such issue tried by a jury, and inasmuch as a contested election is not an action at law within the meaning of the constitution, it is competent for the legislature to dispense with a jury trial in a case of a contested election, and a provision for the trial of such cases in a summary way has that effect;[70] and, although the court may have the power to order a jury trial, it seems that it should not do so, because great delay and expense might result from repeated disagreements by partisan juries.[71] In proceedings of this character the statute contemplates that the contest shall be tried as an action at law without the intervention of a jury.[72] In one jurisdiction at least the practice in contested election cases is to all intents and purposes the same as in chancery and not as in actions at law.[73] It should be observed, however, in this connection that cases are not

62. Continuances in civil cases generally see Continuances in Civil Cases.

63. Keller *v.* Chapman, 34 Cal. 635; Norwood *v.* Kenfield, 34 Cal. 329.

64. Lord *v.* Dunster, 79 Cal. 477, 21 Pac. 865.

Statute directory only.— Kraleman *v.* Sippel, 57 Mo. App. 598.

65. Keller *v.* Chapman, 34 Cal. 635.

66. English *v.* Dickey, 128 Ind. 174, 27 N. E. 495, 13 L. R. A. 40.

67. Nicholls *v.* Barrick, 27 Colo. 432, 62 Pac. 202.

68. Trial generally see Trial.

69. Boring *v.* Griffith, 1 Heisk. (Tenn.) 456.

Issue as to legality of votes.— Under the Michigan statute see People *v.* Kamps, 129 Mich. 217, 88 N. W. 475.

Time to file a reply.— See Rodman *v.* Wurzburg, 183 Ill. 395, 55 N. E. 688.

70. *Alabama.*— Taliaferro *v.* Lee, 97 Ala. 92, 13 So. 125.

Arkansas.— Wise *v.* Martin, 36 Ark. 305; Govan *v.* Jackson, 32 Ark. 553.

Georgia.— Freeman *v.* State, 72 Ga. 812.

Indiana.— Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700; Corey *v.* Lugar, 62 Ind. 60; French *v.* Lighty, 9 Ind. 475, 477 note.

Minnesota.— Ford *v.* Wright, 13 Minn. 518; Whallon *v.* Bancroft, 4 Minn. 109.

Oregon.— Hughes *v.* Holman, 23 Oreg. 481, 32 Pac. 298.

Pennsylvania.— Ewing *v.* Filley, 43 Pa. St. 384; Kneass' Case, 2 Pars. Eq. Cas. 553, Brightly Lead. Cas. El. 260, 266; Thompson *v.* Ewing, 1 Brewst. 67.

See 18 Cent. Dig. tit. "Elections," § 308 *et seq.*

71. Kneass' Case, 2 Pars. Eq. Cas. (Pa.) 553, Brightly Lead. Cas. El. 260.

Provision that contest shall be tried in the same manner as a civil action.— Under a statute which provides that an appeal in an election contest from the decision of the board of county canvassers to the district court shall be heard and tried by the district court of the proper county in the manner that civil actions are tried by that court, the district court may try such contests without a jury. Newton *v.* Newell, 26 Minn. 529, 6 N. W. 346.

72. Hughes *v.* Holman, 23 Oreg. 481, 32 Pac. 298; Fenton *v.* Scott, 17 Oreg. 189, 20 Pac. 95, 11 Am. St. Rep. 801; Hartman *v.* Young, 17 Oreg. 150, 20 Pac. 17, 11 Am. St. Rep. 787, 2 L. R. A. 596.

73. Page *v.* Kuykendall, 161 Ill. 319, 43 N. E. 1114, 32 L. R. A. 656; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; Dale *v.* Irwin, 78 Ill. 170; Talkington *v.* Turner, 71 Ill. 234.

wanting where it appears that the issues of fact in contested election proceedings were submitted to a jury.[74]

M. Judgment[75]— **1. In General.** A quo warranto proceeding adjudges the right to the office to no one; it determines only whether the person exercising it is a usurper and ousts him if the judgment is in favor of the relator.[76] But in a statutory contest at the suit of a defeated candidate, whatever the proceeding may be styled, the effect of the judgment if the contestant prevails is not only to oust the incumbent but to put the contestant in possession of the office.[77] Consequently a jury selected to try a contested election case instituted by a rival candidate against one who has by the proper authority been declared duly elected at a regular election is authorized to decide and should determine which of the candidates was elected, or that there was no valid election of either as the facts may warrant. A finding that the contestee did not receive a majority of all the legal votes at that election and a decision that he was therefore not elected to the office is incomplete and insufficient.[78]

2. Legal Effect of Judgment of Ouster. The legal effect of a judgment of ouster from an office while it stands is to render null and void all subsequent pretended official acts of the person ousted.[79]

3. After Term of Office Has Expired. Although the office has expired when judgment on the rights of the parties comes to be pronounced, the court will notwithstanding proceed and pronounce judgment when the relator if successful is entitled to costs.[80]

4. Conclusive Effect of Judgment. A judgment of amotion while it stands is a bar to proceedings by mandamus to restore the ousted officer, although he

74. *California.*— Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 49 Am. St. Rep. 64, 29 L. R. A. 673.

Indiana.— Parvin *v.* Wimberg, 130 Ind. 561, 30 N. E. 790, 30 Am. St. Rep. 254, 15 L. R. A. 775.

Iowa.— State *v.* Funck, 17 Iowa 365.

Louisiana.— State *v.* Head, 22 La. Ann. 54.

Michigan.— People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 140; Carleton *v.* People, 10 Mich. 250.

New York.— People *v.* Livingston, 79 N. Y. 279; People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

North Carolina.— State *v.* Nicholson, 102 N. C. 465, 9 S. E. 545, 11 Am. St. Rep. 767; Gatling *v.* Boone, 101 N. C. 61, 7 S. E. 477.

Texas.— Little *v.* State, 75 Tex. 616, 12 S. W. 965; Hunnicutt *v.* State, 75 Tex. 233, 12 S. W. 106.

See 18 Cent. Dig. tit. "Elections," § 308 *et seq.*

75. Judgment generally see Judgments.

76. State *v.* Francis, 88 Mo. 557.

77. Fulgham *v.* Johnson, 40 Ga. 164; State *v.* Ralls County Ct., 45 Mo. 58. In Moock *v.* Conrad, 155 Pa. St. 586, 598, 26 Atl. 700, Williams, J., said: "The object of the contest is to test the correctness of the returns. On the trial the court may hear the testimony of witnesses, require the production of the ballot boxes, open them, make a recount of the votes, and determine what the actual result of the election was. It may give this result final form by a decree declaring the vote received by the several candidates and naming the persons elected."

78. State *v.* Wright, 56 Ohio St. 540, 47 N. E. 569.

79. Fulgham *v.* Johnson, 40 Ga. 164; Rex *v.* Serle, 8 Mod. 332.

Conclusive effect of judgment of legislature. — The judgment of the legislature in a contest for the office of governor is final and conclusive, and the incumbent being adjudged not to be entitled to the office his powers immediately cease, the judgment being self-executing; and therefore a pardon thereafter granted by him is void, although he retains possession of the executive building, archives, and records. Powers *v.* Com., 61 S. W. 735, 22 Ky. L. Rep. 1807, 53 L. R. A. 245.

Where new election is ordered.— Under the Maryland statute where a person has been declared duly elected to an office and commissioned by the governor, he is entitled to possession of the office until his successor is elected and qualified, although the house of delegates on contest has declared his election illegal and ordered a new election; but the commission cannot confer upon him the rights of an officer elected by the voters. It in fact entitles him after qualification to hold the office only temporarily as a mere *locum tenens*, until the election and qualification of his successor. Wells *v.* Munroe, 86 Md. 443, 38 Atl. 987; Ijams *v.* Duvall, 85 Md. 252, 36 Atl. 819, 36 L. R. A. 127.

80. People *v.* Loomis, 8 Wend. (N. Y.) 396, 24 Am. Dec. 33. See Hammer *v.* State, 44 N. J. L. 667, 671 [*citing* People *v.* Loomis, 8 Wend. (N. Y.) 396, 24 Am. Dec. 33; Reg. *v.* Blizard, L. R. 2 Q. B. 55, 7 B. & S. 922, 36 L. J. Q. B. 18, 15 L. T. Rep. N. S. 242, 15 Wkly. Rep. 105; Rex *v.* Holt, 2 Chit. 360, 18 E. C. L. 680; Rex *v.* Williams, 1 W. Bl. 93; Cole Cr. Informations 204, and *affirming* 42 N. J. L. 435].

may have been duly elected.[81] So also a judgment in favor of the contestant in a statutory contest is conclusive while it stands, and the matter will not again be litigated in a proceeding in the nature of a quo warranto.[82]

5. IMPOSING FINE IN QUO WARRANTO. Where there is no pretense of improper motives on the part of him against whom judgment of ouster from his office is rendered on an information in the nature of a quo warranto, the fine imposed should be nominal merely.[83]

6. BINDS ONLY PARTIES AND PRIVIES. A judgment of ouster in an action in the nature of a quo warranto does not conclude one who is in no sense a party to the action and does not take office from or in any way hold under the defeated party; nor is it competent evidence against him.[84]

7. FORM OF IN CASE OF TIE. Where the court finds that the contestant and the contestee received an equal number of legal votes, the judgment should be that the contestant takes nothing.[85]

8. DECLARING ELECTION VOID. Where there is an improper omission or addition to official ballots which prevents the free exercise of the franchise by electors which misleads them, the tribunal hearing the contest must decide the election invalid and certify the decision to the governor for a new election.[86] So too by statutory authority where such a number of voters were by the officers of election denied the privilege of voting, as had they been allowed to vote the result would have been materially changed, the court may adjudge the election void and direct another election to fill the offices.[87]

9. OF TRIBUNAL APPOINTED UNDER UNCONSTITUTIONAL LAW. The judgment of a tribunal appointed under an unconstitutional law is void and confers no rights on a contestant.[88]

10. TIME OF RENDITION. Where the jurisdiction of statutory contests is placed in courts as term cases the judgment must be announced at some time during the term at which the trial occurs.[89]

11. ANSWER TAKEN PRO CONFESSO. Where the answer is taken *pro confesso*, it is error to render judgment for the contestee, where proof of the allegations of the petition would still entitle the contestant to recover.[90]

12. JUDGMENT BY DEFAULT. A contestant should not be permitted to take judgment by default annulling the election of the contestee for want of an answer.[91] So too in the house of representatives of the United States it has been held that a failure to answer cannot have the effect of unseating the contestee and seating the contestant. Proof of the facts will be required however the sitting member may have managed his own case.[92]

13. POWER OF COURT OVER JUDGMENT OR DECREE. The court in which an election contest is pending has full power during the term at which a decree is entered to revise, correct, amend, or vacate such decree, or to open the decree

81. Rex *v.* Serle, 8 Mod. 332.

82. Atty.-Gen. *v.* Sands, 68 N. H. 54, 44 Atl. 83.

83. State *v.* Brown, 5 R. I. 1.

84. People *v.* Murray, 73 N. Y. 535.

85. Snibley *v.* Palmtag, 128 Cal. 283, 60 Pac. 860.

86. *In re* Leh, 6 Pa. Dist. 152.

87. Under such a statute it was held that an election was properly adjudged void and a new election ordered where the contestant received but one vote less than the contestee, and one of the persons who voted for the contestee was not a legal voter and a person who was entitled to vote but was denied the right by the election officers would have voted for the contestant. Rathgen *v.* French, 22 Tex. Civ. App. 439, 55 S. W. 578.

88. Pratt *v.* Breckenridge, 65 S. W. 136, 23 Ky. L. Rep. 1356.

89. Orr *v.* Bailey, 59 Nebr. 128, 80 N. W. 495.

90. Preston *v.* Price, 77 S. W. 623, 24 Ky. L. Rep. 1090.

91. Keller *v.* Chapman, 34 Cal. 635; Searcy *v.* Grow, 15 Cal. 117.

No legal notice of trial.— A judgment rendered on default in a suit to contest the right to an office when the court is not in regular session without giving the parties interested legal notice of the trial is null and void. State *v.* Billings, 23 La. Ann. 798.

92. Sheridan *v.* Pinchback, Smith Cas. Cont. El. 196. See Follett *v.* Delano, 2 Bartl. Cas. Cont. El. 113.

and hold it in abeyance, until issues on an intervening petition can be formed and determined.[93]

N. New Trial.[94] In special proceedings, such as statutory election contests, the court looks to the statute alone for authority; and the question whether in a given case the court can exercise any power or adopt any of the forms of procedure common to courts of law must be determined by the provisions of the statute conferring jurisdiction. Accordingly it has been held that the court has no power to grant a new trial in a contested election case, unless the statute confers such power;[95] and where the trial of such cases proceeds in the manner of suits in chancery, it has been held that the court in which the proceedings are instituted has no jurisdiction to review by bill of review a decree after the term at which it was rendered.[96] It would seem, however, that courts of general jurisdiction have power to entertain motions for new trials in such case under statutes empowering them to grant new trials generally.[97]

O. Appeal[98]— **1. Right of.** The right to appeal from the decisions of inferior courts and tribunals in election cases does not exist, unless it has been conferred by some constitutional or statutory provision.[99] And statutes authorizing appeals or writs of error to be taken from judgments rendered in civil cases do not apply to contested election proceedings under the statute as they are not civil cases.[1] But in some jurisdictions appeals and writs of error are authorized in such cases either by constitutional or statutory provisions.[2] The proceeding, however, is

93. Weinberg *v.* Noonan, 193 Ill. 165, 61 N. E. 1022. In this case immediately after the decree had been entered on the petition and defendant's answer disclaiming all right to the office, an order was entered by consent of both parties granting leave to an intervener to file his petition. It was held error for the court of its own motion to strike his petition from the files.

94. New trial generally see NEW TRIAL.

95. Dorsey *v.* Barry, 24 Cal. 449.

Appeal the only remedy.— The California statutes regulating election contests are special and summary; and the only remedy provided therein for a party aggrieved by the decision of the superior court being an appeal to the supreme court a motion for a new trial cannot be made. Packard *v.* Craig, 114 Cal. 95, 45 Pac. 1033.

96. Allerton *v.* Hopkins, 160 Ill. 448, 43 N. E. 753.

97. *Arkansas.*— Aven *v.* Wilson, 61 Ark. 287, 32 S. W. 1074.

New York.— People *v.* McGuire, 60 N. Y. 640 [*affirming* 2 Hun 269].

North Carolina.— Gatling *v.* Boone, 98 N. C. 573, 3 S. E. 392.

Pennsylvania.— *In re* Sheppard, 77 Pa. St. 295 [*affirming* 8 Phila. 469]; *In re* Contested Elections, 2 Brewst. 1.

Texas.— Henderson *v.* Albright, 12 Tex. Civ. App. 368, 34 S. W. 992.

See 18 Cent. Dig. tit. "Elections," § 314.

98. Appeal generally see APPEAL AND ERROR.

99. *Indiana.*—French *v.* Lighty, 9 Ind. 475.

Louisiana.— Rice *v.* De Buys, 5 La. Ann. 398.

New Mexico.— Arellano *v.* Chacon, 1 N. M. 269 [*overruling* Quintana *v.* Tompkins, 1 N. M. 29].

Ohio.— Stearns *v.* Wyoming, 53 Ohio St. 352, 41 N. E. 578; State *v.* Belmont County Com'rs, 31 Ohio St. 451.

Oregon.— Simon *v.* Portland, 9 Oreg. 437.

Pennsylvania.— Lyon *v.* Dunp, 196 Pa. St. 90, 46 Atl. 384; *In re* Yonkin, (1888) 13 Atl. 750; *In re* Election Cases, 65 Pa. St. 20; *In re* Carpenter, 14 Pa. St. 486; *In re* Contested Elections, 2 Brewst. 1; Mitton's Appeal, 2 Pennyp. 380.

South Carolina.— Whipper *v.* Talbird, 32 S. C. 1, 10 S. E. 578.

Texas.— Gibson *v.* Templeton, 62 Tex. 555; *Ex p.* Towles, 48 Tex. 413; Rogers *v.* Johns, 42 Tex. 339; O'Docherty *v.* Archer, 9 Tex. 295.

See 18 Cent. Dig. tit. "Elections," § 317 *et seq.*

When judge does not sit as a court.— A statute providing that all papers in an election contest shall be transmitted to the judge of the superior court, who shall determine the same either in term-time or in chambers, does not confer upon the superior court jurisdiction of such contests, but merely designates the judge as the person who shall perform the duties prescribed, and hence the action of the judge cannot be reviewed on error. Carter *v.* Janes, 96 Ga. 280, 23 S. E. 201.

In South Carolina.— The state board of canvassers is the tribunal of last resort, and from its determination no appeal is allowed by law. Pettigrew *v.* Bell, 34 S. C. 104, 12 S. E. 1023; *Ex p.* Whipper, 32 S. C. 5, 10 S. E. 579; *Ex p.* Mackay, 15 S. C. 322.

Jurisdiction of supreme court limited by the constitution.— Williamson *v.* Lane, 52 Tex. 335.

1. Buckler *v.* Turbeville, 17 Tex. Civ. App. 120, 42 S. W. 810.

2. *Indiana.*— Weakley *v.* Wolf, 148 Ind. 208, 47 N. E. 466.

purely statutory and the jurisdiction of the court over it, except for errors apparent on the record that may be reached on a common-law writ of certiorari, depends on the statutes creating and regulating it.[3]

2. NOTICE OF. Notice of appeal is not premature where given after the judgment has been announced, although before it has been reduced to writing and filed.[4]

3. TIME FOR TAKING. An appeal in an election contest will be dismissed unless taken within the time prescribed by statute after the entry of final judgment in the contest.[5]

4. QUESTIONS NOT RAISED BELOW. No question should be considered or passed upon by the court upon appeal which does not appear by the record to have been raised or passed upon in the court below.[6] Thus where the contestant's statement that he was qualified to hold the office went unchallenged at the trial, the incumbent cannot defeat a canvass of the vote on appeal on the ground that the contestant failed to prove on the trial that he was eligible.[7] So also it has been held that objections to the manner of marking the ballots which were not raised in the court below cannot be considered on appeal.[8] And it has also been deter-

Kansas.— Bland *v.* Jackson, 51 Kan. 496, 33 Pac. 295; Buckland *v.* Goit, 23 Kan. 327; State *v.* Sheldon, 2 Kan. 322.

Kentucky.— Wilson *v.* Hines, 99 Ky. 221, 35 S. W. 627, 37 S. W. 148, 18 Ky. L. Rep. 233; Imboden *v.* Cully, 94 Ky. 45, 21 S. W. 339, 14 Ky. L. Rep. 701.

Maine.— Curran *v.* Clayton, 86 Me. 42, 29 Atl. 930.

Maryland.— Shaeffer *v.* Gilbert, 73 Md. 66, 20 Atl. 434; Baltimore *v.* Fledderman, 67 Md. 161, 8 Atl. 758.

Mississippi.— Perkins *v.* Carraway, 59 Miss. 222.

See 18 Cent. Dig. tit. "Elections," § 317

24 Pac. 218.

See 18 Cent. Dig. tit. "Elections," § 317 *et seq.*

In California the constitution gives the supreme court jurisdiction on appeal from judgments rendered in contested election cases in the county courts. Day *v.* Jones, 31 Cal. 261; Knowles *v.* Yates, 31 Cal. 82; Dorsey *v.* Barry, 24 Cal. 449.

In Tennessee it was held that from the decisions of the special tribunal created to decide cases of contested elections no appeal or writ of error would lie to the supreme court (Wade *v.* Murry, 2 Sneed 50); but that the judgment of the county court on a contested election of constable was subject to revision in the circuit court on appeal (Dodd *v.* Weaver, 2 Sneed 670).

No findings of fact by the court below.— An assignment of error complaining of the refusal of the court to count votes for the relator and its rulings in counting votes for the respondent cannot be considered, where there are no findings of fact by the court showing which votes were received and counted and which were rejected. Davis *v.* State, 75 Tex. 420, 12 S. W. 957.

3. Moock *v.* Conrad, 155 Pa. St. 586, 26 Atl. 700.

Thus where the statute authorizes an appeal, the word is used in its technical or distinctive sense and not generally, and does not authorize a proceeding in error. Mauck *v.* Brown, 59 Nebr. 382, 81 N. W. 313; Buckler *v.* Turbeville, 17 Tex. Civ. App. 120, 42 S. W. 810.

No appeal from an order opening a default. — Jensen *v.* Petty, 14 S. D. 434, 85 N. W. 923.

4. Mentzer *v.* Davis, 109 Iowa 528, 80 N. W. 557.

5. Murray *v.* Whitmore, 9 S. D. 288, 68 N. W. 745.

Petition for a rehearing.— Strong *v.* Jones, 101 Ky. 652, 42 S. W. 752, 43 S. W. 704, 19 Ky. L. Rep. 1298.

Appeal not taken in time.— The objection that the judgment in a contested election case is not sustained by the evidence cannot be made on appeal under a statute authorizing such appeal subject to rules of the law regulating appeals in other cases, unless the appeal has as required in other cases been taken within sixty days after judgment. Packard *v.* Craig, 114 Cal. 95, 45 Pac. 1033.

6. Crabb *v.* Orth, 133 Ind. 11, 32 N. E. 711; Curry *v.* Miller, 42 Ind. 320; Shaeffer *v.* Gilbert, 73 Md. 66, 20 Atl. 434.

Sufficiency of notice.— Lunsford *v.* Culton, 23 S. W. 946, 15 Ky. L. Rep. 504.

New grounds of objection on appeal.— On the trial before the proper board of a proceeding to contest an election after a motion to quash the summons, made on a special appearance and overruled for vagueness of the notice, while a party may on the appeal renew his motion as made below he cannot move anew for the same purpose, specifying new grounds of objection. Hadley *v.* Gutridge, 58 Ind. 302.

Objection to disclosure of vote.— In an election contest the objection that a voter cannot be compelled to disclose his vote, if not taken in the lower court, cannot be urged on appeal. State *v.* Olin, 23 Wis. 309.

7. Morrison *v.* Pepperman, 112 Iowa 471, 84 N. W. 522.

8. People *v.* Campbell, 138 Cal. 11, 70 Pac. 918.

mined, following the general rule of appellate procedure, that the theory of the case adopted in the court below must be adhered to on appeal.[9]

5. OBJECTIONS AND EXCEPTIONS. Special findings of fact not excepted to are conclusive upon subsequent proceedings on appeal or error;[10] and the rulings of the trial court will not be reviewed by the appellate court, unless exceptions were reserved thereto at the trial.[11]

6. REVIEW OF QUESTIONS OF FACT. The appellate court will not determine disputed or doubtful questions of fact in contested election cases.[12] Thus the question as to whether marks placed on a ballot were intended by the voter as marks of identification is a question of fact for the determination of the trial court and will not be reviewed on appeal,[13] unless the original ballots are certified to the appellate court for its inspection.[14] The appellate court merely determines whether the conclusions of law are warranted by the findings of fact;[15] and the findings of fact will not be reviewed if the bill of exceptions does not purport to contain all the evidence.[16]

Marking a cross after the words "no nomination."— Where in an election contest a ballot is not objected to on the ground that the voter had marked a cross after the words "no nomination," such objection cannot be considered on appeal. People *v.* Campbell, 138 Cal. 11, 70 Pac. 918.

9. Crabb *v.* Orth, 133 Ind. 11, 32 N. E. 711.

10. Baker *v.* Long, 17 Kan. 341.

11. Lay *v.* Parsons, 104 Cal. 661, 38 Pac. 447.

Counting ballots not marked with judge's initials.— A ruling of the county court in an election contest in counting ballots not containing the initials of any judge of election will not be reviewed on appeal, where no objection to the ruling was made in the court below. Perkins *v.* Bertrand, 192 Ill. 58, 61 N. E. 405, 85 Am. St. Rep. 315.

12. *California.*— Preston *v.* Culbertson, 58 Cal. 198.

Kentucky.— Imboden *v.* Cully, 94 Ky. 45, 21 S. W. 339, 14 Ky. L. Rep. 701; Newcum *v.* Kirtley, 13 B. Mon. 515; Lunsford *v.* Culton, 23 S. W. 946, 15 Ky. L. Rep. 504; Cowan *v.* Prowse, 93 Ky. 156, 19 S. W. 407, 14 Ky. L. Rep. 273.

Missouri.— Nash *v.* Craig, 134 Mo. 347, 35 S. W. 1001; Lankford *v.* Gebhardt, 130 Mo. 621, 32 S. W. 1127, 51 Am. St. Rep. 585; Gumm *v.* Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312; Donnell *v.* Lee, 10 Mo. App. 191, 73 S. W. 997.

Nevada.— Dennis *v.* Caughlin, 23 Nev. 188, 14 Pac. 818.

North Carolina.— Norment *v.* Charlotte, 85 N. C. 387.

See 18 Cent. Dig. tit. "Elections," § 329.

13. Spurrier *v.* McLennan, 115 Iowa 461, 88 N. W. 1062.

Intent of voter in marking his ballot.— Where a voter marks his ballot in the squares in several of which it is doubtful whether the lines really form a cross and in one of which the lines just meet so that no cross was formed, the question whether the departure from the prescribed marks was deliberate or merely accidental or careless is one of fact for the trier. Voorhees *v.* Arnold, 108 Iowa 77, 78 N. W. 795. So a doubtful question as to whether unauthorized marks were made with a deliberate intent and can be used to identify the ballot is one of fact for the trier. Voorhees *v.* Arnold, 108 Iowa 77, 78 N. W. 795. At a township election fourteen ballots were cast on which a person had written his own name as a candidate in a blank space left under the words "chosen freeholder" printed on the ballots. It was held that the question whether the ballots were invalid as marked ballots was one of fact for the circuit court on a contest and that the decision of that court could not be reviewed on an appeal under the election law. Hackett *v.* Mayhew, 62 N. J. L. 481, 41 Atl. 688.

14. Perkins *v.* Bertrand, 192 Ill. 58, 66, 62 N. E. 405, 85 Am. St. Rep. 315.

15. Van Winkle *v.* Crabtree, 34 Oreg. 462, 55 Pac. 831, 56 Pac. 74.

Sufficiency of findings.— A finding that plaintiff had a majority of the votes cast on the official precinct return and that she also had a majority on a count of the ballots of the only precinct in dispute is sufficient to support a judgment declaring plaintiff elected and awarding to her the office in dispute. Eakin *v.* Campbell, 10 N. D. 416, 87 N. W. 991.

16. McDonald *v.* Wood, 118 Ala. 589, 24 So. 86.

Thus a finding by the jury on conflicting evidence that the ballots counted by the board of county canvassers at the recount were the same ballots that were voted is conclusive. Atty.-Gen. *v.* Campbell, (Mich. 1902) 92 N. W. 787.

Where the law makes the judge the trier of facts in cases to which the constitutional right to trial by jury does not extend, as in election cases, his findings of fact are as conclusive as the verdict of a jury. Jones *v.* Glidewell, 53 Ark. 161, 13 S. W. 723, 7 L. R. A. 831.

Where the proceeding under the statute is in the nature of a chancery proceeding, the rule in chancery practice that in order to uphold the decree it must appear upon the record that it is supported by the proofs should be applied upon appeal. Kingery *v.* Berry, 94 Ill. 515.

7. Trial De Novo. Upon appeal in a contested election case the cause must be tried in the appellate court on the record alone and not *de novo*;[17] and, although it be provided by statute that the trial of the contest shall be conducted by the court without the intervention of a jury, this does not make it a chancery case in such a sense that there can be a trial *de novo*.[18]

8. Construction of Ballots. The construction to be given the markings on official ballots is a question of law for the court and not for the jury, and hence is properly brought before the appellate court by a bill of exceptions.[19]

9. Order Refusing to Quash Petition. No appeal lies from an order refusing to quash a petition in a contested election case.[20]

10. Reversible Error. It has been held that where the record does not purport to contain all the evidence in an election contest the erroneous admission of a single vote is reversible error.[21] So where the contest was triable by the court without a jury, and there have been no findings as to material issues presented by the pleadings, the judgment will be reversed.[22]

11. Harmless Error. Error at the trial of an election contest whatever it may be will be treated as harmless if it is apparent that it could not have affected the result.[23] Thus it is harmless error to exclude evidence that certain votes counted for the contestee were in fact cast for the contestant, where if they were counted in favor of the contestant the contestee would still have a majority.[24]

12. Effect as Supersedeas. It has been held that a writ of error or an appeal from a judgment of ouster accompanied by a suitable bond operates as a supersedeas to the judgment.[25] But according to the weight of authority the right of a successful party in an election contest to perform the duties of the office and receive the emoluments thereof is neither stayed nor obstructed by an appeal, where there is no provision of the statute requiring a suspension of the judgment.[26] Where a stay is allowed the ousted party should be required to give a

17. Griffin *v.* Wall, 32 Ala. 149; Spurrier *v.* McLennan, 115 Iowa 461, 88 N. W. 1062.

Aliter on appeal from statutory contest court.— Brown *v.* Crosson, 115 Iowa 256, 88 N. W. 366.

18. Hughes *v.* Holman, 23 Oreg. 481, 32 Pac. 298. A statute providing that appeals shall be docketed and stand for trial as ordinary actions and shall be tried anew as if no judgment had been rendered was held to relate exclusively to appeals from judgments of certain courts of inferior jurisdiction and to have no application to appeals from an election board. Cowan *v.* Prowse, 93 Ky. 156, 19 S. W. 407, 14 Ky. L. Rep. 273.

19. Church *v.* Walker, 10 S. D. 90, 72 N. W. 101.

20. The petition and the order to answer simply bring the respondent into court where he may be fully heard. There is no judgment of final order in the case and the investigation is but just begun. Moock *v.* Conrad, 155 Pa. St. 586, 26 Atl. 700; *In re* Election Cases, 65 Pa. St. 20.

21. McDonald *v.* Wood, 118 Ala. 589, 24 So. 86.

22. Breding *v.* Williams, 33 Oreg. 391, 54 Pac. 206.

23. Litsey *v.* Moffett, 29 Kan. 507; Atty.-Gen. *v.* May, 99 Mich. 538, 58 N. W. 483, 25 L. R. A. 325; Ewing *v.* Filley, 43 Pa. St. 384. At the trial of a contested election the question to be determined is, Who received the highest number of votes for the office in dispute? If that question can be decided from the competent evidence introduced, then any errors of the contest court must be deemed to be immaterial. Blue *v.* Peter, 40 Kan. 701, 20 Pac. 442.

Compelling voters to testify after claiming their privilege.— Sorenson *v.* Sorenson, 189 Ill. 179, 59 N. E. 555.

Counting illegal ballots for both sides.— Van Winkle *v.* Crabtree, 34 Oreg. 462, 55 Pac. 831, 56 Pac. 74.

Testimony of the declaration of an alleged illegal voter as to the place he came from is harmless where it is proved that he was an illegal voter. Gray *v.* State, 19 Tex. Civ. App. 521, 49 S. W. 699.

Admission of original minutes of city council.— Gray *v.* State, 19 Tex. Civ. App. 521, 49 S. W. 699.

24. Groff *v.* Clark, 146 Ind. 52, 44 N. E. 803.

25. Grelle *v.* Pinney, 62 Conn. 478, 26 Atl. 1106; U. S. *v.* Addison, 22 How. (U. S.) 174, 16 L. ed. 304.

Stay granted by court.—People *v.* Nolan, 10 Abb. N. Cas. (N. Y.) 471, 63 How. Pr. (N. Y.) 271.

Execution of bond.— Keller *v.* Ferguson, 72 S. W. 785, 24 Ky. L. Rep. 2012.

26. *Minnesota.*— Allen *v.* Robinson, 17 Minn. 113.

Missouri.— State *v.* Woodson, 128 Mo. 497, 31 S. W. 105.

Nebraska.— State *v.* Kearney, 28 Nebr. 103, 44 N. W. 90; State *v.* Meeker, 19 Nebr. 444,

bond to the contestant, conditioned that if the judgment be affirmed or the appeal dismissed, the appellant will pay the value of the use of the office from the time of the appeal until the delivery of possession to the contestant.[27]

18. JUDGMENT. In reversing the decision of an inferior tribunal the appellate court will itself render the judgment which ought to have been rendered whenever the record enables it to do so.[28]

P. Certiorari.[29] Although no form of review is provided by statute the court may nevertheless exercise such supervisory control as is proper on certiorari.[30] But upon certiorari the court can see only that the successive steps taken in the trial were in accordance with the statute, and cannot review the case on its merits.[31]

Q. Bills of Exceptions.[32] The usual mode of getting the evidence before the appellate court is by a bill of exceptions settled and signed by the court or other tribunal before which the contest was tried.[33] And the ballots or *fac-simile* copies of them as well as other evidence must be made a part of the bill of exceptions, if they are to be considered by the appellate court;[34] and in the absence of a bill of exceptions the appellate court in reviewing the action of the trial court can notice only such errors as appear upon the face of the record proper.[35]

27 N. W. 427; Gandy *v.* State, 10 Nebr. 243, 4 N. W. 1019.

Ohio.— Lewis *v.* Marion County Com'rs, 14 Ohio St. 515.

Pennsylvania.— Ewing *v.* Thompson, 43 Pa. St. 372, Brightly Lead. Cas. El. 573.

South Dakota.— Fylpaa *v.* Brown County, 6 S. D. 634, 62 N. W. 962.

See 18 Cent. Dig. tit. "Elections," § 322.

27. Sweeney *v.* Karsky, 25 Nev. 197, 58 Pac. 813.

28. Griffin *v.* Wall, 32 Ala. 149; Mandlove *v.* Pavy, 33 Ind. 505.

Judgment for costs after expiration of term.— Boring *v.* Griffith, 1 Heisk. (Tenn.) 456.

Contest remanded for further hearing.— Farnham *v.* Boland, 134 Cal. 151, 66 Pac. 200.

29. Certiorari generally see CERTIORARI.

30. Com. *v.* Ramsay, 166 Pa. St. 642, 31 Atl. 345.

Certiorari to inferior tribunals.— In West Virginia a writ of error and supersedeas will not lie to the judgment of a county court or other inferior tribunal in an election case. Certiorari is the proper mode of bringing such proceedings before the circuit court for review. Alderson *v.* Kanawha County Com'rs, 31 W. Va. 633, 8 S. E. 274; Chenowith *v.* Randolph County Com'rs, 26 W. Va. 230; Fowler *v.* Thompson, 22 W. Va. 106; Swinburn *v.* Smith, 15 W. Va. 483.

Order refusing to quash petition.— An order refusing to quash an election petition, where the record discloses only the petition and order to answer and a motion to quash which has been refused, cannot be reviewed on certiorari. Moock *v.* Conrad, 155 Pa. St. 586, 26 Atl. 700.

31. Com. *v.* Ramsay, 166 Pa. St. 642, 31 Atl. 345; *In re* Election Cases, 65 Pa. St. 20; *In re* Barber, 7 Leg. Gaz. (Pa.) 126 [*reversing* 10 Phila. 579, 3 Luz. Leg. Reg. 153].

32. Bills of exceptions generally see APPEAL AND ERROR.

33. Litsey *v.* Moffett, 29 Kan. 507; State *v.* Sheldon, 2 Kan. 322.

Mandamus to compel signing of bill.— Fleming *v.* Kanawha County Com'rs, 31 W. Va. 608, 8 S. E. 267.

No bill of exceptions allowed.— In Pennsylvania there is no bill of exceptions allowed in contested election cases. The only way to get the evidence before the court is by special agreement of the parties. Mann *v.* Cassidy, 1 Brewst. (Pa.) 11; Brisbane *v.* Van Lear, 14 Pittsb. Leg. J. (Pa.) 17, 2 Pittsb. Leg. J. N. S. 17.

Case made.— A contest court has no power to settle and sign a case made. Litsey *v.* Moffett, 29 Kan. 507.

34. In an election contest a ruling excluding a ballot on account of the insufficiency of the marking will not be reviewed, unless the record contains the original ballot or a *fac-simile* copy thereof; a verbal description of the mark being insufficient. Lay *v.* Parsons, 104 Cal. 661, 38 Pac. 447. In an election contest the court refused to allow ballots introduced in evidence to be incorporated into the bill of exceptions, on the ground that he had not ordered them to be marked as exhibits in the case. It appeared elsewhere in the bill of exceptions that the ballots were marked as exhibits with the knowledge of the court and that the court had ordered the clerk to preserve the ballots and seal them up. It was held that since the ballots could be identified with certainty plaintiff was entitled to have them certified to the supreme court. Jennings *v.* Brown, 109 Cal. 290, 41 Pac. 1085.

Settlement of bill including ballots.— Mauck *v.* Brown, 59 Nebr. 382, 81 N. W. 313.

Ballots included by stipulation and order of court.— McMahon *v.* Polk, 10 S. D. 296, 73 N. W. 77, 47 L. R. A. 830.

35. Miller *v.* Rolph, 8 Nebr. 438, 1 N. W. 123.

R. Costs[36] — **1. In General.** The court has no authority to give judgment for costs in a contested election case, unless there is a statute expressly authorizing it.[37] A statute regulating the taxation of costs in civil actions will not be construed to give such authority.[38] But by special statute where an election is contested upon issues joined, the prevailing party may be allowed a judgment for costs.[39] So also by special statute where there are probable grounds for a successful contest the costs may be imposed on the county,[40] city,[41] or election district;[42] and where such legislation exists an act imposing costs upon contestants in election cases where the contest has failed, whether probable cause has been shown or not, is prospective in its operation and does not apply to contests pending at the date of the passage of the act.[43] But costs cannot be awarded against the county, unless there is a special provision in the law for doing so.[44] Where the evidence shows that there was no probable cause for inaugurating the contest the costs should be placed upon the petitioners.[45] But these statutes apply only to contests had before the courts.[46]

2. In Case of Tie. It has been held that where it is determined in a contested election case that it was a tie vote, neither party can recover costs.[47] But on the other hand it has been held that in such case the contestant may recover his costs, for, although he has not established his right to the office, he has succeeded in ousting another who has no right to it.[48]

3. Bonds For Costs. A statute allowing an appeal in contested election cases may require an appeal-bond for costs as a condition of taking the appeal.[49] Where

Presumption in case no bill is reserved.— Peters *v.* Morey, 34 Nebr. 82, 51 N. W. 312.

Ballots not made a part of the record.— Edwards *v.* Logan, 69 S. W. 800, 24 Ky. L. Rep. 678.

36. **Costs** generally see Costs.

37. Borgstede *v.* Clark, 5 La. Ann. 733; West *v.* Ferguson, 16 Gratt. (Va.) 270.

Contest of county-seat election.— In a provision under the statute to contest the validity of a vote upon the question of the removal of a county-seat the prevailing party is not entitled to judgment for his disbursements, the same not being specially provided for by statute. Bayard *v.* Klinge, 16 Minn. 249.

38. Patterson *v.* Murray, 53 N. C. 278; West *v.* Ferguson, 16 Gratt. (Va.) 270.

39. Soto *v.* Vannoy, 65 Cal. 285, 3 Pac. 895; Gimbel *v.* Green, 134 Ind. 628, 33 N. E. 964, 34 N. E. 217; Knox *v.* Fesler, 17 Ind. 254; Esker *v.* McCoy, 5 Ohio Dec. (Reprint) 573, 6 Am. L. Rec. 694; Dean *v.* State, (Tex. Civ. App. 1895) 31 S. W. 546.

Discontinuance.— Where an election contest is discontinued, costs should be taxed against the contestant, under a statute which provides that costs in election contests shall be taxed and collected as other costs are. English *v.* Dickey, 128 Ind. 174, 27 N. E. 495, 13 L. R. A. 40.

40. *In re* O'Neil, 98 Pa. St. 461.

Proceedings coram non judice.— Where the proceedings growing out of an election contest are *coram non judice* because the election was unlawful, the court has no power, under a statute providing that in contested elections of county officers in which the court shall not decide that the complaint was without probable cause the county shall pay all costs, to say that there was probable cause for the contest. *In re* Stevens, 1 Lack. Leg. Rec. (Pa.) 476.

41. Where in an election contest it appeared that the election officers improperly allowed persons to vote who were not registered and that affidavits supposed to have been made by voters not registered in order to qualify them to vote were not found in the prothonotary's office where they are required by law to be filed, a probable cause for the contest was deemed to exist and the costs thereof taxed to the city whose officers were negligent. *In re* Brant, 13 York Leg. Rec. (Pa.) 145.

42. Kochersperger *v.* Hargrave, 6 Pa. Co. Ct. 510.

43. *In re* Thomas, 198 Pa. St. 546, 48 Atl. 489.

44. Walker *v.* Sanford, 78 Ga. 165, 1 S. E. 424.

45. Pearce *v.* Dickison, 12 Phila. (Pa.) 571; *In re* Hoff, 13 York Leg. Rec. (Pa.) 165; Dickinson's Case, 2 Leg. Rec. (Pa.) 103.

Where the election contest fails in limine because the parties fail to swear to the charges on which it is based it may be properly regarded as instituted without probable cause and the costs should be taxed to the petitioner. *In re* Ruddy, 5 Lack. Leg. N. (Pa.) 43.

46. The prevailing party cannot maintain an action for his disbursements in a contest before a legislative body. Steele *v.* Wear, 54 Mo. 531; Garrard *v.* Gallagher, 11 Nev. 382.

47. Soto *v.* Vannoy, 65 Cal. 285, 3 Pac. 895.

48. Gimbel *v.* Green, 134 Ind. 628, 33 N. E. 964, 34 N. E. 217.

49. Pearson *v.* Wilson, 57 Miss. 848.

the statute does not expressly require a bond on appeal and no stay of proceedings is sought no bond need be given.[50] So also the statute may require the contestant to file a bond for the protection of the contestee conditioned to pay all costs in case of failure to maintain his contest.[51] But this is not jurisdictional, and if no bond be given at the commencement of the contest or if an insufficient one be accepted by the court, it is incumbent on the contestee to object at the earliest opportunity; an objection comes too late after issues are joined and the cause is set down for trial.[52] Such a bond is not invalid because it runs to the state instead of to the contestee.[53] The wrongful neglect of the contestant to have his bond approved and filed as required by law cannot be taken advantage of by him or his sureties.[54] The statute, however, may be so worded as to make the giving of security for all costs jurisdictional, and where this is so until a proper bond is filed the court has no right to proceed.[55] A statute requiring the contestant to execute a bond for costs does not require the incumbent to execute such a bond when he sets up counter charges of illegal voting in answer to the statement of the contestant.[56] The court has no authority to tax the costs against the sureties on the bond of the unsuccessful party unless the statute expressly authorizes it.[57] Where the statute imposes no liability for costs upon either party in any contingency, security for costs is of course not demandable.[58]

4. Motion to Dismiss For Want of Sufficient Bond. Since a motion to dismiss an election contest on the ground that the bond filed was not such as is required by statute is in the nature of a plea in abatement to the proceeding, such motion cannot be sustained after the contestee has pleaded to the merits of the contest.[59]

5. Fees of Officers. Fees will not be given to officers by the courts, unless they are specially provided for by the statute.[60]

Where the execution of a bond is a condition precedent to the right of appeal, an appeal should be dismissed where no bond has been executed. The execution of a supersedeas bond in the court of appeals is not a compliance with the statute. Patterson *v.* Davis, 70 S. W. 47, 24 Ky. L. Rep. 842. Where the statute requires that an appeal-bond shall be executed within a certain number of days after the decision of the contest, a failure to execute a bond within that time is a bar to an appeal from a decision in the contest. Strong *v.* Jones, 101 Ky. 652, 42 S. W. 752, 43 S. W. 704, 19 Ky. L. Rep. 1298.

50. Mentzer *v.* Davis, 109 Iowa 528, 80 N. W. 557.

51. In an action on the bond given in an election contest proof of the judgment rendered on the contest is relevant as showing that the contest is ended and that the costs are due. McWhirter *v.* Frazier, 129 Ala. 450, 29 So. 445.

Requiring second bond.— McWhirter *v.* Frazier, 129 Ala. 450, 29 So. 445.

52. Nicholls *v.* Barrick, 27 Colo. 432, 62 Pac. 202.

Deposit of cash.— A statute which authorizes an appeal to the county judge by an elector who desires to attack the validity of an election to determine whether certain territory should be incorporated as a village on deposit of one hundred dollars with the county clerk to meet the expenses of appeal, and which further authorizes the payment of portions of such sum on a decision adverse to the appellant to the persons designated by the county judge, empowers the county judge to provide for the payment of the costs or expenses of the appeal out of the sum so deposited. Harrisville *v.* Lawrence, 66 Hun (N. Y.) 302, 21 N. Y. Suppl. 62.

Upon injunction against officers declared elected.— Upon the granting of an order restraining certain persons from exercising the duties of certain offices to which they have been declared elected, it is not error to require plaintiffs to give a bond for costs and damages. Moore *v.* Jones, 76 N. C. 189.

Inasmuch as the requirement is not jurisdictional, it is proper for the court to allow the contestant to execute a new and proper bond where his original security for costs was insufficient. Davis *v.* Jones, 123 Ala. 647, 26 So. 321.

53. Balcom *v.* Peacock, 59 Kan. 136, 52 Pac. 76.

54. Nehring *v.* Haines, 70 Minn. 233, 72 N. W. 1061.

55. Wilson *v.* Duncan, 114 Ala. 659, 21 So. 1017.

56. Kelso *v.* Wright, 110 Iowa 560, 81 N. W. 805.

57. Frazier *v.* McWhirter, 121 Ala. 308, 25 So. 804.

Notice to sureties.— Mills *v.* Sanderson, 68 Ark. 130, 56 S. W. 779.

58. *In re* Northampton County, 6 Pa. Dist. 148, 18 Pa. Co. Ct. 584.

59. Nicholls *v.* Barrick, 27 Colo. 432, 62 Pac. 202.

60. Garrard *v.* Gallagher, 11 Nev. 382.

XVIII. VIOLATIONS OF ELECTION LAWS.[61]

A. Offenses — 1. At Common Law. An examination of the authorities discloses that divers acts concerning elections have been held offenses at common law as tending to disturb the due regulation and domestic order of the state.[62] The following have been held to be acts of this description: Bribery or an attempt at bribery of an elector;[63] swapping votes;[64] repeating or voting more than once at a legal election;[65] the fraudulent change of a name in a watcher's certificate;[66] the making of false and fraudulent entries in the book of voters at an election, the depositing of false and fraudulent ballots, and the assuming and undertaking to count the ballots in a false and fraudulent manner by a person who is not an election officer;[67] and the destruction of the ballots so long as they furnish evidence by which the right to enjoy the prerogatives of an office may be determined.[68] So also an indictment lies at common law for disorderly behavior in town meetings.[69]

2. Statutory Offenses — a. Illegal Voting — (I) *In General.* It is a very general statutory provision that whoever knowingly and illegally votes at an election held according to law shall be deemed guilty of a criminal offense and upon conviction shall be punished as the statute directs.[70] In some cases also a mere attempt to vote illegally is an indictable offense.[71]

(II) *The Intent.* A guilty intent is a necessary ingredient of the crime of illegal voting, and a person to come within the statute must know at the time of his voting that he is not a qualified voter and that he is doing or attempting to do an unlawful act.[72] It has been held that ignorance of the law will not excuse a

61. For general matters relating to criminal law and criminal procedure see Criminal Law.

62. The argument upon which they rest is that there is nothing more essential to public order than that the government be conducted by those chosen for the purpose by the qualified voters, and that any act tending to prevent this is a public wrong which can be redressed only by a criminal prosecution. In Com. *v.* McHale, 97 Pa. St. 397, 411, 39 Am. Rep. 808, Paxson, J., said: "The ingenuity of politicians is such that offences against the purity of elections are constantly liable to occur which are not specifically covered by statute. It would be a reproach to the law were it powerless to punish them."

63. Curran *v.* Taylor, 92 Ky. 537, 18 S. W. 232, 13 Ky. L. Rep. 750; State *v.* Jackson, 73 Me. 91, 40 Am. Rep. 342.

64. Thus a corrupt agreement between A and B that A shall vote for C as commissioner in consideration that B will vote for D as clerk if carried into execution is an indictable misdemeanor at common law. Com. *v.* Callaghan, 2 Va. Cas. 460.

65. Com. *v.* Silsbee, 9 Mass. 417; Com. *v.* Huber, 13 Lanc. Bar (Pa.) 139.

66. Com. *v.* Weitzel, 24 Pittsb. Leg. J. N. S. 303.

67. Com. *v.* McHale, 97 Pa. St. 397, 39 Am. Rep. 808.

68. Mason *v.* State, 55 Ark. 529, 18 S. W. 827.

69. Com. *v.* Hoxey, 16 Mass. 385. And see 1 Saund. 135 note 3.

70. *Alabama.*— Gandy *v.* State, 82 Ala. 61, 2 So. 465; Wilson *v.* State, 52 Ala. 299; Nettles *v.* State, 49 Ala. 35.

Florida.— *Ex p.* Senior, 37 Fla. 1, 19 So. 652, 32 L. R. A. 133.

Iowa.— State *v.* Minnick, 15 Iowa 123.

Kentucky.— Com. *v.* Gale, 10 Bush 488.

Nebraska.— State *v.* Chichester, 31 Nebr. 325, 47 N. W. 934, 1 L. R. A. 104.

New York.— People *v.* Tripp, 4 N. Y. Leg. Obs. 344.

Rhode Island.— State *v.* McClarnon, 15 R. I. 462, 8 Atl. 688.

Tennessee.—State *v.* Liston, 9 Humphr. 603. See 18 Cent. Dig. tit. "Elections," § 338.

Voting by women.— U. S. *v.* Anthony, 24 Fed. Cas. No. 14,459, 11 Blatchf. 200.

Illegal voting at primary election.— One who being challenged insists after repeated warnings upon voting at a primary election in a ward in which he is not a qualified voter is guilty of a misdemeanor under the act of June 8, 1881, section 41, which makes it a misdemeanor for one not qualified to vote at a general election to vote at a nominating or primary election. Com. *v.* Polluck, 6 Pa. Dist. 559.

71. Com. *v.* Jones, 10 Phila. (Pa.) 211.

Offer by minor.— An offer to vote by one who knows himself to be under age is an offense. People *v.* Tripp, 4 N. Y. Leg. Obs. 344.

These statutes are denounced against double voting or repeating by legal voters as well as illegal voting by those who are not qualified to vote. State *v.* Philbrick, 84 Me. 562, 24 Atl. 955; State *v.* Williams, 25 Me. 561; State *v.* Bailey, 21 Me. 62; Com. *v.* Howe, 144 Mass. 144, 10 N. E. 755; State *v.* Welch, 21 Minn. 22; Morrill *v.* Haines, 2 N. H. 246.

72. Austin *v.* State, 71 Ga. 595; Com. *v.* Aglar, Thach. Cr. Cas. (Mass.) 412.

voter; but to convict one of illegal voting under the statute it must appear that the voter knew a state of facts which would in point of law disqualify him from voting.[73] But under a similar statute it was held that a voter is not indictable unless his vote is knowingly cast without right, although he had full knowledge of all the facts in relation to his right to vote.[74]

b. Violations of Registration Laws. Certain violations of the registration laws are made penal by statute; such as procuring the name of a person known to be an unqualified voter to be registered;[75] registering in two or more districts;[76] placing fictitious names on the registration list;[77] a refusal by the officer having charge of the registration of voters to place the name of any citizen on the list of voters who applied for registration and is entitled under the constitution and laws to be registered as a voter;[78] for an officer having charge of the registration books to knowingly, wilfully, and fraudulently enter therein the name of a person as a qualified voter who has not appeared before him and applied for registration and taken the oath required by law;[79] for an officer to include in the list of names of persons stricken from the registry and required to be published the names of persons not stricken from the registry and who are qualified voters;[80] or a wilful refusal by registration officers to have certified copies of the registration lists made and kept accessible to the public for examination at all reasonable hours.[81] And one who wilfully and maliciously procures the members of the board of registration to conceal the lists and to neglect and refuse to cause them to be accessible to the public for examination and for making copies of the same by his aid, counsel, and assistance, is guilty of a felony under the statute.[82]

c. Offenses of Election Officers — (i) *In General.* Any wilful violation or neglect of any of their various duties on the part of election officers is a statutory crime punishable with more or less severity according to the jurisdiction in which it is committed;[83] and in some cases the statute applies to primary elections or

Illegal vote by minor.— Carter *v.* State, 55 Ala. 181; Gordon *v.* State, 52 Ala. 308, 23 Am. Rep. 575.

Repeaters.— Where one votes twice at the same election in violation of the law, it will be conclusively presumed that he intended to violate the law, and the only question of fact for the jury is, whether defendant having already voted voluntarily cast a second vote at the same election. State *v.* Welch, 21 Minn. 22. It has been held, however, that one who votes a second time when so intoxicated that he has no knowledge that he has voted before is not guilty under the statute. People *v.* Harris, 29 Cal. 678.

73. McGuire *v.* State, 7 Humphr. (Tenn.) 54.

Disqualified by commission of crime.— Under a statute providing that ignorance of the law is no excuse for its violation, and that no mistake of law excuses the commission of an offense, it has been held that knowledge of a person voting that he has been convicted of an assault with an intent to murder is equivalent to knowledge that he is not a qualified voter. Thompson *v.* State, 26 Tex. App. 94, 9 S. W. 486.

74. State *v.* Macomber, 7 R. I. 349.

75. State *v.* McBarron, 66 N. J. L. 680, 51 Atl. 146.

Accomplices.— People *v.* Sternberg, 111 Cal. 3, 43 Pac. 198.

76. State *v.* Lally, 2 Marv. (Del.) 424, 43 Atl. 258; State *v.* Caldwell, 1 Marv. (Del.) 555, 41 Atl. 198.

Intent.— Under a statute making it unlawful knowingly and fraudulently to register in two election districts intent is not a necessary ingredient of the offense. State *v.* Lally, 2 Marv. (Del.) 424, 43 Atl. 258.

77. U. S. *v.* Eagan, 30 Fed. 498.

78. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,252, 2 Hughes 518.

79. U. S. *v.* Molloy, 31 Fed. 19.

80. Minicher *v.* State, 66 Md. 227, 7 Atl. 451.

81. People *v.* McKane, 143 N. Y. 455, 38 N. E. 950 [*affirming* 80 Hun 322, 30 N. Y. Suppl. 95].

82. People *v.* McKane, 143 N. Y. 455, 38 N. E. 950 [*affirming* 80 Hun 322, 30 N. Y. Suppl. 95].

83. *California.*— People *v.* Eagan, 116 Cal. 287, 48 Pac. 120.

Delaware.— State *v.* Brand, 2 Marv. 459, 43 Atl. 263; State *v.* Clark, 2 Marv. 456, 43 Atl. 254; State *v.* Colton, 9 Houst. 530, 30 Atl. 259.

Illinois.—Spragins *v.* Houghton, 3 Ill. 377; Binger *v.* People, 24 Ill. App. 310.

Indiana.— State *v.* Tuidell, 26 Ind. 264.

Iowa.— State *v.* Clark, 102 Iowa 685, 72 N. W. 296.

Kentucky.— Com. *v.* Duff, 87 Ky. 586, 9 S. W. 816, 10 Ky. L. Rep. 617; Com. *v.* Eckert, 20 S. W. 253, 14 Ky. L. Rep. 250.

Massachusetts.— Com. *v.* McGurty, 145 Mass. 257, 14 N. E. 98.

New York.— People *v.* Southerland, 9 N. Y. App. Div. 313, 41 N. Y. Suppl. 181; People

nominating conventions[84] subjecting the officers of such elections or conventions to indictment for wilful violation or neglect of their duties.

(II) *THE INTENT.* Judges or inspectors of elections are not liable to criminal prosecution, unless they have acted from a corrupt motive. An election officer is not responsible for a mere mistake in judgment, but only for a wilful disregard of duty.[85]

d. Betting on Elections. Aside from the general statutes on the subject of gambling and wagering betting on elections is in many states made a distinct statutory offense.[86] The statute may be violated by betting on the vote of a particular candidate, as that he will beat some other candidate.[87] So also a bet upon the vote of a county in a general election or of a precinct in a district or county election is a bet upon the election within the statute.[88] It has been held that betting on the result of an election after the election has been consummated is not within the statute;[89] but on the other hand it has been held that betting upon the uncertain result of any election, whether made before or after the time of holding such election, is within the statute.[90]

v. Gleason, 18 Misc. 511, 42 N. Y. Suppl. 1084, 12 N. Y. Cr. 192; People *v.* Sullivan, 10 N. Y. Suppl. 243, 7 N. Y. Cr. 420; Matter of Hilt, 9 Abb. N. Cas. 484; Matter of Spooner, 9 Abb. N. Cas. 481.

Pennsylvania.— Com. *v.* Boyle, 3 Pa. Dist. 591; *In re* Election, etc., Acts, 2 Brewst. 138; Com. *v.* Ziert, 4 Pa. Co. Ct. 394, 5 Lanc. L. Rev. 138; Com. *v.* Shaub, 5 Lanc. L. Rev. 121.

Wisconsin.— Byrne *v.* State, 12 Wis. 519.

See 18 Cent. Dig. tit. "Elections," § 340.

See also the following cases decided in the federal courts: *In re* Hilt, 104 Fed. 336; *In re* Spooner, 104 Fed. 334; U. S. *v.* Carpenter, 41 Fed. 330; U. S. *v.* Chamberlain, 32 Fed. 777; *Ex p.* Perkins, 29 Fed. 900; U. S. *v.* Wright, 16 Fed. 112; U. S. *v.* Baldridge, 11 Fed. 552; U. S. *v.* Fisher, 8 Fed. 414; U. S. *v.* Hayden, 26 Fed. Cas. No. 15,333, 52 How. Pr. (N. Y.) 471.

84. Com. *v.* Young, 16 Pa. Super. Ct. 317; Com. *v.* Boyle, 3 Pa. Dist. 591.

Making false return.— Where the votes at a primary election have been properly cast and counted, but the returns have been altered after they were certified by the election officers, a judge of the election may be convicted of making a false return by giving effect to the alteration by handing the returns to the county chairman, although he may not himself have made the alteration. Com. *v.* Hafer, 22 Pa. Super. Ct. 107.

85. All that the law requires in election officers is the exercise of prudence, of intelligent deliberation leading them to judgment; and when they do that, although they do not live up to the law there is no crime, because there is no criminal intent. People *v.* Burns, 75 Cal. 627, 17 Pac. 646; People *v.* Boas, 29 Hun (N. Y.) 377, 1 N. Y. Cr. 132; Com. *v.* Ridgway, 20 Wkly. Notes Cas. (Pa.) 365; Com. *v.* Lee, 1 Brewst. (Pa.) 273; Com. *v.* Sheriff, 1 Brewst. (Pa.) 183, 7 Phila. (Pa.) 84; Com. *v.* Maher, 38 Leg. Int. (Pa.) 269; U. S. *v.* Carpenter, 41 Fed. 330; U. S. *v.* Baldridge, 11 Fed. 552; U. S. *v.* Foster, 6 Fed. 247, 4 Hughes 514; U. S. *v.* Gillis, 25 Fed. Cas. No. 15,207, 2 Cranch C. C. 44; U. S. *v.* Hayden, 26 Fed. Cas. No. 15,333, 52 How. Pr. (N. Y.) 471.

86. The purpose of this is to preserve the purity of elections and to exclude from them the operation of motives not founded on but adverse to the public good, whereby undue exertion may be brought to bear upon the voters.

Alabama.— State *v.* Mahan, 2 Ala. 340.

Indiana.— Wagner *v.* State, 63 Ind. 250; Frazee *v.* State, 58 Ind. 8; Parsons *v.* State, 2 Ind. 499.

Kentucky.— Com. *v.* Kirk, 4 B. Mon. 1; Com. *v.* McAtee, 8 Dana 28; Moore *v.* Com., 7 Ky. L. Rep. 292.

Mississippi.— Miller *v.* State, 33 Miss. 356, 69 Am. Dec. 351.

Ohio.— Veach *v.* Elliott, 1 Ohio St. 139.

Pennsylvania.— Com. *v.* Wells, 110 Pa. St. 463, 1 Atl. 310.

Tennessee.— Lillard *v.* Mitchell, (Ch. App. 1896) 32 S. W. 702; State *v.* McLelland, 4 Sneed 437; Quarles *v.* State, 5 Humphr. 561.

Virginia.— Shumate *v.* Com., 15 Gratt. 653.

West Virginia.—State *v.* Snider, 34 W. Va. 83, 11 S. E. 742; State *v.* Griggs, 34 W. Va. 78, 11 S. E. 740.

Election in another state.— The statute of Mississippi to suppress gambling in which there is a provision against betting money upon the result of any election extends to the betting of money in that state upon the result of an election held in another state. Sharkey *v.* State, 33 Miss. 353. But in Texas where the statute is aimed only at betting on the result of any public election held within that state, it has been held that one who entered into a wager on the result of the election for president in the several states is not guilty of a violation of the law. Covington *v.* State, 28 Tex. App. 225, 14 S. W. 126.

When wager is complete.— Rich *v.* State, 38 Tex. Cr. 199, 42 S. W. 291.

87. Com. *v.* Pash, 9 Dana (Ky.) 31.

88. Com. *v.* Kennedy, 15 B. Mon. (Ky.) 531.

89. State *v.* Mahan, 2 Ala. 340.

90. Miller *v.* State, 33 Miss. 356, 69 Am. Dec. 351; State *v.* Snider, 34 W. Va. 83, 11

e. Illegal Expenditures and Corrupt Practices. There are statutes in some of the states limiting the amount of money which candidates may expend for campaign purposes and requiring them to file verified statements of their expenses. If a candidate transgresses the statutory limit of expenditure he is not only guilty of a public offense, but may forfeit the office if he is elected.[91] So also there are statutes making it a public offense for any person to make use of money or other thing of value to influence the result of the election, or to accomplish other than such legitimate purposes as the printing and circulating of hand-bills, books, and other papers previous to an election or town meeting, or conveying such poor or infirm electors to the polls as are not able to go there.[92]

f. Obstruction of or Interference With Officers or Voters. It is also a statutory offense to obstruct, interfere with, or delay election officers in the performance of their duty,[93] or to obstruct or interfere with legal voters who offer to vote.[94]

g. Fraud. Fraud in the conduct of primary or final elections is also a statutory offense.[95]

h. Bribery. Bribery is an offense at common law and has been largely attended to by statutes making it a penal offense to give any money, property, or reward to an elector to induce him to vote according to the giver's desire or to refrain from voting.[96] It is no defense that the elector's vote was not actually

S. E. 742; State *v.* Griggs, 34 W. Va. 78, 11 S. E. 740.

91. State *v.* Bland, 144 Mo. 534, 46 S. W. 440, 41 L. R. A. 297.

Applicable to candidate for congress.— It has been held that the corrupt practice act of Ohio providing that a candidate for congress may be fined for failure to file a statement of his election expenses with the county clerk is not unconstitutional, since it is not an additional qualification for a member of congress. State *v.* Russell, 20 Ohio Cir. Ct. 551, 11 Ohio Cir. Dec. 299 [*reversing* 10 Ohio S. & C. Pl. Dec. 255, 8 Ohio N. P. 54].

92. Smith *v.* Babcock, 3 N. Y. App. Div. 6, 37 N. Y. Suppl. 965.

Success not essential to offense.— To sustain an indictment against an alien for interfering in an election by influencing citizens to vote, it is not necessary to show that the influence was successful. Mere solicitation is sufficient. Respublica *v.* Ray, 3 Yeates (Pa.) 65.

The treating of electors with a view to obtain their votes is indictable. State *v.* Shaw, 8 Humphr. (Tenn.) 32.

Bribery not an ingredient of the offense.— State *v.* Milby, 26 Wash. 661, 67 Pac. 362.

93. Com. *v.* Hoxey, 16 Mass. 385; *In re* Depriest, 43 Fed. 911; U. S. *v.* Fisher, 8 Fed. 414.

94. State *v.* Franks, 38 Tex. 640.

Arrest of elector.— Under the New York penal code any person or officer who attempts to arrest a registered elector while voting or offering himself to vote in order to prevent him from voting commits an assault and battery and also violates the section of the penal code which forbids any one wilfully to obstruct or delay any elector on his way to a registration or polling-place, or while he is attempting to register or vote. People *v.* Hochstim, 36 Misc. (N. Y.) 562, 73 N. Y. Suppl. 626.

Must be a qualified elector at that poll.— Com. *v.* Cornelius, 8 Wkly. Notes Cas. (Pa.) 215.

Refusal to assist officer.— By N. Y. Laws (1898), c. 676, § 7, as amended by Laws (1899), c. 499, the state superintendent of elections in the metropolitan district, or any deputy, may call on any person to assist him in the performance of his duty; and he may also call on any public officer who by himself or his assistants, deputies, or subordinates shall render such assistance as may be required. Any such person, public officer, deputy, or subordinate who shall fail on demand by the state superintendent or any deputy to render such aid and assistance in the performance of his duty as he shall demand, or who shall wilfully hinder or delay or attempt to hinder or delay such superintendent or deputy in the performance of his duty, shall be guilty of a felony, and shall upon conviction thereof be sentenced to imprisonment in a state prison for a period of not more than three years; and if a public officer shall in addition to such imprisonment forfeit his office. It is held that a person cannot be convicted under this statute of hindering or delaying an officer in the performance of his duty, unless he has first been called upon by the officer to render such assistance as may be required. People *v.* Hochstim, 36 Misc. (N. Y.) 562, 73 N. Y. Suppl. 626.

95. State *v.* Lesueur, 103 Mo. 153, 15 S. W. 539. See also U. S. *v.* Brewer, 139 U. S. 278, 11 S. Ct. 538, 35 L. ed. 190.

96. While bribery only and not contributions by a candidate for necessary campaign expenses or payments to individuals to help him conduct his personal canvass is prohibited by the statute there is a case for the jury where there is evidence that defendant, a candidate, gave twenty dollars "for services to the ticket," to an elector who, although of the same political party, was

influenced by the gift.[97] So where a voter is hired to go away from the polls and refrain from voting at the time he goes there for that purpose, the offense denounced by the statute is complete, although the voter subsequently returns and casts his vote.[98] But it would seem that one cannot be charged with bribing a whole county.[99] By statute it may be made a crime to pay money to an elector to obtain his vote or influence for a candidate at a primary or nominating election.[1] There are statutes making it unlawful to promise any office, place, or emolument to any person in order to induce him to procure or to endeavor to procure the election of any person.[2] It is also a crime for a voter to accept a bribe to influence his vote, but a loan to him in good faith does not amount to a bribe.[3]

1. Intimidation and Violence. It is a penal offense under a number of statutes to injure, threaten, intimidate, or oppress voters on account of their vote.[4] The

opposed to defendant's election and had organized a political club hostile to him and worked for the rival candidate till election day, when he was quiet, and that defendant gave money and whisky to four electors of a different political party to be used by two of them "as best they could and thought proper," and by the other two "as they liked." Epps *v.* Smith, 121 N. C. 157, 28 S. E. 359.

Influencing voters to register.—One may be convicted of influencing a voter to register in violation of Del. Const. (1897) art. 5, § 7, where he gives him money to pay the registration fee, although he may have no corrupt motive. State *v.* Collins, 1 Pennew. (Del.) 420, 42 Atl. 619.

Election for stock subscription.— Under the Kentucky statute relating to elections, which provides that whoever shall bribe another shall be fined and imprisoned and be excluded from suffrage for five years, and which further provides that whenever it is said in that or any subsequent statute that an election shall be held or an equivalent expression is used in reference to a state, district, or county election, it shall be deemed to mean an election by the qualified voters to be held at the voting place of precincts whose voters have a right to vote in the "election of the officers designated," it was held that this statute as to bribery does not apply to the buying of a vote at an election to change the sense of the voters of a county as to making a county subscription to stock of a railroad. Curran *v.* Taylor, 92 Ky. 537, 18 S. W. 232, 13 Ky. L. Rep. 750.

97. State *v.* Downs, 148 Ind. 324, 47 N. E. 670.

98. Thompson *v.* State, 16 Ind. App. 84, 44 N. E. 763.

99. Thus the offer of grounds and public buildings as an inducement to the voters of a county to change the county-seat is not bribery. Hall *v.* Marshall, 80 Ky. 552. The offer to furnish land, buildings, etc., or to build a bridge between two towns, or the gift by individuals of their promissory notes to the county high school as an inducement to the voters to vote in favor of the removal of the county-seat is not bribery within the meaning of the statute. Dishon *v.* Smith, 10 Iowa 212.

1. Com. *v.* Rudy, 5 Pa. Dist. 270.

Applies to nomination of candidates only. — Com. *v.* Gouger, 21 Pa. Super. Ct. 217.

2. Under such a statute it was held that a complaint charging defendant with a promise of patronage to a person named, with intent to promote defendant's own election, charged an offense. Bradley *v.* Clarke, 133 Cal. 196, 65 Pac. 395.

Promise to appoint one a deputy.— An agreement to appoint a voter a deputy if a candidate shall be elected, in consideration of his services, is within the prohibition of the statute. State *v.* Towns, 153 Mo. 91, 54 S. W. 552.

3. At a trial for receiving a bribe to vote for a certain candidate for congress defendant requested an instruction that the jury must believe that the money was given the accused to influence his vote, that for such money the accused did vote as requested, and that if the money was in good faith loaned the accused was not guilty, it was held that it was improper to refuse the instruction. Johnson *v.* Com., 90 Ky. 53, 13 S. W. 520, 12 Ky. L. Rep. 20.

4. **Expulsion from church.**— In State *v.* Rogers, 128 N. C. 576, 38 S. E. 34, it was held that an indictment charging defendants with having injured, threatened, oppressed, or attempted to intimidate a voter by expelling him from the church of which they were members because he voted the democratic ticket at a certain election was properly quashed, since the voter suffered no pecuniary loss, personal injury, or physical restraint by his expulsion.

Carrying of weapons.— In Texas the statute prohibits without exception the carrying of fire-arms within one-half mile of the place of election on election day. Brownlee *v.* State, 35 Tex. Cr. 213, 32 S. W. 1043; Snell *v.* State, 4 Tex. App. 171; Livingston *v.* State, 3 Tex. App. 74.

Validity of election.— A defendant on trial for carrying dangerous weapons on election day cannot object that it was no offense because the election was void; the election being actually held under color of law. Cooper *v.* State, 25 Tex. App. 530, 8 S. W. 654.

To extricate a relative from peril.— Where defendant saw from his place of business that his brother at a polling-place near by was retreating before several persons who were armed with sticks, and it reasonably appeared

offense is complete by indulging in such threats as drive from the polls voters who are approaching for the purpose of voting.[5] So also the offense is complete by the forcible expulsion from the polls of voters waiting in line to cast their ballots, although they afterward return and vote.[6] The right to vote is a continuing one which exists on days other than election day, and this offense may be committed by giving out in advance such threats as keep lawful voters away from the polls.[7]

j. Power of Congress to Enact Penal Legislation. A federal statute making it an offense for any officer of an election at which any delegate or representative to congress is elected to omit the performance of any duty imposed on him by either state or federal law or to violate any of the provisions of such laws is constitutional.[8] So also a federal statute providing for the punishment of persons who register illegally under a state law at a registration of voters for an election for representatives in congress is not repugnant to the constitution,[9] and a federal statute making it unlawful to hinder a citizen from voting, although unconstitutional in so far as it attempts to regulate state or municipal elections, is valid as a regulation of congressional elections.[10] By act of congress any officer having charge of the registration of voters under the state laws who refuses or knowingly omits to give full effect to the law by placing the name of any citizen on the list of voters who applies for registration, and who is entitled under the state constitution and laws to be registered as a voter at an election where representatives in congress are to be voted for, may be declared guilty of a misdemeanor and liable to criminal prosecution as well as to a civil action by the party aggrieved.[11] So too registration officers who knowingly and wilfully register as voters any persons not entitled to be registered are subject to indictment.[12] But the only power possessed by congress to legislate with reference to elections held solely for state or municipal purposes is derived from the fifteenth amendment of the federal constitution.[13] Since the amendment is in terms addressed to action by the

to him that his brother was in danger of serious bodily injury, and he procured a pistol from his place of business and went to the polling-place and succeeded in quelling the disturbance peaceably, it was held that he was not guilty under the statute. Barkley *v.* State, 28 Tex. App. 99, 12 S. W. 495.

5. U. S. *v.* Canter, 25 Fed. Cas. No. 14,719, 2 Bond 389.

Challenging without threat.—U. S. *v.* Guion, 37 Fed. 263.

6. U. S. *v.* Souders, 27 Fed. Cas. No. 16,358, 2 Abb. 465.

7. U. S. *v.* Crosby, 25 Fed. Cas. No. 14,893, 1 Hughes 448.

Threat of arrest.—Any violence or restraint or threat thereof to prevent persons from voting is a crime under the New York statute. The giving out of an announcement or threat that if certain registered persons present themselves and offer to vote they will then and there be arrested comes within the operation of the statute. People *v.* Hochstim, 36 Misc. (N. Y.) 562, 73 N. Y. Suppl. 626.

8. U. S. *v.* Gale, 109 U. S. 65, 3 S. Ct. 1, 27 L. ed. 857; *Ex p.* Clarke, 100 U. S. 399, 25 L. ed. 715; *Ex p.* Siebold, 100 U. S. 371, 25 L. ed. 717.

9. U. S. *v.* Quinn, 27 Fed. Cas. No. 16,110, 8 Blatchf. 48.

10. U. S. *v.* Belvin, 46 Fed. 381; U. S. *v.* Munford, 16 Fed. 223.

11. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,252, 2 Hughes 518.

12. U. S. *v.* Eagan, 30 Fed. 495.

Where the state statute requires voters to appear before the register and take the prescribed oath before registering, it is an indictable offense under the act of congress for a recorder of votes to knowingly, wilfully, and fraudulently enter in the registration books or cause to be entered in them the name of a person as a qualified voter who has not appeared before him and applied for registration and has not taken the oath required by law. U. S. *v.* Molloy, 3 Fed. 19.

13. This amendment which provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude, and that congress shall have power to enforce this article by appropriate legislation; but the right conferred by this article and which congress may enforce by legislation is not the right of suffrage, but the right of the citizen to exemption from being discriminated against in the exercise of the elective franchise, by the United States or a state on account of race, color, or previous condition of servitude, and a statute which is not limited to the enforcement of such right, but is broad enough in terms to make punishable as a criminal offense an act of a private person committed at a state or a municipal election, if committed against a voter of African descent, although it has no relation to race, color, or previous condition of such voter is

United States or by a state, appropriate legislation for its enforcement must also be addressed to state action and not to the action of individuals.[14] For the amendment relates solely to action by the United States or by any state, and does not contemplate wrongful individual acts.[15]

B. Penalties and Actions Therefor.[16] In an action against election officers to recover a penalty for rejecting plaintiff's vote, plaintiff must allege in his declaration or complaint all the facts which constitute his qualification as a legal voter at the time and place where his vote was rejected.[17] An action will not lie against the judges or inspectors of an election for refusing the vote of a person legally qualified to vote without alleging and proving malice express or implied.[18] But it has been held that in an action against an election officer to recover a penalty for a violation of his duty, it is enough to allege that he did so knowingly, wilfully, wrongfully, and contrary to the form of the statute in such case made and provided, without charging that he did so corruptly and maliciously.[19] Each voter who has been wilfully and improperly deprived of his vote has a separate and distinct remedy at law; and the joinder of others like circumstanced or injured, as complainants in equity, on grounds of avoiding a multiplicity of suits, will not avail to afford equitable relief.[20]

C. Prosecution and Punishment — 1. Indictment or Information[21] — a. Offenses Against Federal Election Laws. An indictment against election officers for an offense against the election laws of the United States to be cognizable by the federal courts must contain an affirmative and distinct charge of an act which does or may affect the election of a representative to congress;[22] and must charge that they wilfully disregarded their duty or negligently failed to perform it.[23] In an indictment against inspectors of election for allowing the ballot-box to pass

unconstitutional and void. Lackey *v.* U. S., 107 Fed. 114, 46 C. C. A. 189, 53 L. R. A. 660 [*reversing* 99 Fed. 952].

14. Karem *v.* U. S., 121 Fed. 250, 57 C. C. A. 486, 61 L. R. A. 437.

15. James *v.* Bowman, 190 U. S. 127, 23 S. Ct. 678, 47 L. ed. 979. A federal statute which makes it a criminal offense if two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States is not appropriate legislation for the enforcement of the fifteenth constitutional amendment, both because it relates to the acts of individuals and not of a state, and because it is broader in its terms than the legislation authorized by the amendment; and it will not sustain an indictment for conspiring to prevent a citizen from voting at a purely state or municipal election on account of his race or color, whether defendants were charged as individuals or as officers of the state. Karem *v.* U. S., 121 Fed. 250, 57 C. C. A. 486, 61 L. R. A. 437.

16. **Penalties** generally see Penalties.

17. Blanchard *v.* Stearns, 5 Metc. (Mass.) 298; McKay *v.* Campbell, 15 Fed. Cas. No. 8,839, 2 Abb. 120, 1 Sawy. 374.

18. Officers required by law to exercise their judgment are not answerable for mistakes in law or mere errors of judgment without any fraud or malice.

Indiana.—Carter *v.* Harrison, 5 Blackf. 138.

Kentucky.—Caulfield *v.* Bullock, 18 B. Mon. 494.

Maryland.— Friend *v.* Hamill, 34 Md. 298.

New Hampshire.— Wheeler *v.* Patterson, 1 N. H. 88, 8 Am. Dec. 41.

New York.— Jenkins *v.* Waldron, 11 Johns. 114, 6 Am. Dec. 359.

Pennsylvania.—Moran *v.* Rennard, 3 Brewst. 601.

United States.— Seeley *v.* Koox, 21 Fed. Cas. No. 12,630, 2 Woods 368.

19. Kirkpatrick *v.* Stewart, 19 Ark. 695. In Blanchard *v.* Stearns, 5 Metc. (Mass.) 298, it was held that an action might be maintained against selectmen for refusing to receive the vote of a qualified voter or for omitting to put his name on the list of voters without proof of malice, but in order to maintain such action it must be shown that plaintiff furnished defendants with sufficient evidence of his having the legal qualifications of a voter and requested them to insert his name on the list of voters before defendants refused to receive his vote or omitted to insert his name on the list.

20. Hardesty *v.* Taft, 23 Md. 512, 87 Am. Dec. 584.

21. **Indictments and informations** generally see Indictments and Informations.

22. U. S. *v.* Morrissey, 32 Fed. 147.

23. U. S. *v.* Dwyer, 56 Fed. 464.

Defective charges.—A charge that canvassers unlawfully, fraudulently, corruptly, and feloniously neglected and refused to receive, estimate, and count all the ballots voted and returned to them, describes no offense, as their duty is confined to the returns and has no connection with the ballots. A charge that canvassers unlawfully, fraudulently, corruptly, and feloniously suppressed the return of certain ballots, without charging that the

out of their possession and presence, the allegation of intent with which the act was done is wholly immaterial.[24] An indictment against an election clerk for making a false certificate as to the result of a congressional election is bad on demurrer, where under the law the clerk does not certify as to the result, but merely authenticates the signatures of the judges of election.[25] It being the duty of an inspector of a general election at which a member of congress is voted for not to part with the certificate deposited with him for safe-keeping until he delivers or returns it to the board of canvassers, the offense is complete as soon as he parts with such certificate to a person not entitled to receive it, and an indictment need not set out the precise nature of the alterations in such certificate by such person, or aver that they were designed to affect or did in fact affect the result of the election for a representative in congress.[26]

b. Against Election Officers — (I) *For Receiving Illegal Votes.* An indictment which charges that defendant as judge or inspector of elections knowingly and wilfully received the vote of a person named, knowing that he was not a resident of or registered in the voting precinct, sufficiently alleges a violation of duty on the part of defendant as an officer of election;[27] and it is not necessary to state how the other officers of election acted.[28] A count in an indictment charging that the inspectors of an election did knowingly receive and sanction the reception of an illegal vote is not objectionable for duplicity.[29] In an indictment for receiving an illegal vote, it must be charged that defendant was one of the judges or other officer of election authorized to receive votes.[30] Such indictment must state the name of the voter from whom the illegal ballot was received.[31] In an indictment for receiving an illegal vote for a member of congress, it must be alleged specifically that the ballot contained the name of a candidate for congress, although the alleged offense was committed in a state where the names of all candidates voted for, including candidates for congress, are required to be on the same ballot.[32] An indictment charging that defendants put a large number of fraudulent ballots into the box need not set out the names of the persons fraudulently stated by defendants to have voted such ballots.[33]

(II) *For Rejection of Legal Ballots.* Where the law makes the rejection of the vote of a qualified elector a crime and the lawful mode of voting is by ballot, a charge that a qualified voter of the district offered his ballots for the purpose of voting and that the ballots were unlawfully and knowingly rejected sufficiently alleges a violation of the law;[34] and it is not necessary to aver that

offense was committed knowingly and without setting out the facts which constituted such suppression, is fatally defective. In such an indictment the omission of an affirmative allegation that the election returns were delivered to the canvassers is a fatal defect. U. S. *v.* Kelsey, 42 Fed. 882.

24. U. S. *v.* Jackson, 25 Fed. 548.

25. U. S. *v.* Green, 33 Fed. 619.

26. *In re* Coy, 31 Fed. 794.

27. U. S. *v.* Doherty, 25 Fed. 28.

In an indictment under the Maine statute against one of the wardens of the city of Portland for receiving at a general election the vote of a person whose name was not borne on the list of voters, it was held to be necessary to allege that the act so done and committed was "unreasonable, corrupt, or wilfully oppressive." State *v.* Small, 10 Me. 109.

28. Com. *v.* Gray, 2 Duv. (Ky.) 373.

29. Byrne *v.* State, 12 Wis. 519.

30. State *v.* Krueger, 134 Mo. 262, 35 S. W. 604.

31. State *v.* Clark, 134 Mo. 275, 35 S. W. 613; State *v.* Krueger, 134 Mo. 262, 35 S. W. 604.

32. U. S. *v.* Morrissey, 32 Fed. 147, holding that a statute making the use of such ballots *prima facie* evidence that the voter voted for a member of congress will not cure the omission of such a charge in the indictment.

33. Com. *v.* Miller, 2 Pars. Eq. Cas. (Pa.) 480, Brightly Lead. Cas. El. 711.

However, it has been held that it is not sufficient to allege in a general way that an indefinite number of ballots cast were fraudulent without describing with reasonable accuracy any one of them. If the indictment were with respect to a single fraudulent ballot it would be insufficient, unless it described that ballot by its number and the name of the voter by whom it is claimed to have been cast, and the number of the ballots cast cannot change the rule. There is no difference in principle in the two cases; if it is necessary to describe the ballot in one case it is in the other. State *v.* Krueger, 134 Mo. 262, 35 S. W. 604.

34. Com. *v.* Youlls, 5 Kulp (Pa.) 231.

the voter did not take the oath prescribed by statute.[35] It has been held that an indictment against an inspector of an election for refusing to administer to an elector the oath provided by statute should contain an averment that the applicant was registered;[36] but on the other hand it has been held to be sufficient to allege that the applicant was a qualified voter without alleging that he was registered.[37] In an indictment for rejecting a vote it is sufficient to allege that the person whose vote was rejected was a qualified voter. It is not necessary to allege that he was a citizen.[38]

(III) *For Fraud.* Where election officers are charged with fraud the particular facts and circumstances constituting the fraud must be stated.[39]

(IV) *For Alteration of Returns.* In an indictment against election officers for the fraudulent alteration of the returns, it is not necessary to set out a copy of the poll-book or the tally-sheet on which the offense was committed nor is the purport thereof required.[40]

(V) *For Making False Returns.* An indictment charging an election officer with falsely reporting the number of votes received by certain candidates, without alleging the number in fact received, or in what respect, or how the report was false, is uncertain and insufficient.[41]

(VI) *For Alteration of Ballots.* An indictment charging a judge of election with altering ballots legally voted need not give the names of the electors

35. Byrne *v.* State, 12 Wis. 519.

36. Wattles *v.* People, 13 Mich. 446.

37. Thus where an indictment alleged that the prosecutor, a duly qualified elector, on offering to vote at defendant's polling station was challenged as having voted before; that he then and there demanded of defendant to administer to him the oath prescribed by statute; and that defendant well knowing the law relating to elections and his duties as inspector knowingly, wilfully, fraudulently, and feloniously refused to administer the oath, it was held that the indictment related fully facts constituting the offense and informed defendant of the charge he had to meet and that it need not aver that the prosecutor was registered. People *v.* Burns, 75 Cal. 627, 17 Pac. 646.

38. Com. *v.* Youlls, 5 Kulp (Pa.) 231.

39. It will not do merely to charge the offense in the general language of the statute. Com. *v.* Miller, 2 Pars. Eq. Cas. (Pa.) 480, Brightly Lead. Cas. El. 711. Although an indictment charging that defendant as election officer destroyed the list of voters kept and substituted therefor a false one need not set out the difference between the true and false lists.

A charge that defendant acted unlawfully as an election officer is insufficient, as corrupt conduct is not thus charged. Boyd *v.* Com., 77 Va. 52. But under another statute it has been held that it is not necessary to charge that the officer acted either wilfully, corruptly, or fraudulently in doing the act charged, inasmuch as the statute imposed upon him merely a clerical or ministerial function and not the performance of a judicial duty. Mincher *v.* State, 66 Md. 227, 7 Atl. 451.

Names written on list of voters.— An allegation that the defendants "did fraudulently procure and cause to be written on the list of voters kept at such election a large number (to wit) one hundred and fifty names of persons as having lawfully voted at such election, whereas in truth and in fact, no such persons voted at the same" is not sufficient, if it does not also set out the names so fraudulently written on the list. Com. *v.* Miller, 2 Pars. Eq. Cas. (Pa.) 480.

40. It is sufficient to describe it by the designation of the poll-book or tally-sheet, and to aver that defendant wrongfully and fraudulently changed, altered, erased, or tampered with a name, word, or figure contained in such poll-book or tally-sheet as the facts may require, setting forth the nature and character of the alteration made, and that it was made with intent to defeat, hinder, or prevent a fair expression of the will of the people at an election. State *v.* Granville, 45 Ohio St. 264, 12 N. E. 803.

41. Com. *v.* Eckert, 20 S. W. 252, 14 Ky. L. Rep. 250.

Charge as to returns.— An indictment charging a false return of the number of ballots cast at an election is an insufficient description of the offense designated by the statute as a "false return of an election." State *v.* Conway, 2 Marv. (Del.) 453, 43 Atl. 253.

Failure to return all the ballots.— Under a statute imposing a penalty for returning part only of the ballots cast at elections a warden and clerk were indicted for returning part only of the ballots cast for mayor at an election for a representative in the general assembly and for mayor and other municipal officers. The election was not held at the legally set time for electing a representative, but the indictment did not state whether the election was special or called, what municipal officers were to be elected, or that the ballots not returned were legally cast, and defendants were jointly and severally indicted. It was held that a motion to quash the indictment on such grounds was properly overruled. State *v.* Collins, 16 R. I. 42, 12 Atl. 121.

whose ballots are alleged to have been altered,[42] but such indictment must allege specifically what changes were made.[43]

(VII) *For Destruction of Ballots.* An indictment for the statutory offense of destroying ballots need not set out the particular manner of destruction.[44]

(VIII) *For Neglect or Violation of Duty.* In an indictment against an election officer for a refusal to perform any duty imposed on him by law it is sufficient to allege the duty, its undertaking, and the intentional refusal to perform it.[45] It is sufficient to allege in such indictment that defendant was appointed and duly qualified and that he acted as inspector without specifically alleging that he took the oath of office and received a certificate.[46]

(IX) *Statement of Office Held.* An indictment against the officers of an election charging them with a violation of the law as such officers should state the office which each held at the election.[47]

(X) *Against Officers at Primary Election.* An indictment charging a judge of primaries with violating the election law should aver that the accused was appointed by the governing authority of the party holding the election. It is not sufficient to allege merely that he was duly appointed;[48] and in such case it should be stated that public notice of the election had been given in the manner required by statute. It is not sufficient to allege merely that the election was duly and regularly called and ordered.[49]

c. For Illegal Voting — (I) *Charge of Fraud.* An indictment or information charging that defendant fraudulently voted at an election when he was not entitled to vote, although in the language of the statute, is not sufficient to state an offense, but must set forth the facts relied on to show fraudulent voting.[50] An indictment for illegal voting need not charge also that defendant voted fraudulently.[51]

(II) *Charge of Disqualification.* An indictment against a person for voting when he was not a qualified elector must specify the qualification which he lacked.[52] So also an indictment for unlawfully counseling and advising a person to vote must specify the disqualification of the voter.[53] It has been held, however, that, although an indictment which fails to specify in what particular the accused was disqualified at the time of the voting is bad on demurrer, it will be sufficient to support a conviction after a trial upon the merits without objection.[54]

42. Binger *v.* People, 21 Ill. App. 367.

43. Hunter *v.* People, 52 Ill. App. 367.

44. State *v.* Mundy, 2 Marv. (Del.) 429, 43 Atl. 260.

45. U. S. *v.* Vigil, 7 N. M. 296, 34 Pac. 530.

46. Hall *v.* People, 90 N. Y. 498.

47. State *v.* Krueger, 134 Mo. 262, 35 S. W. 604; Com. *v.* Miller, 2 Pars. Eq. Cas. (Pa.) 480, Brightly Lead. Cas. El. 711.

48. Com. *v.* Maddox, 32 S. W. 129, 17 Ky. L. Rep. 557.

49. Com. *v.* Maddox, 32 S. W. 129, 17 Ky. L. Rep. 557.

50. People *v.* McKenna, 81 Cal. 158, 22 Pac. 488.

51. State *v.* Moore, 27 N. J. L. 105.

52. A mere general charge of illegal voting without specifying in what the illegal voting consisted is not sufficient to support a conviction.

California.— People *v.* Neil, 91 Cal. 465, 27 Pac. 760.

Indiana.— Quinn *v.* State, 35 Ind. 485, 9 Am. Rep. 754.

Missouri.— State *v.* Miller, 3 Mo. App. 584.

New Jersey.— State *v.* Moore, 27 N. J. L. 105.

New York.— People *v.* Standish, 6 Park. Cr. 111.

Tennessee.— Pearce *v.* State, 1 Sneed 63, 60 Am. Dec. 135.

See 18 Cent. Dig. tit. "Elections," § 358.

Women.— Where women are not qualified electors, a charge that defendant was a female is a sufficient description of her disqualification. People *v.* Barber, 48 Hun (N. Y.) 198.

Failure to pay taxes.—An indictment which charges defendant with illegally voting at a municipal election legally and regularly held at a certain time and place on account of defendant's being then and there a defaulter in a certain sum for taxes due by him to the state and county for a given year sufficiently conforms to the requirements of the law in stating the offense. Banyon *v.* State, 108 Ga. 49, 33 S. E. 845.

53. State *v.* Tweed, 27 N. J. L. 111.

54. In State *v.* Bruce, 5 Oreg. 68, 20 Am. Rep. 734, the indictment failed to point out in what particular defendant was disqualified,

(III) *Description of Election.* An indictment for unlawful voting should describe the purpose for which the election was held. Merely calling it a general election is not enough.[55] In an indictment for illegal voting at a town meeting it is sufficient to allege that such meeting was duly held without stating how or by what authority it was called;[56] and generally it is not necessary to plead the law under which a regular election is held,[57] or to allege the names of the candi-

and the court conceded that it would have been bad on demurrer; but considered that defendant having slept upon his right by failing to demand by demurrer a fuller specification of the facts and circumstances necessary to the complete identification of the transaction charged against him as a crime, he could not be heard to object to the indictment after a trial upon the merits, when it substantially charged a crime in the language of the statute, as by his silence and acquiescence he virtually admitted that he understood the nature and cause of the accusation against him.

55. Carter *v.* State, 55 Ala. 181.

Defective description of election.— An indictment which charges that defendant having been convicted of larceny "unlawfully voted at a special election held in and for precinct number twelve (12), at Greenville in said county, on the 13th day of December, 1886," is demurrable for uncertainty, because it does not describe or sufficiently identify the character of the election. Gandy *v.* State, 82 Ala. 61, 2 So. 465. Under a charter requiring an election to be held on the first Monday of the month, an indictment charging the accused with illegal voting on the fourteenth of the month, not being the first Monday, is demurrable; the indictment showing that the election was not held pursuant to law. Com. *v.* Banner, 4 Ky. L. Rep. 369. An indictment charging that defendant on a certain day at a certain township in a certain county did unlawfully, wilfully, and knowingly vote more than once, to wit, twice, at a certain corporation election then and there being holden and authorized to be holden by the laws of the state is fatally defective in failing to allege the election at which the defendant voted. Lane *v.* State, 39 Ohio St. 312.

Sufficient description of election.— Under the Massachusetts statute the meeting is sufficiently described in an indictment for illegal voting averring the holding on a specified date for the annual election of municipal officers of, "a meeting of the qualified voters of the various wards" of the city, and that defendant committed the offense charged on that date "at Ward One . . . , at the election aforesaid." Com. *v.* Desmond, 122 Mass. 12. An indictment for illegal voting averring that the election was "held and authorized by law within and for the corporation of the city of Weatherford" sufficiently states the place of voting; and an averment that the "vote was for city attorney and other officers then and there to be chosen at said election" sufficiently charges the purpose for which it was held. Gallagher *v.* State, 10 Tex. App. 469. An indictment which alleges that a town meeting was duly held for the election of certain officers and that the inhabitants were also "called on to give in their votes for Member of Congress" sufficiently alleges that the purpose of the meeting was to vote for a member of congress. State *v.* Marshall, 45 N. H. 281.

Place where held.— Where the indictment alleged that the offense was committed "at Boston, in said district of Massachusetts, at an election for a representative in the congress of said United States for the Fourth congressional district of the commonwealth of Massachusetts, instituted and held in said Boston, on said fourth day of November, in accordance with the laws of said commonwealth, and with the laws of the said United States," it was held that this was a sufficient averment that the election was held in the fourth congressional district which is a part of Boston. U. S. *v.* Doherty, 25 Fed. 28. An indictment for illegal voting is not defective for failing to allege that the place at which defendant voted was the place selected by the commissioners' court, the further allegation that the election was authorized by law at such place would authorize proof of facts which would render an election at this place a legal election. May *v.* State, 43 Tex. Cr. 54, 63 S. W. 132. It is no cause for arresting judgment on an indictment for giving false answers to selectmen and for voting wilfully without being qualified for governor, lieutenant-governor, and senators for the district of M, that it is not alleged that the district of M is within the commonwealth. Com. *v.* Shaw, 7 Metc. (Mass.) 52.

56. State *v.* Boyington, 56 Me. 512; State *v.* Bailey, 21 Me. 62; State *v.* Marshall, 45 N. H. 281. An information that an attempt to vote illegally at an electors' meeting in a certain town by assuming the name of another person on the registry list described the offense in the words of the statute, but did not allege the name of the person assumed by defendant or that such name was unknown; that the electors' meeting was legally warned or held; that the offense was committed in either of the voting districts of the town; that the registry list was a list of either of the voting districts or was legally prepared; or that the offense was committed between the hours of six o'clock in the morning and five o'clock in the afternoon. It was held that neither of the omitted averments was necessary to the defense and that the information was sufficient. State *v.* Lockbaum, 38 Conn. 400.

57. For example in an indictment for illegal voting under the New Jersey statute it was charged that the vote was given at an election held in pursuance of the statute in that case made and provided for electors for

dates.[58] The indictment should show affirmatively that the election at which fraud was perpetrated was a lawful one held for purposes known to the law;[59] but an allegation that defendant voted at a certain election authorized by law implies the averment that it was held by the proper officers.[60] If the election is described as continuing for more than one day the indictment must designate the day on which the accused voted.[61]

(IV) *NAMES OF CANDIDATES VOTED FOR.* In an indictment for illegal voting in a state or municipal election, it is not necessary to charge that the accused voted for any particular candidates or measures.[62]

(V) *DEFENDANT'S KNOWLEDGE OF WANT OF RIGHT.* An indictment charging that defendant did unlawfully and fraudulently vote, not being by law a qualified elector, is sufficient as an indictment for illegal voting without charging that the offense was committed knowingly;[63] unless the true reading of the statute makes defendant's knowledge of his want of right to vote an essential element of the crime.[64]

(VI) *AIDING IN ILLEGAL VOTING.* In an indictment for aiding or assisting in the commission of the crime of illegal voting at an election for a representative in congress it is not necessary to state the particular act constituting the aid or assistance, as these are mere matters of evidence to make out the offense at the trial.[65]

(VII) *AT PRIMARY ELECTIONS.* An indictment for unlawfully voting at a primary election in a precinct where defendant is not qualified to vote at the next election must allege that he would not be a qualified elector in such precinct at the next election.[66]

(VIII) *REPEATING OR DOUBLE VOTING* — (A) *In General.* An indictment charging that defendant voted twice at the same election need not allege that the accused was a qualified voter.[67] It is sufficient to charge that defendant voted twice, once in each of two wards, for, although the election was held in each of the several wards at the same time, it constituted but one election.[68] Where this offense is a felony, it is no objection to the indictment that it also charges defend-

president, etc., naming the officers voted for. The act to regulate elections was the only one under which the election of these officers could be held, and it was held that the indictment substantially charged that the election was held under that act. State *v.* Moore, 27 N. J. L. 105. An indictment for voting more than once at a municipal election alleged that the city of Stillwater was a municipal corporation, etc., organized under an act entitled "An act to reduce the law incorporating the city of Stillwater in the county of Washington and State of Minnesota, and the several acts amendatory thereof, into one act, and to amend the same," approved March 3, 1870, and the act amendatory thereof, and that the offense was committed by defendant voting in the first ward and afterward in the second ward of said city. The act of March 3, 1870, provided that the annual election should be held in such place in said city as the common council should designate. It was held that there was sufficient averment of a lawful election in each ward at which defendant voted. State *v.* Welch, 21 Minn. 22.

58. State *v.* Minnick, 15 Iowa 123; Gallagher *v.* State, 10 Tex. App. 469.

59. Com. *v.* Huber, 13 Lanc. Bar (Pa.) 139.

60. State *v.* Douglass, 7 Iowa 413. An averment that certain persons were judges of the election is a sufficient averment that such persons were duly made and appointed judges. State *v.* Randles, 7 Humphr. (Tenn.) 9.

61. State *v.* Day, 74 Me. 220.

62. Wilson *v.* State, 52 Ala. 299; May *v.* State, 43 Tex. Cr. 54, 63 S. W. 132.

But in an indictment under the federal statute for voting illegally for a member of congress it must be charged specifically that defendant did vote for a representative to congress, for if he voted at the general election and voted for state and county officers only, as he might have done, he committed no offense against the laws of the United States. His offense was against the state and punishable alone by the state, although the general election at which he voted was one at which a representative to congress was chosen. Blitz *v.* U. S., 153 U. S. 308, 14 S. Ct. 924, 38 L. ed. 725; U. S. *v.* Seaman, 23 Fed. 882, 23 Blatchf. 216.

63. Com. *v.* Warner, 17 Pa. Co. Ct. 556; State *v.* Haynorth, 3 Sneed (Tenn.) 64.

64. U. S. *v.* Watkinds, 6 Fed. 152, 7 Sawy. 85.

65. U. S. *v.* Doherty, 25 Fed. 28.

66. Calcoat *v.* State, 37 Tex. Cr. 245, 39 S. W. 364.

67. State *v.* Bailey, 21 Mo. 484.

68. State *v.* Davis, 22 Minn. 423; State *v.* Welch, 21 Minn. 22.

ant with a misdemeanor in voting in an election district in which he did not reside.[69] Where the statute denounces the double offense of voting more than once and of putting in more than one ballot, care should be taken to describe the particular offense of which defendant is accused.[70]

(B) *Place Where Offense Was Committed.* The offense committed by one who, having voted in one town, ward, or district at the same election shall vote in another town, ward, or district as defined by the statute is a local offense, and the places at which the two votings took place, necessarily enter into the description of the offense.[71]

d. For Violation of Registration Laws — (I) *In General.* An indictment or information for entering names on the registration book at a time and place not authorized by law need not allege any criminal intent.[72] An indictment or information which charges substantially in the language of the statute that defendant as registration officer unlawfully and feloniously registered the name of a person as a voter who did not appear in person and was not present, and did not give his name, occupation, and place of residence as the statute directs, sufficiently charges the culpable intent with which the act was done.[73] An indictment against a recorder of voters charging that said officer at a registration for a congressional election knowingly and wilfully registered a person named as a duly qualified voter, then and there residing at a residence described, he, said defendant, well knowing that the person so registered did not reside at the place described and was not entitled to register therefrom, is not demurrable.[74] An indictment charging that defendant entered and registered a stated number of names as names of persons who had then and there applied to him to be registered, when in truth and in fact no persons represented by such names had applied to him or taken the oath, is neither uncertain nor repugnant.[75] An indictment for unlawfully procuring or advising one to register must set forth the acts done by the accused with intent to effect a fraudulent registration;[76] but it need not set forth the particular words of the advice or method of procurement employed.[77] Where the registration laws differ in different parts of the state, an indictment under the federal statute for fraudulent registration or for procuring such registration must specify the election district in which the registration was effected.[78] Where it is charged that defendant to secure registration for a person named wrote his name in the registration book, it will be inferred that the person whose name was so inserted was a real and not a fictitious person.[79] The advising

69. State *v.* Davis, 22 Minn. 423; State *v.* Welch, 21 Minn. 22.

70. An indictment which alleges that defendant "did then and there unlawfully, wilfully, purposely and feloniously vote more than once upon said day at said election for the officers aforesaid, by then and there unlawfully, wilfully, purposely and feloniously handing to . . . the inspector of said election at the precinct aforesaid, two separate and distinct ballots at the same time and place, then and thereby intending to and indicating his vote for the officers aforesaid, which said ballots and votes were then and there accepted and placed in the ballot-box by said inspector" sufficiently charges the crime of voting twice. State *v.* Patterson, 116 Ind. 45, 10 N. E. 289, 18 N. E. 270. Thus an indictment which alleges that defendant once voted and afterward on the same day, at the same polling-place, received another ballot and handed it to the judges with intent that it should be placed in the ballot-box and fraudulently and feloniously caused said ballot to be numbered and put into the box as a legal ballot, charges no offense under the Revised Statutes of Missouri prohibiting a person from "voting more than once either at the same or a different place" or from "knowingly casting more than one ballot," since it does not use the language of the statute or its equivalent in charging the first offense that defendant voted more than once, or the second offense that he knowingly cast more than one ballot. State *v.* Miller, 132 Mo. 297, 33 S. W. 1149.

71. State *v.* Fitzpatrick, 4 R. I. 269.

72. State *v.* Bush, 45 Kan. 138, 25 Pac. 614.

73. State *v.* Bush, 47 Kan. 201, 27 Pac. 834, 13 L. R. A. 607.

74. U. S. *v.* Eagan, 30 Fed. 495.

75. U. S. *v.* Eagan, 30 Fed. 498.

76. U. S. *v.* Brown, 58 Fed. 558; U. S. *v.* McCabe, 58 Fed. 557.

77. U. S. *v.* Brown, 58 Fed. 558.

78. U. S. *v.* Brown, 58 Fed. 558; U. S. *v.* McCabe, 58 Fed. 557.

79. U. S. *v.* O'Connor, 31 Fed. 449, an indictment under U. S. Rev. St. (1878), § 5512.

an officer of registration to do an unauthorized act is a substantive and not an accessorial offense, and the indictment should allege what specific offense the officer of registration had committed and that defendant advised and procured him to do it.[80] Under a statute which requires the registration officer to make and publish lists of the names of persons stricken from the registry of qualified voters, an indictment charging that the officer published in such list the names of qualified voters not stricken from the registry need not allege the names so wrongfully placed on the list.[81]

(II) *Against Persons Who Registered Illegally.* An indictment for illegal registration must state the facts showing that the accused was not entitled to registration.[82] Where it is charged that the registration of the accused was fraudulent, the indictment must point out in what the fraud consisted.[83] Where the charge against the accused is that he falsely stated his place of residence, it must be averred that the statement was made to the inspectors of election at the time of registration.[84] An indictment charging defendant with registering unlawfully and knowingly in two election districts, naming them, is sufficiently specific to advise him of the charge he is to meet.[85] In an indictment for a refusal to answer lawful inquiries of the supervisor of elections in the verification of a registration list, an omission to aver that such inquiries were made of defendant at the place assigned by him in such list as his place of residence is matter of substance and cannot be aided by amendment.[86]

e. For Bribery. A charge that the person bribed was a legal voter and entitled to vote at a legal election, that defendant gave him a specified amount of money, and that he being influenced thereby voted for a candidate for an office named, sufficiently describes the offense of bribery under the statute.[87] An indict-

80. U. S. *v.* Carroll, 32 Fed. 775.

81. There is but one offense for which but one indictment will lie, no matter how many names were wrongfully published, and alleging the names would not aid the accused in making his defense, as the evidence requirecd would be simply a comparison of the list published with the list of registered voters. Mincher *v.* State, 66 Md. 227, 7 Atl. 451.

82. U. S. *v.* Hirschfield, 26 Fed. Cas. No. 15,372, 13 Blatchf. 330.

Mere conclusion of law.— An indictment which charges defendant with unlawfully and fraudulently registering in a certain election district, he then and there not having the lawful right to register therein, is fatally defective in that it states merely a conclusion of law. State *v.* Vincent, 1 Marv. (Del.) 560, 41 Atl. 199.

83. U. S. *v.* Hirschfield, 26 Fed. Cas. No. 15,372, 13 Blatchf. 330, so that defendant may have proper notice of the charge he is called upon to meet.

Illustrations of bad indictments.— An indictment alleging that defendant "at a certain general registration of all the qualified voters unlawfully and fraudulently registered" in a certain district, "not having a lawful right to register therein," is insufficient in that it fails to state the fact constituting the fraud. State *v.* Vincent, 1 Marv. (Del.) 560, 41 Atl. 199. An indictment under the Ohio statute for falsely and fraudulently obtaining registration, which alleges as the only representation made by the accused "that he represented to the registrars that he was then a qualified elector of Precinct 'A' of the third ward in said city of Findlay, Ohio, and thereby falsely, fraudulently and unlawfully, did obtain registration in said precinct" is bad on demurrer. Ebbenpowell *v.* State, 14 Ohio Cir. Ct. 129, 7 Ohio Cir. Dec. 572.

84. U. S. *v.* Jacques, 55 Fed. 53.

85. State *v.* Lally, 2 Marv. (Del.) 424, 43 Atl. 258.

An indictment averring in the language of the statute that defendant unlawfully registered in two election districts is sufficient, although he had a right to register in one of the districts. State *v.* Caldwell, 2 Marv. (Del.) 555, 41 Atl. 198.

If defendant had a right to register in two districts that is a matter of defense and the indictment need not negative it. State *v.* Lally, 2 Marv. (Del.) 424, 43 Atl. 258.

86. U. S. *v.* Davis, 6 Fed. 682.

87. Com. *v.* Selby, 87 Ky. 594, 9 S. W. 819, 10 Ky. L. Rep. 621.

Allegation as to candidacy of person voted for.— In an indictment charging one with bribing another to vote at an election an allegation that the person bribed did vote for such bribe for the persons named is a sufficient allegation of the holding of the election at the time and place laid in the indictment, and an allegation that the parties voted for were candidates is unnecessary. Com. *v.* Stephenson, 3 Metc. (Ky.) 226.

Legal signification of the word "bribe."— The word "bribe" has a legal and statutory signification; and an indictment for bribery where the offense is only laid that defendant "bribed R C to vote" and that R C did vote

ment against a person for receiving a bribe for his vote at an election which shows that an election was held, who received the bribe, the person who gave it, the purpose for which it was given, and that in consideration of the bribe the vote of defendant was cast for a person who was a candidate for an office named, is sufficient.[88] An indictment which follows the words of the statute creating and defining the offense of bribery and also recites the time, place, manner, and occasion of committing the alleged crime is sufficient.[89] The fact that the statute makes both the giving of the bribe and the offering of a bribe offenses does not render an indictment which charges in a single count that defendant unlawfully offered and gave a bribe bad for duplicity.[90] In an indictment for bribing a qualified voter to refrain from voting an allegation that the voter claimed a right to vote at the election is not equivalent to an allegation that he was a qualified voter.[91] An averment in an indictment for bribery that an election was held in a certain precinct on the day prescribed for holding such election is sufficient, it

accordingly, is a good indictment and sufficiently alleges the charge. Com. *v.* Stephenson, 3 Metc. (Ky.) 226.

Allegation as to influence of the bribe.—An indictment for bribery alleging that defendant "did unlawfully and wilfully bribe G. W. Carpenter to vote in an election by paying said Carpenter one dollar which he received and voted as requested by said Steele, in consideration of said one dollar," is insufficient, as it does not state that the party receiving the bribe was influenced thereby to vote in any particular way. Com. *v.* Steele, 97 Ky. 27, 29 S. W. 855, 16 Ky. L. Rep. 700.

Indictment under Georgia statute.— An indictment charging that defendant on a certain day "in the county aforesaid, did then and there, unlawfully and with force and arms, buy the vote of one Sam Brown by then and there paying to said Sam Brown fifty cents in money, upon condition that the said Sam Brown should vote" at a certain county election, sufficiently charges a violation of the statute, making it a misdemeanor for any one to buy or sell a vote, or be concerned in buying or selling a vote at any state or county election. Brown *v.* State, 104 Ga. 736, 30 S. E. 951; Cohen *v.* State, 104 Ga. 734, 30 S. E. 932.

Purchase of one's influence.— Under a statute providing for the punishment of any person who shall bribe another, an indictment for bribery charging that defendant bribed B by paying him a certain sum of money "for the purpose of buying his influence with the Democratic challengers and election officers" at a certain election, "and for the purpose of bribing the said challengers and election officers for the purpose of procuring and influencing votes" at such election is good under the statute, it being further provided by statute that "whoever shall receive money or other thing of value to be used for the purpose of procuring or influencing a vote or votes shall be deemed to have been bribed." And such indictment is also good at common law, the intention of defendant according to averment being to influence B to corrupt the election officers. Com. *v.* Headley, 111 Ky. 815, 64 S. W. 744, 23 Ky. L. Rep. 1104, 56 L. R. A. 709.

Allegation as to vote for congressman.— In U. S. *v.* McBosley, 29 Fed. 897, it was held that an indictment under the federal statute for illegal voting or for bribery at an election for a representative in congress voted for at the same time and places and upon the same tickets with candidates for local or state offices need not charge that the ballot cast contained the name of a person voted for as representative in congress or that the bribe was with intent to influence the voter in respect to the congressional election.

Bribery of election officer.—Under a statute which provides that if prior to an election the chairman of the county central committee of either of the two parties that cast the largest number of votes at the last general election shall designate a member of such party as judge he shall be appointed, it was held in a prosecution for attempting to bribe one who "had theretofore been designated as one of the election board" of a certain precinct before the election, that the information was defective in failing to state by whom the alleged election judge had been designated for appointment or under or by what authority such designation had been made. Banks *v.* State, 157 Ind. 190, 60 N. E. 1087.

88. Com. *v.* Adams, 5 Ky. L. Rep. 248.

Allegation as to person who gave the bribe.—Where an indictment for vote-selling is direct and certain as to the persons who received the consideration, the offense charged, and the place of commission, it is sufficient, although it does not allege who gave the bribe; hence it is a good charge of a public offense that defendant at precinct No. 9 in H county in consideration of one dollar in money voted at the August election, 1886, for one H, for clerk of said county court. Hensley *v.* Com., 9 S. W. 129, 10 Ky. L. Rep. 175.

89. People *v.* Smith, 6 N. Y. Cr. 470, 5 N. Y. Suppl. 22; State *v.* Milby, 26 Wash. 661, 67 Pac. 362.

90. People *v.* Smith, 6 N. Y. Cr. 470, 5 N. Y. Suppl. 22, as a conviction may be had upon proof of either of the charges.

91. U. S. *v.* Hendric, 26 Fed. Cas. No. 15,347, 2 Sawy. 479.

being presumed that the election was legal.[92] Under a statute which punishes any person who procures or advises any person to vote who has no lawful right to vote, an allegation that defendant offered a person a certain sum to vote as a gift, bribe, and reward is equivalent to an allegation that defendant counseled and advised him to vote.[93] It need not be alleged that the vote sought to be influenced was to be cast for a candidate rather than for a ticket.[94] An allegation of a corrupt offer to give money is sufficient, without a further allegation that the money was of value.[95] It is not necessary that the affidavit and information give the names of the candidates and the purpose of the election.[96] Although the offense is criminal, yet the courts will construe the statute liberally, if the legislature has directed that it shall be so construed.[97]

f. For Intimidation and Interference With Voters. An indictment designed to charge an offense under the federal statute for unlawfully preventing a qualified voter from exercising the right of suffrage should charge the offender with interfering at a congressional election with a voter qualified to vote and offering to vote for a representative in congress;[98] but it is not necessary to set out the facts on which depends the right of the person interfered with to vote.[99] It is necessary, however, to set forth the acts of the accused and the method of the hindering and interference.[1] So also if an affidavit on which an information under a state statute for causing a breach of the peace at a voting place, at a general public election, was issued, fails to state the means used to disturb the election, it is insufficient.[2] In such case the affidavit and information must state the voting box where the disturbance took place, otherwise they will be insufficient to support a conviction.[3] In an indictment for a conspiracy to keep lawful voters from voting, it is not necessary to allege the names of the persons who being entitled to vote were to be prevented from the exercise of the elective franchise by defendants.[4] An indictment for a conspiracy to prevent by force a citizen lawfully authorized to vote from giving his support and advocacy in a legal manner in favor of the election of a lawfully qualified person as a member of congress need not set out the acts of advocacy and support which the conspiracy was formed to prevent.[5] An indictment for unlawfully interfering with the officers of election for a representative in congress which alleges that defendant unlawfully carried away the ballot-box containing the ballots, that he aided and assisted in carrying away such ballot-box, and that he counseled and procured the carry-

92. U. S. *v.* Johnson, 26 Fed. Cas. No. 15,488, 2 Sawy. 482.

An averment that an election was held at a certain precinct is equivalent to an averment that it was held in such precinct. U. S. *v.* Johnson, 26 Fed. Cas. No. 15,488, 2 Sawy. 482.

93. U. S. *v.* Hendric, 26 Fed. Cas. No. 15,346, 2 Sawy. 476.

Knowledge of voter's age.— In such case a charge that defendant knowingly offered to give a certain person a bribe to vote, such person then being under the age of twenty-one years, sufficiently charges that defendant had knowledge of the voter's age. U. S. *v.* O'Neill, 27 Fed. Cas. No. 15,949, 2 Sawy. 481.

94. State *v.* Downs, 148 Ind. 324, 47 N. E. 670.

95. State *v.* Downs, 148 Ind. 324, 47 N. E. 670.

96. Baum *v.* State, 157 Ind. 282, 61 N. E. 672, 55 L. R. A. 250.

97. Com. *v.* Headley, 111 Ky. 815, 64 S. W. 744, 23 Ky. L. Rep. 1104, 56 L. R. A. 709.

98. U. S. *v.* Cahill, 9 Fed. 80, 3 McCrary 200.

99. U. S. *v.* Cahill, 9 Fed. 80, 3 McCrary 200.

1. U. S. *v.* Belvin, 46 Fed. 381.

2. Wright *v.* State, (Tex. Cr. App. 1900) 55 S. W. 48.

3. Wright *v.* State, (Tex. Cr. App. 1900) 55 S. W. 48.

4. U. S. *v.* Crosby, 24 Fed. Cas. No. 14,893, 1 Hughes 448.

But in an indictment for a conspiracy to intimidate a particular citizen of the United States for the purpose of preventing his free exercise of the right to vote, it must be alleged that the individual sought to be intimidated was qualified to vote. U. S. *v.* Crosby, 24 Fed. Cas. No. 14,893, 1 Hughes 448.

5. U. S. *v.* Goldman, 25 Fed. Cas. No. 15,225, 3 Woods 187.

The jurisdiction of a federal court to try the indictment in such case is not ousted by the fact that the indictment charges that in carrying out their design the conspirators were guilty of a crime of which the state courts have exclusive jurisdiction, even though such crime were of a higher grade

ing away of such ballot-box charges but the single offense of interfering with the officers of an election.[6] An indictment under the statute for carrying weapons at the polls need not allege that the accused was not a sheriff, deputy sheriff, or other arresting officer acting in the discharge of his duty, which persons are excepted from the provisions of the statute.[7]

g. For Betting on Elections. An indictment for betting on the result of an election must state for what purpose the election was held.[8] It is sufficient to name the election day without stating that the law requires it to be held on that day.[9] A charge that defendant bet that a certain candidate would be elected sufficiently charges that an election was about to be held.[10] In an indictment for betting that a certain person would or would not be elected to a particular office it must be averred that he was a candidate for that office.[11] The indictment may be good, although the sum bet is not stated;[12] and a statement of a wrong amount of the sum seems not to be fatal.[13] The fact that an indictment charges an offense either under the statute against betting on elections or under the statute against gaming is no ground for quashing it on motion.[14] It is doubtless the better practice to allege with whom the bet was made.[15] It has been held, however, that it is not necessary to aver with whom the bet was made.[16] The indictment must state when the election was to be held.[17] It is not necessary to charge that defendant bet upon the success of any particular candidate.[18] An indictment for winning money on the result of an election is properly laid as of the day of election.[19] It

than the conspiracy charged. U. S. *v.* Goldman, 25 Fed. Cas. No. 15,225, 3 Woods 187.

6. Connors *v.* U. S., 158 U. S. 408, 15 S. Ct. 951, 39 L. ed. 1033.

7. If defendant is such person it is a matter of defense. Kitchens *v.* State, 116 Ga. 847, 43 S. E. 256.

8. Bellair *v.* State, 6 Blackf. (Ind.) 104.

A charge that the election was for president and vice-president of the United States without reference to the electors is sufficient. Somers *v.* State, 5 Sneed (Tenn.) 438; Porter *v.* State, 5 Sneed (Tenn.) 358.

9. State *v.* Banfield, 22 Mo. 461.

10. Sherban *v.* Com., 8 Watts (Pa.) 212, 34 Am. Dec. 460.

11. Com. *v.* Shouse, 16 B. Mon. (Ky.) 325, 63 Am. Dec. 551.

12. State *v.* Bridges, 24 Mo. 353.

13. Upon the trial of an indictment for betting fifty dollars on an election, it appeared that twenty-five dollars only of the money was defendant's; the remaining twenty-five dollars being contributed by two other persons. It was held that the offense being a misdemeanor the indictment was not bad in failing to charge the others as accessaries. Com. *v.* McAtee, 8 Dana (Ky.) 28.

14. Frazee *v.* State, 58 Ind. 8.

15. Lewellen *v.* State, 18 Tex. 538; State *v.* Griggs, 34 W. Va. 78, 11 S. E. 740.

A charge that defendant won and took money from a certain person is equivalent to a charge that he bet with that person. State *v.* Little, 6 Blackf. (Ind.) 267.

An indictment against two persons charging that they bet on the result of an election will be construed to mean that they bet with each other and is therefore good. State *v.* Ragan, 22 Mo. 459; State *v.* Snider, 34 W. Va. 83, 11 S. E. 742; State *v.* Griggs, 34 W. Va. 78, 11 S. E. 740. But see *contra*, Lewellen *v.* State, 18 Tex. 538, where two persons being jointly indicted for betting upon an election, the court said that if it was intended to charge defendants with having made a wager together it would seem that it should have been so averred; if with having jointly made a wager with some other person, it should have been stated with whom; or with some one to the jurors unknown it should have been so charged.

16. State *v.* Trotter, 5 Yerg. (Tenn.) 184.

17. Lewellen *v.* State, 18 Tex. 538.

Averment that election was held.— It has been held that inasmuch as statutes against gaming are remedial and are not to be construed strictly, it need not be alleged that the election was held, since the law requiring the election is presumed to be obeyed. Cain *v.* State, 13 Sm. & M. (Miss.) 456. An indictment charging a betting on an election held on a certain day between certain parties who were then and there running, etc., sufficiently charges that an election was held. State *v.* Ragan, 22 Mo. 459.

18. It is sufficient to charge the pendency of a lawful election for a particular year and that the bet was made on the result of that election. State *v.* Cross, 2 Humphr. (Tenn.) 301.

An allegation that defendant bet on the result of an election is not a conclusion of law. Com. *v.* Avery, 14 Bush (Ky.) 625, 29 Am. Rep. 429.

19. As that is the day the result is reached, although it may not be legally announced until later. Hizer *v.* State, 12 Ind. 330. But in such case the time must not be laid before election day, as that would be an impossible date of winning. State *v.* Windell, 60 Ind. 300.

is no objection to the indictment that the time when the bet is alleged to have been made was after the election.[20]

h. Joinder of Parties. The duties of inspectors, judges, and clerks of election are several and not joint, and as a rule they cannot be joined as defendants in one indictment for neglect or violation of their duties.[21] And where the duties of the officers of a party primary election are the same as under the general election laws, the judge and inspectors cannot be jointly indicted for a violation of the duties of their offices.[22] But where the offense arises wholly from any joint act which in itself is criminal, without regard to any particular personal defendant, defendants may be charged either jointly or severally.[23]

i. Duplicity or Misjoinder of Offenses. The making up of the poll-book by false entries of one or more votes or of votes for one or more candidates is a single offense, and no question of misjoinder of offenses arises.[24] An information charging wilful neglect of duty and corrupt conduct in canvassing election returns is not bad for duplicity, under a statute describing the offense in the same words, but in the disjunctive.[25] Where election officers are tried upon several counts of an indictment, one of which charges conspiracy to make a false return of the votes for a certain candidate and another charges them with fraudulently adding to the poll-book names of persons who did not vote, and the offenses arise out of the same transaction, the prosecution will not be directed to elect under which count it will proceed.[26] A count in an indictment charging that the inspectors of an election did knowingly receive and sanction the reception of an illegal vote is not objectionable for duplicity.[27] An indictment charging in the same count two persons with betting on the result of an election, and a third with becoming

20. State *v.* Little, 6 Blackf. (Ind.) 267.

21. Com. *v.* Miller, 2 Pars. Eq. Cas. (Pa.) 480; U. S. *v.* Davis, 33 Fed. 621, defendant in the latter case being indicted under U. S. Rev. St. (1878) § 5515.

Joinder of judge and inspectors.— Under a statute providing that "if any inspector or judge of an election shall knowingly reject the vote of any qualified citizen . . . each of the persons so offending shall on conviction be punished," etc., the inclusion of the judge and two inspectors in the same indictment is a misjoinder. Com. *v.* Youlls, 5 Kulp (Pa.) 231.

Positions separate and distinct.— The judge, inspectors, and clerks of an election board cannot be jointly indicted for neglecting to make true election returns, making false counts of the ballots, and neglecting to deposit the tally-papers in the ballot-box, as their offices or positions are separate and distinct. Com. *v.* Ziert, 4 Pa. Co. Ct. 394, 5 Lanc. L. Rev. 138.

22. Com. *v.* Boyle, 3 Pa. Dist. 591. Thus primary election officers may be jointly indicted for false returns under the Pennsylvania act of 1881, but they cannot be jointly indicted for holding a primary election without taking the oath prescribed by that act. Com. *v.* Boyle, 14 Pa. Co. Ct. 561.

23. Com. *v.* Miller, 2 Pars. Eq. Cas. (Pa.) 480.

Joinder of counts for conspiracy and for fraud.— The first count of an indictment having jointly charged defendants with conspiracy to defraud, and three other counts thereof with wilful fraud as judge, inspectors, and clerks of a primary election, and defendants having declined to plead on the ground that the last three counts charged them with joint offenses when they exercised different functions, and that they should be indicted and tried separately it was held, directing defendants to plead, that as they were indicted under the act of June 29, 1881, regulating the holding of and to prevent fraud at primary elections, they were all officers, and as the oath and the party rules under that act made it their duty as a board faithfully to conduct the elections, the last three counts were properly joined, and independently of that defendants should be tried jointly on the count for conspiracy. Com. *v.* Shaub, 5 Lanc. L. Rev. 121.

24. Com. *v.* Duff, 87 Ky. 586, 9 S. W. 816, 10 Ky. L. Rep. 617.

25. People *v.* Clarke, 105 Mich. 169, 63 N. W. 1117.

26. Com. *v.* Fry, 5 Lanc. L. Rev. 75.

27. Byrne *v.* State, 12 Wis. 519, 525. In this case Dixon, C. J., said: "The objection of duplicity is untenable. The rule is well settled that, where a statute makes either of two or more distinct acts connected with the same general offense and subject to the same measure and kind of punishment, indictable separately and as distinct crimes, when each shall have been committed by different persons or at different times, they may, when committed by the same person at the same time, be coupled in one count, as constituting altogether but one offense. In such cases the several acts are considered as so many steps or stages in the same affair, and the offender may be indicted as for one combined act in violation of law; and proof of either of the acts mentioned in the statute and set forth in the indictment will sustain a conviction."

a stakeholder of the bet, is defective, inasmuch as the offenses are separate.[28] Where defendant has been found guilty on an indictment charging him in one count substantially with making false returns of the votes cast as an election officer of a primary election, and the evidence is only sufficient to convict him of a false count, a new trial should be granted, as the latter, being a distinct offense, should have been embraced in a separate count.[29]

D. Defenses. When one is prosecuted for voting illegally, it is no defense that he believed he had a right to vote;[30] that defendant had forgotten his conviction of a crime which disqualified him;[31] or that he was advised that there was no record of his conviction on the court dockets and that he voted under this advice, honestly believing that he had a lawful right to vote.[32] The fact that defendant was a minor when convicted and also when discharged from prison is no defense.[33] It is no defense that defendant was advised by one in whom he had entire confidence that he had a right to vote.[34] Irregularities in the manner of holding an election constitute no defense to a prosecution against one who voted illegally thereat.[35] It is no defense to a prosecution for voting a second time that the first vote was illegal and not entitled to be counted.[36] It has been held that the decision of the judges of election in favor of defendant's right to vote upon his being challenged is no defense to a prosecution for illegal voting.[37] But on the other hand it has been held that such decision, although erroneous, relieves him from criminal liability in the absence of fraud and collusion.[38] A judge of election cannot defend a prosecution for wilfully refusing to accept a ballot, on the ground that he did not consider the naturalization papers of the voter sufficient; he must know at his peril.[39] An inspector of election is not bound to accept the decision of the poll clerks and to sign the election returns as prepared by them. It is his duty to examine, investigate, and if necessary correct them. He cannot shield himself by pleading their misconduct.[40] In a prosecution against one not an inspector of election for putting ballots into the box it is no defense that the accused was appointed by power of attorney by one who was a duly authorized inspector, and that he had been advised that he could lawfully act under such power.[41] In a prosecution for signing a certificate of nomination in the name of another it is no defense that defendant entertained no criminal intent and thought that he had a right to do so.[42]

E. Issues, Proof, and Variance. Whether or not the meeting at which one is accused of illegal voting was legally organized is issuable.[43] A conviction on an indictment for using for the purpose of registering a voter a naturalization certificate knowing the same to have been unlawfully issued is not sustained by proof that defendant knew that the certificate had been issued without his presence in court and without any oath being taken by him.[44] An indictment

28. State *v.* Bridges, 24 Mo. 353.
29. Com. *v.* Gallagher, 3 Lanc. L. Rev. 157.
30. U. S. *v.* Anthony, 24 Fed. Cas. No. 14,459, 11 Blatchf. 200.
31. Gandy *v.* State, 82 Ala. 61, 2 So. 465, 86 Ala. 20, 5 So. 420.
32. Gandy *v.* State, 82 Ala. 61, 2 So. 465, 86 Ala. 20, 5 So. 420.
33. Hamilton *v.* People, 57 Barb. (N. Y.) 625.
34. State *v.* Boyett, 32 N. C. 336.
Opinion of others.— Where a person voluntarily gave an unlawful vote, it was held that the unlawful purpose *prima facie* attached to the act, and that the opinions of others who believed the vote lawful, including those of the judges of election, did not amount to a justification or excuse. State *v.* Hart, 51 N. C. 389.
35. State *v.* Cahoon, 34 N. C. 178, 55 Am. Dec. 407.
36. State *v.* Perkins, 42 Vt. 399.
37. Morris *v.* State, 7 Blackf. (Ind.) 607.
38. State *v.* Pearson, 97 N. C. 434, 1 S. E. 914, 12 Am. St. Rep. 303.
39. State *v.* Colton, 9 Houst. (Del.) 530, 33 Atl. 259.
40. Boland *v.* People, 25 Hun (N. Y.) 423.
41. Hogan *v.* People, 2 Thomps. & C. (N. Y.) 535.
42. Com. *v.* Connelly, 163 Mass. 539, 40 N. E. 862.
43. Because if there was no legal meeting there can be no offense in voting therein. Com. *v.* Wallace, Thach. Cr. Cas. (Mass.) 592.
44. U. S. *v.* Burley, 24 Fed. Cas. No. 14,686, 14 Blatchf. 91.

charging inspectors of election with the appointment of incompetent and unsuitable persons as assistant inspectors, to be good, must state that it was done with the intent to affect the result of the election, otherwise it would be insufficient and quashable, and these allegations must on the trial be proved to the satisfaction of the jury beyond a reasonable doubt, if not, no conviction can be had.[45] A statute making every person who wilfully causes, procures, or allows false registration punishable applies as well to private citizens as to officers, and a charge that defendant was a deputy register is surplusage and need not be proved.[46] In a prosecution for betting on the result of an election a variance between the sum alleged to have been bet and that proved to have been bet is immaterial, where the penalty for betting either sum is the same.[47] Where it is charged that defendant, with the fraudulent intent to procure his name to be placed on the list of voters and to obtain permission to vote, gave false answers to the registration officers, and the proof is that his name was on the list of voters when he gave the false answers, the variance is fatal.[48] An allegation that a meeting of the inhabitants of a certain town was duly held is proved by evidence that a meeting of the inhabitants of that town who were qualified to vote was duly held.[49] An indictment for betting on the result of an election which charges that the bet was made before the election was held is sustained by proof that the bet was made afterward, but before the result was known.[50] An indictment for the offense of voting in two precincts which does not allege the place of voting with legal certainty cannot be supported under the statute, and if the places of voting are alleged in the indictment a variance from them or either of them in the proof will be fatal to a conviction.[51] Evidence that defendant had bet that a certain candidate for president of the United States had been elected, and that he had subsequently paid the bet, does not support an allegation in an indictment that the wager depended upon the result of the election in a particular state.[52] One indicted for the felony of knowingly casting more than one vote at a municipal election may be convicted upon sufficient proof of an attempt to cast more than one vote, which is a misdemeanor under the statute.[53] Allegations in an indictment for failure to make and return a certificate of election that the acts were done wilfully and maliciously are surplusage and need not be proved.[54] Where an indictment in general terms negatives the fact that defendant was a qualified voter, but omits to allege what it was that disqualified him from voting, a conviction for illegal voting cannot be sustained by evidence that defendant had prior to the election in question at which he voted made a bet on the result.[55]

F. Evidence — 1. Presumptions and Burden of Proof. In a prosecution for illegal voting the state must show that the accused knowingly and wilfully committed the offense.[56] And the prosecution must also show that the accused voted at an election legally held.[57] Where an election officer is indicted for rejecting a vote the presumptions are in his favor.[58] In a prosecution for voting at an election without being a citizen of the United States, where it appears that the

45. U. S. *v.* Caruthers, 15 Fed. 309.

46. People *v.* Sternberg, 111 Cal. 3, 43 Pac. 198.

47. Com. *v.* McAtee, 8 Dana (Ky.) 28.

48. For the allegation of the intent to procure his name to be placed on the list of voters cannot be rejected as surplusage. Com. *v.* Shaw, 7 Metc. (Mass.) 52.

49. Com. *v.* Shaw, 7 Metc. (Mass.) 52.

50. Gamble *v.* State, 35 Miss. 222.

51. State *v.* Fitzpatrick, 4 R. I. 269. In this case the indictment contained two counts which laid the votings alternately in order of time in Providence and North Providence, and the jury could not determine from the proof in which town the last or illegal voting took place, and it was held that they were not warranted in returning a verdict of guilty upon either or both of the counts of the indictment.

52. Covington *v.* State, 28 Tex. App. 225, 14 S. W. 126.

53. State *v.* Ryan, 60 Mo. App. 487.

54. U. S. *v.* Vigil, 7 N. M. 296, 34 Pac. 530.

55. People *v.* Standish, 6 Park. Cr. (N. Y.) 111.

56. State *v.* McGinly, 2 Ohio Dec. (Reprint) 398, 2 West. L. Month. 594.

57. State *v.* McGinly, 2 Ohio Dec. (Reprint) 398, 2 West. L. Month. 594.

58. Com. *v.* Lee, 1 Brewst. (Pa.) 273, indictment for knowingly rejecting the vote of a qualified voter.

accused is of foreign birth, the burden is upon him to show that he had become naturalized.[59] Where defendant is charged with carrying arms within the prohibited distance of a voting place on election day, the presumption is that the election was legal and the burden is on the accused to show the contrary.[60] Where a number of voters testified that they voted a certain ticket and the returns showed that a less number of votes were counted and returned as the vote for such ticket, it is incumbent on the judges and officers of election to explain the discrepancy.[61] On the trial of a person indicted for giving in a vote at an election, knowing himself not to be a qualified voter, when the only question is, whether he had resided in the town where he voted six months next preceding the election, evidence that he had resided in another town until within seven months of the election does not put upon him the burden of showing that he had changed his residence, but the burden of proof to support the indictment remains with the prosecution.[62]

2. ADMISSIBILITY. In a prosecution for illegal voting the fact that defendant was under age and that he knew it may be proved by his admissions.[63] In such a prosecution it is permissible to prove that defendant's father told him before he voted that he was twenty-one years of age.[64] On the trial of one charged with concealing the registration lists from the public, evidence of the situation of the election districts, their relation to the building in which the registry was made and the votes cast, the poll lists themselves as showing how the vote was made up, that unsuccessful attempts to obtain access to the registration lists were made, and the circumstances consequent upon such attempts are admissible.[65] Although the poll lists are the highest and best evidence of the persons who voted at an election,[66] yet if they are not certified they are not competent evidence against one charged with illegal voting without extrinsic proof of their authenticity and correctness.[67] On a trial for making a false certificate to the returns the certificate itself is *prima facie* evidence that it was signed by the election officers who acted at the precinct in question.[68] The challenger's book should be regarded as a book of original entries, truthfully made, of the transactions as they occur.[69] Testimony by one of the inspectors that an election was in fact held and a board of inspectors that received votes was duly organized is competent evidence that an election was held.[70] Where the ballots have been destroyed as required by law it is competent to introduce secondary evidence of what they contained.[71] Parol evidence of the

59. State *v.* McGinly, 2 Ohio Dec. (Reprint) 398, 2 West. L. Month. 594; Patterson *v.* State, 2 Ohio Dec. (Reprint) 304, 2 West. L. Month. 334.

60. Cooper *v.* State, 26 Tex. App. 575, 10 S. W. 216; Harrell *v.* State, (Tex. App. 1888) 10 S. W. 217.

61. U. S. *v.* Carpenter, 41 Fed. 330.

62. Com. *v.* Bradford, 9 Metc. (Mass.) 268.

63. People *v.* Tripp, 4 N. Y. Leg. Obs. 344. See also Ackerman *v.* Runyon, 3 Abb. Pr. (N. Y.) 111.

64. For a minor cannot be convicted of illegal voting if he honestly believed that he was of full age when he voted. Carter *v.* State, 55 Ala. 181.

Ordinarily there is no excuse for ignorance of the law, and it is not permissible to prove that defendant was advised that he had a right to vote. State *v.* Sheeley, 15 Iowa 404; State *v.* Boyett, 32 N. C. 336. It has been held, however, that evidence that defendant consulted counsel as to his right to vote, and submitted to them the facts of his case, and was advised by them that he had the right to vote, is admissible in his favor on the trial of an indictment against him for wilfully voting, knowing himself not to be a qualified voter; but it is not conclusive evidence that he did not know that he was not a qualified voter. Com. *v.* Bradford, 9 Metc. (Mass.) 268.

65. People *v.* McKane, 143 N. Y. 455, 38 N. E. 950 [*affirming* 80 Hun 322, 30 N. Y. Suppl. 95].

66. Hunter *v.* State, 55 Ala. 76; Wilson *v.* State, 52 Ala. 299.

67. Hunter *v.* State, 55 Ala. 76.

68. Com. *v.* O'Hara, 33 S. W. 412, 17 Ky. L. Rep. 1030.

69. Owens *v.* State, 67 Md. 307, 10 Atl. 210, 302.

Such book is not rendered inadmissible in evidence by the fact that the witness has an independent recollection of the transactions therein referred to. If the witness swears that the entries in the book were truthfully made they are admissible, irrespective of his present recollection. Owens *v.* State, 67 Md. 307, 10 Atl. 210, 302.

70. People *v.* Tripp, 4 N. Y. Leg. Obs. 344.

71. Com. *v.* McGurty, 145 Mass. 257, 13 N. E. 98.

record of a meeting at which the accused is alleged to have voted illegally is not admissible to show that the meeting was not legally authorized, the record itself being the best evidence.[72] On a trial for vote-selling, where a witness for the prosecution has testified that he heard a conversation between a third person and defendant as to voting, it is reversible error to permit him to state what he thinks the inducement was and what defendant was to do, instead of detailing the conversation.[73] Where it appears that the terms of a bet were indorsed on the envelope which held the stakes, parol evidence of the indorsement cannot be given without accounting for the envelope.[74] Defendant's statements made under oath at the polls upon being challenged are not admissible in evidence on his behalf.[75] The policy of the law is to preserve the secrecy of the ballot, but there is no good reason why voters should not be permitted to testify in a criminal prosecution as to how they voted.[76] It has been held, however, that this cannot be permitted.[77] Where in the trial of an indictment against the mayor and aldermen of a city for neglect in omitting to return certain votes to the governor and council which were cast in said city at an election for a member of congress, it appeared that after one certificate of the votes had been returned an error had been discovered therein and an amended certificate returned which had been rejected by the governor and council and retained by them unopened, it was held that such rejected certificate was admissible in evidence and should be taken from the secretary of state and opened by the court.[78] Upon the trial of one who was not an inspector of election, for putting ballots in the box, it is not permissible to prove that at the time he was acting as inspector instead of the person who had been appointed, and who had by power of attorney appointed the prisoner to act in his place.[79] On a prosecution for carrying a pistol near the polls on an election day, it is competent for the sheriff to testify that in arresting defendant he felt something on his person which he thought was a pistol.[80]

3. **Weight and Sufficiency.** In most cases violations of election laws are punished with great severity, but no general rules as to the weight and sufficiency of the evidence in such cases can be stated, except the well-known rule of the criminal law that evidence must be such as to convince the jury of the prisoner's guilt beyond a reasonable doubt.[81] Indeed in some cases it is provided by statute

72. Com. *v.* Wallace, Thach. Cr. Cas. (Mass.) 592.

73. Hensley *v.* Com., 9 S. W. 129, 10 Ky. L. Rep. 175.

74. Frazee *v.* State, 58 Ind. 8.

75. Morris *v.* State, 7 Blackf. (Ind.) 607.

76. Com. *v.* Ryan, 1 Wilcox (Pa.) 147.

77. Com. *v.* Barry, 98 Ky. 394, 33 S. W. 400, 17 Ky. L. Rep. 1018.

78. Com. *v.* Boston, Thach. Cr. Cas. (Mass.) 298.

79. Hogan *v.* People, 2 Thomps. & C. (N. Y.) 535.

80. Harper *v.* State, (Tex. Cr. App. 1901) 65 S. W. 182.

81. Com. *v.* Young, 15 Pa. Co. Ct. 349; Com. *v.* Maher, 38 Leg. Int. (Pa.) 269.

See also the following cases:

Delaware.— State *v.* Caldwell, 1 Marv. 555, 41 Atl. 198.

Massachusetts.— Com. *v.* McGurty, 145 Mass. 257, 14 N. E. 98; Com. *v.* Bradford, 9 Metc. 268; Com. *v.* Shaw, 7 Metc. 52.

Missouri.—State *v.* Hardeilen, 169 Mo. 579, 70 S. W. 130.

Ohio.— Patterson *v.* State, 2 Ohio Dec. (Reprint) 304, 2 West. L. Month. 333.

Texas.— May *v.* State, (Cr. App. 1901) 63 S. W. 132.

United States.— U. S. *v.* Carpenter, 41 Fed. 330.

See 18 Cent. Dig. tit. "Elections," § 366.

Destruction of ballots.— Under an indictment charging defendant with having destroyed ballots, where the evidence was purely circumstantial, in order to convict the jury should be satisfied from the proof that the ballots could have disappeared in no other reasonable way than by the destruction alleged. State *v.* Mundy, 2 Marv. (Del.) 429, 43 Atl. 260.

Illegal voting.— Where a defendant is charged with the offense of illegal voting at a certain election, and the only evidence introduced on the trial tending to show that he actually voted at such election was a list of voters kept by one of the managers of the election with the name of defendant appearing thereon as a voter, it was held that a verdict of guilty was contrary to the evidence. Banyon *v.* State, 108 Ga. 49, 33 S. E. 845.

Altering election returns.— In the absence of evidence of motive for altering the election returns and of opportunity for doing so a conviction was not sustained merely by a comparison by the jury of the few words and figures alleged to have been altered with the

that a conviction cannot be had upon the uncorroborated testimony of a single witness.[82] In a prosecution for knowingly voting without being a qualified elector, it is sufficient to prove that defendant admitted that he knew he was not qualified, without proving in what the disqualification consisted.[83]

G. Sentence and Punishment. The punishment to be inflicted for the numerous offenses against election laws by officers of election and voters is purely a matter of local statutory regulation and no general rules can be stated.[84]

same words and figures written by defendant under abnormal conditions. People *v.* Buckley, 116 Cal. 146, 47 Pac. 1009.

Knowingly procuring a false registration of a voter.—In a prosecution for knowingly procuring a false registration of a voter there was no positive evidence that defendant knew that the person registered was not a voter, but there was evidence that he knew that such person had not voted in the district for at least three years, that he was not on the registry, and that the landlady where the person boarded gave him the names of the voters in the house and did not include such person, it was held that whether defendant knew the person registered was not a voter was for the jury. McBarron *v.* State, 6 N. J. L. 43, 42 Atl. 777.

Carrying a pistol near the polls.— In a prosecution for carrying a pistol near an election precinct on an election day a person testified that he saw the handle of a pistol on defendant's person and what he thought was the bulk of the pistol below the handle. Another witness having seen defendant's coat and fearing it would expose "something" pulled the coat down. After he was arrested by the sheriff defendant was heard to state that he had a gun on his person, etc. The sheriff testified that in undertaking to arrest him he felt what he believed to be a pistol on defendant's person. It was held that the evidence was sufficient to support a conviction. Harper *v.* State, (Tex. Cr. App. 1901) 65 S. W. 182.

Counseling and procuring concealment of registration lists.— In People *v.* McKane, 143 N. Y. 455, 38 N. E. 950 [*affirming* 80 Hun 322, 30 N. Y. Suppl. 95], it appeared in evidence that the town board of the town of Gravesend, of which board defendant as supervisor was the presiding officer, divided the town into six election districts. These were so arranged that all of them converged in the town hall, in which building the registry lists were prepared and the vote cast for the entire town. The inspectors in all the districts concealed the registry lists and wilfully neglected and refused to give the public access to them, and the evidence tended to show that they were all acting in furtherance of a common plan. G, a candidate for an office to be voted for at the election, instituted judicial proceedings to compel the performance of their duty by the inspectors. Defendant employed counsel to resist these proceedings and made an affidavit to be used therein, in which he stated among other things that he had examined the lists and that they contained no fraudulent names. Defendant was chief of police and as such and as chairman of the town board had charge and control of the town hall. G sent a large body of men to the town hall to obtain access to the lists and make copies thereof; they were all driven from the hall, some beaten, and some arrested and imprisoned. Another body of G's supporters who went to the town hall on election day for the purpose of watching the proceedings were treated in a similar manner. Many were arrested without cause. Defendant was the leader in all these proceedings. The registry lists contained a great number of names of persons not legal voters and not residents of the town, and the vote at the election as reported and certified by the canvassers was much larger than the number of actual voters. Defendant had been supervisor for eight successive terms, and during that time the vote of the town was nearly unanimous in favor of the candidates he supported, which were sometimes of one political party and sometimes of another. It was held that the evidence was sufficient to sustain a conviction.

82. Com. *v.* Hart, 98 Ky. 7, 32 S. W. 138, 17 Ky. L. Rep. 545.

Bribery.—By a former statute in Kentucky no conviction for bribery could be had upon the uncorroborated testimony of a single witness. Russell *v.* Com., 3 Bush (Ky.) 469. But that statute was repealed May 7, 1886, and the conviction of a defendant for receiving a bribe for his vote may now be had on the uncorroborated testimony of the briber, although contradicted by defendant. Cheek *v.* Com., 87 Ky. 42, 7 S. W. 403, 9 Ky. L. Rep. 880.

83. State *v.* Douglass, 7 Iowa 413.

84. **Punishment inflicted by jury.**— Under a statute giving the jury authority in fixing the penalty for a misdemeanor if the same be a fine to say in their verdict whether defendant shall be put at hard labor in lieu of imprisonment for non-payment of the fine, the offense so punishable being manifestly misdemeanors only, a judgment on a verdict directing punishment by hard labor for receiving a bribe for voting, being a crime for which under the provisions of the constitution a person may be excluded from office and suffrage, is erroneous. Eldridge *v.* Com., 87 Ky. 365, 8 S. W. 892, 10 Ky. L. Rep. 176. Under the Kentucky act of April 10, 1878, section 2, providing that if a part or all the penalty for a misdemeanor prescribed in Gen. St. c. 29, be a fine, the jury in fixing the amount shall say in its verdict whether on failure to pay defendant shall be put to hard labor in lieu of imprisonment, does not ap-

H. Review. The supreme court of the United States has jurisdiction to issue a writ of habeas corpus to inquire as to the imprisonment of an officer of election convicted for a violation of an election law, where it is claimed that the law is unconstitutional; but errors of the trial court not going to its jurisdiction can be reviewed only by writ of error.[85]

ELECTION OFFICER. See ELECTIONS.

ELECTIO SEMEL FACTA, ET PLACITUM TESTATUM, NON PATITUR REGRESSUM. A maxim meaning "Election once made, and plea witnessed, suffers not a recall."[1]

ELECTIVE FRANCHISE. See ELECTIONS.

ELECTIVE OFFICE. A term applied to any office to be filled by the voters at any state, city, or town election.[2] (See, generally, ELECTIONS; OFFICERS.)

ELECTOR.[3] In general, one who elects, or one who has the right of choice.[4] Also one who exercises the right of election in equity.[5] (See CHOICE; ELECT; ELECTION; and generally, ELECTIONS.)

ELECTORAL COLLEGE. See UNITED STATES.

ELECTORS OF THE COUNTY. In law, those present and voting at an election within the county.[6] (See, generally, ELECTIONS.)

ELECTRICAL PLANT. In technical parlance, a plant consisting of dynamos, converters, switchboard, lamps, etc., with the necessary wiring and connections.[7]

ELECTRIC ARC. A term used to describe the flow of electric current over an air gap caused by the interruption of the continuity of the circuit by throwing open a bridge connecting the two stationary terminals connected to the opposite branches of a circuit.[8]

ELECTRIC COMPANIES. See ELECTRICITY.

ply to a conviction for betting on an election, made a misdemeanor by Gen. St. c. 47, and on default by defendant it is not necessary to impanel a jury to fix the punishment. Com. *v.* Neat, 89 Ky. 241, 12 S. W. 256, 11 Ky. L. Rep. 434.

Disqualification for holding office.— The trial, conviction, and sentence of one who holds the office of sheriff of the offense of bribing a voter previous to his election to the office, is not such a conviction of misbehavior in office or of any infamous crime as will disqualify him from exercising the duties of his office. Com. *v.* Shaver, 3 Watts & S. (Pa.) 338, Brightly Lead. Cas. El. 134.

Fine fixed at amount bet.— Where a statute provides that if any one shall bet on an election he shall be fined not exceeding the amount bet, it has been held that the amount risked or bet is the value of the property, because one might lose that; and as a bet is a joint transaction, both parties are held equally guilty and each should be fined up to the amount bet. *In re* Shumate, 15 Gratt. (Va.) 653.

85. *Ex p.* Clark, 100 U. S. 399, 25 L. ed. 715; *Ex p.* Siebold, 100 U. S. 371, 25 L. ed. 717.

1. Wharton L. Lex.

Applied in Equitable Co-operative Foundry Co. *v.* Hersee, 33 Hun (N. Y.) 169, 177.

2. Mass. Rev. Laws (1902), p. 104, c. 11, § 1.

3. See 8 Cyc. 739 note 90, 791 note 6, 846 note 29; 7 Cyc. 135.

4. Webster Dict. [*quoted* in Beardstown *v.* Virginia, 76 Ill. 34, 39].

5. Bouvier L. Dict.

In the German Empire, the name was given to those great princes who had the right to elect the emperor or king. Bouvier L. Dict.

6. Taylor *v.* Taylor, 10 Minn. 107.

7. John A. Roebling's Sons Co. *v.* Humboldt Electric Light, etc., Co., 112 Cal. 288, 290, 44 Pac. 568.

8. It is "mainly a stream of metallic vapor" which comes from the fusing and vaporizing of the contracts or of the electrodes, for an electric arc "is the source of an intense heat and light." Thomson-Houston Electric Co. *v.* Nassau Electric R. Co., 107 Fed. 277, 278, 46 C. C. A. 263.

ELECTRICITY

By Frank E. Jennings*

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CROSS-REFERENCES

For Matters Relating to:
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*Author of "Bastards," 5 Cyc. 622; "Bridges," 5 Cyc. 1049; "Census," 6 Cyc. 725; "Colleges and Universities," 7 Cyc. 238; "Common Scold," 8 Cyc. 392; "Compounding Felony," 8 Cyc. 492; "Concealment of Birth or Death," 8 Cyc. 545; "Confusion of Goods," 8 Cyc. 570; "Continuances in Criminal Cases," 9 Cyc. 163; "Covenant Action of," 11 Cyc. 1022; "Debt, Action of," 13 Cyc. 402; "Detectives," 14 Cyc. 234; and joint author of "Damages," 13 Cyc. 266.

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I. DEFINITION.

Electricity in physics is "the name given to the cause of a series of phenomena exhibited by various substances, and also to the phenomena themselves." Its true nature is not understood.[1]

II. RIGHT TO PRODUCE AND SELL.

The right to produce and sell electricity as a commercial product is not a prerogative of government but is open to all.[2]

III. ELECTRICAL COMPANIES.[3]

A. Construction of Franchise. The charter of a company engaged in the manufacture or sale of electricity for lighting or other purposes will be strictly construed against the incorporators in reference to the powers of the company,[4] the

1. Imperial Dict. [*quoted* in Spensley *v.* Lancashire Ins. Co., 54 Wis. 433, 442, 11 N. W. 894, where the court, quoting from the same authority, said: "We are totally ignorant of the nature of this cause — whether it be a material agent or merely a property of matter. But as some hypothesis is necessary for explaining the phenomena observed, it has been assumed to be a highly subtile, imponderable fluid, identical with lightning, which pervades the pores of all bodies, and is capable of motion from one body to another. . . . Electricity, when accumulated in large quantities, becomes an agent capable of producing the most sudden, violent and destructive effects, as in thunder storms; and even in its quiescent state it is extensively concerned in the operations of nature"].

Other definitions are: "A name denoting the cause of an important class of phenomena of attraction and repulsion, chemical decomposition, etc., or, collectively, these phenomena themselves. The true nature of electricity is as yet not at all understood; but it is probable that it is not, as was formerly assumed, of the nature of a fluid — either a single fluid, as was supposed by Franklin, or two fluids (positive and negative), as was supposed by Symmer. The word was first used by Gilbert, the creator of the science of electricity, and by him was applied to the phenomena of attraction and repulsion as exhibited when amber (electrum) and some other substances of a similar character were briskly rubbed. Its meaning has been gradually extended to include a large variety of phenomena, among which may be named heating, luminous and magnetic effects, chemical decomposition, etc., together with numerous apparent attractions and repulsions of matter widely differing from those originally noted, but all of which are attributed to a common cause. The subject is usually divided into the two parts of statical or frictional electricity, including the electricity produced by friction and analogous means, the phenomena of which are chiefly statical, and current electricity (also called voltaic electricity), including that produced by the chemical or voltaic battery and electromagnetic machines, the phenomena of which are mostly dynamical." Century Dict.

As used in the Electric Lighting Act of 1882 (45 & 46 Vict. c. 56, § 32) it "means electricity, electric current, or any like agency."

"'Electric' suggests a meaning. I do not mean to say it has a meaning. The more one knows of electricity perhaps the less meaning it has. . . . The Act of Parliament [relative to a trade mark] is for an ordinary Englishman. What does the ordinary Englishman know of 'Electric' as applied to velveteen? He knows what 'Electric' is more or less, perhaps rather less than more, and he associates it with electricity — that is what an ordinary person would suppose, rightly or wrongly. . . . This word is not obviously meaningless, and is not in my judgment a fancy word." *In re* Van Duzer's Trade-Mark, 34 Ch. D. 623, 643, 56 L. J. Ch. 370, 56 L. T. Rep. N. S. 286, 35 Wkly. Rep. 294, per Lindley, L. J.

Electric launches as steam vessels see COLLISION, 7 Cyc. 329 note 81.

2. Purnell *v.* McLane, (Md. 1904) 56 Atl. 830.

3. See also RAILROADS; STREET RAILROADS; TELEGRAPHS AND TELEPHONES.

4. Brush Electric Light Co. *v.* Jones Brothers Electric Co., 10 Ohio Dec. (Reprint) 767, 23 Cinc. L. Bul. 329, holding that the authority to engage in electrical illumination must be clear and explicit, and will not be implied from the authority to manufacture and operate dynamos, motors, and other electrical appliances, or to manufacture, buy, and sell telegraph and electrical appliances and engage in "general light manufacturing."

exclusiveness[5] and the perpetuity[6] of the grant, and the performance of conditions upon which the privilege is conferred.[7]

B. Regulation and Control.[8] Companies engaged in the manufacture or handling of so dangerous a commodity as electricity are subject to reasonable regulations and restrictions by the proper authorities. They may be required to transfer their wires from poles to conduits,[9] and to supply electric lighting to premises within a specified distance of their wires.[10]

C. Rights and Powers — 1. In General. The general rules of law gov-

Companies organized before electricity was used for lighting will not be held to contemplate the furnishing of light by this means, although the words used in the articles of incorporation are broad enough to be construed otherwise had this means of lighting been so commonly used as to have been in the probable contemplation of the grantors of the charter. Carthage *v.* Carthage Light Co., 97 Mo. App. 20; Scranton Electric Light, etc., Co.'s Appeal, 122 Pa. St. 154, 15 Atl. 446, 9 Am. St. Rep. 79, 1 L. R. A. 285.

Place of operation.— A charter authorizing a company to manufacture and sell electricity for light, heat, or power in certain villages, and in other cities, villages, and towns of a designated state, is sufficiently broad to authorize the company to extend its electrical appliances to adjoining towns. Metropolitan Trust Co. *v.* Dolgeville Electric Light, etc., Co., 35 Misc. (N. Y.) 467, 71 N. Y. Suppl. 1055.

5. Empire City Subway Co. *v.* Broadway, etc., R. Co., 87 Hun (N. Y.) 279, 33 N. Y. Suppl. 1055; Scranton Electric Light, etc., Co. *v.* Scranton Illuminating Heat, etc., Co., 3 Pa. Co. Ct. 628, both cases holding that the rule that the grant of a franchise will be construed strictly against its alleged exclusiveness applies to companies engaged in the manufacture or sale of electricity.

A period of exclusiveness until an electric company shall, from its earnings, have "realized and divided among its stockholders for five years a dividend of eight per cent" is not terminated by the fact that its profits have within such time exceeded fifty per cent, if they have been invested in good faith in improvements and not set apart as dividends. Wilkes-Barre Electric Light Co. *v.* Wilkes-Barre Light, etc., Co., 4 Kulp (Pa.) 47.

6. Horner *v.* Eaton Rapids, 122 Mich. 117, 80 N. W. 1012, holding that an electrical company's claim of a perpetual or vested right in a street for certain purposes will not be sustained unless clearly established.

7. Edison Electric Illuminating Co. *v.* Hooper, 85 Md. 110, 36 Atl. 113 (holding that if certain acts or the compliance with conditions precedent are necessary for the acquirement of certain privileges, the company must comply therewith before claiming the same); Kensington Electric Co. *v.* Philadelphia, 187 Pa. St. 446, 41 Atl. 309 (holding that where valuable privileges are given an electric light company by an ordinance in consideration of which provision is made that the company shall light all buildings belonging to the city which are occupied as police and fire stations within a designated territory, the company may be required to light a new building used for such a purpose which is erected in the vicinity of and as a substitute for an old building).

Consent of municipal officers.— Under some statutes the consent of a city board must first be obtained before an electric light company may furnish lights therein. Atty.-Gen. *v.* Walworth Light, etc., Co., 157 Mass. 86, 31 N. E. 482, 16 L. R. A. 398, holding that the statute applies to wires laid under the streets by the predecessor of an electric light company; also to wires put up by the company, even though, where they cross the streets, they were sold to its customers to evade the statute; and also to wires put up and owned by the company's customers without intent to evade the statute.

8. **Corporate charter as contract** see Constitutional Law, 8 Cyc. 951 note 98, 982 note 36.

9. Geneva *v.* Geneva Telephone Co., 30 Misc. (N. Y.) 236, 62 N. Y. Suppl. 172 (holding that such a requirement is not unconstitutional as imposing taxation on such corporations without their consent or opportunity of being heard); Missouri *v.* Murphy, 170 U. S. 78, 18 S. Ct. 505, 42 L. ed. 955.

Use of municipal conduits.— They may be required to use certain conduits constructed by a city (Missouri *v.* Murphy, 170 U. S. 78, 18 S. Ct. 505, 42 L. ed. 955), since it will be presumed that the municipal officers will make proper regulations for the use of a conduit by different companies which are expected to use the same jointly. Geneva *v.* Geneva Telephone Co., 30 Misc. (N. Y.) 236, 62 N. Y. Suppl. 172. See, generally, Municipal Corporations.

10. Moore *v.* Champlain Electric Co., 88 N. Y. App. Div. 289, 85 N. Y. Suppl. 37 (holding, however, that under the statute providing that the occupant of any premises within one hundred feet of the wires of any electric light corporation may require it to supply him with electric light, and, on failure to do so within ten days, it shall forfeit certain sums to the applicant, an occupant is not entitled to make such requirement, and collect the penalty for failure to comply therewith, because within one hundred feet of the company's wire to light the street, which could not be used for lighting dwellings); Andrews *v.* North River Electric Light, etc., Co., 24 Misc. (N. Y.) 671, 53 N. Y. Suppl. 810 [*affirming* 23 Misc. 512, 51 N. Y. Suppl. 872] (holding, however, that the company may require the applicant to specify the number of lights or the quantity of power desired).

erning the powers of corporations are commonly applicable to electrical companies.[11]

2. POLES AND CONDUITS — a. In General. Under some statutes an electrical company cannot place poles in the streets of a city without first obtaining from it a particular designation thereof;[12] and the company must usually exercise the right to place poles and string wires thereon subject to the police powers of the municipality.[13] The right to lay underground wires in a street includes the right to break up the surface thereof and make proper excavations.[14]

b. Rights of Abutting Owners. A company cannot place a pole in front of property abutting on a street unless it is necessary for the better transaction of its business.[15] Poles may usually be erected, however, upon obtaining the consent of adjoining owners;[16] but the company has no right to injure or mutilate the trees of an adjoining owner, if it can be avoided by reasonable care and proper insulation.[17]

3. CONFLICTING FRANCHISES AND OPERATIONS — a. Priority. If two or more electrical companies come into conflict in their operations, the rights of that one will prevail whose franchise was first obtained, other things being equal.[18]

11. American L. & T. Co. *v.* General Electric Co., 71 N. H. 192, 51 Atl. 660, holding that such companies, although quasi-public corporations, may mortgage their property and secondary franchises without legislative consent. See also Metropolitan Trust Co. *v.* Dolgeville Electric Light, etc., Co., 35 Misc. (N. Y.) 467, 71 N. Y. Suppl. 1055, holding that a statute authorized a corporation organized for the manufacture of electricity for the purpose of light, heat, etc., to execute a trust mortgage securing its long-term bonds, which would cover after-acquired property. See, generally, CORPORATIONS.

Construction of franchise see *supra*, III, A.

12. Meyers *v.* Hudson County Electric Co., 60 N. J. L. 315, 37 Atl. 618. See, however, Suburban Light, etc., Co. *v.* Boston, 153 Mass. 200, 26 N. E. 447, 10 L. R. A. 497, holding that a statute which made it obligatory upon a city board to designate the location of telegraph poles, and which was subsequently extended to apply to electric light companies "so far as applicable," does not necessitate any action on the part of the board as to the location of poles for the latter kind of company.

13. Monongahela *v.* Monongahela Electric Light Co., 12 Pa. Co. Ct. 529; Lancaster *v.* Edison Electric Illuminating Co., 8 Pa. Co. Ct. 178, holding that they may be required to number them and designate them with initials. See, generally, MUNICIPAL CORPORATIONS.

License-tax.—The company may be required to take out a license imposing a tax of fifty cents a year for each pole. Lancaster *v.* Edison Electric Illuminating Co., 8 Pa. Co. Ct. 178. But see Newcastle *v.* Electric Illuminating Co., 16 Pa. Co. Ct. 663, holding that when a city enters into a contract with an electric light company to light the city, it gives them the right to erect poles and wires to carry out their contract, and cannot impose a tax on poles or wires used exclusively for that purpose, but that the city may exact a tax on poles and wires used to light private properties.

14. Montreal *v.* Standard Light, etc., Co., [1897] A. C. 527, 66 L. J. P. C. 113, 77 L. T. Rep. N. S. 115.

15. Tiffany *v.* U. S. Illuminating Co., 51 N. Y. Super. Ct. 280 [*affirming* 67 How. Pr. 73].

16. Point Pleasant Electric Light, etc., Co. *v.* Bay Head, 62 N. J. Eq. 296, 49 Atl. 1108.

Consent is not always necessary. Montclair Light, etc., Co. *v.* Montclair, 67 N. J. L. 151, 50 Atl. 350, holding that, where a city enters into a contract with an electric light company requiring it to erect poles at designated points, the company is relieved from the necessity of obtaining the consent of the adjoining property-owners.

17. Van Siclen *v.* Jamaica Electric Light Co., 45 N. Y. App. Div. 1, 61 N. Y. Suppl. 210 [*affirmed* in 168 N. Y. 650, 61 N. E. 1135]; Malone *v.* Waukesha Electric Light Co., (Wis. 1904) 98 N. W. 247, holding that in the absence of special authority a company has no right to set a pole in front of an abutting owner's property, so as to require the trimming of his shade trees, without his consent.

18. Nebraska Telephone Co. *v.* York Gas, etc., Light Co., 27 Nebr. 284, 43 N. W. 126 (holding that an electric light company will not be enjoined from stringing its wires so as to interfere with a telephone company, where the light company obtained its franchise first); Edison Electric Light, etc., Co. *v.* Merchants', etc., Electric Light, etc., Co., 200 Pa. St. 209, 49 Atl. 766, 86 Am. St. Rep. 712 (holding that if limitations must necessarily be placed on one or the other, the later company must give way, and that the fact that it is under contract with the city for work of a public nature does not alter its position); Paris Electric Light, etc., Co. *v.* Southwestern Tel., etc., Co., (Tex. Civ. App. 1894) 27 S. W. 902 (holding that an electric light company will be enjoined from placing its wires in such close proximity as to impair the efficiency of a previously established telephone service); Rutland Electric Light Co. *v.* Marble City Electric Light Co., 65 Vt. 377, 26 Atl. 635, 36 Am. St. Rep. 868, 20 L. R. A. 821 (holding that the court will enjoin interference with the operations of an electric light company by a company subsequently formed for the same purpose).

b. Injury Resulting From Operation.[19] It sometimes occurs that a company whose business requires the use of electricity is injured by the escape of electricity from the appliances of a company subsequently organized for quasi-public purposes, and in determining the relative rights of the parties the courts are not in complete accord. It has been held that if plaintiff's franchise expressly provides that the pursuit of its business shall not prevent the adoption by the public of a safe, convenient, and expeditious mode of transit, and defendant is performing this function, plaintiff cannot recover for injury either by induction or by conduction;[20] and also that while a company transporting electricity by wires over the street cannot recover for injuries occasioned by induction from a subsequently erected electric railway, where the establishment of the latter is a legitimate use of the street, yet it may recover for injury arising from conduction, where it does not occur upon or within the streets or through the medium of plaintiff's poles and wires upon the streets.[21]

D. Dealings With Customers — 1. In General. Contracts made by a company dealing in electricity with its customers are governed for the most part by the general rules of law applicable to other contracts.[22]

2. Discrimination — a. In General. Electric light companies cannot arbitrarily charge different prices to different patrons for light, but must treat all customers without unjust discrimination.[23] A company maintaining a conduit, however,

Equity will adjust the conflicting interests, if possible, so that each company may exercise its own franchise as fully as is compatible with the necessary exercise of the other. Edison Electric Light, etc., Co. *v.* Merchants', etc., Electric Light, etc., Co., 200 Pa. St. 209, 49 Atl. 766, 86 Am. St. Rep. 712.

19. Negligence of joint operators of appliances see *infra*, III, E, 1, b, (II), (C).

20. Hudson River Telephone Co. *v.* Watervliet Turnpike, etc., Co., 135 N. Y. 393, 32 N. E. 148, 31 Am. St. Rep. 838, 17 L. R. A. 674 [*reversing* 61 Hun 140, 15 N. Y. Suppl. 752]; Cincinnati Inclined Plane R. Co. *v.* City, etc., Telephone Assoc., 48 Ohio St. 390, 27 N. E. 890, 29 Am. St. Rep. 559, 12 L. R. A. 534 [*reversing* 11 Ohio Dec. (Reprint) 106, 24 Cinc. L. Bul. 471].

21. Cumberland Tel., etc., Co. *v.* United Electric R. Co., 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236. This case, while arriving at a different result than the analogous case of Hudson River Telephone Co. *v.* Watervliet Turnpike, etc., Co., 135 N. Y. 393, 32 N. E. 148, 31 Am. St. Rep. 838, 17 L. R. A. 674 [*reversing* 61 Hun 140, 15 N. Y. Suppl. 752], is not necessarily in conflict therewith, as in the latter case the injury complained of, arising from conduction, seems to have arisen from the fact that the telephone company had an underground return wire for at least part of the distance in the street, and the decision in Cumberland Tel., etc., Co. *v.* United Electric R. Co., *supra*, lays stress upon the fact that the injury arising from conduction in that case was upon plaintiff's private property and that of its subscribers lying outside of the street and within half a mile on either side. But see Cumberland Tel., etc., Co. *v.* United Electric R. Co., 42 Fed. 273, 12 L. R. A. 544 (where the court, in refusing to grant an injunction on the ground that complainant's business was being injured by conduction, also held that defendants would not be liable in damages resulting from this injury, inasmuch as complainant could obviate the difficulty by a return wire much cheaper than could defendant obviate the difficulty by remodeling its system); Eastern, etc., Tel. Co. *v.* Cape Town Tramways Co., [1902] A. C. 381, 86 L. T. Rep. N. S. 457, 71 L. J. P. C. 122, 50 Wkly. Rep. 657.

Grounding current.— A reason which has been urged against the allowance of damages for injuries arising from conduction is that inasmuch as the right to use the earth as a return circuit is common and universal, it is not subject to the rule that a party who is prior in point of time is prior in point of right in using the same. Cincinnati Inclined Plane R. Co. *v.* City, etc., Tel. Assoc., 48 Ohio St. 390, 27 N. E. 890, 29 Am. St. Rep. 559, 12 L. R. A. 534. Where, however, a telephone company use the earth for this purpose on its private premises or the premises of its subscribers, it would be unfair to assume that another company, by generating and using an immeasurably superior current of electricity, should be allowed to invade the private premises of another and destroy the successful pursuit of a legitimate business. Cumberland Tel., etc., Co. *v.* United Electric R. Co., 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236.

22. Laclede Power Co. *v.* Stillwell, 97 Mo. App. 258, 71 S. W. 380, construing a contract as binding the customer to take power during the life of the contract and not merely to take it at such times during the contract period as he might require it. See, generally, CONTRACTS.

23. Snell *v.* Clinton Electric Light, etc., Co., 196 Ill. 626, 63 N. E. 1082, 89 Am. St. Rep. 341, 58 L. R. A. 284 [*reversing* 95 Ill. App. 552]; Cincinnati, etc., R. Co. *v.* Bowling Green, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422.

Discrimination by: Gas companies see GAS.

through which electrical companies by paying a rental value have acquired the right to lay their wires, is not a quasi-public corporation in the sense that the courts will interfere and regulate or determine the amount of rent which it may charge for the use of the conduit.[24]

b. What Constitutes. The question of what constitutes an unjust discrimination against a customer of an electric light company depends upon the circumstances of the particular case.[25] A mere difference in charges to different customers does not of necessity constitute a discrimination.[26]

E. Liability For Injuries Caused by Electricity[27] — **1. Negligence**[28] — **a. In General.** Companies engaged in the manufacture, sale, or use of electricity are liable for injuries arising from their negligence the same as other corporations, and subject to the same rules.[29]

b. Measure of Care Required — (i) *General Rule.* Electrical companies are

Telegraph and telephone companies see Telegraphs and Telephones.

24. Brush Electric Illuminating Co. *v.* Consolidated Tel., etc., Co., 15 N. Y. Suppl. 81.

25. Snell *v.* Clinton Electric Light, etc., Co., 196 Ill. 626, 63 N. E. 1082, 89 Am. St. Rep. 341, 28 L. R. A. 284 [*reversing* 95 Ill. App. 552] (holding that a refusal to furnish a transformer or converter to a customer without charge therefor because he did not have his house wired by the company is an unfair discrimination, where the company furnishes such appliances free to those whose houses it has wired); Gould *v.* Edison Electric Illuminating Co., 29 Misc. (N. Y.) 241, 60 N. Y. Suppl. 559 (holding that a demand that a prospective customer shall agree to pay a minimum charge of one dollar and fifty cents per month is reasonable, where it is requested to put in twelve additional lamps for the customer, each lamp necessitating an investment of twenty dollars on the part of the company); Mercur *v.* Media Electric Light, etc., Co., 19 Pa. Super. Ct. 519 (holding that where a customer is transferred from the contract to the meter class of patrons at his own request, he cannot afterward demand that he be retransferred, if all persons in the latter class are treated fairly and equally, and a retransfer would necessitate the incurment of additional expenses by the company).

26. Snell *v.* Clinton Electric Light, etc., Co., 196 Ill. 626, 63 N. E. 1082, 89 Am. St. Rep. 341, 58 L. R. A. 264 [*reversing* 95 Ill. App. 552] (holding that it depends upon the circumstances of the case); Mercur *v.* Media Electric Light, etc., Co., 19 Pa. Super. Ct. 519 (holding that the distance from the main electric line, the number of lights used, whether the means of access to a residence is along a public way or over private property, and the nature of the obstructions to be overcome by the company, are all proper subjects for consideration in determining whether a certain charge is an unjust discrimination); Metropolitan Electric Supply Co. *v.* Ginder, [1901] 2 Ch. 799, 65 J. P. 519, 70 L. J. Ch. 862, 84 L. T. Rep. N. S. 818, 49 Wkly. Rep. 508 (holding that where the circumstances differ or the quantities of electricity do not correspond, differences may be made in the charges therefor).

27. **Injury done to another electrical company** see *supra*, III, C, 3, b.

28. See, generally, Negligence.

29. See Lewis *v.* Louisville Electric Light Co., 50 S. W. 992, 21 Ky. L. Rep. 34. And see, generally, Corporations, 10 Cyc. 1221.

Where an electric company purchases a plant of another company and continues the business, it impliedly contracts with customers and the public that due care will be exercised in their protection. Waller *v.* Leavenworth Light, etc., Co., 9 Kan. App. 301, 61 Pac. 327.

Independent contractors.— Where an electric light plant is in actual operation and lights are furnished and charges made therefor, a contract with the constructors of the plant that they are to keep a competent man in charge, for thirty days after regular service has begun, to make necessary adjustments and to instruct the attendants as to their duties, does not leave the possession of the plant in the hands of the contractor for the thirty days' period so as to absolve the company from liability for injuries resulting from negligence during that interval. International Light, etc., Co. *v.* Maxwell, 27 Tex. Civ. App. 294, 65 S. W. 78.

Negligence of third person.— While an electric light company is bound to see that the wires which it puts in are properly insulated, yet where it is employed only to deliver the current over wires which have been put in by a third person, its responsibility ends when the connection is properly made under proper conditions; and if the wiring has been unskilfully done, the person injured cannot recover of the company. National F. Ins. Co. *v.* Denver Consol. Electric Co., 16 Colo. App. 86, 63 Pac. 949.

Limitation of liability.— A proviso in a contract between an electrical company and a customer releasing it from contingent liability for negligence is against public policy. Denver Consol. Electric Co. *v.* Lawrence, 31 Colo. 301, 73 Pac. 39.

Proximate cause.— Where two companies jointly use poles for their wires, the negligence of the one in failing properly to insulate its wires is the proximate cause of the death of a lineman employed by the other, although the employing company failed to shut off the current from its own wires upon directing the lineman to work thereon.

not insurers of the safety of the public or of those whose occupation is likely to bring them into dangerous contact with their appliances, and hence are not liable for injuries unless guilty of some wrongful act or omission.[30] The measure or degree of care required of electrical companies is variously defined,[31] but it is conceived that the consensus of opinion is that they must exercise that reasonable care consistent with the practical operation of their business which would be observed by reasonably prudent persons under like circumstances, increasing the care with any change in conditions likely to increase the danger,[32] and having due regard to the existing state of science and of the art in question.[33]

(II) *Applications of Rule* — (A) *In General.* The proper degree of care

Standard Light, etc., Co. v. Munsey, (Tex. Civ. App. 1903) 76 S. W. 931. So the failure of an electric light company to insulate its wires is the proximate cause of the death of a person coming in contact with it after it had burned and fallen into the street, although the burning of the wire was due to the negligence of a telephone company in so loosely stringing its wires above those of the light company that during a storm they fell upon the latter. Hebert v. Lake Charles Ice, etc., Co., 111 La. 522, 35 So. 731, 64 L. R. A. 101. See also *infra*, III, E, 3, c, (III).

30. *Delaware.*— Cook v. Wilmington City Electric Co., 9 Houst. 306, 32 Atl. 643.

Illinois.— Tri-City R. Co. v. Killeen, 92 Ill. App. 57.

New York.— Ludwig v. Metropolitan St. R. Co., 71 N. Y. App. Div. 210, 75 N. Y. Suppl. 667.

Oregon.— Boyd v. Portland Electric Co., 40 Oreg. 126, 66 Pac. 576.

Pennsylvania.—Smith v. East End Electric Light Co., 198 Pa. St. 19, 47 Atl. 1123; Hand v. Central Pennsylvania Telephone, etc., Co., 1 Lack. Leg. N. 351.

31. Schweitzer v. Citizens' Gen. Electric Co., 52 S. W. 830, 21 Ky. L. Rep. 608, holding that a high degree of care is requisite.

The highest degree of care is necessary. Macon v. Paducah St. R. Co., 110 Ky. 680, 62 S. W. 496, 23 Ky. L. Rep. 46; Haynes v. Raleigh Gas Co., 114 N. C. 203, 19 S. E. 344, 41 Am. St. Rep. 786, 26 L. R. A. 810.

The utmost degree of care is required. Giraudi v. Electric Imp. Co., 107 Cal. 120, 40 Pac. 108, 48 Am. St. Rep. 114, 28 L. R. A. 596; Perham v. Portland Gen. Electric Co., 33 Oreg. 451, 53 Pac. 14, 24, 72 Am. St. Rep. 730, 40 L. R. A. 799.

Every means to protect the public from injury must be employed. Cook v. Wilmington City Electric Co., 9 Houst. (Del.) 306, 32 Atl. 643.

32. *Colorado.*— Denver Consol. Electric Co. v. Lawrence, 31 Colo. 301, 73 Pac. 39; Denver Consol. Electric Co. v. Simpson, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; Walters v. Denver Consol. Electric Co., 17 Colo. App. 192, 68 Pac. 117.

Connecticut.—Nelson v. Branford Lighting, etc., Co., 75 Conn. 548, 54 Atl. 303.

Delaware.— Neal v. Wilmington, etc., R. Co., 3 Pennew. 467, 53 Atl. 338.

Illinois.— Economy Light, etc., Co. v. Stephen, 187 Ill. 137, 58 N. E. 359 [*affirming* 87 Ill. App. 220].

Iowa.— Knowlton v. Des Moines Edison Light Co., 117 Iowa 451, 90 N. W. 818.

Louisiana.— Potts v. Shreveport Belt R. Co., 110 La. 1, 34 So. 103, 98 Am. St. Rep. 452; Clements v. Louisiana Electric Light Co., 44 La. Ann. 692, 11 So. 51, 32 Am. St. Rep. 348, 16 L. R. A. 43; Yates v. Brush Electric Light, etc., Co., 40 La. Ann. 467, 4 So. 250.

Maryland.— Brown v. Edison Electric Illuminating Co., 90 Md. 400, 45 Atl. 182, 78 Am. St. Rep. 442, 46 L. R. A. 745.

Missouri.— Geismann v. Missouri-Edison Electric Co., 173 Mo. 654, 73 S. W. 654.

Nebraska.— New Omaha Thomson-Houston Electric Light Co. v. Johnson, (1903) 93 N. W. 778.

New York.— Caglione v. Mt. Morris Electric Co., 56 N. Y. App. Div. 191, 67 N. Y. Suppl. 660; Wittleder v. Citizens' Electric Illuminating Co., 50 N. Y. App. Div. 478, 64 N. Y. Suppl. 114; Ennis v. Gray, 87 Hun 355, 34 N. Y. Suppl. 379.

Oregon.— Ahern v. Oregon Telephone, etc., Co., 24 Oreg. 276, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 635.

Texas.— Brush Electric Light, etc., Co. v. Lefevre, (Civ. App. 1900) 55 S. W. 396; Citizens' R. Co. v. Gifford, (Civ. App. 1898) 47 S. W. 1041.

Canada.— Royal Electric Co. v. Heve, 11 Quebec K. B. 436.

See 18 Cent. Dig. tit. "Electricity," § 7.

33. Martinek v. Swift, 122 Iowa 611, 98 N. W. 477 (holding, in an action for the death of plaintiff's decedent from a shock received while handling an electric light on defendant's premises, that evidence that defendant used an ordinary brass socket on a secondary circuit conducting electricity to a light on his premises was not evidence of negligence, such sockets being in universal use on similar circuits, and considered safe as against the voltage ordinarily transmitted over such circuits); Herzog v. Municipal Electric Light Co., 89 N. Y. App. Div. 569, 85 N. Y. Suppl. 712 (holding, in an action for the loss of a building destroyed by fire communicated by wires placed in the building by defendant under a contract to wire the building for electric lighting, made several years before the fire, that defendant was liable only for the exercise of ordinary care as exercised by persons engaged in the same business, according to the state of the art and methods generally used at the time the work was done).

requires a greater precaution against injury from electric wires when so placed that persons are likely to come in contact therewith [34] than at more isolated points.[35] Municipal regulations concerning the placement or protection of wires must be observed,[36] and they must be so erected as to withstand ordinary weather;[37] and diligence must be exercised to discover any breaks or defects in the wires.[38] So if the facilities for the use of electricity in a building are removed the wires also must be removed.[39]

(B) *Insulation and Inspection.* The exercise of a sufficient degree of care requires a careful and proper insulation of all wires and appliances in places where there is a likelihood or reasonable probability of human contact therewith,[40]

34. Walters *v.* Denver Consol. Electric Light Co., 17 Colo. App. 192, 68 Pac. 117.

Roofs of houses are accessible for purposes of repair or otherwise, and hence wires strung thereon must be properly protected or placed out of danger of contact. Giraudi *v.* Electric Imp. Co., 107 Cal. 120, 40 Pac. 108, 48 Am. St. Rep. 114, 28 L. R. A. 596; Ennis *v.* Gray, 87 Hun (N. Y.) 355, 34 N. Y. Suppl. 379.

35. McLaughlin *v.* Louisville Electric Light Co., 100 Ky. 173, 37 S. W. 851, 18 Ky. L. Rep. 693, 34 L. R. A. 812; Overall *v.* Louisville Electric Light Co., 47 S. W. 442, 20 Ky. L. Rep. 759; McMullan *v.* Edison Electric Illuminating Co., 13 Misc. (N. Y.) 392, 34 N. Y. Suppl. 248 (holding that it was not negligence to fail to tape the end of service wires which entered in a cellar eight feet from the ground, the current being such as would not cause death or great bodily harm); Brush Electric Light, etc., Co. *v.* Lefevre, 93 Tex. 604, 57 S. W. 640, 77 Am. St. Rep. 898, 49 L. R. A. 771 (holding that the top of a wooden awning containing no railings and not used as a place of resort is not a place where people would be expected to resort, and that negligence cannot be imputed to a company for placing wires two feet over the top of it).

36. *California.*— Wales *v.* Pacific Electric Motor Co., 130 Cal. 521, 62 Pac. 932, 1120.

Iowa.— Knowlton *v.* Des Moines Edison Light Co., 117 Iowa 451, 90 N. W. 818.

Louisiana.— Clements *v.* Louisiana Electric Light Co., 44 La. Ann. 692, 11 So. 51, 32 Am. St. Rep. 348, 16 L. R. A. 43.

North Carolina.— Mitchell *v.* Raleigh Electric Co., 129 N. C. 166, 39 S. E. 801, 85 Am. St. Rep. 735, 55 L. R. A. 398.

Texas.— Brush Electric Light, etc., Co. *v.* Lefevre, (Civ. App. 1900) 55 S. W. 396.

37. Wolpers *v.* New York, etc., Electric Light, etc., Co., 91 N. Y. App. Div. 424, 86 N. Y. Suppl. 845 (holding that ordinary storms must be anticipated); Mitchell *v.* Charleston Light, etc., Co. 45 S. C. 146, 22 S. E. 767, 31 L. R. A. 577.

38. Macon *v.* Paducah St. R. Co., 110 Ky. 680, 62 S. W. 496, 23 Ky. L. Rep. 46; Mitchell *v.* Charleston Light, etc., Co., 45 S. C. 146, 22 S. E. 767, 31 L. R. A. 577; Wehner *v.* Lagerfelt, 27 Tex. Civ. App. 520, 66 S. W. 221. See also *infra*, III, E, 1, b, (II), (B).

39. Southern Bell Telephone, etc., Co. *v.* McTyer, 137 Ala. 601, 34 So. 1020.

40. *Colorado.*—National F. Ins. Co. *v.* Denver Consol. Electric Co., 16 Colo. App. 86, 63 Pac. 949.

Kansas.— Consolidated Electric Light, etc., Co. *v.* Healy, 65 Kan. 798, 70 Pac. 884.

Kentucky.— Thomas *v.* Maysville Gas Co., 108 Ky. 224, 56 S. W. 153, 21 Ky. L. Rep. 1690, 53 L. R. A. 147; McLaughlin *v.* Louisville Electric Light Co., 100 Ky. 173, 37 S. W. 851, 18 Ky. L. Rep. 693, 34 L. R. A. 812; Owensboro *v.* Knox, 76 S. W. 191, 25 Ky. L. Rep. 680; Lexington R. Co. *v.* Fain, 71 S. W. 628, 24 Ky. L. Rep. 1443; O'Donnel *v.* Louisville Electric Light Co., 55 S. W. 202, 21 Ky. L. Rep. 1362; Schweitzer *v.* Citizens' Gen. Electric Co., 52 S. W. 830, 21 Ky. L. Rep. 608; Overall *v.* Louisville Electric Light Co., 47 S. W. 442, 20 Ky. L. Rep. 759.

Missouri.— Geismann *v.* Missouri-Edison Electric Co., 173 Mo. 654, 73 S. W. 654.

New Jersey.—Anderson *v.* Jersey City Electric Light Co., 63 N. J. L. 387, 43 Atl. 654.

Texas.— Standard Light, etc., Co. *v.* Munsey, (Civ. App. 1903) 76 S. W. 931; Brush Electric Light, etc., Co. *v.* Lefevre, (Civ. App. 1900) 55 S. W. 396.

West Virginia.— Thomas *v.* Wheeling Electrical Co., 54 W. Va. 395, 46 S. E. 217.

See also *supra*, III, E, 1, b, (II), (A); *infra*, III, E, 1, b, (II), (C); III, E, 1, b, (III).

Insulation against lightning.— It has been held that a company need not insulate its wires against electricity having its origin in the clouds or atmosphere. Phœnix Light, etc., Co. *v.* Bennett, (Ariz. 1903) 74 Pac. 48. *Compare* Griffith *v.* New England Tel., etc., Co., 72 Vt. 441, 48 Atl. 643, 52 L. R. A. 919 (holding that whether a defendant was negligent in failing to supply and use an appliance, if one such were obtainable, which would prevent lightning entering a residence over a telephone wire, is for the jury); Southwestern Tel., etc., Co. *v.* Robinson, 50 Fed. 810, 1 C. C. A. 684, 16 L. R. A. 545.

Cause of contact.— It is the absolute duty of an electric light company conveying electricity by overhead wires in the streets of a city to keep them constantly insulated so as to guard against the effect on objects coming in contact with them, regardless of the causes which may bring about such contact. Hebert *v.* Lake Charles Ice, etc., Co., 111 La. 522, 35 So. 731, 64 L. R. A. 101.

Insulation of wires put in by third person see *supra*, note 29.

State of art as affecting sufficiency of insulation see *supra*, III, E, 1, b, (I).

and such reasonable and thorough inspection as will preserve such insulation from impairment or detect any defects when occurring.[41]

(c) *Adjoining or Contiguous Lines.* Due care requires those using wires or conductors of electricity so to place and maintain them with reference to similar conducting agencies that dangerous contact is not probable; and where wires maintained concurrently by different parties are so erected or strung that one is likely to fall upon or come in contact with the other, thereby producing possible destructive consequences, either or both of them must make efforts to abate such dangerous condition,[42] and if an injury occurs through a neglect of such duty, both are liable.[43] So where companies engaged in the handling or conduction of electricity lease or allow other similar companies to use their structures for similar purposes, due care requires the former to keep, so far as is practicable, their wires in a safe and harmless condition at such places as the servants of the latter are expressly or impliedly licensed to go in the performance of their duties in repairing or handling the latter company's wires.[44]

Want of insulation as proximate cause of injury see *supra*, note 29.

41. Potts *v.* Shreveport Belt R. Co., 110 La. 1, 34 So. 103, 98 Am. St. Rep. 452; Wagner *v.* Brooklyn Heights R. Co., 174 N. Y. 520, 66 N. E. 1117 [*affirming* 69 N. Y. App. Div. 349, 74 N. Y. Suppl. 809, holding that the mere fact of insulation is a recognition of the inherent danger of a conductor of electricity]; Fitzgerald *v.* Edison Electric Illuminating Co., 200 Pa. St. 540, 50 Atl. 161, 86 Am. St. Rep. 732. See also *supra*, III, E, 1, b, (II), (A); *infra*, III, E, 1, b, (II), (C); III, E, 1, b, (III).

Presumption of knowledge.— Where an abrasion of the insulation of a wire has been seen and known to exist by several persons for two years, knowledge thereof on the part of the company will be presumed. Mitchell *v.* Raleigh Electric Co., 129 N. C. 166, 39 S. E. 801, 85 Am. St. Rep. 735, 55 L. R. A. 398.

42. *Alabama.*— McKay *v.* Southern Bell Tel., etc., Co., 111 Ala. 337, 19 So. 695, 56 Am. St. Rep. 59, 31 L. R. A. 589.

Arkansas.— City Electric St. R. Co. *v.* Conery, 61 Ark. 381, 33 S. W. 426, 54 Am. St. Rep. 262, 31 L. R. A. 570.

Illinois.— Kankakee Electric R. Co. *v.* Whittemore, 45 Ill. App. 484.

Louisiana.— Hebert *v.* Lake Charles Ice, etc., Co., 111 La. 522, 35 So. 731, 64 L. R. A. 101.

New Jersey.— Hamilton *v.* Bordentown Electric Light, etc., Co., 68 N. J. L. 85, 52 Atl. 290; Rowe *v.* New York, etc., Tel. Co., 66 N. J. L. 19, 48 Atl. 523.

New York.—Paine *v.* Electric Illuminating, etc., Co., 64 N. Y. App. Div. 477, 72 N. Y. Suppl. 279.

North Carolina.— Haynes *v.* Raleigh Gas Co., 114 N. C. 203, 19 S. E. 344, 44 Am. St. Rep. 786, 26 L. R. A. 810.

Oregon.— Ahern *v.* Oregon Telephone, etc., Co., 24 Oreg. 276, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 635.

Pennsylvania.—Devlin *v.* Beacon Light Co., 192 Pa. St. 188, 43 Atl. 962. And see Hand *v.* Central Pennsylvania Telephone, etc., Co., 1 Lack. Leg. N. 351.

Tennessee.— United Electric R. Co. *v.* Shelton, 89 Tenn. 423, 14 S. W. 863.

Texas.— International Light, etc., Co. *v.* Maxwell, 27 Tex. Civ. App. 294, 65 S. W. 78.

43. *Alabama.*— McKay *v.* Southern Bell Tel., etc., Co., 111 Ala. 337, 19 So. 695, 56 Am. St. Rep. 59, 31 L. R. A. 589.

Arkansas.— City Electric St. R. Co. *v.* Conery, 61 Ark. 381, 33 S. W. 426, 54 Am. St. Rep. 262, 31 L. R. A. 570.

Georgia.— Western Union Tel. Co. *v.* Griffith, 111 Ga. 551, 36 S. E. 859.

Illinois.— Economy Light, etc., Co. *v.* Hiller, 203 Ill. 518, 68 N. E. 72 [*affirming* 106 Ill. App. 306].

Kansas.— See also Kansas City *v.* File, 60 Kan. 157, 55 Pac. 877.

Kentucky.— Cumberland Telephone, etc., Co. *v.* Ware, 74 S. W. 289, 24 Ky. L. Rep. 2519.

Tennessee.— United Electric R. Co. *v.* Shelton, 89 Tenn. 423, 14 S. W. 863.

44. *Georgia.*— Atlanta Consol. St. R. Co. *v.* Owings, 97 Ga. 663, 25 S. E. 377, 33 L. R. A. 798.

Massachusetts.— Illingsworth *v.* Boston Electric Light Co., 161 Mass. 583, 37 N. E. 778, 25 L. R. A. 552. And see Barker *v.* Boston Electric Light Co., 178 Mass. 503, 60 N. E. 2, where it is held that if there is a general understanding that different companies shall use the poles of each other in the conduct of their business, the question of whether a person injured while repairing the wires of one of the companies is a mere licensee is for the jury.

New York.— Wagner *v.* Brooklyn Heights R. Co., 69 N. Y. App. Div. 349, 74 N. Y. Suppl. 809.

Texas.— Dallas Electric Co. *v.* Mitchell, (Civ. App. 1903) 76 S. W. 935; Standard Light, etc., Co. *v.* Munsey, (Civ. App. 1903) 76 S. W. 931, holding that where two electric companies contract for the joint use of certain poles, the duty of one of them to keep its wires properly insulated to avoid injuries to the servants of the other is incident to the operation and ownership of its plant, and non-transferable.

United States.— Newark Electric Light,

(III) *As to Trespassers or Licensees.* As negligence involves a breach of some duty owed by defendant to complainant,[45] it follows that where electrical appliances are so placed that persons would not, in the pursuance of their ordinary duties or vocations,[46] or while acting within the scope of their licenses,[47] come in contact therewith, the company is not liable to one occupying the position of licensee or trespasser, in the absence of a showing of wilful or wanton injury.[48] The question whether a person is a mere licensee or a trespasser or not depends largely upon the circumstances of the particular case.[49] If the company itself is a trespasser in maintaining its wires on certain property it cannot object that plaintiff also is a trespasser there.[50]

c. Contributory Negligence. As in other cases of negligence,[51] contributory

etc., Co. *v.* Garden, 78 Fed. 74, 23 C. C. A. 649, 37 L. R. A. 725.

See also *infra*, III, E, 1, b, (III).

The liability of defendant is limited to cases in which it has permitted or licensed another company to use its fixtures, and also to places where it has reasonable cause to expect that the servants of the other company would go in the discharge of their duties in connection with wires attached to defendant's fixtures and to which it has invited or licensed them to go. Hector *v.* Boston Electric Light Co., 174 Mass. 212, 54 N. E. 539, 75 Am. St. Rep. 300.

45. See San Antonio Edison Co. *v.* Dixon, 17 Tex. Civ. App. 320, 42 S. W. 1009. And see, generally, NEGLIGENCE.

46. See Calumet Electric St. R. Co. *v.* Grosse, 70 Ill. App. 381 (where it is held that while an electric company must necessarily use such precautions and appliances as will protect a person while engaged in his ordinary duties, it need not provide precautions for extraordinary duties in which he may be engaged); Proctor *v.* San Antonio St. R. Co., 26 Tex. Civ. App. 148, 62 S. W. 938, 939.

47. Hector *v.* Boston Electric Light Co., 161 Mass. 558, 37 N. E. 773, 25 L. R. A. 554, holding that while an electric light company is bound to insulate its wires in all places where licensees would probably come in contact therewith, it is not bound to insulate them for the protection of such persons when acting without the scope of their license, and when going to places where the company has no reason to expect them to go.

48. *Georgia.*— Augusta R. Co. *v.* Andrews, 89 Ga. 653, 16 S. E. 203.

Kentucky.— Cumberland Tel., etc., R. Co. *v.* Martin, 76 S. W. 394, 25 Ky. L. Rep. 787, 63 L. R. A. 469.

Massachusetts.—Sias *v.* Lowell, etc., R. Co., 179 Mass. 343, 60 N. E. 974; Sullivan *v.* Boston, etc., R. Co., 156 Mass. 378, 31 N. E. 128.

Michigan.— McCaughna *v.* Owosso, etc., Electric Co., 129 Mich. 407, 89 N. W. 73, 95 Am. St. Rep. 441.

New Jersey.— Newark Electric Light, etc., Co. *v.* McGilvery, 62 N. J. L. 451, 41 Atl. 955.

New York.— Freeman *v.* Brooklyn Heights R. Co., 54 N. Y. App. Div. 596, 66 N. Y. Suppl. 1052.

Rhode Island.—Keefe *v.* Narragansett Electric Lighting Co., 21 R. I. 575, 43 Atl. 542.

See 18 Cent. Dig. tit. "Electricity," § 8.

49. Southern Bell Telephone, etc., Co. *v.* McTyer, 137 Ala. 601, 34 So. 1020, 97 Am. St. Rep. 62 (holding that a duty is owed to the customers of a merchant whose store has been fitted with electric appliances as well as to the storekeeper himself, and that where a customer is injured by the negligent escape of electricity he can recover from the company); Cumberland Tel., etc., Co. *v.* Martin, 76 S. W. 394, 25 Ky. L. Rep. 787, 63 L. R. A. 469, 77 S. W. 718, 25 Ky. L. Rep. 1298 (holding that a person who takes refuge under a porch of a store from an electrical storm is a trespasser there); Reagan *v.* Boston Electric Light Co., 167 Mass. 406, 45 N. E. 743 (holding that the fact that an electric light company has contracted to make all needed repairs on a roof does not deprive the owner of the right to send men there to make repairs, and if, while in the exercise of ordinary care, such persons are injured from the negligent attachment of the company's wires, they may recover); Wagner *v.* Brooklyn Heights R. Co., 69 N. Y. App. Div. 349, 74 N. Y. Suppl. 809 (holding that where an electric company leases its structures to a municipality for the purpose of stringing wires thereon, it must be held to contemplate the necessity of their repair, and a person so engaged cannot be considered a trespasser); Caglione *v.* Mt. Morris Electric Light Co., 56 N. Y. App. Div. 191, 67 N. Y. Suppl. 660 (holding that where a person goes on a public highway and does that which any citizen would be justified in doing in trying to put out a fire, although not invited upon the premises by the owner of the building, he cannot be considered a trespasser so far as the electric company who causes the fire is concerned); Freeman *v.* Brooklyn Heights R. Co., 54 N. Y. App. Div. 596, 66 N. Y. Suppl. 1052 (holding that where a safe sidewalk has been constructed for the accommodation of pedestrians, and the girders of a bridge crossed by an electric railroad may be used for the purpose of passage only by climbing, a person using them cannot be said to be a person to whom the railroad company owes a duty, and therefore it is not liable if he is injured by an escape of electricity from its guard wire). See also *supra*, III, E, 1, b, (II), (C).

50. Wittleder *v.* Citizens' Electric Illuminating Co., 47 N. Y. App. Div. 410, 62 N. Y. Suppl. 297.

51. See, generally, NEGLIGENCE.

negligence on the part of plaintiff in an action for injury done by electricity precludes a recovery.[52] Thus one who has notice of the dangerous condition of a wire or other electrical appliance and voluntarily brings himself into contact with it cannot hold the company for the resulting injuries.[53] To give rise to this defense, however, it must be shown that plaintiff in coming in contact with the appliances voluntarily and unnecessarily exposed himself to danger,[54] and if reasonable men might honestly differ on the question, the court will not hold plaintiff guilty of contributory negligence as a matter of law.[55]

52. Katafiasz *v.* Toledo Consol. Electric Co., 24 Ohio Cir. Ct. 127. See also Cumberland *v.* Lottig, 95 Md. 42, 51 Atl. 841; Danville St. Car Co. *v.* Watkins, 97 Va. 713, 34 S. E. 884.

53. Cook *v.* Wilmington City Electric Co., 9 Houst. (Del.) 306, 32 Atl. 643 (notice by inspection); Columbus R. Co. *v.* Dorsey, 119 Ga. 363, 46 S. E. 635 (express or implied notice); Frauenthal *v.* Laclede Gaslight Co., 67 Mo. App. 1; Katafiasz *v.* Toledo Consol. Electric Co., 24 Ohio Cir. Ct. 127.

Where the condition of a wire or appliance is in dispute and a party deliberately and needlessly touches it he cannot recover for the resulting injury. Anderson *v.* Jersey City Electric Light Co., 64 N. J. L. 664, 46 Atl. 593, 81 Am. St. Rep. 504, 48 L. R. A. 616; Wood *v.* Diamond Electric Co., 185 Pa. St. 529, 39 Atl. 1111.

Presumption of knowledge.— Ordinarily a person cannot be presumed to know that moisture is an agency which destroys the insulation of a wire. Giraudi *v.* Electric Imp. Co., 107 Cal. 120, 40 Pac. 108, 48 Am. St. Rep. 114, 28 L. R. A. 596.

54. Clements *v.* Louisiana Electric Light Co., 44 La. Ann. 692, 11 So. 51, 32 Am. St. Rep. 348, 16 L. R. A. 43; Wolpers *v.* New York, etc., Electric Light, etc., Co., 91 N. Y. App. Div. 424, 86 N. Y. Suppl. 845.

55. *Alabama.*— Jones *v.* Finch, 128 Ala. 217, 29 So. 182, holding that a failure to see a live wire hanging in the street was not contributory negligence, as one has a right to assume that the street is free from dangerous obstructions.

California.— Giraudi *v.* Electric Imp. Co., 107 Cal. 120, 40 Pac. 108, 48 Am. St. Rep. 114, 28 L. R. A. 596, holding that the mere fact that a person had been upon a roof after electric wires had been placed thereon did not necessarily show that he knew their location, and that his coming in contact with them on a stormy night while upon the roof for sufficient reason was not negligence as a matter of law.

Colorado.— Denver Tramway Co. *v.* Reid, 4 Colo. App. 53, 35 Pac. 269.

Indiana.— Brush Electric Lighting Co. *v.* Kelley, 126 Ind. 220, 25 N. E. 812, 10 L. R. A. 250.

Kansas.— Leavenworth Coal Co. *v.* Ratchford, 5 Kan. App. 150, 48 Pac. 927, holding that an attempt by the owner of a building to remove a live wire which is emitting sparks and apparently endangering the building is not as a matter of law contributory negligence.

Louisiana.— Williams *v.* Louisiana Electric Light, etc., Co., 43 La. Ann. 295, 8 So. 938.

New Jersey.— Suburban Electric Co. *v.* Nugent, 58 N. J. L. 658, 34 Atl. 1069, 32 L. R. A. 700.

North Carolina.— Haynes *v.* Raleigh Gas Co., 114 N. C. 203, 19 S. E. 344, 41 Am. St. Rep. 786, 26 L. R. A. 810, holding that where there was nothing to indicate that the wire was charged, it was not contributory negligence for a child ten years of age, while walking along the sidewalk, to grasp a guy wire which was hanging from an electric light pole.

Pennsylvania.— Dillon *v.* Allegheny County Light Co., 179 Pa. St. 482, 36 Atl. 164, holding that it is not necessarily negligence for a policeman to attempt to remove with his mace a broken wire hanging from a pole in a street in his beat, although he knows it to be charged.

United States.— Denver *v.* Sherret, 88 Fed. 226, 31 C. C. A. 499, holding that the fact that plaintiff was walking diagonally across the street when struck by a falling electric light pole and wire did not show contributory negligence, in the absence of a knowledge on her part that there was greater danger in so crossing than in following the walk.

See 18 Cent. Dig. tit. "Electricity," § 10. See also *infra*, III, E, 3, c, (III).

A failure to wear rubber gloves while handling wires which are not ordinarily charged (Paine *v.* Electric Illuminating, etc., Co., 64 N. Y. App. Div. 477, 72 N. Y. Suppl. 279) or in conducting a business where gloves are not ordinarily used (Geismann *v.* Missouri-Edison Electric Co., 173 Mo. 654, 73 S. W. 654) is not negligence as a matter of law.

To assume that wires are properly insulated is not necessarily negligence (Knowlton *v.* Des Moines Edison Light Co., 117 Iowa 451, 90 N. W. 818; Clements *v.* Louisiana Electric Light Co., 44 La. Ann. 692, 11 So. 51, 32 Am. St. Rep. 348, 16 L. R. A. 43; Mitchell *v.* Raleigh Electric Co., 129 N. C. 166, 39 S. E. 801, 85 Am. St. Rep. 735, 55 L. R. A. 398; Thomas *v.* Wheeling Electrical Co., 54 W. Va. 395, 46 S. E. 217); and it is necessary under such circumstances to look for patent defects only (Clements *v.* Louisiana Electric Light Co., *supra*; Mitchell *v.* Raleigh Electric Co., *supra*. See also Fitzgerald *v.* Edison Electric Illuminating Co., 200 Pa. St. 540, 50 Atl. 161).

To assume that a current will not be turned on while one is handling or working near

2. Nuisance.[56] If an electrical company so operates its business as to create a nuisance it is liable in damages,[57] and the nuisance may be enjoined.[58]

3. Procedure — a. Parties.[59] Where electric light wires and telephone wires become crossed through the joint negligence of both companies and injuries result, the companies may be joined as parties defendant in an action for negligence.[60]

b. Pleading[61] — (I) *Complaint.* A complaint in an action for an injury arising from a negligent escape of electricity must show that it was the duty of defendant to prevent the accident and that it had a reasonable opportunity to discharge such duty;[62] but it is usually sufficient to specify the particular act of commission or omission which caused the injury, adding the general averment that it was negligently and carelessly done or omitted;[63] and in determining whether a complaint states a cause of action, the care required of defendant in transporting such a dangerous element, together with the presumption of negligence often arising from the fact and the circumstances of the injury,[64] will be considered.[65]

(II) *Pleading and Proof.* As in other actions at law, the evidence offered in support of a complaint against an electrical company for negligence must conform with the allegations contained in that pleading.[66]

c. Evidence[67] — (I) *Burden of Proof and Presumptions.* While plaintiff

wires is not negligence as a matter of law. Knowlton *v.* Des Moines Edison Light Co., 117 Iowa 451, 90 N. W. 818. And see Paine *v.* Electric Illuminating, etc., Co., 64 N. Y. App. Div. 477, 72 N. Y. Suppl. 279; Perham *v.* Portland Gen. Electric Co., 33 Oreg. 451, 53 Pac. 14, 24, 72 Am. St. Rep. 730, 40 L. R. A. 799.

56. See, generally, Nuisance.

57. Wittleder *v.* Citizens' Electric Illuminating Co., 47 N. Y. App. Div. 410, 62 N. Y. Suppl. 297.

58. Shelfer *v.* City of London Electric Lighting Co., [1895] 1 Ch. 287, 64 L. J. Ch. 216, 72 L. T. Rep. N. S. 34, 12 Reports 112, 43 Wkly. Rep. 238, holding that an injunction will issue against one whose electrical light plant so injures the property of another through vibrations that it constitutes a nuisance. See, generally, Injunctions.

59. See, generally, Parties.

60. Economy Light, etc., Co. *v.* Hiller, 203 Ill. 518, 68 N. E. 72 [*affirming* 106 Ill. App. 306].

61. See, generally, Pleading.

62. Scheiber *v.* United Telephone Co., 153 Ind. 609, 55 N. E. 742.

63. Chaperon *v.* Portland Electric Co., 41 Oreg. 39, 67 Pac. 928; Boyd *v.* Portland Electric Co., 40 Oreg. 126, 66 Pac. 576. See also Snyder *v.* Wheeling Electrical Co., 43 W. Va. 661, 28 S. E. 733, 64 Am. St. Rep. 922, 39 L. R. A. 499.

Surplusage.— The fact that a complaint contains allegations assuming that defendant is an absolute insurer of the public against injury will not render it fatally defective, where it also alleges that the location and defective condition of the wire in question were due to the negligence of defendant in the building and supervision of its line. Denver Consol. Electric Co. *v.* Simpson, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566.

For forms of complaints in whole or in substance held sufficient to state a cause of action against an electric company see the following cases:

Colorado.— Denver Consol. Electric Co. *v.* Lawrence, 31 Colo. 301, 73 Pac. 39; Miller *v.* Ouray Electric Light, etc., Co., (App. 1902) 70 Pac. 447.

Georgia.— Western Union Tel. Co. *v.* Griffith, 111 Ga. 551, 36 S. E. 859, holding that while the complaint stated a cause of action and was not subject to a general demurrer, yet an allegation that one defendant permitted wires to remain in contact with those of the other defendant at "divers other places in said village and city" was subject to a special demurrer because it did not point out at what particular points the wires crossed.

Missouri.— Geismann *v.* Missouri-Edison Electric Co., 173 Mo. 654, 73 S. W. 654.

New York.— Wittleder *v.* Citizens' Electric Illuminating Co., 47 N. Y. App. Div. 410, 62 N. Y. Suppl. 297, holding that the complaint stated a cause of action on the ground of either negligence or nuisance.

Oregon.— Chaperon *v.* Portland Electric Co., 41 Oreg. 39, 67 Pac. 928.

64. See *infra*, III, E, 3, c, (I).

65. Alton R., etc., Co. *v.* Foulds, 81 Ill. App. 322.

66. See, generally, Negligence. See, however, Lutolf *v.* United Electric Light Co., 184 Mass. 53, 67 N. E. 1025 (holding that an allegation that defendant negligently suffered its wires to be out of repair is sufficient to raise the question whether defendant employed the proper method of inspection); Melican *v.* Missouri-Edison Electric Co., 90 Mo. App. 595 (holding that evidence that a wire might be charged with electricity at any time and that it was dangerously charged at the time of the injury is not at variance with an allegation that defendant maintained a wire which was broken and displaced and was charged with electricity and therefore dangerous).

67. See, generally, Evidence.

bears the burden of convincing the jury of the existence of the facts on which he bases his right to relief,[68] yet the circumstances of the accident are often such as to create a presumption of negligence and afford an application for the maxim *res ipsa loquitur*.[69] The facts that a defendant conducts electricity to a certain place; that electricity so employed may escape in such a way as to produce an injury; and that an injury from electricity is actually occasioned in a place where the injured party has a right to be are usually held to constitute a *prima facie* case of negligence and shift upon defendant the burden of showing that he was not negligent.[70]

(II) *ADMISSIBILITY*. In an action against an electrical company for negligence in the use of electricity or electrical appliances, any evidence tending to establish the acts or omissions set forth in the complaint is admissible,[71] subject,

68. See, generally, EVIDENCE, NEGLIGENCE.

69. Boyd *v.* Portland Electric Co., 41 Oreg. 336, 342, 68 Pac. 810, where the court said: "*Res ipsa loquitur* is a maxim of evidentiary potency and consequence, and serves to imply or raise a presumption of negligence as a fact, when from the physical facts attending the accident or injury there is a reasonable probability that it would not have happened if the party having control, management, or supervision, or with whom rests the responsibility for the sound and safe condition of the thing, property, or appliance which is the immediate cause of the accident or injury, had exercised usual and proper care and precaution with reference to it."

70. *California*.— Giraudi *v.* San Jose Electric Imp. Co., 107 Cal. 120, 40 Pac. 108, 48 Am. St. Rep. 114, 28 L. R. A. 596.

Colorado.— Denver Consol. Electric Co. *v.* Simpson, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; Walters *v.* Denver Consol. Electric Light Co., 17 Colo. App. 192, 68 Pac. 117.

Illinois.— Larson *v.* Central R. Co., 56 Ill. App. 263.

Kansas.— Leavenworth Coal Co. *v.* Ratchford, 5 Kan. App. 150, 48 Pac. 927.

Kentucky.— Owensboro *v.* Knox, 76 S. W. 191, 25 Ky. L. Rep. 680.

Louisiana.— Hebert *v.* Lake Charles Ice, etc., Co., 111 La. 522, 35 So. 731, 64 L. R. A. 101, holding that where a wire of an electric company was detached from the poles and lying in the street, those having control of it have the duty of accounting for its being found in such position, and to show that it was not due to their negligence.

Missouri.— Gannon *v.* Laclede Gaslight Co., 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505.

New Jersey.— Newark Electric Light, etc., Co. *v.* Ruddy, 62 N. J. L. 505, 41 Atl. 712, 57 L. R. A. 624 [*affirmed* in 63 N. J. L. 357, 46 Atl. 1100, 57 L. R. A. 624].

New York.— Wolpers *v.* New York, etc., Electric Light, etc., Co., 91 N. Y. App. Div. 424, 86 N. Y. Suppl. 845 (holding that the fact that an electric wire fell, and that plaintiff was injured by coming in contact therewith on alighting from his wagon, affords *prima facie* evidence that the accident arose from want of care on the part of the electric light company); Clancy *v.* New York, etc., R. Co., 82 N. Y. App. Div. 563, 81 N. Y. Suppl. 875; Smith *v.* Brooklyn Heights R. Co., 82 N. Y. App. Div. 531, 81 N. Y. Suppl. 838; Ludwig *v.* Metropolitan St. R. Co., 71 N. Y. App. Div. 210, 75 N. Y. Suppl. 667; Clarke *v.* Nassau Electric R. Co., 9 N. Y. App. Div. 51, 41 N. Y. Suppl. 78.

North Carolina.— Haynes *v.* Raleigh Gas Co., 114 N. C. 203, 19 S. E. 344, 41 Am. St. Rep. 786, 26 L. R. A. 810.

Oregon.— Boyd *v.* Portland Electric Co., 41 Oreg. 336, 68 Pac. 810; Chaperon *v.* Portland Electric Co., 41 Oreg. 39, 67 Pac. 928.

West Virginia.— Thomas *v.* Wheeling Electrical Co., 54 W. Va. 395, 46 S. E. 217 (holding that where an injury to a person comes from contact with a live electric wire, from bad insulation, at a place where there ought to be safe insulation for safety to persons, it is negligence on the part of the electrical corporation, rendering it *prima facie* liable); Snyder *v.* Wheeling Electrical Co., 43 W. Va. 661, 28 S. E. 733, 64 Am. St. Rep. 922, 39 L. R. A. 499.

71. Denver Consol. Electric Co. *v.* Simpson, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; Rucker *v.* Sherman Oil, etc., Co., (Tex. Civ. App. 1902) 68 S. W. 818.

Conditions after accident.—Where the position of an electric wire is material, and the injury is not of such a nature as would likely change its situation, evidence of its position a short time after the accident is admissible. Gloucester Electric Co. *v.* Kankas, 120 Fed. 490, 56 C. C. A. 640. See also Western Union Tel. Co. *v.* Thorn, 64 Fed. 287, 12 C. C. A. 104, holding that evidence of the condition of a wire nine months after an accident was admissible as corroborative evidence of its condition at the time of the accident.

Cost of change of system.— Evidence that a change making certain appliances or the system of conduction more safe would have cost an inconsiderable amount is admissible. Herron *v.* Pittsburg, 204 Pa. St. 509, 54 Atl. 311, 93 Am. St. Rep. 798.

Demonstrative evidence.— Clothing worn by a child at the time it received an electrical shock from a live wire is admissible as tending to illustrate and explain the manner in which the injury was occasioned. Quincy Gas, etc., Co. *v.* Baumann, 203 Ill. 295, 67 N. E. 807.

Time of existence of defect.— It may be shown that a defect has existed so long that

however, to the general exclusionary rules of evidence applied in other actions for negligence.[72]

(III) *Sufficiency.* The sufficiency of the evidence of defendant's negligence to carry the case to the jury,[73] or to show that the negligence of defendant, when admitted or proven, was the proximate cause of the injury,[74] or to show freedom from contributory negligence,[75] or to support a verdict in favor of plaintiff,[76] must

defendant should have learned thereof. Wolpers *v.* New York, etc., Electric Light, etc., Co., 91 N. Y. App. Div. 424, 86 N. Y. Suppl. 845; Fitzgerald *v.* Edison Electric Illuminating Co., 200 Pa. St. 540, 50 Atl. 161, holding that evidence that for several weeks before the accident a wire, when blown against the corner of a building, would "spit fire" was admissible.

72. Martinek *v.* Swift, (Iowa 1904) 98 N. W. 477 (holding that evidence that a horseshoe was hanging over a wire outside of defendant's office, leading to the light in question, in such a position as possibly to induce a greater current on the wire, is improperly admitted in the absence of any showing that defendant was responsible for the presence of the shoe); Fitzgerald *v.* Edison Electric Illuminating Co., 200 Pa. St. 540, 50 Atl. 161 (holding that the fact that an electric wire was put up against the consent of the owner is immaterial, in an action against the company by one who while painting the building was injured because of the defective insulation of the wire).

Remoteness.— Evidence of the inspection of wires a year previous to the accident, offered as a preliminary to evidence by the same inspector that the appliances as they then stood were properly constructed, being in any event merely corroborative, is too remote in character to be admissible. Nelson *v.* Branford Lighting, etc., Co., 75 Conn. 548, 54 Atl. 303.

Rules as to wiring buildings.— Rules of fire underwriters and other electric light companies prescribing the manner of wiring buildings are inadmissible in an action against an electric light company, inasmuch as they are merely declarations made out of court as to their conceived propriety of insulating wires. Dechert *v.* Municipal Electric Light Co., 39 N. Y. App. Div. 490, 57 N. Y. Suppl. 225. It has been held, however, that the ordinances and rules of the police department as to the inspection of wires owned by a city are admissible as tending to show more clearly the duty resting on the city with regard to the care required of it. Herron *v.* Pittsburg, 204 Pa. St. 509, 54 Atl. 311, 93 Am. St. Rep. 798.

73. **For evidence held sufficient** to carry the question to the jury see the following cases:

Illinois.— Economy Light, etc., Co. *v.* Sheridan, 200 Ill. 439, 65 N. E. 1070.

Kentucky.— Owensboro *v.* Knox, 76 S. W. 191, 25 Ky. L. Rep. 680.

Maryland.— Western Union Tel. Co. *v.* State, 82 Md. 293, 33 Atl. 763, 51 Am. St. Rep. 464, 31 L. R. A. 572.

Massachusetts.— Lutolf *v.* United Electric Light Co., (1903) 67 N. E. 1025.

New York.— Braham *v.* Nassau Electric R. Co., 72 N. Y. App. Div. 456, 76 N. Y. Suppl. 578; Ludwig *v.* Metropolitan St. R. Co., 71 N. Y. App. Div. 210, 75 N. Y. Suppl. 667; Gordon *v.* Ashley, 34 Misc. 743, 70 N. Y. Suppl. 1038.

Oregon.— Boyd *v.* Portland Electric Co., 41 Oreg. 336, 68 Pac. 810; Chaperon *v.* Portland Electric Co., 41 Oreg. 39, 67 Pac. 928.

Pennsylvania.— Herron *v.* Pittsburg, 204 Pa. St. 509, 54 Atl. 311, 93 Am. St. Rep. 798.

For evidence held insufficient to take the case to the jury see Crowe *v.* Nanticoke Light Co., 206 Pa. St. 374, 55 Atl. 1038.

An inspection once a week of electric wires carrying a high voltage and crossing the wires of other companies does not show freedom from negligence as a matter of law. Paine *v.* Electric Illuminating Co., 64 N. Y. App. Div. 477, 72 N. Y. Suppl. 279.

74. **For illustrative cases** holding that defendant's negligence was the proximate cause of the injury see Atlanta Consol. St. R. Co. *v.* Owings, 97 Ga. 663, 25 S. E. 377, 33 L. R. A. 798; Leavenworth Coal Co. *v.* Ratchford, 5 Kan. App. 150, 48 Pac. 927; Paine *v.* Electric Illuminating Co., 64 N. Y. App. Div. 477, 72 N. Y. Suppl. 279.

For illustrative cases holding that defendant's negligence was not the proximate cause of the injury see Consolidated Electric Light, etc., Co. *v.* Koepp, 64 Kan. 735, 68 Pac. 608; Albany *v.* Watervliet Turnpike, etc., Co., 76 Hun (N. Y.) 136, 27 N. Y. Suppl. 848; Huber *v.* La Crosse City R. Co., 92 Wis. 636, 66 N. W. 708, 53 Am. St. Rep. 940, 31 L. R. A. 583.

75. Knowlton *v.* Des Moines Edison Light Co., 117 Iowa 451, 90 N. W. 818 (holding that freedom from contributory negligence need not be established by direct affirmative proof, as the circumstances of the case may be such as to justify an inference of due care); Clements *v.* Louisiana Electric Light Co., 44 La. Ann. 692, 11 So. 51, 32 Am. St. Rep. 348, 16 L. R. A. 43; New Omaha Thomson-Houston Electric Light Co. *v.* Johnson, (Nebr. 1903) 93 N. W. 778 (where the evidence was held to show plaintiff guilty of contributory negligence).

76. **For evidence held sufficient** to support a verdict for plaintiff see the following cases:

California.— Giraudi *v.* Electric Imp. Co., 107 Cal. 120, 40 Pac. 108, 48 Am. St. Rep. 114, 28 L. R. A. 596.

Colorado.— Denver Consol. Electric Co. *v.* Lawrence, (1903) 73 Pac. 39.

Connecticut.— Nelson *v.* Branford Lighting, etc., Co., (1903) 54 Atl. 303.

Minnesota.— Schultz *v.* Faribault Consol. Gas, etc., Co., 82 Minn. 100, 84 N. W. 631.

be determined by a reference to the particular facts involved, and the general rules of evidence.[77]

d. Trial[78]—(I) *INSTRUCTIONS.* The general rules of law governing instructions in civil cases generally apply in actions against electric companies.[79]

(II) *QUESTIONS FOR JURY.* Questions of fact are ordinarily to be left to the jury.[80] Thus it is usually a question for the jury to determine, under proper instructions from the court, whether, under the circumstances of a given case, defendant on the one hand was guilty of the acts and omissions complained of,[81]

New Jersey.— New Jersey Consol. Gas Co. *v.* Brooks, (Sup. 1902) 53 Atl. 296.

New York.— O'Flaherty *v.* Nassau Electric R. Co., 165 N. Y. 624, 59 N. E. 1128 [*affirming* 34 N. Y. App. Div. 74, 54 N. Y. Suppl. 96]; Smith *v.* Brooklyn Heights R. Co., 82 N. Y. App. Div. 531, 81 N. Y. Suppl. 838; Caglione *v.* Mt. Morris Electric Light Co., 56 N. Y. App. Div. 191, 67 N. Y. Suppl. 660; Dwyer *v.* Buffalo Gen. Electric Co., 20 N. Y. App. Div. 124, 46 N. Y. Suppl. 874.

Pennsylvania.— Sorrell *v.* Titusville Electric Traction Co., 23 Pa. Super. Ct. 425.

Texas.— San Antonio Gas, etc., Co. *v.* Speegle, (Civ. App. 1900) 60 S. W. 884.

For evidence held insufficient to sustain a verdict for plaintiff see the following cases:

Colorado.— National F. Ins. Co. *v.* Denver Consol. Electric Co., 16 Colo. App. 86, 63 Pac. 949.

Iowa.— Martinek *v.* Swift, (1904) 98 N. W. 477.

Massachusetts.—Sias *v.* Lowell, etc., R. Co., 179 Mass. 343, 60 N. E. 974.

New Jersey.— McGilvery *v.* Newark Electric Light, etc., Co., 63 N. J. L. 591, 44 Atl. 637 [*affirming* 62 N. J. L. 451, 41 Atl. 955].

New York.— Flinn *v.* World's Dispensary Medical Assoc., 64 N. Y. App. Div. 490, 72 N. Y. Suppl. 243; Walters *v.* Syracuse Rapid Transit R. Co., 64 N. Y. App. Div. 150, 71 N. Y. Suppl. 853.

Pennsylvania.— Crowe *v.* Nanticoke Light Co., 206 Pa. St. 374, 55 Atl. 1038.

For evidence held sufficient to show that the injury was caused by an electric shock see Chaperon *v.* Portland Electric Co., 41 Oreg. 39, 67 Pac. 928.

77. See, generally, EVIDENCE; NEGLIGENCE.

78. See, generally, TRIAL.

79. See Boyd *v.* Portland Electric Co., 40 Oreg. 126, 66 Pac. 576; Denver *v.* Sherrett, 88 Fed. 226, 31 C. C. A. 499. See also NEGLIGENCE.

Assumption of disputed facts.— For the court to assume the existence of facts in dispute is erroneous. Dallas Electric Co. *v.* Mitchell, (Tex. Civ. App. 1903) 76 S. W. 935.

Instructions must be confined to the pleadings. Geismann *v.* Missouri-Edison Electric Co., 173 Mo. 654, 73 S. W. 654, holding that a complaint alleging that death was caused by contact with one of defendant's electric wires which through defendant's negligence had become uninsulated for a long time prior to the accident and whose condition was known or might have been known to defendant is sufficiently broad to authorize an instruction that it was incumbent on defendant to keep its wires reasonably safe.

Instructions must conform to the evidence. Schweitzer *v.* Citizens' Gen. Electric Co., 52 S. W. 830, 21 Ky. L. Rep. 608. However, an instruction which correctly states the law as to what constitutes an act of God is not erroneous as being outside of the evidence, where it is shown that the wire parted during a windstorm of a velocity from twenty-one to forty miles an hour, although such a storm was not unusual in that locality. Boyd *v.* Portland Electric Co., 41 Oreg. 336, 68 Pac. 810.

Instructions must not invade the province of the jury. Boyd *v.* Portland Electric Co., 41 Oreg. 336, 68 Pac. 810. And see Cumberland Telephone, etc., Co. *v.* Ware, 74 S. W. 289, 24 Ky. L. Rep. 2519.

80. Knowlton *v.* Des Moines Edison Light Co., 117 Iowa 451, 90 N. W. 818 (holding that the meaning of "waterproof" insulation may be left to the jury); Barker *v.* Boston Electric Light Co., 178 Mass. 503, 60 N. E. 2 (holding it to be a question for the jury whether plaintiff was a bare licensee or trespasser).

81. *Colorado.*— Walters *v.* Denver Consol. Electric Light Co., 12 Colo. App. 145, 54 Pac. 960.

Illinois.— Economy Light, etc., Co. *v.* Hiller, 203 Ill. 518, 68 N. E. 72 [*affirming* 106 Ill. App. 306].

Kentucky.— Lexington R. Co. *v.* Fain, 71 S. W. 628, 24 Ky. L. Rep. 1443.

Massachusetts.— Lutolf *v.* United Electric Light Co., 184 Mass. 53, 67 N. E. 1025; Barker *v.* Boston Electric Light Co., 178 Mass. 503, 60 N. E. 2.

Michigan.— Hovey *v.* Michigan Telephone Co., 124 Mich. 607, 83 N. W. 600.

New York.— Wagner *v.* Brooklyn Heights R. Co., 174 N. Y. 520, 66 N. E. 1117 [*affirming* 69 N. Y. App. Div. 349, 74 N. Y. Suppl. 809]; Wolpers *v.* New York, etc., Electric Light, etc., Co., 91 N. Y. App. Div. 424, 86 N. Y. Suppl. 845; Wittleder *v.* Citizens' Electric Illuminating Co., 47 N. Y. App. Div. 410, 62 N. Y. Suppl. 297.

Oregon.— Boyd *v.* Portland Electric Co., 40 Oreg. 126, 66 Pac. 576.

Pennsylvania.— Fitzgerald *v.* Edison Electric Illuminating Co., 207 Pa. St. 118, 56 Atl. 350.

Vermont.— Griffith *v.* New England Tel., etc., Co., 72 Vt. 441, 48 Atl. 643, 52 L. R. A. 919.

Whether defendant was negligent in not maintaining a guard wire over its trolley

and whether plaintiff on the other hand was guilty of contributory negligence such as to defeat his right to recover.[82]

F. Right of Action For Injuries to Company.[83] Title to manholes leading to conduits constructed in a street by electric lighting companies by municipal authority is in the companies, so that they may recover for tortious injury thereto.[84]

ELECTRIC LIGHT PLANT.[1] A term which includes the steam engine or other prime motors, the generating dynamo or dynamos, the lamps and other electro-receptive devices, and the circuit connected therewith.[2] (See, generally, ELECTRICITY.)

ELECTRIC LINE. As defined by statute, the term includes a wire or wires, conductor, or other means used for the purpose of conveying, transmitting, or distributing, electricity with any casing, coating, covering, tube, pipe, or insulator enclosing, surrounding, or supporting the same, or any part thereof, or any apparatus connected therewith for the purpose of conveying, transmitting, or distributing electricity or electric currents.[3] (See, generally, ELECTRICITY.)

ELECTRIC SMELTING.[4] A term which carries the idea of fusing and electrolyzing, both being well-known functions.[5] (See, generally, ELECTRICITY; MINES AND MINING.)

wire to prevent wires falling thereon from becoming charged is for the jury. Block *v.* Milwaukee St. R. Co., 89 Wis. 371, 61 N. W. 1101, 46 Am. St. Rep. 849, 27 L. R. A. 365.

Whether defendant was grossly negligent, thereby authorizing punitive damages, is a question for the jury. Macon *v.* Paducah St. R. Co., 62 S. W. 496, 23 Ky. L. Rep. 46.

Whether defendant should have known of the burned-out or non-insulated condition of a wire is a question for the jury. Economy Light, etc., Co. *v.* Hiller, 203 Ill. 518, 68 N. E. 72 [*affirming* 106 Ill. App. 306]; Griffin *v.* United Electric Light Co., 164 Mass. 492, 41 N. E. 675, 49 Am. St. Rep. 477, 32 L. R. A. 400.

Rebuttal of prima facie case.—Where plaintiff establishes a *prima facie* case of defendant's negligence by showing that the live wire with which he came in contact had fallen into the street, it is for the jury to determine whether the explanation offered by defendant is such as to relieve it from responsibility. Wolpers *v.* New York, etc., Electric Light, etc., Co., 91 N. Y. App. Div. 424, 86 N. Y. Suppl. 845.

82. *Arkansas.*— Texarkana Gas, etc., Co. *v.* Orr, 59 Ark. 215, 27 S. W. 66, 43 Am. St. Rep. 30.

Colorado.— Walters *v.* Denver Consol. Electric Light Co., 17 Colo. App. 192, 68 Pac. 117.

Iowa.— Knowlton *v.* Des Moines Edison Light Co., 117 Iowa 451, 90 N. W. 818.

Kentucky.— Lexington R. Co. *v.* Fain, 71 S. W. 628, 24 Ky. L. Rep. 1443; Macon *v.* Paducah St. R. Co., 62 S. W. 496, 23 Ky. L. Rep. 46.

Massachusetts.— Reagan *v.* Boston Electric Light Co., 167 Mass. 406, 45 N. E. 743; Griffin *v.* United Electric Light Co., 164 Mass. 492, 41 N. E. 675, 49 Am. St. Rep. 477, 32 L. R. A. 400.

Michigan.— Hovey *v.* Michigan Telephone Co., 124 Mich. 607, 83 N. W. 600.

Missouri.— Geismann *v.* Missouri-Edison Electric Co., 173 Mo. 654, 73 S. W. 654.

Nebraska.—South Omaha Water-Works Co. *v.* Vocasek, 62 Nebr. 710, 87 N. W. 536.

New Jersey.— Rowe *v.* New York, etc., Telephone Co., 66 N. J. L. 19, 48 Atl. 523.

Oregon.— Boyd *v.* Portland Electric Co., 41 Oreg. 336, 68 Pac. 810.

Pennsylvania.— Fitzgerald *v.* Edison Electric Illuminating Co., 207 Pa. St. 118, 56 Atl. 350.

Vermont.— Griffith *v.* New England Telephone, etc., Co., 72 Vt. 441, 48 Atl. 643, 52 L. R. A. 919.

83. **Injury caused by another electrical company** see *supra*, III, C, 3, b.

84. Missouri-Edison Electric Co. *v.* Weber, 102 Mo. App. 95, 76 S. W. 736 [*citing* State *v.* St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113], holding that one may not drive an extraordinarily heavy load over manholes which he has noticed are not strong enough therefor, where he has ample room to pass by instead of over them; and that while the fact that the manholes are constructed according to municipal regulations does not alone entitle the company to recover for the injury, yet it is not necessary that they should be able to sustain as great a weight as the rest of the street.

1. **Damages for breach of contract** to erect electric light plant see 9 Cyc. 783 note 76.

2. Fisher Electric Co. *v.* Bath Iron Works, 116 Mich. 293, 299, 74 N. W. 403.

3. 45 & 46 Vict. (1882) c. 56, § 32.

4. **"Electric smelting processes" and furnaces,** as used in a contract of assignment in relation thereto, do not embrace processes solely electrolytic. Lowrey *v.* Cowles Electric Smelting, etc., Co., 68 Fed. 354, 371.

5. Cowles Electric Smelting, etc., Co. *v.* Lowrey, 79 Fed. 331, 343, 24 C. C. A. 616.

ELECTROCUTION. See CRIMINAL LAW.

ELECTRODE. A pole of the current from an electric battery applied generally to the two ends of an open circuit;[6] the path by which electricity is conveyed into or from a solution or other conducting medium; (especially,) the wires or conductors, leading from the source of electricity, and terminating in the medium traversed by the currents.[7]

ELECTROLYSIS. A chemical dissolution by means of an electric current.[8]

ELECTRO-METALLURGY. A term characterizing all processes in which electricity is applied to the working of metals.[9]

ELECTROPLATING. The coating of one metal by another, the deposited metal becoming inseparably a part of the object plated.[10]

ELECTROTYPING. The act of making electrotypes, or copies of objects in metal by means of electricity.[11]

ELECTUS. Chosen.[12]

ELEEMOSYNARY.[13] CHARITABLE,[14] *q. v.*; ALMS,[15] *q. v.* Something constituted for the perpetual distribution of the alms or bounty of the founder.[16] (Eleemosynary: Corporation—In General, see ASYLUMS; CHARITIES; HOSPITALS; Adoption of Child by, see ADOPTION OF CHILDREN; Taxation of, see TAXATION.)

ELEEMOSYNARY LIFE. Living upon alms; or entirely dependent on charity.[17]

ELEGANS. Accurate.[18]

ELEGANTER. In the civil law, accurately; with discrimination.[19]

ELEGIT. See EXECUTIONS.

ELEMENTS.[20] In common speech, earth, air, fire and water.[21] Strictly speak-

6. Century Dict. [*quoted* in California Electrical Works *v.* Henzel, 48 Fed. 375, 378].

7. Webster Int. Dict. [*quoted* in California Electrical Works *v.* Henzel, 48 Fed 375, 378].

8. Lowrey *v.* Cowles Electric Smelting, etc., Co., 68 Fed. 354, 366, where the process is described as follows: "Whenever a current of sufficient quantity and intensity is passed through a chemical compound in a fluid condition, it will cause a chemical disruption, and one of the elements will go to the anode, or the place at which the current enters the fluid mass, and the other will go to the cathode, or place where the current leaves it."

9. Edison Electric Light Co. *v.* Westinghouse, 55 Fed. 490, 508.

10. Edison Electric Light Co. *v.* Westinghouse, 55 Fed. 490, 509, where the process is described and said to be very similar in its operation to electrotyping.

11. Edison Electric Light Co. *v.* Westinghouse, 55 Fed. 490, 509, where the process is described.

12. Burrill L. Dict. See also Scarro *v.* Saprany, Cro. Jac. 119; Reg. *v.* Aldborough, 10 Mod. 100, 102.

13. **This word comes to us from the Greek word meaning alms,** but, while it is always interesting to note the origin and first meanings of words, this knowledge is frequently more curious than valuable." People *v.* Cogswell, 113 Cal. 129, 137, 45 Pac. 270, 35 L. R. A. 269.

Contra-distinguished to "civil" in Cresson *v.* Cresson, 6 Fed. Cas. No. 3,389.

14. People *v.* Cogswell, 113 Cal. 129, 138, 45 Pac. 270, 35 L. R. A. 269; People *v.* Fitch, 12 N. Y. App. Div. 581, 584, 39 N. Y. Suppl. 926, 42 N. Y. Suppl. 1131 [*reversed* in 154 N. Y. 14, 47 N. E. 983, 38 L. R. A. 591].

15. People *v.* Cogswell, 113 Cal. 129, 137, 45 Pac. 270, 35 L. R. A. 269.

16. 2 Kent Comm. 275 [*quoted* in Cresson *v.* Cresson, 6 Fed. Cas. No. 3,389].

The term "includes all charitable purposes." People *v.* Cogswell, 113 Cal. 129, 138, 45 Pac. 270, 35 L. R. A. 269 [*quoted* in *In re* Gay, 138 Cal. 552, 553, 71 Pac. 707, 94 Am. St. Rep. 70].

17. Johnson Dict. [*quoted* in Cresson *v.* Cresson, 6 Fed. Cas. No. 3,389].

18. Veazie *v.* Williams, 28 Fed. Cas. No. 16,907, 3 Story 611, 636 note 3, where Ware, J., said: "The word *elegans* I have translated accurate, the primary sense of the word, and that in which it appears to be used in the Digest most frequently, and not in its secondary sense, tasteful, in which we have transferred it into our language."

19. Burrill L. Dict. [*citing* Veazie *v.* Williams, 28 Fed. Cas. No. 16,907, 3 Story 611, 636].

20. **"The act of the elements"** is more comprehensive than the expression "human agency." Polack *v.* Pioche, 35 Cal. 416, 423, 95 Am. Dec. 115.

"The elements are the means by which God acts, and we are unable to perceive why 'damages by the elements' and 'damages by the acts of God' are not convertible expressions in the law of leases." Polack *v.* Pioche, 35 Cal. 416, 423, 95 Am. Dec. 115 [*quoted* in Van Wormer *v.* Crane, 51 Mich. 363, 371, 16 N. W. 686, 47 Am. Rep. 582]. See also Pope *v.* Farmers' Union, etc., Co., 130 Cal. 139, 141, 62 Pac. 384.

21. Van Wormer *v.* Crane, 51 Mich. 363, 365, 370, 16 N. W. 686, 47 Am. Rep. 582. See also Harris *v.* Corlies, 40 Minn. 106, 109, 41 N. W. 940, 2 L. R. A. 349.

ing, the ultimate, undecomposable parts which unite to form anything.[22] (Elements: Affecting Performance of — Conditions in Bond, see BONDS; Contract, see CONTRACTS. Liability For — Flowage, see WATERS AND WATERCOURSES; Injuries Caused by Elements In General, see NEGLIGENCE; Of Carrier For Injuries Caused by Floods, etc., see CARRIERS.)

ELEVATED RAILROAD. A railroad which is placed above the surface of the street, and is used by the general public.[23] (See, generally, EMINENT DOMAIN; STREET RAILROADS.)

ELEVATOR. A warehouse for the storage and ready shipment of grain.[24] (Elevator:[25] Liability For Injury to — Employee, see MASTER AND SERVANT; Passenger, see CARRIERS; Person Not Passenger, see NEGLIGENCE.)

ELIGIBILITY. See OFFICERS.

ELIGIBLE.[26] Worthy of choice; worthy to be chosen or selected; desirable; that may be selected, or elected;[27] fit or worthy of choice or adoption; suitable;[28] fit to be chosen;[29] preferable.[30] (See, generally, OFFICERS.)

ELISOR. A person appointed to perform certain duties pertaining to certain officers, when the latter are disqualified;[31] a person appointed by the court to return a jury when the sheriff and coroner have been challenged as incompetent.[32] (Elisor: Appointment — To Execute Writ, see ATTACHMENT;[33] SHERIFFS AND CONSTABLES; To Return Jury, see JURIES.)

ELIZA. A commonly used abbreviation of Elizabeth.[34]

"**Elements or other cause**" as used in a lease see Hatch *v.* Stamper, 42 Conn. 28, 30.

22. "As the gases which form air and water are the elements respectively of those substances." Van Wormer *v.* Crane, 51 Mich. 363, 365, 16 N. W. 686, 47 Am. Rep. 582.

23. State *v.* King County Super. Ct., 30 Wash. 219, 225, 70 Pac. 484.

24. Erie County *v.* Erie, etc., Transp. Co., 87 Pa. St. 434, 437.

25. **Contract between railroad company and elevator company** see 9 Cyc. 535 note 2.

When the sheriff may be directed to operate an elevator for court purposes see 11 Cyc. 738 note 12.

26. "**Primarily, the word 'eligible,'** from the latin, *eligere*, to elect." Kirkpatrick *v.* Brownfield, 97 Ky. 558, 562, 31 S. W. 137, 17 Ky. L. Rep. 376, 53 Am. St. Rep. 422, 29 L. R. A. 703. See also Demaree *v.* Scates, 50 Kan. 275, 284, 32 Pac. 1123, 34 Am. St. Rep. 113, 20 L. R. A. 97 (where it is said: "Its derivation from the Latin word *eligere*, to choose, with the suffix *ible*, ordinarily signifying able, or capable of, would seem to give the word, naturally, the signification of able to be, or capable of being, chosen"); Taylor *v.* Sullivan, 45 Minn. 309, 311, 47 N. W. 802, 22 Am. St. Rep. 729, 11 L. R. A. 272 [*quoted* in Demaree *v.* Scates, 50 Kan. 275, 288, 32 Pac. 1123, 34 Am. St. Rep. 113, 20 L. R. A. 97 (where it is said: "In this, and the cognate words derived from the same source, (the Latin verb '*eligere*,') the idea primarily involved is that of choosing, selecting. It is expressed in our words, 'to elect,' derived from the same Latin word. This primary and strictly proper signification of the word 'eligible' is also its well-understood popular meaning. It we had adopted the form 'electible' for the adjective, instead of following more nearly the form of the verb from which it is derived, the meaning might have been more obvious, but it would not have been different").

As used in articles of association of a company which provided that no person should be "eligible" as a director unless he held a stated number of shares see *Ex p.* Stock, 10 Jur. N. S. 790, 33 L. J. Ch. 731, 736, 12 Wkly. Rep. 814.

Applied to a case of a defaulter in State *v.* Moores, 52 Nebr. 770, 799, 73 N. W. 299.

27. Demaree *v.* Scates, 50 Kan. 275, 278, 284, 32 Pac. 1123, 34 Am. St. Rep. 113, 20 L. R. A. 97 [*quoting* Webster Dict.; Worcester Dict.].

28. Standard Dict. [*quoted* in State *v.* Moores, 52 Nebr. 770, 795, 73 N. W. 299].

29. Baker *v.* Lee, 8 H. L. Cas. 495, 522, 7 Jur. N. S. 1, 30 L. J. Ch. 625, 11 Eng. Reprint 522; Worcester Dict. [*quoted* in Demaree *v.* Scates, 50 Kan. 275, 284, 32 Pac. 1123, 34 Am. St. Rep. 113, 20 L. R. A. 97].

30. Webster Dict. [*quoted* in Demaree *v.* Scates, 50 Kan. 275, 284, 32 Pac. 1123, 34 Am. St. Rep. 113, 20 L. R. A. 97].

"**An eligible freehold house** fit and proper for investment" was considered in Hope *v.* Walter, [1900] 1 Ch. 257, 258, 69 L. J. Ch. 166, 82 L. T. Rep. N. S. 30.

31. Bruner *v.* San Francisco Super. Ct., 92 Cal. 239, 245, 28 Pac. 341 [*quoting* 3 Blackstone Comm. 355], where it is said: "He was originally confined to the duty of returning a jury in the event of such disqualifications; but in some states his duties are extended to the service of other process, but only in the event of the disqualification of some other officer." See also Griffith *v.* Montandon, 4 Ida. 75, 79, 35 Pac. 704; 4 Cyc. 576.

32. Bouvier L. Dict. [*quoted* in Bruner *v.* San Francisco Super. Ct., 92 Cal. 239, 246, 28 Pac. 341].

33. See 4 Cyc. 576.

34. Webster Int. Dict. [*quoted* in Goodell *v.* Hall, 112 Ga. 435, 436, 37 S. E. 725].

ELOIGN. To take away beyond the jurisdiction, or to conceal an object from the court.[35]

ELOIGNMENT. Removal; sending to a distant place.[36] (See, generally, LOGGING; REPLEVIN.)

ELOPEMENT. The departure of a married woman from her husband and dwelling with an adulterer.[37] (Elopement: As Bar to Dower, see DOWER.)

ELSE. Besides; other than the person, thing, place, etc., mentioned.[38]

ELSEWHERE. In another place; in any other place.[39]

EM. In printing, the square of any size of type.[40] (See also FOLIO.)

EMANCIPATE. To release; to set free.[41] (See, generally, PARENT AND CHILD.)

EMANCIPATION.[42] An act by which a person who was once in the power or

35. Garneau *v.* Port Blakely Mill Co., 8 Wash. 467, 475, 36 Pac. 463.

36. Wharton L. Lex.

37. Bouvier L. Dict. *Compare* Hatchett *v.* Babbeley, 2 W. Bl. 1079, 1080, where De Grey, C. J., observed: "The word 'elopement' is not a legal term, nor has [it] any express meaning in the law . . . The modern books never speak of elopement, but in a criminal view." See also Hunt *v.* De Blaquiere, 5 Bing. 550, 556, 7 L. J. C. P. O. S. 198, 3 M. & P. 108, 30 Rev. Rep. 737, 15 E. C. L. 716.

"To constitute an elopement, the wife must not only leave the husband, but go beyond his actual control." Cogswell *v.* Tibbetts, 3 N. H. 41, 42 [*citing* Rolle Abr. 680].

38. Century Dict. And see Ferris *v.* Bond, 4 B. & Ald. 679, 681, 23 Rev. Rep. 443, 6 E. C. L. 651, where this word was used in a promissory note.

39. Burrill L. Dict. See also Winn *v.* Littleton, 1 Vern. Ch. 3, 4.

Construed ejusdem generis in connection with "streets and highways" as used in an ordinance rendering it criminal to make a disturbance therein, etc., see State *v.* Camden, 52 N. J. L. 289, 291, 19 Atl. 539.

"Elsewhere" as used in a memorandum of an association of a mining company declaring the object to be the purchase and working of mines, etc., in the state of Missouri or elsewhere, means elsewhere than in the state of Missouri. Missouri Lead Min., etc., Co. *v.* Reinhard, 114 Mo. 218, 229, 21 S. W. 488, 35 Am. St. Rep. 746. But *compare In re* New Terras Tin Min. Co., [1894] 2 Ch. 344, 347, 63 L. J. Ch. 397, 70 L. T. Rep. N. S. 625, 1 Manson 149, 8 Reports 233, 42 Wkly. Rep. 504; *In re* Silver Valley Mines, 18 Ch. D. 472, 473, 45 L. T. Rep. N. S. 104, 30 Wkly. Rep. 36; *Re* Coolgardie Consol. Gold Mines, 76 L. T. Rep. N. S. 269.

In a testamentary gift of property, this word is "the most significant, sensible and comprehensive word that could be used for that purpose," "or in any other place whatsoever." Chester *v.* Chester, 2 Eq. Cas. Abr. 330, 22 Eng. Reprint 281, Fitzg. 150, 3 P. Wms. 56, 61, 24 Eng. Reprint 967. *Compare* Guidot *v.* Guidot, 3 Atk. 254, 256, 26 Eng. Reprint 948.

In shipping articles, this term, following the designation of the port of destination, must be construed either as void for uncertainty or as subordinate to the principal voyage stated in the preceding words. Brown *v.* Jones, 4 Fed. Cas. No. 2,017, 2 Gall. 477, 479.

The word "elsewhere" has received judicial interpretation in connection with an assignment of goods (Greenbirt *v.* Smee, 35 L. T. Rep. N. S. 168, 171); a devise (Pinney *v.* Marriott, 32 Reav. 643); residuary personal estate (*In re* Scarborough, 6 Jur. N. S. 1166, 30 L. J. P. & M. 85, 9 Wkly. Rep. 149); the seduction of an unmarried female (State *v.* McCrum, 38 Minn. 154, 156, 36 N. W. 102).

The words "the United Kingdom or elsewhere," as used in an income tax act, do not include the whole world. Colquhoun *v.* Brooks, 21 Q. B. D. 52, 58, 52 J. P. 645, 57 L. J. Q. B. 439, 59 L. T. Rep. N. S. 661, 36 Wkly. Rep. 657 [*affirmed* in 14 App. Cas. 493, 54 J. P. 277, 59 L. J. Q. B. 53, 61 L. T. Rep. N. S. 518, 38 Wkly. Rep. 289].

40. Century Dict. See also Hobe *v.* Swift, 58 Minn. 84, 89, 59 N. W. 831, where it is said: "The em was originally square, and such square is the unit of measurement, and varies in size as the type varies."

41. Porter *v.* Powell, 79 Iowa 151, 154, 44 N. W. 295, 18 Am. St. Rep. 353, 7 L. R. A. 176.

42. Origin and use of the term.—"The word 'emancipation' is not *vocabulum artis*, and has no definite legal meaning. In Rex *v.* Cold Ashton, Burr. S. C. 444, Lord Mansfield, C. J., and Wilmot, J., objected to the use of the word, on the ground that it is a vague term in our law, especially in the matter of settlements, and is used in the books without affixing any precise idea; Wilmot, J., observing that it is a term borrowed from another law, and not properly applicable to ours." Lord Denman, C. J., said: "Lord Mansfield and Wilmot, J., might dislike the introduction of the word 'emancipation' from the Roman into the English law: but it has been so introduced, and is now well understood by parish officers and justices." Reg. *v.* Rothwell, 7 Q. B. 574, 575, 576 note, 53 E. C. L. 574. See also Schouler Dom. Rel 561 [*quoted* in Dunks *v.* Grey, 3 Fed. 862, 865].

The term has been construed in connection with an agreement by the father with his minor child as to wages (Varney *v.* Young, 11 Vt. 258, 260); the consent of the father to the enlistment of his minor son in the military service (Baker *v.* Baker, 41 Vt. 55, 57); the consent of parents to the adoption of a child (Tunbridge *v.* Eden, 39 Vt. 17, 20); the marriage of a child (Sherburne *v.* Hartland, 37 Vt. 528, 529); the marriage of a minor daughter (Fremont *v.* Sandown, 56

under the control of another is rendered free.[43] (Emancipation: Of Child, see DOMICILE; INFANTS; PARENT AND CHILD. Of Slave,[44] see CITIZENS; CIVIL RIGHTS; CONSTITUTIONAL LAW.)

EMBANKMENT. An artificial bank or mound of earth.[45] In its common, usual, and accepted meaning, a ridge of earth of sufficient height and base to form a serious obstruction to a highway, if raised across its passage.[46] (See, generally, ADJOINING LANDOWNERS; EMINENT DOMAIN; LEVEES; RAILROADS; WATERS AND WATERCOURSES.)

EMBARGO. A prohibition to sail;[47] a restraint and detention by public authority.[48] (See, generally, INTERNATIONAL LAW; WAR.)

EMBARRASS. In pleading, the bringing forward of a defense which the defendant is not entitled to make use of.[49] (See, generally, PLEADING.)

EMBARRASSED. In its application to a man's financial condition or standing, incumbered with debt; beset with urgent claims and demands; unable to meet his pecuniary engagements, etc.[50]

EMBASSADOR. See AMBASSADORS AND CONSULS.

N. H. 300, 303); a pauper (Poultney *v.* Glover, 23 Vt. 328, 331); a pauper law (Sherburne *v.* Hartland, 37 Vt. 528, 529); a pauper settlement (Rex *v.* Offchurch, 3 T. R. 114, 116). See also Reg. *v.* Roach, 6 T. R. 247, 252, 3 Rev. Rep. 169.

43. Bouvier L. Dict. [*quoted* in Fremont *v.* Sandown, 56 N. H. 300, 303; Kelinski *v.* Melville Coal Co., 10 Kulp (Pa.) 455, 456].

44. **That the emancipation of a slave will support a note** given by the slave after emancipation see 7 Cyc. 714 note 39.

45. Webster Dict. [*quoted* in State *v.* New Orleans, etc., R. Co., 42 La. Ann. 138, 142, 7 So. 226, where it is said: "It may be used either exclusively as a roadway or as a railroad bed, or exclusively as a protection from overflow or as both"].

"Embankment," should be construed to include the ties used by a railroad company in the construction of a railway, and the ballasting or filling in between the same. Pittsburgh, etc., R. Co. *v.* Rose, 74 Pa. St. 362, 369.

"Embankment . . . is not synonymous with the term levee, as used in the statute. . . . Every levee is . . . an embankment, but every embankment is not a levee." State *v.* New Orleans, etc., R. Co., 42 La. Ann. 138, 142, 7 So. 226.

46. State *v.* Day, 52 Ind. 483, 485.

Embankments, except for retaining walls, are normally made of earth, not of rock. Curley *v.* Hudson County, 66 N. J. L. 401, 406, 49 Atl. 471.

47. The William King, 2 Wheat. (U. S.) 148, 153, 4 L. ed. 206.

"Embargo," ex vi termini, means only a temporary suspension of trade. A general and permanent prohibition of trade would not be an embargo. McBride *v.* Marine Ins. Co., 5 Johns. (N. Y.) 299, 308.

48. Delano *v.* Bedford Mar. Ins. Co., 10 Mass. 347, 351, 6 Am. Dec. 132.

An "embargo" is as much a restraint and detention, although it amounts to nothing more than a legal prohibition against the sailing of the vessel, as if she were taken into the custody of the officers of the government, and were deprived of all the means of removing from the wharf. King *v.* Delaware Ins. Co., 14 Fed. Cas. No. 7,788, 2 Wash. 300.

Violation of embargo laws as used in a libel against a vessel see 1 Cyc. 855 note 6.

49. Heugh *v.* Chamberlain, 25 Wkly. Rep. 742, 743. See also Spurr *v.* Hall, 2 Q. B. D. 615, 46 L. J. Q. B. 693, 37 L. T. Rep. N. S. 313, 26 Wkly. Rep. 78; Berdan *v.* Greenwood, 3 Ex. D. 251, 259, 47 L. J. Exch. 628, 39 L. T. Rep. N. S. 223, 26 Wkly. Rep. 902.

Pleadings will not be deemed embarrassing because they are inconsistent. *In re* Morgan, 35 Ch. D. 492, 500, 56 L. J. Ch. 603, 56 L. T. Rep. N. S. 503, 35 Wkly. Rep. 705 [*affirmed* in 39 Ch. D. 316, 60 L. T. Rep. N. S. 71, 37 Wkly. Rep. 243].

50. It is substantially of the same meaning as the words "bad circumstances," "insolvent," "unworthy of credit." Hayes *v.* Press Co., 127 Pa. St. 642, 647, 18 Atl. 331, 14 Am. St. Rep. 874, 5 L. R. A. 643.

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* Author of "Boundaries," 5 Cyc. 861; "Bribery," 5 Cyc. 1088; "Covenants," 11 Cyc. 1085; and joint author of "Champerty and Maintenance," 6 Cyc. 847, etc.

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Civil Liability For Conversion, see ACTIONS; BAILMENTS; PRINCIPAL AND AGENT; TROVER AND CONVERSION.
Embezzlement as Ground For:
Attachment, see ATTACHMENT.
Civil Arrest, see ARREST.
Embezzlement of Letters, see POST-OFFICE.
Former Jeopardy, see CRIMINAL LAW.
Jurisdiction, see CRIMINAL LAW.
Larceny, see LARCENY.
Receiving Embezzled Property, see RECEIVING STOLEN GOODS.
Venue, see CRIMINAL LAW.
For General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW.

I. NATURE AND ELEMENTS OF OFFENSE.

A. Definition. Embezzlement is a fraudulent appropriation of another's property by a person to whom it has been intrusted or into whose hands it has lawfully come. It differs from larceny in that the original taking of the property was lawful or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.[1] At common law the term had

1. Moore *v.* U. S., 160 U. S. 268, 269, 16 S. Ct. 294, 40 L. ed. 422.
For similar definitions see the following cases:
California.—People *v.* Gordon, 133 Cal. 328, 329, 65 Pac. 746; People *v.* McMahan, 133 Cal. 278, 280, 65 Pac. 571; People *v.* Westlake, 124 Cal. 452, 453, 57 Pac. 465; People

no distinctive meaning as applied to a crime. The offense is of purely statutory

v. Gallagher, 100 Cal. 466, 467, 35 Pac. 80; *Ex p.* Hedley, 31 Cal. 108, 111.

Delaware.— State *v.* Davis, 3 Pennew. 220, 222, 50 Atl. 99; State *v.* Foster, 1 Pennew. 289, 296, 40 Atl. 939.

Indiana.— State *v.* Winstandley, 155 Ind. 290, 291, 58 N. E. 71 [*citing* Anderson L. Dict.; Bouvier L. Dict.]; Colip *v.* State, 153 Ind. 584, 587, 55 N. E. 739, 74 Am. St. Rep. 322; State *v.* Matthews, 129 Ind. 281, 283, 28 N. E. 703.

Iowa.— State *v.* Orwig, 24 Iowa 102, 106.

Kentucky.— Com. *v.* Clifford, 96 Ky. 4, 6, 27 S. W. 811, 16 Ky. L. Rep. 184 [*quoting* Bouvier L. Dict.].

Louisiana.— State *v.* Nicholls, 50 La. Ann. 699, 701, 23 So. 980.

Nebraska.— Mills *v.* State, 53 Nebr. 263, 271, 73 N. W. 761; Chaplin *v.* Lee, 18 Nebr. 440, 443, 25 N. W. 609 [*quoting* Webster Dict.].

Nevada.— State *v.* Trolson, 21 Nev. 419, 422, 32 Pac. 930.

New Jersey.— State *v.* Lyon, 45 N. J. L. 272.

New York.— Quail *v.* Nelson, 39 N. Y. App. Div. 18, 20, 56 N. Y. Suppl. 865 [*quoting* Bouvier L. Dict.]; Fagnan *v.* Knox, 40 N. Y. Super. Ct. 41, 49.

North Carolina.— State *v.* McDonald, 133 N. C. 680, 683, 45 S. E. 582; State *v.* Foust, 114 N. C. 842, 843, 19 S. E. 275.

North Dakota.— State *v.* Collins, 4 N. D. 433, 61 N. W. 467.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* McCurdy, 114 Pa. St. 554, 558, 8 Atl. 230, 60 Am. Rep. 363; Com. *v.* Scott, 3 C. Pl. 98, 100.

Texas.— Golden *v.* State, 22 Tex. App. 1, 14, 2 S. W. 531; Brady *v.* State, 21 Tex. App. 659, 660, 1 S. W. 462; Cole *v.* State, 16 Tex. App. 461, 470; Leonard *v.* State, 7 Tex. App. 417, 444.

Utah.— People *v.* Hill, 3 Utah 334, 356, 3 Pac. 75.

Canada.— London Guarantee, etc., Co. *v.* Hochelaga Bank, 3 Quebec Q. B. 25, 34 [*quoting* Webster Dict.]; Ferris *v.* Irwin, 10 U. C. C. P. 116, 117.

It involves two general ingredients or elements: (1) A breach of duty or trust in respect of money, property, or effects, in the party's possession, belonging to another; (2) the wrongful or fraudulent appropriation thereof. There must be the actual and lawful possession or custody of the property of another, by virtue of some trust, duty, agency, or employment on the part of the accused; and while so lawfully in the possession of such property it must be unlawfully and fraudulently converted to the use of the person so in the possession and custody thereof. Reeves *v.* State, 95 Ala. 31, 41, 11 So. 158; U. S. *v.* Harper, 33 Fed. 471, 474.

Larceny distinguished.— At common law the term "embezzlement" had no technical meaning and was frequently applied to every kind of stealing. People *v.* McKinney, 10 Mich. 54, 109. See also McAleer *v.* State, 46 Nebr. 116, 120, 64 N. W. 358. Under modern statutes, however, embezzlement, while a species of larceny, is a distinct offense. "It is distinguished from larceny, properly so called, as being committed in respect of property which is not at the time in the actual possession of the owner." People *v.* Burr, 41 How. Pr. (N. Y.) 293, 294. "Theft, as distinguished from embezzlement, is taking property of another from the possession of the owner, with intent to defraud. Embezzlement, as distinguished from theft, is taking property of another in the possession of the accused, with intent to defraud. The crimes are essentially the same; but most unfortunately are, for the purposes of prosecution, entirely distinct. The one demands, as an essential element a trespass, a breach of technical possession; the other cannot be committed unless the element of trespass or breach of technical possession is absent. The former is a crime at common law; the latter is a statutory offense." State *v.* Hanley, 70 Conn. 265, 270, 39 Atl. 148. See also People *v.* De Coursey, 61 Cal. 134; People *v.* Belden, 37 Cal. 51; State *v.* Yeiter, 54 Kan. 277, 283, 38 Pac. 320; State *v.* Sullivan, 49 La. Ann. 197, 200, 21 So. 688, 62 Am. St. Rep. 644 [*citing* State *v.* Wolff, 34 La. Ann. 1153]; Com. *v.* King, 9 Cush. (Mass.) 284; Taylor *v.* Kneeland, 1 Dougl. (Mich.) 67, 72; State *v.* Harmon, 106 Mo. 635, 18 S. W. 128; People *v.* Hennessey, 15 Wend. (N. Y.) 147, 151; Griffin *v.* State, 4 Tex. App. 390, 409; U. S. *v.* Lee, 12 Fed. 816, 818; U. S. *v.* Stone, 8 Fed. 232, 250.

Larceny by bailee is a common designation of embezzlement. People *v.* Perini, 94 Cal. 573, 575, 29 Pac. 1027 [*citing* Anderson L. Dict.]; Com. *v.* Keller, 9 Pa. Co. Ct. 253, 255.

"**'To embezzle'** is the verb correlative to 'embezzlement,'" the noun, and signifies to commit embezzlement. McCann *v.* U. S., 2 Wyo. 274, 295 [*cited* in Moore *v.* U. S., 160 U. S. 268, 270, 16 S. Ct. 294, 40 L. ed. 422]. The word has a settled technical meaning of its own (Reeves *v.* State, 95 Ala. 31, 41, 11 So. 158; State *v.* Nicholls, 50 La. Ann. 699, 701, 23 So. 980 [*citing* U. S. *v.* Britton, 107 U. S. 655, 666, 2 S. Ct. 512, 27 L. ed. 520]; State *v.* Sullivan, 49 La. Ann. 197, 200, 21 So. 688, 62 Am. St. Rep. 644; State *v.* Trolson, 21 Nev. 419, 423, 32 Pac. 930; U. S. *v.* Northway, 120 U. S. 327, 332, 7 S. Ct. 580, 30 L. ed. 664 [*cited* in Moore *v.* U. S., 160 U. S. 268, 270, 16 S. Ct. 294, 40 L. ed. 422]), and signifies to fraudulently appropriate to one's own use the property of another (Spalding *v.* People, 172 Ill. 40, 56, 49 N. E. 993; Metropolitan L. Ins. Co. *v.* Miller, 71 S. W. 921, 922, 24 Ky. L. Rep. 1561; Hamilton *v.* State, 46 Nebr. 284, 287, 64 N. W. 965; State *v.* Lyon, 45 N. J. L. 272, 275. See also State *v.* Jamison, 74 Iowa 602, 604, 38 N. W. 508; *In re* Bellencontre, [1891] 2 Q. B. 122, 139, 17 Cox C. C. 257, 55 J. P. 694, 60 L. J. Q. B. 83, 64 L. T. Rep. N. S. 461, 39 Wkly. Rep. 381). "The word 'embezzle' may be

origin,[2] and accordingly the particular statutes of the various jurisdictions must be looked to in order to determine the constituent elements of the offense thereiu.[3]

said to contain within itself all the elements of a criminal conversion" (State *v.* Reilly, 4 Mo. App. 392, 396) and "necessarily imports fraud and breach of trust" (Alleghany County *v.* Van Campen, 3 Wend. (N. Y.) 48, 53. See also Dotson *v.* State, 51 Ark. 119, 122, 10 S. W. 18; People *v.* Johnson, 91 Cal. 265, 269, 27 Pac. 663; State *v.* Stevenson, 91 Me. 107, 112, 39 Atl. 471; Com. *v.* Hays, 14 Gray (Mass.) 62, 74 Am. Dec. 662; State *v.* Lyon, 45 N. J. L. 272, 275; Grin *v.* Shine, 187 U. S. 181, 189, 23 S. Ct. 98, 47 L. ed. 130). For other definitions see Century Dict. [*quoted* in State *v.* Trolson, 21 Nev. 419, 423, 32 Pac. 930; Com. *v.* Bright, 11 Pa. Dist. 173]; Imperial Dict. [*quoted* in London Guarantee, etc., Co. *v.* Hochelaga Bank, 3 Quebec Q. B. 25, 33]; Richardson Dict [*quoted* in London Guarantee, etc., Co. *v.* Hochelaga Bank, 3 Quebec Q. B. 25, 34]; Standard Dict. [*quoted* in *In re* Grin, 112 Fed. 790, 796]; Webster Dict. [*quoted* in State *v.* Sullivan, 49 La. Ann. 197, 200, 21 So. 688, 62 Am. St. Rep. 644; State *v.* Trolson, *supra*]; Wharton L. Lex. [*quoted* in State *v.* Trolson, *supra*]. "To embezzle" and "to wilfully misapply" are not synonymous, as used in U. S. Rev. St. § 5209 [U. S. Comp. St. (1901) p. 3497], punishing offenses by national bank officers (U. S. *v.* Northway, 120 U. S. 327, 332, 7 S. Ct. 580, 30 L. ed. 664. See also U. S. *v.* Taintor, 28 Fed. Cas. No. 16,428, 11 Blatchf. 374, 377); nor are "to embezzle" and "to appropriate to one's own use" necessarily and strictly synonymous, since the former term embraces also the meaning "to misappropriate" (State *v.* Foust, 114 N. C. 842, 19 S. E. 275). In civil statutes the word "embezzle" is sometimes used in a popular sense not implying the commission of a crime. Sawin *v.* Martin, 11 Allen (Mass.) 439, 441.

2. Com. *v.* Hays, 14 Gray (Mass.) 62, 63, 74 Am. Dec. 662, where it is said: "The statutes relating to embezzlement, both in this country and in England, had their origin in a design to supply a defect which was found to exist in the criminal law. By reason of nice and subtle distinctions, which the courts of law had recognized and sanctioned, it was difficult to reach and punish the fraudulent taking and appropriation of money and chattels by persons exercising certain trades and occupations, by virtue of which they held a relation of confidence or trust towards their employers or principals, and thereby became possessed of their property. In such cases the moral guilt was the same as if the offender had been guilty of an actual felonious taking; but in many cases he could not be convicted of larceny, because the property which had been fraudulently converted was lawfully in his possession by virtue of his employment, and there was not that technical taking or asportation which is essential to the proof of the crime of larceny. Bazeley's Case, 2 East P. C. 571, 2 Leach C. C. 973. The statutes relating to embezzlement were intended to embrace this class of offences; and it may be said generally that they do not apply to cases where the element of a breach of trust or confidence in the fraudulent conversion of money or chattels is not shown to exist."

The earliest statute creating the offense of embezzlement was 21 Hen. VIII, c. 7, which has been held to be in force in Pennsylvania (Opinion of Justices, 3 Binn. 595) and in Vermont (State *v.* White, 2 Tyler 352).

The act of 39 Geo. III is no part of the common law of New Mexico. Territory *v.* Maxwell, 2 N. M. 250.

3. *Indiana.*— State *v.* Wells, 112 Ind. 237, 13 N. E. 722 [*overruling* in effect State *v.* Mason, 108 Ind. 48, 8 N. E. 716] (holding that Rev. St. (1881) § 943, is not repealed by the act of March 5, 1883 (Acts (1883), p. 106); State *v.* Smith, 72 Ind. 549 (construing the act of March 21, 1879, § 3).

Louisiana.— State *v.* Doherty, 25 La. Ann. 119, 13 Am. Rep. 131, to the effect that the act of 1871 in no manner conflicts with Rev. St. (1870) § 1593.

Michigan.—People *v.* Hiller, 113 Mich. 209, 71 N. W. 630, to the effect that Howell Annot. St. § 9191*a*, was repealed by Acts (1895), No. 51.

Minnesota.— State *v.* Herzog, 25 Minn. 490, to the effect that the act of March 1, 1876 (Gen. St. (1878) c. 95, § 33) did not repeal or abrogate Gen. St. (1866) c. 95, § 23.

Nebraska.— Whitney *v.* State, 53 Nebr. 287, 73 N. W. 696 [*following* Korth *v.* State, 46 Nebr. 631, 65 N. W. 792], holding that Cr. Code, § 124, is not repealed by Laws (1891), c. 50.

Ohio.— State *v.* Mannix, 9 Ohio Dec. (Reprint) 667, 16 Cinc. L. Bul. 212, construing the act of April 17, 1885.

Pennsylvania.— Com. *v.* Slingluff, 3 Montg. Co. Rep. 205 (construing the act of June 3, 1885); Com. *v.* Huntzinger, 35 Pittsb. Leg. J. 364 (to the effect that the act of 1860, §§ 116–119, was repealed by the act of June 12, 1878).

South Dakota.— State *v.* Taylor, 7 S. D. 533, 64 N. W. 548, holding Comp. Laws, § 1665, ineffectual for any purpose.

Washington.—State *v.* Krug, 12 Wash. 288, 41 Pac. 126, holding Pen. Code, § 58, constitutional.

Wisconsin.— State *v.* Van Stralen, 45 Wis. 437, to the effect that Laws (1876), c. 340, revising the subject-matter of Rev. St. (1858) c. 165, §§ 30, 31, operates as a repeal thereof.

United States.— U. S. *v.* Benecke, 98 U. S. 447, 25 L. ed. 192, construing the act of March 3, 1873.

See 18 Cent. Dig. tit. "Embezzlement," § 2.

Constitutional law.—Although Minn. Const. art. 9, § 12, makes the neglect or refusal of a person charged with the keeping of state funds to pay over the same *prima facie* embezzlement, it is competent for the legisla-

B. Intent. In embezzlement as in most crimes the essence of the offense or that which makes it criminal is the intent with which the act is done, which may be shown or conclusively presumed from the doing of the wrongful, fraudulent, and illegal acts which in their necessary results naturally produce loss to the person, natural or artificial, against whom the offense is committed.[4] Where, however, the act or omission is of itself made to constitute the offense, knowingly and wilfully doing the act or omitting to perform the duty imposed by the law carries with it a conclusive presumption of criminal intent, and no other evidence of such intent is necessary.[5] As distinguished from larceny, the intent in embezzlement

ture to declare such offense to be embezzlement *per se*. State *v.* Munch, 22 Minn. 67.

Amendment or repeal.— The general rule that in the absence of a saving clause the repeal of a criminal statute carried with it all pending prosecutions thereunder, as well as the right to institute such proceedings, has been abrogated by the constitution in Florida, and accordingly an amendatory law does not deprive the state of its right to prosecute for an offense committed previous to the amendment, although the indictment is not found until thereafter. Sigsbee *v.* State, 43 Fla. 524, 30 So. 816.

4. *Alabama.*— Reeves *v.* State, 95 Ala. 31, 11 So. 158.

Arkansas.— Fleener *v.* State, 58 Ark. 98, 23 S. W. 1; Wallis *v.* State, 54 Ark. 611, 16 S. W. 821; Dotson *v.* State, 51 Ark. 119, 10 S. W. 18.

California.— People *v.* Jackson, 138 Cal. 462, 71 Pac. 566.

Delaware.— State *v.* Sienkiewiez, (Del. 1902) 55 Atl. 346; State *v.* Foster, 1 Pennew. 289, 40 Atl. 939; State *v.* Collins, 1 Marv. 536, 41 Atl. 144.

Georgia.— Robinson *v.* State, 109 Ga. 564, 35 S. E. 57, 77 Am. St. Rep. 392; Etheridge *v.* State, 78 Ga. 340; Snell *v.* State, 50 Ga. 219.

Illinois.— Phillips *v.* People, 55 Ill. 334.

Indiana.— Beaty *v.* State, 82 Ind. 228.

Iowa.— State *v.* Ames, 119 Iowa 680, 94 N. W. 231; State *v.* Walleik, 87 Iowa 369, 54 N. W. 246.

Kansas.— State *v.* Eastman, 60 Kan. 557, 57 Pac. 109.

Louisiana.— State *v.* Smith, 47 La. Ann. 432, 16 So. 938.

Massachusetts.— Com. *v.* Tuckerman, 10 Gray 173.

Michigan.— People *v.* Butts, 128 Mich. 208, 87 N. W. 224; People *v.* Bauman, 105 Mich. 543, 63 N. W. 516; People *v.* Hurst, 62 Mich. 276, 28 N. W. 838; People *v.* Galland, 55 Mich. 628, 22 N. W. 81. See also People *v.* Warren, 122 Mich. 504, 81 N. W. 360, to the effect that it is not necessary that there be an intent so to appropriate the money as forever to exclude the rightful owner.

Minnesota.— State *v.* Cowdery, 79 Minn. 94, 81 N. W. 750, 48 L. R. A. 92; State *v.* Kortgaard, 62 Minn. 7, 64 N. W. 51.

Missouri.— State *v.* Obuchon, 159 Mo. 256, 60 S. W. 85; State *v.* Schilb, 159 Mo. 130, 60 S. W. 82; State *v.* Cunningham, 154 Mo. 161, 55 S. W. 282; State *v.* Silva, 130 Mo. 440, 32 S. W. 1007; State *v.* Noland, 111 Mo. 473, 19 S. W. 715; State *v.* Finley, 101 Mo. 217, 14 S. W. 185; Norton *v.* State, 4 Mo. 461; State *v.* Hellwig, 60 Mo. App. 483; Home Lumber Co. *v.* Hartman, 45 Mo. App. 647; State *v.* Reilly, 4 Mo. App. 392. *Compare* State *v.* Stone, 68 Mo. 101, construing Wagner St. p. 459, § 37.

Nebraska.— Davis *v.* State, 54 Nebr. 177, 74 N. W. 599 [*citing* Ford *v.* State, 46 Nebr. 390, 64 N. W. 1082]; Hamilton *v.* State, 46 Nebr. 284, 64 N. W. 965.

New Jersey.— State *v.* Reynolds, 65 N. J. L. 424, 47 Atl. 644 [*explaining* State *v.* Temple, 63 N. J. L. 375, 43 Atl. 697]; Fitzgerald *v.* State, 50 N. J. L. 475, 14 Atl. 746.

New York.— People *v.* Pollock, 51 Hun 613, 4 N. Y. Suppl. 297; People *v.* Dalton, 15 Wend. 581.

North Carolina.— State *v.* McDonald, 133 N. C. 680, 45 S. E. 582.

Ohio.— State *v.* Mannix, 9 Ohio Dec. (Reprint) 667, 16 Cinc. L. Bul. 212; State *v.* Jones, 11 Ohio S. & C. Pl. Dec. 45, 8 Ohio N. P. 104.

South Carolina.— State *v.* Butler, 21 S. C. 353.

Texas.— Huggins *v.* State, 42 Tex. Cr. 364, 60 S. W. 85; Ximenez *v.* State, (Cr. App. 1899) 54 S. W. 588; Eilers *v.* State, 34 Tex. Cr. 344, 30 S. W. 811; Stallings *v.* State, 29 Tex. App. 220, 15 S. W. 716; Williams *v.* State, 25 Tex. App. 733, 8 S. W. 935.

Utah.— State *v.* Blue, 17 Utah 175, 53 Pac. 978.

United States.— U. S. *v.* Sander, 27 Fed. Cas. No. 16,219, 6 McLean 598.

See 18 Cent. Dig. tit. "Embezzlement," § 3.

"**The fraudulent intent,** which is a necessary ingredient of every offense of embezzlement, is the fraudulent intent with which the money or property is appropriated to the use of the party charged." Reeves *v.* State, 95 Ala. 31, 53, 11 So. 158.

To show the felonious intent, some kind or degree of concealment or acts calculated to mislead the employer should be proven. Fleener *v.* State, 58 Ark. 98, 23 S. W. 1. See also Com. *v.* Evans, 2 Leg. Op. (Pa.) 3; Von Senden *v.* State, (Tex. Cr. App. 1898) 45 S. W. 725.

Presumption of intent.— However, every sane person is presumed to intend the natural consequences of his voluntary acts. Ford *v.* State, 46 Nebr. 390, 64 N. W. 1082.

Intent of agent see *infra*, II, B, 1.

5. *Dakota.*— U. S. *v.* Adams, 2 Dak. 305, 9 N. W. 718.

must have arisen subsequent to the taking possession of the property, since to obtain possession of property from the owner with the intention of appropriating it, which intention is carried out, constitutes larceny, not embezzlement.[6]

C. Nature of Property. Subject to particular statutory provisions, it may be said generally that every species of personal property is subject to embezzlement which is subject to larceny.[7]

D. Value of Property. The value of the property converted is not an element of the crime of embezzlement.[8] A conviction, however, cannot be had for the embezzlement of money without its being shown that the accused has received some particular sum on account of his employer, and has converted either the whole or part of that sum to his own use.[9]

E. Ownership of Property. One cannot commit embezzlement of money or other property lawfully his own or in which he has a joint interest.[10] The

Minnesota.— State *v.* Czizek, 38 Minn. 192, 36 N. W. 457.

Nevada.— State *v.* Trolson, 21 Nev. 419, 32 Pac. 930.

New Jersey.— State *v.* Stimson, 24 N. J. L. 478.

Vermont.— State *v.* Hopkins, 56 Vt. 250.

6. *Alabama.*— Levy *v.* State, 79 Ala. 259.

California.—People *v.* Salorse, 62 Cal. 139; People *v.* Smith, 23 Cal. 280 [*following* People *v.* Poggi, 19 Cal. 600].

Missouri.— State *v.* Williams, 35 Mo. 229. But see State *v.* Findley, 101 Mo. 217, 14 S. W. 185; State *v.* Reilly, 4 Mo. App. 392.

Nebraska.— Ford *v.* State, 46 Nebr. 390, 64 N. W. 1082.

New York.—People *v.* Civille, 44 Hun 497. But see Langley's Case, 4 City Hall Rec. 159.

Contra.— Cole *v.* State, 16 Tex. App. 461; Leonard *v.* State, 7 Tex. App. 417.

7. State *v.* Small, 26 Kan. 209. See also State *v.* Stoller, 38 Iowa 321; Reg. *v.* Barnes, 8 Cox C. C. 129; Rex *v.* Bakewell, R. & R. 26. And see LARCENY.

Exchequer bills.— See Rex *v.* Aslett, 1 B. & P. N. R. 1, 2 Leach C. C. 954, 958, R. & R. 49.

Halves of country bank-notes.— See Rex *v.* Mead, 4 C. & P. 535, 19 E. C. L. 637.

Liquors illegally kept for sale, and their proceeds.— See Com. *v.* Smith, 129 Mass. 104.

Money drawn in lottery.— See State *v.* Cloutman, 61 N. H. 143.

Money received from thief.— See State *v.* Littschke, 27 Oreg. 189, 40 Pac. 167.

Negotiable municipal bonds, although unissued.— See Bork *v.* People, 91 N. Y. 5, 1 N. Y. Cr. 379 [*affirming* 1 N. Y. Cr. 368]; State *v.* White, 66 Wis. 343, 28 N. W. 202.

Proceeds of horses consigned for sale.— See Com. *v.* Keller, 9 Pa. Co. Ct. 253, construing the act of March 31, 1860.

Promissory notes and bills of exchange.— See State *v.* Orwig, 24 Iowa 102. *Contra*, State *v.* Stimson, 24 N. J. L. 9. And see State *v.* Stebbins, 132 Mo. 332, 33 S. W. 1147, in which, however, the negotiable paper had not been issued, and did not come within the terms of Rev. St. (1889) § 3550, as to paper "negotiable by delivery only."

Railroad tickets.— See Com. *v.* Parker, 165 Mass. 526, 43 N. E. 499.

Shares of stock.— See People *v.* Williams, 60 Cal. 1.

Undelivered county warrants.— State *v.* Raby, 31 Wash. 111, 71 Pac. 771.

Wild rabbits are not subject to embezzlement. Reg. *v.* Read, 3 Q. B. D. 131, 14 Cox C. C. 17, 47 L. J. M. C. 50, 37 L. T. Rep. N. S. 722, 26 Wkly. Rep. 283. And see ANIMALS.

8. Washington *v.* State, 72 Ala. 272; People *v.* Salorse, 62 Cal. 139; People *v.* Bork, 31 Hun (N. Y.) 360. But see Perry *v.* State, 22 Tex. App. 19, 2 S. W. 600.

9. Reg. *v.* Chapman, 1 Cox C. C. 47 [*disapproving* Rex *v.* Grove, 7 C. & P. 635, 1 Moody C. C. 447, 32 E. C. L. 796]. And see *infra*, IV, B, 5, c; IV, C, 4. Compare Reg. *v.* Lambert, 2 Cox C. C. 309, to the effect that, on an indictment for embezzlement, it is not necessary to prove that any particular sum or sums were received from any particular person; that where a prisoner has debited himself with an amount forming the balance of a large number of receipts and payments it is sufficient.

10. *Alabama.*— St. Clair *v.* State, 100 Ala. 61, 14 So. 544; Kirksey *v.* Fike, 29 Ala. 206.

Arizona.— See Territory *v.* Meyer, 3 Ariz. 199, 24 Pac. 183.

Kansas.— Parli *v.* Reed, 30 Kan. 534, 2 Pac. 635.

Massachusetts.— See Com. *v.* Libbey, 11 Metc. 64, 45 Am. Dec. 185.

Minnesota.— State *v.* Kent, 22 Minn. 41, 21 Am. Rep. 764.

Missouri.— State *v.* Williamson, 118 Mo. 146, 23 S. W. 1054, 40 Am. St. Rep. 358, 21 L. R. A. 827.

North Carolina.— State *v.* Keith, 126 N. C. 1114, 36 S. E. 169.

Texas.— Webb *v.* State, 8 Tex. App. 310.

England.— Reg. *v.* Barnes, 8 Cox C. C. 129. See 18 Cent. Dig. tit. "Embezzlement," § 6.

An assignment of unearned salary by a government employee being void as against public policy, an employee who has made such an assignment and been appointed agent of the assignee to collect it is not guilty of embezzlement if he collects and appropriates it. State *v.* Williamson, 118 Mo. 146, 23 S. W. 1054, 40 Am. St. Rep. 358, 21 L. R. A. 827. See also St. Clair *v.* State, 100 Ala. 61, 14 So. 544; Reg. *v.* Barnes, 8 Cox C. C. 129.

Money belonging to a wife is not subject to embezzlement by the husband. Golden *v.* State, 22 Tex. App. 1, 2 S. W. 531.

property embezzled need not belong to one other than the master, since the term "other person," as used in the statutes defining embezzlement, means one other than the person guilty of the offense.[11]

F. Possession or Custody of Property. If a servant, clerk, or agent has merely the custody of the money or goods which he feloniously appropriates, the offense is larceny; if he has the possession, it is embezzlement.[12] Under the

Proportional part of price as wages.— If a servant receive money from his master, for an article made of his master's material, it will be within 39 Geo. III, c. 85, if he embezzle it, although he made the article, and was to have been given a proportion of the price for making it. Rex *v.* Hoggins, R. & R. 108.

Property of unincorporated association.— The fraudulent appropriation of the assets of an unincorporated banking association by the cashier, who is also a shareholder, is embezzlement under Ohio Rev. St. § 6842, since that statute does not require the thing converted to be wholly the property of another. State *v.* Kusnick, 45 Ohio St. 535, 15 N. E. 481, 4 Am. St. Rep. 564. See also Reg. *v.* Atkinson, C. & M. 525, 2 Moody C. C. 278, 41 E. C. L. 287. The treasurer of a beneficial association can be held for embezzlement of the funds of the association, since he owns no part of such funds, under the Pennsylvania act of June 20, 1883, providing that the funds of beneficial associations shall be trust property and not be distributed among the members on dissolution or be diverted to other purposes. Com. *v.* Volz, 14 Wkly. Notes Cas. (Pa.) 289.

Claim of ownership as defense see *infra*, III, B, 6.

Embezzlement by partner see *infra*, II, C.

Invalidity of security embezzled see *infra*, III, B, 9.

Right to deduct commissions as making joint ownership see *infra*, II, B, 2.

11. *Arkansas.*— Fleener *v.* State, 58 Ark. 98, 23 S. W. 1 [*explaining* Powell *v.* State, 34 Ark. 693].

California.— People *v.* Gallagher, 100 Cal. 466, 35 Pac. 80.

Massachusetts.— Com. *v.* Ryan, 155 Mass. 523, 30 N. E. 364, 31 Am. St. Rep. 560, 15 L. R. A. 317; Com. *v.* Stearns, 2 Metc. 343.

Missouri.— State *v.* Porter, 26 Mo. 201.

New York.—People *v.* Hennessey, 15 Wend. 147.

See 18 Cent. Dig. tit. "Embezzlement," § 6.

12. *Arkansas.*— Powell *v.* State, 34 Ark. 693.

California.— People *v.* Montarial, 120 Cal. 691, 53 Pac. 355; People *v.* Perini, 94 Cal. 573, 29 Pac. 1027; People *v.* Johnson, 91 Cal. 265, 27 Pac. 663.

Colorado.— Brown *v.* People, 20 Colo. 161, 36 Pac. 1040.

Georgia.— Wall *v.* State, 75 Ga. 474.

Illinois.— Hobbs *v.* People, 183 Ill. 336, 55 N. E. 692.

Indiana.— State *v.* Wingo, 89 Ind. 204; Smith *v.* State, 28 Ind. 321.

Iowa.— Ennis *v.* State, 3 Greene 67.

Kentucky.— Warmoth *v.* Com., 81 Ky. 133. See Barclay *v.* Breckinridge, 4 Metc. 374; Gill *v.* Bright, 6 T. B. Mon. 130.

Massachusetts.— Com. *v.* Ryan, 155 Mass. 523, 30 N. E. 364, 31 Am. St. Rep. 560, 15 L. R. A. 317; Com. *v.* Barry, 116 Mass. 1; Com. *v.* Davis, 104 Mass. 548; Com. *v.* Berry, 99 Mass. 428, 96 Am. Dec. 767; Com. *v.* King, 9 Cush. 284.

Minnesota.— State *v.* Kortgaard, 62 Minn. 7, 64 N. W. 51.

New York.— People *v.* Sherman, 16 N. Y. Suppl. 782; People *v.* Sheahan, 1 Wheel. Cr. Cas. 226.

Texas.— Cobletz *v.* State, 36 Tex. 353; Zysman *v.* State, (Cr. App. 1901) 60 S. W. 669; Roeder *v.* State, 39 Tex. Cr. 199, 45 S. W. 570; Cody *v.* State, 31 Tex. Cr. 183, 20 S. W. 398; Simco *v.* State, 8 Tex. App. 406.

See 18 Cent. Dig. tit. "Embezzlement," § 7.

Custody as distinguished from possession means a charge to keep and care for the owner, subject to his order and direction, without any interest or right therein adverse to him, which every servant possesses with regard to the goods of the master confided to his mere care, which custody may be terminated or prolonged according to the will and pleasure of the master. Where, however, the owner of personal property delivers it to another for any purpose, intending not only to part with the custody but with the absolute right or control of the property for any length of time, he parts not only with such custody but the legal possession as well, for the actual possession of the property, with the suspension of the rights of ownership, for a period however short, transforms such actual possession which under other circumstances might create but a mere custody into a legal possession in the person having it; and that this is so there can be no doubt, for if the manual possession is gone from the owner and the right of ownership and control is ever so temporarily suspended, where can the legal possession be, if not in the person having the manual possession and the right to hold it as against every one? People *v.* Burr, 41 How. Pr. (N. Y.) 293.

Delivery to servant of accused.—A delivery of property to the accused is sufficiently shown by showing that the owner gave the check for his baggage to the servants of the accused, a hotel-keeper, by whom it was brought to his hotel, and came into his custody. People *v.* Husband, 36 Mich. 306.

Actual possession.— It is not necessary, however, to prove that any particular pieces of money were physically handled in order to sustain a conviction. Bartley *v.* State, 55 Nebr. 294, 75 N. W. 832.

English statutes and those of some of the United States, it is held that the property embezzled must have come into the possession of the servant from one other than the master, for if it has first come into the possession of the latter, the conversion by the servant is larceny and not embezzlement;[13] but the weight of modern authority is to the contrary.[14]

G. Capacity or Character in Which Property Is Held. In order to constitute embezzlement the accused must occupy the designated fiduciary relation, and the money or property must belong to his principal, and come to the possession of the accused by reason of such employment.[15]

13. Lambeth *v.* State, 3 Tenn. Cas. 754; U. S. *v.* Clew, 25 Fed. Cas. No. 14,819, 4 Wash. 700; Reg. *v.* Masters, 2 C. & K. 930, 3 Cox C. C. 178, 1 Den. C C. 332, 12 Jur. 942, 18 L. J. M. C. 2, 3 New Sess. Cas. 326, T. & M. 1, 61 E. C. L. 930; Reg. *v.* Butler, 2 C. & K. 340, 61 E. C. L. 340; Reg. *v.* Hayward, 1 C. & K. 518, 47 E. C. L. 518; Reg. *v.* Smith, 1 C. & K. 423, 47 E. C. L. 423; Reg. *v.* Evans, C. & M. 632, 41 E. C. L. 343; Reg. *v.* Beaman, C. & M. 595, 41 E. C. L. 324; Reg. *v.* Goode, C. & M. 582, 41 E. C. L. 317; Reg. *v.* Reed, 6 Cox C. C. 284, 2 C. L. R. 607, Dears. C. C. 257, 18 Jur. 67, 23 L. J. M. C. 25, 2 Wkly. Rep. 190; Reg. *v.* Watts, 4 Cox C. C. 336, 2 Den. C. C. 14, 14 Jur. 870, 19 L. J. M. C. 192, T. & M. 342, 1 Eng. L. & Eq. 558; Reg. *v.* Hawkins, 4 Cox C. C. 224, 1 Den. C. C. 584, 14 Jur. 513, T. & M. 328, 1 Eng. L. & Eq. 547; Reg. *v.* Wilson, 9 C. & P. 27, 38 E. C. L. 28; Rex *v.* Freeman, 5 C. & P. 534, 24 E. C. L. 694; Rex *v.* Murray, 5 C. & P. 146, 1 Moody C. C. 276, 24 E. C. L. 496; Rex *v.* White, 4 C. & P. 46, 19 E. C. L. 400; Abrahat's Case, 2 East P. C. 569, 2 Leach C. C. 960; Rex *v.* Chipchase, 2 East P. C. 567, 2 Leach C. C. 805; Lavender's Case, 2 East P. C. 566; Bass' Case, 2 East P. C. 566, 1 Leach C. C. 285; Rex *v.* Paradice, 2 East P. C. 565; Rex *v.* Hammon, 2 Leach C. C. 1083, R. & R. 165, 4 Taunt. 304, 13 Rev. Rep. 596; Reg. *v.* Heath, 2 Moody C. C. 33; Reg. *v.* Jackson, 2 Moody C. C. 32; Rex *v.* Metcalf, 1 Moody C. C. 433; Rex *v.* Stock, 1 Moody C. C. 87. But see Reg. *v.* Cooper, L. R. 2 C. C. 123, 12 Cox C. C. 600, 43 L. J. M. C. 89, 30 L. T. Rep. N. S. 306, 22 Wkly. Rep. 555.

14. *Alabama.*— Lowenthal *v.* State, 32 Ala. 589.

California.— People *v.* Bailey, 23 Cal. 577, holding, under an earlier statute, that the offense is confined to cases where the employee received the money or property directly from the employer.

Kentucky.— Com. *v.* Clifford, 96 Ky. 4, 27 S. W. 811, 16 Ky. L. Rep. 184.

Missouri.— State *v.* Healy, 48 Mo. 531.

New Mexico.— Territory *v.* Maxwell, 2 N. M. 250.

New York.— People *v.* Dalton, 15 Wend. 581; People *v.* Hennessey, 15 Wend. 147.

North Carolina.— State *v.* Fann, 65 N. C. 217.

See 18 Cent. Dig. tit. "Embezzlement," § 7.

15. *Illinois.*— Mulford *v.* People, 139 Ill. 586, 28 N. E. 1096.

Kentucky.— Lee *v.* Com., 1 S. W. 4, 8 Ky. L. Rep. 53.

Massachusetts.—Com. *v.* Hays, 14 Gray 62, 74 Am. Dec. 662, holding that the fraudulent conversion of money paid by mistake is not embezzlement.

Michigan.— People *v.* Butts, 128 Mich. 208, 87 N. W. 224.

Missouri.— State *v.* Brown, 171 Mo. 477, 71 S. W. 1031; State *v.* Obuchon, 169 Mo. 256, 60 S. W. 85.

Nevada.— State *v.* Trolson, 21 Nev. 419, 32 Pac. 930.

Pennsylvania.— Com. *v.* Lynch, 3 Lanc. L. Rev. 412.

Texas.— Loving *v.* State, (Cr. App. 1902) 71 S. W. 277; Brady *v.* State, 21 Tex. App. 659, 1 S. W. 462; Griffin *v.* State, 4 Tex. App. 390.

Washington.— State *v.* Covert, 14 Wash. 652, 45 Pac. 304.

England.— Reg. *v.* Gale, 2 Q. B. D. 141, 13 Cox C. C. 340, 46 L. J. M. C. 134, 35 L. T. Rep. N. S. 526; Reg. *v.* Cullum, L. R. 2 C. C. 28, 12 Cox C. C. 469, 42 L. J. M. C. 64, 28 L. T. Rep. N. S. 521, 21 Wkly. Rep. 687; Reg. *v.* Adey, 3 C. & K. 339, 4 Cox C. C. 208, 1 Den. C. C. 571, 14 Jur. 556, 19 L. J. M. C. 149, 4 New Sess. Cas. 360, T. & M. 296; Reg. *v.* Beaumont, 2 C. L. R. 614, 6 Cox C. C. 629, Dears. C. C. 270, 18 Jur. 159, 23 L. J. M. C. 54, 2 Wkly. Rep. 235; Reg. *v.* Harris, 2 C. L. R. 464, 6 Cox C. C. 363, Dears. C. C. 344, 18 Jur. 408, 23 L. J. M. C. 110, 2 Wkly. Rep. 413; Reg. *v.* Thorpe, 8 Cox C. C. 29, Dears. & B. 62, 4 Jur. N. S. 466, 27 L. J. M. C. 264, 6 Wkly. Rep. 502; Reg. *v.* Arman, 7 Cox C. C. 45, Dears. C. C. 575, 1 Jur. N. S. 1115, 1117; Reg. *v.* Baxter, 5 Cox C. C. 302; Reg. *v.* Bearcock, 1 Cox C. C. 187; Reg. *v.* Wilson, 9 C. & P. 27, 38 E. C. L. 28; Rex *v.* Snowley, 4 C. & P. 390, 19 E. C. L. 568; Rex *v.* Thorley, 1 Moody C. C. 343; Rex *v.* Beechey, R. & R. 237.

See 18 Cent. Dig. tit. "Embezzlement," § 8.

Necessity of fiduciary relation.— Embezzlement cannot be charged with reference to funds acquired and spent before the party assumed the fiduciary capacity (Lee *v.* Com., 1 S. W. 4, 8 Ky. L. Rep. 53); nor where the character of debtor and creditor subsists between the parties (Smith *v.* Glendenning, 194 Pa. St. 550, 45 Atl. 364; Com. *v.* Gerdemann, 11 Phila. (Pa.) 397). The servant or employee must be in possession by reason of some special trust imposed. Colip *v.* State, 153 Ind. 584, 55 N. E. 739, 74 Am. St. Rep. 322. "This trust relationship must exist at the time of the reception of the money by the agent or employee, or the money must be

H. Conversion or Appropriation of Property — 1. In General. In order to constitute embezzlement the accused must be shown to have fraudulently converted money or other property to his own, or someone's else, use, or to have fraudulently secreted it, with intent so to convert it.[16] However, the weight of authority is to the effect that a demand for the money or other property alleged to have been embezzled need not be made by the prosecution,[17] in the absence

under the care of the agent by virtue of that agency or employment, in order to constitute the offense of embezzlement." Taylor *v.* State, 29 Tex. App. 466, 501, 16 S. W. 302 [*citing* Gaddy *v.* State, 8 Tex. App. 127].

Marked money given by master to third person.— In Reg. *v.* Gill, 6 Cox C. C. 295, Dears. C. C. 289, 18 Jur. 70, 23 L. J. M. C. 50, 2 Wkly. Rep. 222, the prosecutor gave some marked money to a third person to expend at his (the prosecutor's) shop, for the purpose of detecting a servant whom he suspected; the servant was convicted of embezzling a portion of the marked money; and it was held that the conviction was right. See also Rex *v.* Headge, 2 Leach C. C. 1033, R. & R. 119; Rex *v.* Whittingham, 2 Leach C. C. 912.

Right of master to money.— If a servant receives money on his employers' account and embezzles it, he is guilty of the felony, although they had no right to it, and were wrong-doers in receiving it. Rex *v.* Beacall, 1 C. & P. 454, 12 E. C. L. 265.

Where money of a corporation is received by its treasurer, and by him deposited to his credit as such treasurer, and is afterward drawn out by him, either in bills or coin, such bills or coin are the property of the corporation, and while in the hands of the treasurer are subject to embezzlement by him. Com. *v.* Tuckerman, 10 Gray (Mass.) 173.

Effect of taking receipt.— The fact that complainant, at the time he left with defendant a draft for collection, took from him a receipt to account for the proceeds does not show that complainant parted with his interest in the draft, so as to prevent the conviction of defendant for embezzling the proceeds thereof. People *v.* Hanaw, 107 Mich. 337, 65 N. W. 231.

16. *Alabama.*— Henderson *v.* State, 129 Ala. 104, 29 So. 799; Penny *v.* State, 88 Ala. 105, 7 So. 50.

Illinois.— Kribs *v.* People, 82 Ill. 425. See also Mulford *v.* People, 139 Ill. 586, 28 N. E. 1096.

Iowa.— Bowman *v.* Brown, 52 Iowa 437, 3 N. W. 609.

Nebraska.— State *v.* Hill, 47 Nebr. 456, 66 N. W. 541; McAleer *v.* State, 46 Nebr. 116, 64 N. W. 358.

New Jersey.— Fitzgerald *v.* State, 50 N. J. L. 475, 14 Atl. 746.

New York.— People *v.* Paine, 35 Misc. 763, 72 N. Y. Suppl. 3.

Pennsylvania.— Com. *v.* Gerdemann, 11 Phila. 397.

Rhode Island.— State *v.* Snell, 9 R. I. 112.

Texas.— Riley *v.* State, 32 Tex. 763; Jackson *v.* State, (Cr. App. 1902) 70 S. W. 760; Epperson *v.* State, 22 Tex. App. 694, 3 S. W. 789; Cohen *v.* State, 20 Tex. App. 224; Baker *v.* State, 6 Tex. App. 344.

See 18 Cent. Dig. tit. "Embezzlement," § 9.

Sale for purpose of conversion.—Where an agent for the sale of property sells it as his own, and not as agent, and has at the time of sale a fraudulent intent to appropriate the proceeds to his own use, he is guilty of the embezzlement of the property itself. Epperson *v.* State, 22 Tex. App. 694, 3 S. W. 789 [*citing* Leonard *v.* State, 7 Tex. App. 417].

17. *Arkansas.*— Wallis *v.* State, 54 Ark. 611, 16 S. W. 821.

California.— People *v.* Goodrich, 142 Cal. 216, 75 Pac. 796; People *v.* Ward, 134 Cal. 301, 66 Pac. 372. But see People *v.* Royce, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524.

Louisiana.— State *v.* Mathis, 106 La. 263, 30 So. 834; State *v.* Tompkins, 32 La. Ann. 620.

Massachusetts.— Com. *v.* Mead, 160 Mass. 319, 35 N. E. 1125; Com. *v.* Tuckerman, 10 Gray 173.

Minnesota.— State *v.* New, 22 Minn. 76.

Missouri.— State *v.* Porter, 26 Mo. 201.

New Jersey.— State *v.* Reynolds, 65 N. J. L. 424, 47 Atl. 644.

Vermont.— State *v.* Hopkins, 56 Vt. 250.

See 18 Cent. Dig. tit. "Embezzlement," § 9.

Demand may become material in some cases to establish conversion but not in all. State *v.* Reynolds, 65 N. J. L. 424, 47 Atl. 644.

Form of demand.— The demand necessary to sustain a conviction need not be in any particular form of words, if the language plainly indicates to the person that he is called upon to perform the neglected duty. State *v.* Bancroft, 22 Kan. 170. Under Ill. Act, March 4, 1869, evidence that the consignor of goods went to the consignee (the accused), and that the latter said, "I know what you have come for, but it is impossible for me to pay you anything now," is not a sufficient demand. Wright *v.* People, 61 Ill. 382.

Authority to make demand.— Where a demand is made, the person making it must have authority so to do from the principal. People *v.* Tomlinson, 66 Cal. 344, 5 Pac. 509; State *v.* Bancroft, 22 Kan. 170. See also People *v.* Ward, 134 Cal. 301, 66 Pac. 372. *Compare* State *v.* Hopkins, 56 Vt. 250, to the effect that a notice requiring payment need not state the authority to give the notice.

Impossibility of making demand.— Where an agent of an express company had disappeared, so that demand could not be made on him to account for the proceeds of money orders sold by him, proof of such demand and refusal to account is unnecessary, but the conversion may be otherwise shown. Kossakowski *v.* People, 177 Ill. 563, 53 N. E. 115.

of statute to the contrary,[18] except under the peculiar circumstances of the particular case.

2. By Public Officers or Employees. As in the case of other servants or agents, a conversion is necessary to constitute the offense of embezzlement by a public officer or employee; that is, it is essential that the owner should be deprived of the property embezzled by an adverse holding or use.[19] So too a demand and refusal are not in general an element of the offense,[20] although proof of a demand and refusal will be sufficient evidence of the fact of conversion.[21]

II. By Whom Committed.

A. Servants, Clerks, and Employees — 1. In General. The term "servant," "clerk," or "employee," as used in the statutes on embezzlement, does not mean, nor is the language limited in its application to, the mere menial of the prosecutor; but it does mean that relation between the parties which gives the employer the right to order, command, direct, and control, and imposes on the person employed the duty of obedience and subjection in the performance of the particular service at all times and in every particular.[22]

See also People *v.* Carter, 122 Mich. 668, 81 N. W. 924; State *v.* Reynolds, 65 N. J. L. 424, 47 Atl. 644.

A failure to pay over at a definite time fixed by agreement is sufficient evidence of conversion without a demand. State *v.* Reynolds, 65 N. J. L. 424, 47 Atl. 644.

18. Wright *v.* People, 61 Ill. 382; State *v.* Bancroft, 22 Kan. 170; State *v.* Pierce, 7 Kan. App. 418, 53 Pac. 278.

19. *Alabama.*— Noble *v.* State, 59 Ala. 73.

Arkansas.— State *v.* Hunnicut, 34 Ark. 562.

Iowa.— State *v.* Brandt, 41 Iowa 593.

Massachusetts.— Com. *v.* Este, 140 Mass. 279, 2 N. E. 769.

Minnesota.— State *v.* Baumhager, 28 Minn. 226, 9 N. W. 704.

New York.— Bork *v.* People, 91 N. Y. 5, 1 N. Y. Cr. 379.

Tennessee.—State *v.* Cameron, 3 Heisk. 78; State *v.* Leonard, 6 Coldw. 307.

United States.— U. S. *v.* Forsythe, 25 Fed. Cas. No. 15,133, 6 McLean 584.

See 18 Cent. Dig. tit. "Embezzlement," § 10.

20. Dean *v.* State, 147 Ind. 215, 46 N. E. 528; Hollingsworth *v.* State, 111 Ind. 289, 12 N. E. 490. See Reynolds *v.* State, 65 N. J. L. 424, 47 Atl. 644.

Failure to pay over to successor.— The improper neglect or refusal of a public officer to deliver to his successor in office all the money remaining in his hands upon demand therefor is, under Minn. Gen. St. (1878) c. 95, § 36, embezzlement *per se* of such money, although no particular sum was demanded (State *v.* Ring, 29 Minn. 78, 11 N. W. 233), and although no actual or deliberate purpose to defraud the city or county is shown (State *v.* Czizek, 38 Minn. 192, 36 N. W. 457).

21. State *v.* Bryan, 40 Iowa 379; State *v.* Ring, 29 Minn. 78, 11 N. W. 233.

Explanation of refusal.— This proof may, however, be always met and neutralized by evidence showing an excuse for the refusal. State *v.* Bryan, 40 Iowa 379, 381 [*citing* State *v.* Cameron, 3 Heisk. (Tenn.) 78; State *v.* Leonard, 6 Coldw. (Tenn.) 307; Reg. *v.* Welch, 2 C. & K. 296, 2 Cox C. C. 85, 1 Den. C. C. 199, 61 E. C. L. 296; Reg. *v.* Moah, 7 Cox C. C. 60, Dears. C. C. 625, 2 Jur. N. S. 213.

22. *California.*— People *v.* Gallagher, 100 Cal. 466, 35 Pac. 80.

Georgia.— Mobley *v.* State, 114 Ga. 544, 40 S. E. 728; Wylie *v.* State, 97 Ga. 207, 22 S. E. 954; McNish *v.* State, 88 Ga. 499, 14 S. E. 865.

Indiana.— Jones *v.* State, 59 Ind. 229.

Iowa.— State *v.* Johnson, 49 Iowa 141.

Kentucky.— Johnson *v.* Com., 5 Bush 430.

Massachusetts.— Com. *v.* Young, 9 Gray 5.

Nevada.— *Ex p.* Ricord, 11 Nev. 287.

New York.— Coats *v.* People, 22 N. Y. 245 [*reversing* 4 Park. Cr. 662]; People *v.* Burr, 41 How. Pr. 293; People *v.* Allen, 5 Den. 76; People *v.* Dalton, 15 Wend. 581; People *v.* Sherman, 10 Wend. 298, 25 Am. Dec. 563.

North Carolina.—State *v.* Barton, 125 N. C. 702, 34 S. E. 553; State *v.* Costin, 89 N. C. 511.

Ohio.— Gravatt *v.* State, 25 Ohio St. 162; Calkins *v.* State, 18 Ohio St. 366, 98 Am. Dec. 121.

South Carolina.— State *v.* Shirer, 20 S. C. 392.

Tennessee.— Johnson *v.* State, 9 Baxt. 279.

Texas.— Aldrich *v.* State, 29 Tex. App. 394, 16 S. W. 251; Brady *v.* State, 21 Tex. App. 659, 1 S. W. 462.

England.— Reg. *v.* Stuart, [1894] 1 Q. B. 310, 17 Cox C. C. 723, 58 J. P. 299, 63 L. J. M. C. 63, 70 L. T. Rep. N. S. 44, 42 Wkly. Rep. 303, 10 Reports 124; Reg. *v.* Foulkes, L. R. 2 C. C. 150, 13 Cox C. C. 63, 44 L. J. M. C. 65, 32 L. T. Rep. N. S. 407, 23 Wkly. Rep. 696; Reg. *v.* Harris, 17 Cox C. C. 656, 57 J. P. 729, 69 L. T. Rep. N. S. 25; Reg. *v.* Coley, 16 Cox C. C. 226, 51 J. P. 710, 56 L. T. Rep. N. S. 747; Reg. *v.* Flanagan, 10 Cox C. C. 561; Reg. *v.* Tite, 8 Cox C. C. 458, 7 Jur. N. S. 556, 30 L. J. M. C. 142, 4 L. T. Rep. N. S. 259, L. & C. 29, 9 Wkly. Rep. 554; Reg. *v.* Gibson, 8 Cox C. C. 436; Reg. *v.* May, 8 Cox C. C. 421, 7 Jur. N. S. 147,

2. NON-COMPULSORY OR OCCASIONAL DUTY. Where the duty assumed by the accused is not compulsory but merely voluntary, and there is no power in the prosecutor to control his actions, he is not a clerk or servant within the meaning of the statute.[23] However, the mere fact that the accused's employment is occasional will not prevent his being held a clerk or servant if in other respects the relation is sufficiently established.[24]

3. EMPLOYMENT BY OTHER MASTERS. The mere fact that a person is employed by others than the prosecutor will not prevent the relation of master and servant between himself and the latter, within the meaning of the embezzlement statutes.[25]

4. AGREEMENT AS TO COMPENSATION.[26] One who has converted to his own use money received for the use of another is guilty of embezzlement, although there was no agreement as to compensation for his services in such transaction.[27]

B. Agents — 1. IN GENERAL. To convict an agent under the statutes as to embezzlement, four propositions must be proved: that he was an agent; that he received the money or other property in the course of his employment; that he received money or other property belonging to his principal; and that he con-

30 L. J. M. C. 81, 3 L. T. Rep. N. S. 680, L. & C. 13, 9 Wkly. Rep. 256; Reg. *v.* Barnes, 8 Cox C. C. 129; Reg. *v.* Walker, 8 Cox C. C. 1, Dears. & B. 600, 4 Jur. N. S. 465, 27 L. J. M. C. 207, 6 Wkly. Rep. 505; Reg. *v.* Gibbs, 6 Cox C. C. 455, Dears. C. C. 445, 1 Jur. N. S. 118, 24 L. J. M. C. 62; Reg. *v.* Thomas, 6 Cox C. C. 403; Reg. *v.* Truman, 2 Cox C. C. 306; Reg. *v.* Sampson, 1 Cox C. C. 355; Reg. *v.* Goodbody, 8 C. & P. 665, 34 E. C. L. 951; Rex *v.* Beacall, 1 C. & P. 457, 12 E. C. L. 266; Reg. *v.* Hoare, 1 F. & F. 647; Rex *v.* Smith, R. & R. 384; Rex *v.* Squire, R. & R. 260, 2 Stark. 349, 3 E. C. L. 439; Rex *v.* Hartley, R. & R. 104; Rex *v.* Mellish, R. & R. 59; Rex *v.* Bakewell, R. & R. 26.

See 18 Cent. Dig. tit. "Embezzlement," § 11.

Collection.— Where a constable is employed to collect certain demands, without suit if the debtors will pay, and by procuring and serving process before a justice of the peace where they will not, he is not a servant of the creditor within the meaning of the statute concerning embezzlement. People *v.* Allen, 5 Den. (N. Y.) 76. In Com. *v.* Lynch, 3 Lanc. L. Rev. 412, a farmer handed to a neighbor (defendant) a note for collection. Defendant was to retain a moiety of any sum collected by way of compensation. It was held that his failure to pay over half of a small sum collected by him did not constitute embezzlement, as he was not a clerk, servant, or other person in the employ of another.

A conductor of a railroad train is a person employed, within the act of assembly as to embezzlement, and as such may be guilty of embezzling the funds of the company. Com. *v.* Hill, 4 Luz. Leg. Obs. (Pa.) 52, 5 Luz. Leg. Reg. (Pa.) 241.

Manufacturing tradesman.— A tradesman to whom raw materials are given to be converted into manufactured articles, who contracts and receives them in good faith, is not guilty of embezzlement by a subsequent wrongful conversion of the manufactured article. Com. *v.* Young, 9 Gray (Mass.) 5.

Soliciting agent.— An agent who solicits subscriptions to a newspaper and custom for its job department, the bills for the job work procured by the agent being sent to him, and the papers which he receives and distributes being charged to him on the books, is not employed by the company, within the statute relating to embezzlement by employees. Com. *v.* Behle, 1 Lack. Leg. N. (Pa.) 303.

A direct hiring by the prosecutor is not necessary. See Com. *v.* Hill, 2 Pearson (Pa.) 432. Thus the son of a clerk who acts for him personally may be guilty of embezzling the employer's funds. Reg. *v.* Foulkes, L. R. 2 C. C. 150, 13 Cox C. C. 63, 44 L. J. M. C. 65, 32 L. T. Rep. N. S. 407, 23 Wkly. Rep. 696.

23. Reg. *v.* Negus, L. R. 2 C. C. 34, 12 Cox C. C. 492, 42 L. J. M. C. 62, 28 L. T. Rep. N. S. 646, 21 Wkly. Rep. 687; Reg. *v.* Bowers, L. R. 1 C. C. 41, 10 Cox C. C. 250, 12 Jur. N. S. 550, 35 L. J. M. C. 206, 14 L. T. Rep. N. S. 671, 14 Wkly. Rep. 803; Reg. *v.* Marshall, 11 Cox C. C. 490, 21 L. T. Rep. N. S. 796; Reg. *v.* Mayle, 11 Cox C. C. 150; Reg. *v.* Hall, 13 Cox C. C. 49, 31 L. T. Rep. N. S. 883. But see Reg. *v.* Thomas, 6 Cox C. C. 403; Reg. *v.* Bailey, 12 Cox C. C. 56, 24 L. T. Rep. N. S. 477.

24. Reg. *v.* Tongue, Bell C. C. 289, 8 Cox C. C. 386, 30 L. J. M. C. 49, 3 L. T. Rep. N. S. 415, 9 Wkly. Rep. 59; Reg. *v.* Hastie, 9 Cox C. C. 264, 9 Jur. N. S. 235, 32 L. J. M. C. 63, 7 L. T. Rep. N. S. 695, L. & C. 269, 11 Wkly. Rep. 293; Reg. *v.* Winnall, 5 Cox C. C. 326; Rex *v.* Hughes, 1 Moody C. C. 370; Rex *v.* Spencer, R. & R. 222. But see Johnson *v.* State, 9 Baxt. (Tenn.) 279; Rex *v.* Freeman, 5 C. & P. 534, 24 E. C. L. 694; Rex *v.* Nettleton, 1 Moody C. C. 259; Rex *v.* Burton, 1 Moody C. C. 237.

25. Reg. *v.* Turner, 11 Cox C. C. 551, 22 L. T. Rep. N. S. 278; Reg. *v.* Batty, 2 Moody C. C. 257; Rex *v.* Carr, R. & R. 148.

26. Agreement for compensation see also *infra*, II, B, 2.

27. State *v.* Brooks, 85 Iowa 366, 52 N. W. 240. But see Reg. *v.* Hoare, 1 F. & F. 647.

verted the money or other property to his own use, with the intent to steal and embezzle it.[28] The question of whether the relation of principal and agent exists between given persons in reference to a particular transaction is determined by the general rules of law applicable to that subject.[29]

28. *Alabama.*— Case *v.* State, 26 Ala. 17.
California.— *Ex p.* Hedley, 31 Cal. 108.
Kentucky.— Shelburn *v.* Com., 85 Ky. 173, 3 S. W. 7, 8 Ky. L. Rep. 832; Barclay *v.* Breckinridge, 4 Metc. 374.
Massachusetts.— Com. *v.* Smith, 129 Mass. 104; Com. *v.* Foster, 107 Mass. 221.
Missouri.— State *v.* Adams, 108 Mo. 208, 18 S. W. 1000; State *v.* Jennings, 98 Mo. 493, 11 S. W. 980; State *v.* Reilly, 4 Mo. App. 392.
Nebraska.— Miller *v.* State, 16 Nebr. 179, 20 N. W. 253.
Nevada.— State *v.* Trolson, 21 Nev. 419, 32 Pac. 930.
New Mexico.— Territory *v.* Maxwell, 2 N. M. 250.
New York.— People *v.* Civille, 44 Hun 497. *Compare* People *v.* Howe, 2 Thomps. & C. 383, to the effect that where an agent receiving money has a right to mix it with his own, being accountable only for a balance, a misappropriation does not constitute embezzlement.
North Dakota.—State *v.* Hasledahl, 3 N. D. 36, 53 N. W. 430.
Rhode Island.— State *v.* Taberner, 14 R. I. 272, 51 Am. Rep. 382.
South Carolina.— State *v.* Ezzard, 40 S. C. 312, 18 S. E. 1025.
Texas.— Smith *v.* State, 34 Tex. Cr. 265, 30 S. W. 236; Taylor *v.* State, 29 Tex. App. 466, 16 S. W. 302; Golden *v.* State, 22 Tex. App. 1, 2 S. W. 531.
Wisconsin.—State *v.* Leicham, 41 Wis. 565.
England.— Rex *v.* Prince, 2 C. & P. 517, 12 E. C. L. 708, holding that 52 Geo. III, c. 63, applies only to persons to whom securities are intrusted in the exercise of their function or business. See also Reg. *v.* Cosser, 13 Cox C. C. 187; Rex *v.* White, 4 C. & P. 46, 19 E. C. L. 400; Rex *v.* Mason, D. & R. N. P. 22, 16 E. C. L. 417, in each of which cases the accused was held not to be indictable as an agent. And see Reg. *v.* Bowerman, [1891] 1 Q. B. 112, 17 Cox C. C. 151, 55 J. P. 373, 60 L. J. M. C. 13, 63 L. T. Rep. N. S. 532, 39 Wkly. Rep. 207.
See 18 Cent. Dig. tit. "Embezzlement," § 13.

Intent.— The gravamen of the crime of embezzlement by an agent is the fraudulent and felonious intent to convert the property of the principal to his own use. State *v.* Culver, (Nebr. 1904) 97 N. W. 1015. Accordingly, in order that the mere use of money or property held by one as agent or factor for the owner may amount to larceny, it must be shown that such use was fraudulent, and accompanied by an intent to deprive the owner of the property. Snell *v.* State, 50 Ga. 219. So the mere failure of an agent to pay over money to his principal after he has received it is not embezzlement; nor is the mere conversion thereof and failure to pay it over. There must be at the time of conversion an intent to appropriate it to his own use, and to deprive the owner thereof. Home Lumber Co. *v.* Hartman, 45 Mo. App. 647. See also State *v.* Foster, 1 Pennew. (Del.) 289, 40 Atl. 939; State *v.* Collins, 1 Marv. (Del.) 536, 41 Atl. 144.

Money not directed to be delivered to principal.— In State *v.* Ezzard, 40 S. C. 312, 18 S. E. 1025, an agent was held guilty, although the person who gave him the money did not direct him to deliver it to the principal.

Failure to account.— A conviction for embezzlement is warranted by evidence that defendant sold grain for his principal and did not account for money received in payment. State *v.* Hasledahl, 3 N. D. 36, 53 N. W. 430. See also Reg. *v.* Jackson, 1 C. & K. 384, 47 E. C. L. 384. *Compare* Reg. *v.* Creed, 1 C. & K. 63, 47 E. C. L. 63.

Shortage in accounts.— On trial of an indictment charging defendant with the embezzlement of certain money received as agent of an express company for transmission, the fact that the money so received was in the safe constitutes no defense, where defendant was short in his accounts with the company in an amount larger than that alleged to have been embezzled. State *v.* Trolson, 21 Nev. 419, 32 Pac. 930.

That the relation of debtor and creditor exists between a principal and agent, and that on balancing the account the agent would be found indebted to his principal, are not alone sufficient to sustain a verdict finding the agent guilty of embezzlement. State *v.* Culver, (Nebr. 1904) 97 N. W. 1015.

Security for repayment.— The fact that one employed by the maker of a promissory note to sell it and receive the proceeds and pay them over specifically to a third person on receiving the note gave to the maker his own note for the same amount will not prevent a fraudulent conversion, there being an embezzlement, if it was agreed that his note should be deposited with the third person as a receipt to be given up to him upon his paying over the proceeds. Com. *v.* Foster, 107 Mass. 221.

Embezzlement by consular agent see AMBASSADORS AND CONSULS, 2 Cyc. 277 note 17.

29. *Alabama.*— Carr *v.* State, 104 Ala. 43, 16 So. 155; Brewer *v.* State, 83 Ala. 113, 3 So. 816, 3 Am. St. Rep. 693; Pullam *v.* State, 78 Ala. 31, 56 Am. Rep. 21; Hinderer *v.* State, 38 Ala. 415.
Indiana.— Wynegar *v.* State, 157 Ind. 577, 62 N. E. 38.
Kansas.— State *v.* Smith, 57 Kan. 657, 47 Pac. 535; State *v.* Bancroft, 22 Kan. 170.
Kentucky.— Stone *v.* Com., 104 Ky. 220, 46 S. W. 721, 20 Ky. L. Rep. 478, 84 Am. St. Rep. 452.
Louisiana.— State *v.* Jones, 9 La. Ann. 307.
Massachusetts.— Com. *v.* Moore, 166 Mass.

2. EFFECT OF RIGHT TO COMMISSION. While one who follows collecting on commission as a business cannot be found guilty of embezzlement on account of the failure to pay over, yet if he was the agent or servant of the prosecutor, whether an individual or a corporation, the fact that he was entitled to a commission on collections will not protect him if he has in fact embezzled the money collected by him.[30]

C. Partners. While a partnership is in existence, there can be no conviction of embezzlement by one member of the money or other property of the firm.[31]

513, 44 N. E. 612 [*distinguishing* Com. *v.* Libbey, 11 Metc. 64, 45 Am. Dec. 185; Com. *v.* Stearns, 2 Metc. 343].

New Hampshire.—State *v.* Barter, 58 N. H. 604.

Ohio.— Campbell *v.* State, 35 Ohio St. 70.

Pennsylvania.— Gerdemann *v.* Com., 11 Phila. 374, 397.

South Carolina.— State *v.* Ezzard, 40 S. C. 312, 18 S. E. 1025.

England.— Reg. *v.* Newman, 8 Q. B. D. 706, 46 J. P. 612, 51 L. J. M. C. 87, 46 L. T. Rep. N. S. 394, 30 Wkly. Rep. 550; Reg. *v.* Tatlock, 2 Q. B. D. 157, 13 Cox C. C. 328, 46 L. J. M. C. 7, 35 L. T. Rep. N. S. 520; Reg. *v.* Cooper, L. R. 2 C. C. 123, 12 Cox C. C. 600, 43 L. J. M. C. 89, 30 L. T. Rep. N. S. 306, 22 Wkly. Rep. 555; Reg. *v.* Fullagar, 14 Cox C. C. 370, 44 J. P. 57, all construing 24 & 25 Vict. c. 96.

See 18 Cent. Dig. tit. "Embezzlement," § 15. See also, generally, PRINCIPAL AND AGENT.

Collection agent.— Where a person not engaged in collecting for others as a business is employed as agent to collect for his employer, he is an agent, and may be indicted for embezzlement. City Trust, etc., Co. *v.* Lee, 107 Ill. App. 263 [*affirmed* in 204 Ill. 69, 68 N. E. 485].

Special agents.— The statutes apply to an agent to do a single thing for a particular purpose as well as to general agents. State *v.* Foster, 1 Pennew. (Del.) 289, 40 Atl. 939 [*affirmed* in (1899) 43 Atl. 265]. *Contra*, Com. *v.* Morton, 7 Del. Co. (Pa.) 521.

A receiver is not an agent within Kan. Crimes Act, § 88. State *v.* Hubbard, 58 Kan. 797, 51 Pac. 290, 39 L. R. A. 860.

A vendee is not an agent. Reg. *v.* Bredin, 15 Cox C. C. 412.

The duration of an agency depends on the facts in the case, and it is error to charge that if defendant had the right to collect the money as agent such agency continued until payment to his principal. Thomas *v.* State, 33 Fla. 464, 15 So. 225.

Termination of agency.— One who obtains possession of property as an agent may be guilty of embezzling it after the agency has ceased. State *v.* Jennings, 98 Mo. 493, 11 S. W. 980. See also Reg. *v.* Gomm, 3 Cox C. C. 64. However, if an agent for the sale of property buys it in, and the principal ratifies the sale, the agent cannot afterward embezzle the property. State *v.* Eagle, 111 Iowa 246, 82 N. W. 763.

30. *Arizona.*— Territory *v.* Meyer, 9 Ariz. 199, 24 Pac. 183.

Arkansas.— Wallis *v.* State, 54 Ark. 611, 16 S. W. 821.

Delaware.— State *v.* Foster, 1 Pennew. 289, 40 Atl. 939; State *v.* Collins, 1 Marv. 536, 41 Atl. 144.

Kentucky.— Clark *v.* Com., 97 Ky. 76, 29 S. W. 973, 16 Ky. L. Rep. 703. But see Stone *v.* Com., 104 Ky. 220, 46 S. W. 721, 20 Ky. L. Rep. 478, 84 Am. St. Rep. 452.

Massachusetts.— Com. *v.* Smith, 129 Mass. 104. *Compare* Com. *v.* Libbey, 11 Metc. 64, 45 Am. Dec. 185.

Michigan.— People *v.* Hanaw, 107 Mich. 337, 65 N. W. 231.

New York.— See People *v.* Civille, 44 Hun 497.

Ohio.— Campbell *v.* State, 35 Ohio St. 70.

Washington.— Brandenstein *v.* Way, 17 Wash. 493, 49 Pac. 511.

See 18 Cent. Dig. tit. "Embezzlement," § 14. See also *infra*, II, I, 1.

But see State *v.* Kent, 22 Minn. 41, 21 Am. Rep. 764; Reg. *v.* Tite, 8 Cox C. C. 458, 7 Jur. N. S. 556, 30 L. J. M. C. 142, 4 L. T. Rep. N. S. 259, L. & C. 29, 9 Wkly. Rep. 554; Rex *v.* May, 8 Cox C. C. 421, 7 Jur. N. S. 147, 30 L. J. M. C. 81, 3 L. T. Rep. N. S. 680, L. & C. 13, 9 Wkly. Rep. 256.

Joint ownership.— "The rule seems to be that where an agent is employed and receives compensation for his work, whether in the shape of a stipulated sum per day or commissions upon the money collected, he still continues an agent; that in order to constitute him a joint owner there must be some right of property or possession of the money collected" (State *v.* Collins, 1 Marv. (Del.) 536, 541, 41 Atl. 144), as where he has a right to deduct commissions from money collected before paying the collections over to the principal (McElroy *v.* People, 202 Ill. 473, 66 N. E. 1058).

31. *New Hampshire.*— State *v.* Butman, 61 N. H. 511, 60 Am. Rep. 332.

Pennsylvania.— Com. *v.* Arnheim, 3 Pa. Super. Ct. 104.

South Dakota.— State *v.* Reddick, 2 S. D. 124, 48 N. W. 846.

Texas.— Manual *v.* State, (Cr. App. 1903) 71 S. W. 973; Dancy *v.* State, 41 Tex. Cr. 293, 53 S. W. 635, 886; Napoleon *v.* State, 3 Tex. App. 522.

England.— Reg. *v.* Robson, 16 Q. B. D. 137, 15 Cox C. C. 772, 50 J. P. 488, 55 L. J. M. C. 55, 53 L. T. Rep. N. S. 823, 34 Wkly. Rep. 276.

See 18 Cent. Dig. tit. "Embezzlement," § 16. See also *supra*, I, E.

D. Bailees or Others Having Possession Under Agreement. The felonious conversion to his own use by a carrier or other bailee of property committed to his possession is generally declared to be embezzlement;[32] but owing to the diversity of the language employed, it is impossible to lay down any general rule as to what classes of persons are included within the scope of the embezzlement statutes.[33]

An unincorporated association having charitable features is not a partnership, within the rule. Laycock *v.* State, 136 Ind. 217, 36 N. E. 137; State *v.* Campbell, 59 Kan. 246, 52 Pac. 454; Reg. *v.* Tyree, L. R. 1 C. C. 177, 11 Cox C. C. 241, 38 L. J. M. C. 58, 19 L. T. Rep. N. S. 657, 17 Wkly. Rep. 334; Reg. *v.* Bren, 9 Cox C. C. 398, 33 L. J. M. C. 59, 9 L. T. Rep. N. S. 452, L. & C. 346, 12 Wkly. Rep. 107; Reg. *v.* Proud, 9 Cox C. C. 22, 8 Jur. N. S. 142, 31 L. J. M. C. 71, 5 L. T. Rep. N. S. 331, L. & C. 97, 10 Wkly. Rep. 62; Reg. *v.* Marsh, 3 F. & F. 523.

Executory contract.— This immunity does not attach so long as the partnership contract is executory only, or is dependent upon unperformed conditions precedent. Napoleon *v.* State, 3 Tex. App. 522. *Compare* Manual *v.* State, (Tex. Cr. App. 1903) 71 S. W. 973, to the effect that one to whom money is given by another with which to purchase a business, they to be partners therein, is not guilty of embezzlement, although he uses the money for other purposes.

After dissolution of the firm the case is different, and if one partner undertakes to settle the affairs of the firm, he may be convicted of embezzlement from the other partner or partners. State *v.* Matthews, 129 Ind. 281, 28 N. E. 703; Sharpe *v.* Johnston, 59 Mo. 557.

32. *Alabama.*— Eggleston *v.* State, 129 Ala. 80, 30 So. 582, 87 Am. St. Rep. 17.

California.— People *v.* McLean, 135 Cal. 306, 67 Pac. 770.

Delaware.— State *v.* Davis, 3 Pennew. 220, 50 Atl. 99.

Iowa.— State *v.* Foster, 37 Iowa 404.

Kansas.— State *v.* Pierce, 7 Kan. App. 418, 53 Pac. 278.

Pennsylvania.— Com. *v.* Maher, 11 Phila. 425.

Texas.— Malz *v.* State, 36 Tex. Cr. 447, 34 S. W. 267, 37 S. W. 748.

Wyoming.— McCann *v.* U. S., 2 Wyo. 274.

England.— Reg. *v.* Aden, 12 Cox C. C. 512; Reg. *v.* Richmond, 12 Cox C. C. 495, 29 L. T. Rep. N. S. 408; Reg. *v.* Clegg, Ir. R. 3 C. L. 166, 11 Cox C. C. 212.

See 18 Cent. Dig. tit. "Embezzlement," § 17.

Property and acts included.— Money and goods to be carried for hire (State *v.* Stoller, 38 Iowa 321); to be delivered at some particular place (Barclay *v.* Breckinridge, 4 Metc. (Ky.) 374); to be delivered to another person (Com. *v.* Williams, 3 Gray (Mass.) 461); fraudulently pledging property subject to larceny, held as collateral, if wrongful conversion is made after payment of principal debt (Com. *v.* Butterick, 100 Mass. 1, 97 Am. Dec. 65. See also Morehouse *v.* State, 35 Nebr. 643, 53 N. W. 571); and fraudulent conversion of personal property held by virtue of a contract of hiring or borrowing (Williams *v.* State, 30 Tex. App. 153, 16 S. W. 760. See also Fulcher *v.* State, 32 Tex. Cr. 621, 25 S. W. 625).

Money paid by mistake cannot be held to be bailed. Fulcher *v.* State, 32 Tex. Cr. 621, 25 S. W. 625.

By whom delivery to bailee made.— Whether the property is delivered by the owner in person or by another party to be handed to him, the bailment is complete. Com. *v.* Mooney, 8 Phila. (Pa.) 610.

Who a consignee.—One "to whom merchandise or personal property of any kind is committed for the purpose of sale." Com. *v.* Harris, 168 Pa. St. 619, 622, 32 Atl. 92.

The act of converting a part of the property is an act of trespass by the carrier by which the privity of contract is determined, and therefore is larceny and not embezzlement. State *v.* Fairclough, 29 Conn. 47, 76 Am. Dec. 590; Nichols *v.* People, 17 N. Y. 114 [*overruling* 3 Park. Cr. 579].

Agreement to conduct business.— Where a person agreed to conduct a business, pay expenses, and divide the net profits, it was held that he was not liable for larceny as bailee for failing to account, but that the remedy was by a civil action. Com. *v.* Philadelphia County Prison, 9 Phila. (Pa.) 581.

33. *Alabama.*— Watson *v.* State, 70 Ala. 13, 45 Am. Rep. 70, holding that Code, § 4384, does not apply to the hirer of a domestic animal who sells it during the term.

Arkansas.— Wallis *v.* State, 54 Ark. 611, 16 S. W. 821, holding that an attorney for collection is a bailee within Mansfield Dig. § 1640.

California.— People *v.* Poggi, 19 Cal. 600, holding that Acts (1850), c. 71 (Wood Dig. art. 1931), includes any bailee, and is not limited to bailees "to keep, to transfer, or to deliver."

Georgia.— Belt *v.* State, 103 Ga. 12, 29 S. E. 451, to the effect that an indictment will lie against any bailee violating Pen. Code, § 191, although he does not belong to any of the classes particularly enumerated.

Illinois.— Zschocke *v.* People, 62 Ill. 127, construing Cr. Code, § 71, and holding that a constable who has made a levy is not a bailee of the judgment creditor so as to be liable for embezzlement, where, after once delivering the goods to such creditor, he afterward takes them away, with the former's consent, and sells them at private sale, converting the proceeds to his own use.

Iowa.— State *v.* Stoller, 38 Iowa 321, construing Rev. (1860) § 4245, and holding that

E. Attorneys. An attorney who collects money for a client acts as agent as well as attorney and may be convicted of embezzlement for appropriating the money to his own use, with intent to deprive the owner thereof.[34]

F. Guardians, Administrators, and Trustees. The fraudulent conversion of money or other property in the hands of a person acting as guardian, administrator, or trustee, is embezzlement.[35]

G. Bankers. In the case of bankers a distinction must be made between special and general deposits. Under a special deposit the banker becomes a

the words "any other person intrusted with" mean other like person.

Kentucky.— Com. *v.* Bull, 5 Ky. L. Rep. 605, construing Gen. St. c. 29, art. 12, § 2, and holding that a collection agent is not within the words "carrier, porter, or person to whom property is intrusted to be carried for hire."

Missouri.—State *v.* Crosswhite, 130 Mo. 358, 32 S. W. 991, 51 Am. St. Rep. 571 (holding that a merchant to whom goods have been consigned to sell on commission is liable under Rev. St. (1889) § 3551, for the embezzlement thereof); State *v.* Grisham, 90 Mo. 163, 165, 2 S. W. 223 (holding under Rev. St. § 1322, that "any carrier or other bailee" extends only to persons of the same class. But see State *v.* Broderick, 7 Mo. App. 19).

Pennsylvania.— Krause *v.* Com., 93 Pa. St. 418, 39 Am. Rep. 762 (holding that property delivered under an agreement to sell is not bailed); Hutchison *v.* Com., 82 Pa. St. 472 (where the owner of oil in the tanks of a pipe line company delivered accepted orders for oil on said company, and took from defendants a receipt therefor, by the terms of which the oil was to be held for storage at a certain price; and it was held that the delivery of the accepted orders amounted to a delivery of the oil, and constituted a bailment); Com. *v.* Chathams, 50 Pa. St. 181, 88 Am. Dec. 539 (holding that under Pen. Code (1860), § 108, a vendor who converts to his own use property left in his hands by the vendee is punishable); Com. *v.* Fitzpatrick, 8 Phila. (Pa.) 613 (to the effect that an auctioneer who receives goods to be publicly sold is a factor, within a statute punishing a factor for appropriating the profits of sales, although the owner attended the sale in person and bid on the goods when the bids did not suit him); Com. *v.* Swayne, 1 Pa. Super. Ct. 547 (construing Cr. Code, March 31, 1860, § 108, and holding that a real-estate agent to whom a check is given by a prospective purchaser, to be returned to such purchaser in case a sale is not made, and who refuses to surrender the check after failure of negotiation, is a bailee).

Texas.— Reed *v.* State, 16 Tex. App. 386, to the effect that a fraudulent conversion by a bailee for hire is not embezzlement.

Virginia.— Smith *v.* Com., 4 Gratt. 532, construing 2 Rev. Code, c. 248, § 8, and holding that it is not necessary that defendant should be the captain of the boat in order to bring his offense within the act.

Wisconsin.— White *v.* State, 20 Wis. 233, holding that Rev. St. c. 165, § 28, applies only to embezzlement by common carriers, and others in like capacity carrying property for hire, and persons who may be intrusted with such property by the carrier, to be carried to its destination.

See 18 Cent. Dig. tit. "Embezzlement," § 18.

The term "bailee," when used in statutes declaring what acts of embezzlement shall constitute a public offense, is not to be understood "in its large, but in its limited sense, as including simply those bailees who are authorized to keep, to transfer, or to deliver, and who receive the goods first *bona fide*, and then fraudulently convert." Dotson *v.* State, 51 Ark. 119, 122, 10 S. W. 18 [*quoting* 1 Wharton Cr. L. (9th ed.) § 1055, and *citing* Watson *v.* State, 70 Ala. 13, 45 Am. Rep. 70; Krause *v.* Com., 93 Pa. St. 418, 39 Am. Rep. 762; Reg. *v.* De Banks, 15 Cox C. C. 450; Reg. *v.* Aden, 12 Cox C. C. 512; Reg. *v.* Bunkall, 9 Cox C. C. 419; Reg. *v.* Hassall, 8 Cox C. C. 491, 7 Jur. N. S. 1064, 30 L. J. M. C. 175, 4 L. T. Rep. N. S. 561, L. & C. 58, 9 Wkly. Rep. 708].

34. *Arkansas.*— Wallis *v.* State, 54 Ark. 611, 16 S. W. 821.

California.— People *v.* Treadwell, 69 Cal. 226, 10 Pac. 502.

Illinois.— George *v.* People, 167 Ill. 447, 47 N. E. 741.

Michigan.— People *v.* Converse, 74 Mich. 478, 42 N. W. 70, 16 Am. St. Rep. 648.

England.— Reg. *v.* Gibson, 8 Cox C. C. 436.

See 18 Cent. Dig. tit. "Embezzlement," § 19.

Contra.— State *v.* McLane, 43 Tex. 404, construing Paschal Dig. arts. 2421–2423.

Although the attorney acknowledges receipt of the money, the rule is the same. State *v.* Belden, 35 La. Ann. 823.

Where money is intrusted to an attorney for investment on satisfactory security being given, the relation of attorney and client is established, subjecting him to punishment for embezzlement as attorney on his fraudulently converting it to his own use. Com. *v.* Barton, 20 Pa. Super. Ct. 447.

35. *Maine.*— See State *v.* Whitehouse, 95 Me. 179, 49 Atl. 869.

Massachusetts.— Com. *v.* Butterick, 100 Mass. 1, 97 Am. Dec. 65.

Mississippi.— See State *v.* Gillis, 75 Miss. 331, 24 So. 25.

Nevada.— State *v.* Borowsky, 11 Nev. 119.

Ohio.— State *v.* Mannix, 9 Ohio Dec. (Reprint) 667, 16 Cinc. L. Bul. 212, holding that "assignee in insolvency" embraces an assignee in trust for benefit of creditors.

England.— Reg. *v.* Townshend, 15 Cox C. C.

bailee, not merely a debtor, and is within the statutes against embezzlement. In case of a general deposit, the depositor stands merely in the relation of a general creditor of the banker, and no such relation of trust exists as will bring the latter within the statute.[36]

H. Officers or Employees of Corporations or Associations. The weight of authority is to the effect that a general statute of embezzlement will include corporations, although not specifically named;[37] but however this may be, it is now usually provided in the statutes themselves that the fraudulent conversion by an officer, servant, agent, clerk, or employee of the property of an incorporated[38] or unincorporated[39] association shall be embezzlement, under the same circumstances as control in the case of a natural person.[40] It is immaterial for what

466; Rex *v.* Fletcher, 9 Cox C. C. 189, 9 Jur. N. S. 649, 31 L. J. M. C. 206, 6 L. T. Rep. N. S. 545, L. & C. 180, 10 Wkly. Rep. 753; Wadham *v.* Rigg, 1 Dr. & Sm. 216. See also Reg. *v.* Gibbs, 6 Cox C. C. 455, Dears. C. C. 445, 1 Jur. N. S. 118, 24 L. J. M. C. 62.

See 18 Cent. Dig. tit. "Embezzlement," § 20.

A mere failure of a guardian to pay over to the ward a balance due on the settlement does not render him liable to indictment for wrongful conversion under the Tennessee act of 1875. State *v.* Henry, 1 Lea (Tenn.) 720.

Intention to restore property as defense see *infra*, III, B, 5.

36. Collins *v.* State, 33 Fla. 429, 15 So. 214; People *v.* Wadsworth, 63 Mich. 500, 30 N. W. 99. And see BANKS AND BANKING, 5 Cyc. 485, 513 *et seq.*, 581.

Bank officers and employees see *infra*, notes 37 *et seq.*

Embezzlement of public funds as ground for forfeiture of charter see CORPORATIONS, 10 Cyc. 1290.

37. Com. *v.* Wyman, 8 Metc. (Mass.) 247; Reg. *v.* Welch, 2 C. & K. 296, 2 Cox C. C. 85, 1 Den. C. C. 199, 61 E. C. L. 296; Reg. *v.* Townsend, 2 C. & K. 168, 2 Cox C. C. 24, 1 Den. C. C. 167, 61 E. C. L. 168; Williams *v.* Stott, 2 L. J. Exch. 303, 3 L. J. Exch. 110, 3 Tyrw. 688; Reg. *v.* Atkinson, C. & M. 525, 2 Moody C. C. 278, 41 E. C. L. 287; Rex *v.* Hall, 1 Moody C. C. 474. *Contra*, Coats *v.* People, 22 N. Y. 245 [*affirming* 4 Park. Cr. 662].

38. *California.*— People *v.* Leonard, 106 Cal. 302, 39 Pac. 617.

Iowa.— State *v.* Goode, 68 Iowa 593, 27 N. W. 772.

Massachusetts.— Com. *v.* Tuckerman, 10 Gray 173.

Missouri.— Hamuel *v.* State, 5 Mo. 260.

Nebraska.— McAleer *v.* State, 46 Nebr. 116, 64 N. W. 358.

New York.— People *v.* Sherman, 133 N. Y. 349, 31 N. E. 107 [*affirming* 16 N. Y. Suppl. 782]; Coats *v.* People, 22 N. Y. 245.

Pennsylvania.— Com. *v.* Leisenring, 11 Phila. 389; Com. *v.* Hill, 4 Luz. Leg. Obs. 52, 5 Luz. L. Reg. 241.

See 18 Cent. Dig. tit. "Embezzlement," § 22.

A de facto officer of a corporation is criminally liable for embezzlement of the funds in his hands. People *v.* Leonard, 106 Cal. 302, 39 Pac. 617.

Foreign corporations.— Ga Code, § 4421, punishing embezzlement by corporate officers, was designed to protect only corporate bodies chartered and doing business under the laws of the state, and an indictment will not lie under that section against the cashier of a local branch office of a foreign corporation, when no law of the state or of the United States has authorized the establishment of such branch in the state. Cory *v.* State, 55 Ga. 236.

The state is not a corporation, within Kan. Laws (1873), c. 177, § 1. State *v.* Bancroft, 22 Kan. 170.

Illegal dividends.— In a prosecution of the president of an insolvent corporation for the embezzlement of its funds in the receipt of dividends voted with his consent from the corporation's assets while it was insolvent, a conviction may be maintained only on proof of knowledge that the corporation had no funds legally applicable to dividends when such dividend was declared and paid, and that such declaration and payment was with the fraudulent purpose of converting the corporation assets to the use of the officers and stock-holders. Taylor *v.* Com., 75 S. W. 244, 25 Ky. L. Rep. 374.

39. Laycock *v.* State, 136 Ind. 217, 36 N. E. 137; State *v.* Campbell, 59 Kan. 246, 52 Pac. 454; Com. *v.* Koons, 1 Kulp (Pa.) 134; Shinn *v.* Com., 32 Gratt. (Va.) 899.

40. State *v.* Goode, 68 Iowa 593, 27 N. W. 772; McAleer *v.* State, 46 Nebr. 116, 64 N. W. 358. See also *supra*, I, E.

Bank officers.— The statutes of embezzlement apply to bank officers. See Ker *v.* People, 110 Ill. 627, 51 Am. Rep. 706 (bank clerk); Com. *v.* Pratt, 137 Mass. 98 (treasurer of savings bank); Com. *v.* Tenny, 97 Mass. 50 (construing the words "incorporated bank"); Com. *v.* Wyman, 8 Metc. (Mass.) 247 (holding that cashier "or other officer" includes president and directors); State *v.* Stimson, 24 N. J. L. 9; Com. *v.* Holtenstein, 2 Woodw. (Pa.) 477. See, however, State *v.* Tuller, 34 Conn. 280, holding that a state statute relating to embezzlement by officers of a bank applies to officers of a national bank who purloin a special deposit, but is inoperative in respect to the embezzlement of property of the bank by its agents for which the act of congress provides a penalty. See also *supra*, II, G.

purpose the property may have been placed in the care of the agent,[41] or that the company of which defendant is agent is itself a mere bailee without power of disposition.[42]

I. Public Officers or Employees — 1. In General. The fraudulent appropriation or conversion by public officers of money or other property which comes into their possession in the course of their employment and by virtue of their official position is almost universally declared by statute to be embezzlement.[43] Under these statutes it is immaterial that the officer is merely an officer *de facto*, if he has held himself out to be a public officer or has acted as such;[44] nor will the fact that the officer was entitled to a commission out of the money collected constitute a defense to a prosecution for its embezzlement.[45] So too the liability of public officers has been held not to depend on the legal right of the appointing power to receive the moneys or on the legal right of the officer or agent to collect, since the essential elements are the relation of trust and a colorable right to employ, with the acceptance of the relation.[46]

2. United States Officers — a. In General. Officers and other persons charged with the safe-keeping, transfer, and disbursement of the public moneys are required by an act of congress to keep an accurate entry of each sum received, and of each payment or transfer; and if any one of the said officers shall convert to his own use, in any way whatever, any portion of the public moneys, intrusted to him for safe-keeping, disbursement, or transfer, or for any other purpose, every such act shall be deemed and adjudged to be embezzlement of so much of the public moneys as shall be thus taken and converted, which is therein declared to be a felony.[47]

b. Who Are United States Officers. An officer of the United States can be

A check left for collection with a cashier is taken by him within the line of his business as cashier. People *v.* Bradner, 10 N. Y. St. 853.

41. Barclay *v.* Breckinridge, 4 Metc. (Ky.) 374.

42. People *v.* Sherman, 133 N. Y. 349, 31 N. E. 107 [*affirming* 16 N. Y. Suppl. 782].

43. Britton *v.* State, 77 Ala. 202 (construing Code, §§ 417, 418, 4265, 4266, and holding a tax-collector who fails to make monthly reports of collections and monthly payments thereof guilty of embezzlement); State *v.* Wells, 112 Ind. 237, 13 N. E. 722 (holding that where a public officer resigns before the expiration of his term, and fraudulently fails or refuses to pay over to his successor money received by virtue of his office, and feloniously embezzles, retains, and converts the same to his own use, he is criminally liable under Rev. St. (1881) § 1934); State *v.* Bancroft, 22 Kan. 170 (to the effect that "any agent" as used in Laws (1873), p. 177, § 1, includes an agent of the state). See, however, State *v.* Connelly, 104 N. C. 794, 10 S. E. 469 (holding clerks of court and other like officers not to be embraced in Code, § 1014, as to embezzlement by officers and agents of corporations); Reg. *v.* Lovell, 2 M. & Rob. 236 (expressing a doubt whether 7 & 8 Geo. IV, c. 29, § 46, was meant to include public servants of the crown). See also, generally, Reg. *v.* Townsend, C. & M. 178, 41 E. C. L. 102; Reg. *v.* Parsons, 16 Cox C. C. 498; Reg. *v.* Graham, 13 Cox C. C. 57; Reg. *v.* Glover, 9 Cox C. C. 500, 10 Jur. N. S. 710, 33 L. J. M. C. 169, 10 L. T. Rep. N. S. 582, L. & C. 466, 12 Wkly. Rep. 885.

44. State *v.* Stone, 40 Iowa 547; State *v.* Goss, 69 Me. 22; Fortenberry *v.* State, 56 Miss. 286; Reg. *v.* Townsend, C. & M. 178, 41 E. C. L. 102; Rex *v.* Barrett, 6 C. & P. 124, 25 E. C. L. 353. *Compare* State *v.* Bolin, 110 Mo. 209, 19 S. W. 650, where it was held that Mo. Rev. St. (1879) § 1326, providing for the punishment of any officer who shall embezzle any portion of the public money received by him in virtue of his office or "under color or pretense thereof," does not apply to one who, having no right to the public money by virtue of his office, obtains possession thereof by falsely representing that he has such right.

45. Com. *v.* Fisher, 113 Ky. 491, 68 S. W. 855, 24 Ky. L. Rep. 300. See *supra*, II, B, 2. But see Com. *v.* Evans, 2 Leg. Op. (Pa.) 3, holding that whenever money is received by a public officer, and not paid over, it is embezzlement, without regard to the method of rendering the account; but when the officer in good faith claims a portion as his due, and retains no more, it would not be that offense, although it should turn out that he was entitled to a less amount.

46. State *v.* Heath, 8 Mo. App. 99.

47. U. S. *v.* Cook, 17 Wall. (U. S.) 168, 21 L. ed. 538, construing act of Aug. 6, 1846. See also U. S. Rev. St. § 5488 [U. S. Comp. St. (1901) p. 3703], as to the unlawful deposit, conversion, loan, or transfer of public money by disbursing officers; U. S. Rev. St. § 5489 [U. S. Comp. St. (1901) p. 3704], as to the failure of the treasurer, assistant treasurer, or any public depositary to keep public money safely; U. S. Rev. St. § 5497 [U. S. Comp. St. (1901) p. 3707], as amended by act

appointed only by the president, by and with the advice and consent of the senate, by a court of law, or by the head of a department. A person in the service of the government who does not derive his position from one of these sources is not an officer of the United States in the sense of the constitution.[48]

c. Statutory Rule of Construction. The statutes as to embezzlement by officers of the United States are to be construed to apply to all persons charged with the safe-keeping, transfer, or disbursement of the public money, whether such persons be indicted as receivers or depositaries of the same.[49]

3. State Officers. State officers, charged with the collection, safe-keeping, transfer, or disbursement of public moneys, who unlawfully convert to their own use, or in any manner misappropriate the same, are guilty of embezzlement,[50]

of Feb. 3, 1879 (Suppl. U. S. Rev. St. 213), as to the unlawful receipt of public money from public officers by any banker, broker, or other person not an authorized depositary of public moneys, and as to embezzlement by internal revenue officers and their assistants.

A failure to deposit public moneys under a general rule or regulation of the treasury department is within U. S. Rev. St. § 5492 [U. S. Comp. St. (1901) p. 3705]. A specific order is not required. U. S. *v.* Dimmick, 121 Fed. 638, 57 C. C. A. 664 [*affirming* 112 Fed. 350].

A postmaster who is convicted of embezzling from the money order funds is guilty of a felony under Suppl. U. S. Rev. St. c. 144, § 1, such money belonging to the United States under U. S. Rev. St. § 4045 [U. S. Comp. St. (1901) p. 2751], which provides that all such funds shall be deemed to be in the national treasury. U. S. *v.* Swan, 7 N. M. 306, 34 Pac. 533.

Postmaster's assistant.—On the prosecution of a postmaster's assistant for embezzlement, the fact that the indictment failed to charge that the embezzlement was without the consent of the postmaster who employed defendant does not necessitate proof that the embezzlement was without his consent. Faust *v.* U. S., 163 U. S. 452, 16 S. Ct. 1112, 41 L. ed. 224.

An Indian agent cannot be indicted for embezzlement, in the absence of a statute providing therefor. U. S. *v.* Upham, 2 Mont. 170.

Indemnity fund.—Money in the charge and within the control of the state department, paid to the United States on various accounts by foreign governments, and collected by and through the state department, commonly known as the "Indemnity Fund," is public money of the United States, within U. S. Rev. St. § 5488 [U. S. Comp. St. (1901) p. 3703], and the acts of congress of March 3, 1875, and of Feb. 3, 1879 [U. S. Comp. St. (1901) pp. 3675, 3707], making criminal the unlawful appropriation of public money by disbursing officers or other persons having the possession or custody of it. Kirckhoefer *v.* U. S., 19 App. Cas. (D. C.) 405.

Where an officer procures public money by fraud, and appropriates it to his own use, the offense is punishable at common law. U. S. *v.* Watkins, 28 Fed. Cas. No. 16,549, 3 Cranch C. C. 441.

48. U. S. *v.* Smith, 124 U. S. 525, 532, 8 S. Ct. 595, 31 L. ed. 534 [*citing* U. S. *v.* Monat, 124 U. S. 363, 8 S. Ct. 505, 31 L. ed. 463; U. S. *v.* Germdine, 99 U. S. 508, 25 L. ed. 482, and *distinguishing* U. S. *v.* Hartwell, 6 Wall. (U. S.) 385, 18 L. ed. 830, on the ground that there the appointment by the assistant treasurer could, under the act of congress of July 23, 1866, be made only with the approbation of the secretary of the treasury, which rendered the appointment one by the head of the department].

Assignee in bankruptcy.—While an assignee in bankruptcy is an officer of the court, he is not an officer within the purview of U. S. Rev. St. § 5504 [U. S. Comp. St. (1901) p. 3710], defining the offense of embezzlement by court officers. U. S. *v.* Bixby, 6 Fed. 375, 10 Biss. 238.

A clerk in charge of a branch post-office, authorized to issue money orders payable at other offices or stations, is intrusted in his official capacity with the care and custody of the funds upon which he is so authorized to draw in such sense that he is guilty of embezzlement, under Rev. St. § 4046 [U. S. Comp. St. (1901) p. 2752], where he issues money orders in payment of his private debts, which are paid to the holders from such funds. U. S. *v.* Royer, 122 Fed. 844.

A deputy collector is a "public officer" within the meaning of the subtreasury act of 1846. U. S. *v.* Bowerman, 24 Fed. Cas. No. 14,630.

A paymaster in the army is within the act of congress of Aug. 6, 1846. U. S. *v.* Cook, 17 Wall. (U. S.) 168, 21 L. ed. 538.

49. U. S. Rev. St. § 5493 [U. S. Comp. St. (1901) p. 3705].

Statute construed.—The statute (Act of Aug. 6, 1846) does not apply to clerks or servants who are neither charged nor credited with public moneys, but only legally authorized custodians of public moneys or officers or agents intrusted by law with the possession of such moneys. U. S. *v.* Hutchinson, 4 Pa. L. J. Rep. 211, 7 Pa. L. J. 365. See also Com. *v.* Hutchinson, 2 Pars. Eq. Cas. (Pa.) 384 (clerk employed in mint); U. S. *v.* Smith, 124 U. S. 525, 8 S. Ct. 595, 31 L. ed. 534 (clerk in office of collector of customs); U. S. *v.* Hartwell, 6 Wall. (U. S.) 385, 18 L. ed. 830 (clerk in office of assistant treasurer).

50. State *v.* Noland, 111 Mo. 473, 19 S. W. 715, holding that Mo. Rev. St. (1889) c. 164, prescribing the duties of the state treasurer,

which may be shown to have been committed before the time for reporting the receipt of the money or accounting therefor had arrived.[51]

4. County and Municipal Officers. For any county official[52] or municipal

and affixing certain penalties for a violation thereof in certain contingencies, is not repugnant to section 3555, providing for the indictment of "any officer," appointed or elected by virtue of the constitution or any law made in pursuance thereof, who may be guilty of embezzlement.

A state treasurer or his deputy is within the meaning of the statutes denouncing embezzlement by public officers. State *v.* Bradt, 41 Iowa 593 (deputy treasurer); State *v.* Archer, 73 Md. 44, 20 Atl. 172; People *v.* McKinney, 10 Mich. 54; State *v.* Noland, 111 Mo. 473, 19 S. W. 715. But see State *v.* Taylor, 7 S. D. 533, 64 N. W. 548, to the effect that the state treasurer is liable neither under S. D. Comp. Laws, § 6796, nor under § 6797, nor § 6799.

The word "treasury," as used in Mich. Comp. Laws, § 5771, is not to be understood in the sense of locality, as descriptive of the particular building in which the treasurer keeps his principal office or place of business; but moneys are to be considered in the state treasury whenever and wherever they are in the official custody of the treasurer, or subject to his direction or control; nor is it necessary that the money embezzled should have been in the county where the treasurer's office is required to be kept, since he might embezzle it without at the time being personally present where the money happened to be. People *v.* McKinney, 10 Mich. 54.

The secretary of a state board who wrongfully appropriates to his own use public moneys received by him in his official capacity is guilty of embezzlement within Cal. Pen. Code, § 504. People *v.* Gray, 66 Cal. 271, 5 Pac. 240.

A state auditor is not an officer charged by law with the collection and transmission of public money under Nebr. Cr. Code, § 124. Moore *v.* State, 53 Nebr. 831, 74 N. W. 319.

A special agent appointed under a joint resolution of the legislature to collect claims due the state for a commission to be paid out of the sum collected by him is not a state officer within Pa. Pen. Code, § 65. Com. *v.* Evans, 2 Leg. Op. (Pa.) 3.

Wharfage charges and tolls become the property of the state as soon as collected, and are subject to embezzlement before being paid into the treasury. People *v.* Gray, 66 Cal. 271, 5 Pac. 240.

Self-executing provisions.— A legislative enactment is not necessary to the operation of a constitutional provision declaring certain acts by a state officer to constitute embezzlement and felony. State *v.* Munch, 22 Minn. 67.

51. People *v.* Royce, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524, in which the fact that defendant, the treasurer of a state soldiers' home, was required to report at stated times only, and the time for reporting the receipt of the money embezzled had not arrived, was held not to prevent the state from showing that defendant had already embezzled it.

52. *Georgia.*— Cooper *v.* State, 101 Ga. 783, 29 S. E. 22, clerk appointed by board of commissioners of roads and revenues.

Illinois.— Stoker *v.* People, 114 Ill. 320, 2 N. E. 55, holding that a constable who fails to pay over money collected on execution cannot be proceeded against under Cr. Code, § 74, which applies to embezzlements generally; but that he is liable to a fine under section 74, which expressly embraces constables. The fact that the money was collected without a levy is immaterial.

Indiana.— State *v.* Wells, 112 Ind. 237, 13 N. E. 722, holding a drainage commissioner to be a public officer of the county for which he is appointed, within Rev. St. (1881) § 1934.

Kansas.— State *v.* Smith, 13 Kan. 274, holding a county treasurer liable under Laws (1873), c. 83, amending Gen. St. c. 31, § 88.

Kentucky.— Com. *v.* Bodley, 31 S. W. 463, 17 Ky. L. Rep. 561, to the effect that a deputy clerk of the county court, authorized to receive money for licenses and taxes, is punishable for embezzling such money.

Maryland.— State *v.* Denton, 74 Md. 517, 22 Atl. 305, to the effect that, while the clerk of a board of county commissioners is in no sense a public officer, within Code Pub. Gen. Laws, art. 27, § 80, yet he is liable for embezzlement under art. 27, § 75, since by art. 25, § 1, the county commissioners are declared to be a corporation.

Missouri.— State *v.* Heath, 70 Mo. 565 [*reversing* 8 Mo. App. 99] (and holding county auditor, unauthorized to receive school funds, not liable as servant or agent of county under Wagner St. p. 459, § 41, although acting at the same time in the dual capacity of auditor and custodian of such funds); State *v.* Bittinger, 55 Mo. 596 (failure of agent to pay over collections to commissioners of northwestern insane asylum punishable under Wagner St. p. 170*b*, §§ 7, 25, which remedy is exclusive of that previously existing at common law).

Nebraska.— Bolln *v.* State, 51 Nebr. 581, 71 N. W. 444, disbursement of public funds by city treasurer without warrant from proper authority.

North Carolina.— State *v.* Connelly, 104 N. C. 794, 10 S. E. 469, to the effect that embezzlement by the clerk of the superior court of money in his hands as such, belonging to a private individual, is not covered by Code, § 1016, which applies only to county funds; nor is such clerk liable under section 1090, as for a wilful neglect or refusal to discharge the duties of his office.

Ohio.— State *v.* Newton, 26 Ohio St. 265, holding a county auditor not an officer charged with the custody of state moneys within the act of April 15, 1858 (Swan & C. St. § 1606). See also State *v.* Meyers, 56 Ohio St. 340, 47

officer[53] or other person[54] intrusted with the collection, safe-keeping, transfer, or disbursement of money or other property belonging to the county or municipality, fraudulently to convert to his own use, fail to account for, or otherwise misappropriate the same, is declared by the statutes of the various states to be embezzlement. Owing to the diversity of language used in these statutes reference must necessarily be had thereto in order to determine just what officers and employees are within their scope.[55]

III. DEGREES, DEFENSES, AND PERSONS LIABLE.

A. Degrees. Under some statutes the amount or value of the money or other property embezzled determines the degree of the crime, whether a felony or misdemeanor, just as in larceny the amount or value of the property stolen determines whether the offense is punishable as grand or petit larceny.[56] Where,

N. E. 138 (to the same effect as to deputy county treasurer under Rev. St. § 6841); State *v.* Whetstone, 8 Ohio S. & C. Pl. Dec. 260, 5 Ohio N. P. 514 (to the same effect as to the secretary of the waterworks department of Cincinnati).

Oregon.— State *v.* Dale, 8 Oreg. 229, sheriff liable for conversion of taxes under Code, p. 414, § 559.

Texas.— State *v.* Brooks, 42 Tex. 62 (holding deputy sheriff an officer within the embezzlement law); Crump *v.* State, 23 Tex. App. 615, 5 S. W. 182 [*distinguishing* Edwards *v.* State, 2 Tex. App. 525] (holding a justice of the peace a county officer within Pen. Code, art. 103).

See 18 Cent. Dig. tit. "Embezzlement," § 27.

Custody of warrants.— When a person assumes the office of county auditor he becomes the legal custodian and bailee of warrants drawn on the treasury, and the agent of the parties in whose favor they are drawn, so as to render him guilty of embezzlement for a wrongful conversion of such warrants. State *v.* Raby, 31 Wash. 111, 71 Pac. 771.

53. *Connecticut.*— State *v.* Griswold, 73 Conn. 95, 46 Atl. 829, tax-collector.

Kansas.— State *v.* Spaulding, 24 Kan. 1, to the effect that if a city clerk receives license money under a custom that is well known and has existed for years and embezzles it, he may be convicted, although a city ordinance provides that such money shall be paid to the treasurer.

Louisiana.— State *v.* Exnicios, 33 La. Ann. 253, clerk of administrator of finance liable under Acts (1871), No. 42.

New York.— Bork *v.* People, 91 N. Y. 5, city treasurer liable, under Laws (1875), c. 19, for wrongful conversion of negotiable bonds of city.

Ohio.— State *v.* Carter, 67 Ohio St. 422, 66 N. E. 537, clerk of corporation charged with special assessments required to be paid him by ordinance providing therefor. See Rev. St. § 6841.

Pennsylvania.— Culp *v.* Com., 42 Leg. Int. 288 (clerk of trustees of gas-works held in employment of city and within the meaning of Act, June 12, 1878, § 1); Com. *v.* Mercer, 29 Leg. Int. 52 (city treasurer loaning city money for private gain held to be within Act, March 31, 1860).

Washington.— State *v.* Krug, 12 Wash. 288, 41 Pac. 126, misappropriation of city funds by treasurer. See also State *v.* Isensee, 12 Wash. 254, 40 Pac. 985, construing Pen. Code, § 55.

Wisconsin.— State *v.* White, 66 Wis. 343, 28 S. W. 202, city controller held liable under Rev. St. § 4418 [U. S. Comp. St. (1901) p. 3024], for the unlawful conversion of unissued negotiable city bonds in his custody as *ex officio* secretary of the commissioners of the public debt, even though the city might not be liable on them.

See 18 Cent. Dig. tit. "Embezzlement," § 25.

54. Spalding *v.* People, 172 Ill. 40, 49 N. E. 993, holding that the treasurer of the state university is a municipal officer within Ill. Cr. Code, § 80.

The treasurer of a school-district is an officer of a municipality of specific statutory creation, and is indictable for embezzlement under Pa. Act, March 31, 1860, § 65. Com. *v.* Morrisey, 86 Pa. St. 416.

Tax-collectors are public officers within the meaning of the embezzlement statutes. Britton *v.* State, 77 Ala. 202; Fuller *v.* State, 73 Ga. 408; State *v.* Walton, 62 Me. 106. See also People *v.* Bedell, 2 Hill (N. Y.) 196. *Compare* Hellings *v.* Com., 5 Rawle (Pa.) 64, to the effect that the Pennsylvania act of 1799, having prescribed a specific remedy where a collector embezzles money received for taxes, an indictment cannot be sustained for that offense.

Township officers.— Statutes making state, county, and municipal officers liable for converting public moneys, embrace township officers, such as trustees (State *v.* Cleveland, 80 Mo. 108; State *v.* Hays, 78 Mo. 600), selectmen (State *v.* Boody, 53 N. H. 610) and treasurers (People *v.* Bringard, 39 Mich. 22, 33 Am. Dec. 344; State *v.* Morton, 21 Ohio St. 669; Com. *v.* Carson, 21 Pa. Super. Ct. 48).

55. See statutes of the several states.

56. State *v.* Hayes, 13 Mont. 116, 32 Pac. 415 (to the effect that, under a statute providing for the punishment for embezzlement as grand or petit larceny, according to the value of the property converted, a bailee of

however, the statute prescribes a punishment applicable without regard to amount, there can be no different degrees of the offense, as for grand and petit larceny;[57] nor will the mere fact that the crime is declared to be larceny establish grades of the offense.[58]

B. Defenses — **1. Authority From Owner.** That the accused had authority from the owner to use the money or other property alleged to have been embezzled is a good defense to a prosecution for its embezzlement;[59] but a subsequent ratification by the party injured is no defense.[60]

2. Want of Authority to Collect — **a. In General.** One who has collected money under color of authority cannot defend a prosecution for embezzlement in not paying it over, on the ground that he was not authorized to collect it.[61]

b. Failure to Give Bond or Take Oath of Office. The failure of defendant to give the required bond or to take the prescribed oath of office is no defense to his prosecution for embezzlement, where he has in fact exercised the functions of the office;[62] nor will a deputy officer be relieved from liability by reason of such failure on the part of his superior, by whom he was appointed.[63]

3. Settlement. The fact that an embezzler has settled his default, or that it has been settled by his sureties, is no defense to a criminal prosecution against him.[64]

4. Indemnity Bonds. The fact that a defendant has given an indemnity bond is no defense to a prosecution for embezzlement;[65] nor, it would seem,

a horse cannot be convicted of grand larceny irrespective of its value, although another statute makes the stealing of a horse of any value grand larceny); Aldrich *v.* State, 29 Tex. App. 394, 16 S. W. 251 (to the effect that where the amount to which an agent is entitled as a commission on a sale, the proceeds of which he embezzles, reduces the amount embezzled below the sum necessary to constitute grand larceny, he is not guilty of a felony, unless some further act remained to be done before he could appropriate his commission); Knight *v.* State (Tex. App. 1890) 13 S. W. 598.

57. State *v.* Weydeman, 3 Wash. 399, 28 Pac. 749.

Embezzlement of horse.— Under Cal. Pen. Code, § 514, providing that "every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled" the embezzlement of a horse is a felony without regard to its value; the stealing of a horse being grand larceny, by the terms of the statute. People *v.* Wickham, 116 Cal. 384, 48 Pac. 329. But see State *v.* Hayes, 13 Mont. 116, 32 Pac. 415.

58. State *v.* Weydeman, 3 Wash. 399, 28 Pac. 749.

59. Henderson *v.* State, 1 Tex. App. 432. See also People *v.* Solomon, 12 N. Y. App. Div. 627, 42 N. Y. Suppl. 573.

Authority of stock-holders.— In a prosecution of the president of an insolvent corporation for embezzlement of its funds, committed by the voting and receiving of unearned dividends from the corporation's assets, it was no defense that such dividends were voted, and the payment thereof concurred in, by all the stock-holders, on the ground that they were the owners of the corporation's assets, such assets being owned by the corporation as a separate entity distinct from the stock-holders. Taylor *v.* Com., 75 S. W. 244, 25 Ky. L. Rep. 374.

60. State *v.* Frisch, 45 La. Ann. 1283, 14 So. 132.

61. Bartley *v.* State, 53 Nebr. 310, 73 N. W. 744; *Ex p.* Ricord, 11 Nev. 287; State *v.* Pohlmeyer, 59 Ohio St. 491, 52 N. E. 1027. See also State *v.* Findley, 101 Mo. 217, 14 S. W. 185, to the effect that where it is shown that defendant received the tax-books and acted as collector, it is not necessary to produce his commission. Also that it constitutes no defense that the tax-books were not duly authenticated by the official seal of the county clerk when delivered to defendant as tax-collector.

62. State *v.* Mims, 26 Minn. 183, 2 N. W. 494, 683; Fortenberry *v.* State, 56 Miss. 286; State *v.* Findley, 101 Mo. 217, 14 S. W. 185. But see Wood *v.* State, 47 Ark. 488, 1 S. W. 709.

63. People *v.* Cobler, 108 Cal. 538, 41 Pac. 401.

64. *Arkansas.*— Fleener *v.* State, 58 Ark. 98, 23 S. W. 1.

Georgia.— Robson *v.* State, 83 Ga. 166, 9 S. E. 610 (in which defendant had reimbursed his sureties before he was indicted); McCoy *v.* State, 15 Ga. 205.

Louisiana.— State *v.* Thompson, 32 La. Ann. 796.

Missouri.— State *v.* Noland, 111 Mo. 473, 19 S. W. 715.

New York.— Fagnan *v.* Knox, 66 N. Y. 525 [*reversing* 40 N. Y. Super. Ct. 41].

Texas.—Goodwyn *v.* State, (Cr. App. 1901) 64 S. W. 254.

United States.— U. S. *v.* Gilbert, 25 Fed. Cas. No. 15,205.

See 18 Cent. Dig. tit. "Embezzlement," § 32.

65. People *v.* De Lay, 80 Cal. 52, 22 Pac. 90; Smith *v.* State, 34 Tex. Cr. 265, 30 S. W. 236.

is he entitled to have it taken into consideration in mitigation of his punishment.[66]

5. INTENTION OR OFFER TO RESTORE MONEY OR PROPERTY. The intention or offer of the accused to restore the money or property embezzled is no defense and will not relieve the act of its criminal nature,[67] although it may be given in evidence on the question of intent,[68] or in mitigation of punishment.[69]

6. OPENNESS OF APPROPRIATION, UNDER CLAIM OF RIGHT. It is a valid defense to a prosecution for embezzlement that the property was appropriated openly and under a claim of right preferred in good faith, even though such claim is untenable.[70]

7. INABILITY TO PERFORM TRUST. An agent who converts to his own use money intrusted to him by his principal for the purchase of land is guilty of embezzlement, notwithstanding the fact that the land contracted for proved to be in litigation, and the title was for that reason in abeyance.[71]

8. ILLEGALITY OF PURPOSE FOR WHICH PROPERTY WAS INTRUSTED. The illegality of the purpose for which the money or property embezzled was intrusted to defendant is no defense to a prosecution for its conversion by him.[72]

66. Smith *v.* State, 34 Tex. Cr. 265, 30 S. W. 236.

67. *California.*— People *v.* De Lay, 80 Cal. 52, 22 Pac. 90.

Illinois.— Spalding *v.* People, 172 Ill. 40, 49 N. E. 993.

Massachusetts.— Com. *v.* Tenney, 97 Mass. 50; Com. *v.* Tuckerman, 10 Gray 173.

Missouri.— State *v.* Pratt, 98 Mo. 482, 11 S. W. 977; Home Lumber Co. *v.* Hartman, 45 Mo. App. 647.

Texas.— Farmer *v.* State, (Cr. App. 1896) 34 S. W. 620.

Virginia.— Shinn *v.* Com., 32 Gratt. 899.

Wisconsin.—State *v.* Leicham, 41 Wis. 565.

United States.— U. S. *v.* Gilbert, 26 Fed. Cas. No. 15,205; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,246, 5 Blatchf. 558.

See 18 Cent. Dig. tit. "Embezzlement," § 34.

See, however, Myers *v.* State, 4 Ohio Cir. Ct. 570, 2 Ohio Cir. Dec. 712; State *v.* Meyer, 10 Ohio Dec. (Reprint) 746, 23 Cinc. L. Bul. 251, both holding that a guardian who in good faith uses the money of his ward in his own business, expecting and intending fully to account for the same to his ward with interest, is not guilty of embezzlement if without fraud on his part the money is lost by the failure of his business.

68. State *v.* Eastman, 62 Kan. 353, 63 Pac. 597. See *infra*, V, B, 2.

69. People *v.* De Lay, 80 Cal. 52, 22 Pac. 90.

70. *Arkansas.*— Fleener *v.* State, 58 Ark. 98, 23 S. W. 1.

California.— People *v.* Lapique, 120 Cal. 25, 52 Pac. 40.

Delaware.— See also State *v.* Foster, 1 Pennew. 289, 40 Atl. 939.

Nebraska.— State *v.* Culver, (1904) 97 N. W. 1015.

England.— Reg. *v.* Norman, C. & M. 501, 41 E. C. L. 274.

Unlawful declaration of dividends.— In a prosecution of the president of an insolvent corporation for embezzlement in the declaration and receipt of dividends from certain funds of the corporation, evidence that defendant and his co-directors believed and were advised by counsel that they were authorized to declare and receive dividends from such funds was admissible; but evidence that other like companies had been accustomed to divide the proceeds of such funds among their stockholders was immaterial. Taylor *v.* Com., 75 S. W. 244, 25 Ky. L. Rep. 374.

Absence of concealment.— The fact that the appropriation was made without any attempt at concealment is no defense of itself. People *v.* Connelly, (Cal. 1894) 38 Pac. 42. See, however, Reg. *v.* Norman, C. & M. 501, 41 E. C. L. 274.

Good faith.— The claim must have been asserted in good faith, else it is no defense. State *v.* Reilly, 4 Mo. App. 392; State *v.* Lewis, 31 Wash. 75, 71 Pac. 778. *Compare* Reg. *v.* Norman, C. & M. 501, 41 E. C. L. 274.

Subsequent claim.—On trial of a city treasurer for embezzlement of public moneys, evidence that, after the conversion of the moneys and an admission of inability to pay the amount due the city, he took the advice of counsel, who assured him that he need not account because the city could not recover the money in a civil action was properly rejected. State *v.* Patterson, 66 Kan. 447, 71 Pac. 860.

Right to commissions as defense see *supra*, II, B, 2; II, I, 1.

71. State *v.* Healy, 48 Mo. 531.

72. *Delaware.*—State *v.* Sienkiewiez, (1902) 55 Atl. 346, holding that where a contract of bailment was void because attempted to be made on Sunday there was nevertheless a bailment sufficient to render the bailee liable for embezzlement as bailee.

Indiana.—Woodward *v.* State, 103 Ind. 127, 2 N. E. 321.

Kansas.— State *v.* Patterson, 66 Kan. 447, 71 Pac. 860, holding that on trial of a city treasurer for fraudulent conversion of public moneys, it is no defense that he collected such moneys from persons engaged in unlawful traffic in intoxicating liquors, under an arrangement between such persons and the

9. Invalidity of Security Embezzled. A defendant is estopped to deny the validity of the security which he is accused of having embezzled.[73]

10. Legality of Corporate Existence. On an indictment against an officer of a corporation for embezzlement, the question whether the corporation was organized strictly in conformity with the requirements of the statutes is not a proper subject of inquiry, and defendant cannot be heard to contradict its legal existence.[74]

11. Legality of Corporate Acts. It is no defense to an indictment for embezzling personal property alleged to belong to a corporation that the law disables such a corporation from owning personalty or taking liens thereon. The question of *ultra vires* cannot be considered.[75] Similarly it is immaterial in a prosecution against an agent for embezzling money of a foreign corporation, whether the corporation was legally doing business in the state or not.[76]

12. Complicity of Other Officers. It is no defense to the prosecution of a bank officer for the embezzlement of its funds that other officers of the bank were in complicity with him, and that false entries were made in his books with their knowledge and approval, for the purpose of deceiving the state banking department.[77]

13. Liability of Principal to Account to Third Person. It is no defense to the prosecution of an agent charged with the embezzlement of his principal's money that the principal is bound to account to another for the money embezzled,[78] or that he had acquired it unlawfully or wrongfully.[79]

14. Extension of Time For Settlement. It is no defense to a prosecution for embezzlement that time has been accorded to defendant in which to make good his shortage.[80]

15. Payment to Partner. It is no defense to a prosecution for the embezzlement of the proceeds of goods consigned to a partnership for sale on commission

city under which such persons secured immunity from prosecution.

Massachusetts.— Com. *v.* Cooper, 130 Mass. 285.

Missouri.— State *v.* Shadd, 80 Mo. 358.

See 18 Cent. Dig. tit. "Embezzlement," § 35.

Compare Com. *v.* Shissler, 7 Pa. Dist. 344, to the effect that a stock transaction on margin is not necessarily illegal, and an indictment charging embezzlement arising out of such contract will not be quashed on the ground of illegality.

Evasion of law.— The fact that the prosecutrix showed some anxiety lest the poor authorities of the city in which she lived should learn that she was the owner of the money alleged to have been stolen could not be shown as a defense. People *v.* McHale, 61 Hun (N. Y.) 618, 15 N. Y. Suppl. 496.

73. People *v.* Royce, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524, holding that the fact that a draft which defendant was alleged to have embezzled was drawn under the act of congress of Aug. 27, 1888 (Suppl. U. S. Rev. St. 617), for the support of disabled soldiers and sailors, and was made payable to the order of the governor instead of the state treasurer, as required by law, is no defense, as defendant is estopped to deny the validity of the draft, or that the money belonged to the soldiers' home of which he was treasurer.

Instruments obtained by fraud.— If the execution of a deed of mortgage has been procured by mere fraud, the person who executed it may lawfully take it into his possession wherever he can find it; but if it was executed for a valuable consideration, even though the full sum named therein was not actually due, it is the property of the mortgagee, and if the mortgagor afterward obtains possession of it from a person with whom it has been deposited, for the purpose of conveying the same to the mortgagee, and instead of so conveying it fraudulently and feloniously converts the same to his own use, knowing that he has no right to retain it, he may be convicted of embezzlement. Com. *v.* Concannon, 5 Allen (Mass.) 502.

74. Shinn *v.* Com., 32 Gratt. (Va.) 899. See also Kossakowski *v.* People, 177 Ill. 563, 53 N. E. 115.

75. Leonard *v.* State, 7 Tex. App. 417, in which the corporation was a national bank.

76. *Indiana.*— State *v.* Tumey, 81 Ind. 559.

Michigan.— People *v.* Hawkins, 106 Mich. 479, 64 N. W. 736.

New Jersey.— State *v.* Reynolds, 65 N. J. L. 424, 47 Atl. 644.

Ohio.— State *v.* Pohlmeyer, 59 Ohio St. 491, 52 N. E. 1027.

Vermont.— State *v.* Hopkins, 56 Vt. 250.

77. Humphrey *v.* People, 18 Hun (N. Y.) 393.

78. Campbell *v.* State, 35 Ohio St. 70.

79. State *v.* Hoshor, 26 Wash. 643, 67 Pac. 386.

80. State *v.* Thomson, 155 Mo. 300, 55 S. W. 1013; Com. *v.* Fitzpatrick, 8 Phila. (Pa.) 613.

that defendant paid over the money arising on a sale to his partner, who converted it to his own use.[81]

16. CLAIM OF LIEN BY INNKEEPER. It is no defense to a prosecution for embezzlement that the accused, a hotel-keeper, sold the property under a claim of lien upon it as baggage, for the owner's bill, since an innkeeper's lien gives no right to sell baggage.[82]

17. AGREEMENT TO TURN STATE'S EVIDENCE. An agreement for immunity in consideration of defendant's turning state's evidence, made with the prosecuting officer alone without the court's advice or consent, affords defendant no protection in the event of his being placed on trial in violation of the agreement.[83]

18. MISAPPROPRIATION BY THIRD PERSON. It is legitimate for defendant to prove that the fund alleged to have been embezzled by him was misappropriated, without his knowledge or consent, by a third person, to whose control he had subjected it.[84]

C. Persons Liable. Under a statute defining and punishing the offense of embezzling public money, which makes any participation in the act itself an act of embezzlement, any person aiding or participating in the conversion of public money by an officer intrusted with it is guilty of embezzlement, although not himself an officer intrusted therewith.[85]

IV. INDICTMENT OR INFORMATION.[86]

A. In General. Simultaneous or successive embezzlements may be prosecuted separately.[87]

B. Requisites and Sufficiency — 1. IN GENERAL. An indictment or information for embezzlement must set forth facts sufficient to constitute the statutory offense, and to notify the accused of the issue he has to meet. Unless it does this it charges nothing on which an issue can be raised by a plea of not guilty.[88]

81. State v. Crosswhite, 130 Mo. 358, 32 S. W. 991, 51 Am. St. Rep. 571.

82. People v. Husband, 36 Mich. 306. And see INNKEEPERS.

83. Whitney v. State, 53 Nebr. 287, 73 N. W. 696.

84. Burnett v. State, 62 N. J. L. 510, 41 Atl. 719.

85. Mills v. State, 53 Nebr. 263, 73 N. W. 761; Brown v. State, 18 Ohio St. 496. See also Noble v. State, 59 Ala. 73; Thomas v. State, (Tex. Cr. App. 1903) 73 S. W. 1045.

On the unlawful loan of public moneys by a public officer to persons having knowledge of the fact, both lender and borrower are principals and equally guilty, under the act of congress of Aug. 6, 1846 (9 U. S. St. at L. 63). U. S. v. Hartwell, 26 Fed. Cas. No. 15,318, 3 Cliff. 221.

86. See, generally, INDICTMENTS AND INFORMATIONS.

87. Com. v. Pratt, 137 Mass. 98; Com. v. Butterick, 100 Mass. 1, 97 Am. Dec. 65 (both holding that a person who embezzles several articles at one time may be indicted for the embezzlement of each separately); Ricord v. Central Pac. R. Co., 15 Nev. 167; *Ex p.* Ricord, 11 Nev. 287 (both holding that successive embezzlements constitute separate offenses and may be prosecuted separately).

88. *Alabama.*— Lang v. State, 97 Ala. 41, 12 So. 183.

California.— People v. Gale, 77 Cal. 120, 19 Pac. 231.

Georgia.— Boyd v. State, 111 Ga. 804, 35 S. E. 675.

Kentucky.— Johnson v. Com., 5 Bush 430.

Maine.— State v. Whitehouse, 95 Me. 179, 49 Atl. 869.

Massachusetts.— Com. v. Simpson, 9 Metc. 138.

Mississippi.— State v. Gillis, 75 Miss. 331, 24 So. 25.

Missouri.— State v. Burks, 159 Mo. 568, 60 S. W. 1100.

New Jersey.— State v. Reynolds, 65 N. J. L. 424, 47 Atl. 644.

New York.— People v. Allen, 5 Den. 76.

Pennsylvania.— Com. v. Fahnestock, 4 Pa. Dist. 297, 15 Pa. Co. Ct. 598; Com. v. Gerdemann, 11 Phila. 397; Com. v. Holtenstein, 2 Woodw. 477.

Texas.— Templeton v. State, (Cr. App. 1900) 57 S. W. 831.

Utah.— People v. Hill, 3 Utah 334, 3 Pac. 75.

Wyoming.— McCann v. U. S., 2 Wyo. 274.

United States.— *In re* Grin, 112 Fed. 790; Webb v. York, 79 Fed. 616, 25 C. C. A. 133.

England.— Rex v. Johnson, 3 M. & S. 539; Rex v. Crighton, R. & R. 45.

See 18 Cent. Dig. tit. "Embezzlement," § 37.

For forms of indictments and informations see, generally, cases cited *supra*, this note. And see State v. Butler, 26 Minn. 90, 1 N. W. 821; Coats v. People, 4 Park. Cr. (N. Y.) 662; State v. Fain, 106 N. C. 760, 11 S. E.

Where the statute makes the offense therein denounced larceny, an indictment under the statute which charges the accused with larceny is sufficient,[89] and in England an indictment on the statute must contain the requisites of an indictment for larceny at common law.[90] On the other hand, where the statute enacts that embezzlement shall be punished as larceny, a charge of larceny in an indictment for embezzlement may be rejected as surplusage.[91] It is not necessary to negative matters of defense.[92]

2. LANGUAGE OF STATUTE — a. In General. An indictment or information for embezzlement which charges the facts constituting the crime in the words of the statute, or in words of equivalent import or more extensive signification which necessarily include the words of the statute, is sufficient;[93] but where the statute simply designates the offense and does not describe or name its constituent elements, it is not sufficient to charge the offense merely in the language of the

593; State *v.* Taylor, 7 S. D. 533, 64 N. W. 548; State *v.* Turner, 10 Wash. 94, 38 Pac. 864; Archbold Cr. Pl. (5th Am ed.) 329.

For form of complaint before justice see State *v.* Knox, 17 Nebr. 683, 24 N. W. 382.

A general allegation of embezzlement in an information is good under Mich. Comp. Laws, § 7811. People *v.* Bringard, 39 Mich. 22, 33 Am. Rep. 344.

An indictment which charges a fiduciary relation between defendant and another; that defendant by virtue thereof received a note of the value of five dollars on account of his employer; and that he fraudulently embezzled and made away with the note is sufficient under N. C. Code, §§ 1014, 1020, as to embezzlement, and § 1183, which provides that it shall be sufficient if the indictment express the charge in an intelligible manner, and sufficient matter appears to enable the court to proceed to judgment. State *v.* Fain, 106 N. C. 760, 11 S. E. 593.

Formal defects.— The failure of an indictment to allege that three different days on which sums were embezzled were within six months of each other, as required by statute, is a formal defect, cured by a statute requiring defects of form to be raised before the jury is sworn, where the respective dates are set out, and show that they were within six months. Com. *v.* Hill, 2 Pearson (Pa.) 432, 4 Luz. Leg. Obs. (Pa.) 52, 5 Luz. Leg. Reg. (Pa.) 241. But see Reg. *v.* Noake, 2 C. & K. 620, 61 E. C. L. 620; Reg. *v.* Purchase, C. & M. 617, 41 E. C. L. 335.

Surplusage.— Where an indictment charged that defendant was the agent and attorney in fact of A E S, "who appointed said O. P. Taylor her said agent and attorney in fact under the name of A. E. Livingston," it was held that the words quoted could be rejected as surplusage, and any uncertainty therein disregarded, but that it was sufficiently clear that it was A E S who acted under the name of A E L. Taylor *v.* State, 29 Tex. App. 466, 499, 16 S. W. 302.

89. State *v.* Butler, 26 Minn. 90, 1 N. W. 821. See also State *v.* New, 22 Minn. 76; People *v.* McHale, 15 N. Y. Suppl. 496. *Compare* State *v.* Sweet, 2 Oreg. 127, where it was held that, although Oreg. Rev. St. p. 216, § 22, calls embezzlement "larceny," an indictment is good which, after describing in the words of the statute the act of an agent fraudulently converting the money of his employer, names the offense "embezzlement."

The common-law form of indictment is sufficient to sustain a conviction of larceny under a statute making a fraudulent appropriation of property by a bailee larceny. Truslow *v.* State, 95 Tenn. 189, 31 S. W. 987 [*citing* Defrese *v.* State, 3 Heisk. (Tenn.) 53, 8 Am. Rep. 1].

"Feloniously did steal, take, and carry away" is a necessary allegation. Com. *v.* Pratt, 132 Mass. 246.

90. McGregor's Case, 3 B. & P. 106, 2 East P. C. 576, R. & R. 17.

91. State *v.* Lanier, 89 N. C. 517.

92. State *v.* Hayes, 59 Kan. 61, 51 Pac. 905; State *v.* Nicholson, 67 Md. 1, 8 Atl. 817; Hemingway *v.* State, 68 Miss. 371, 8 So. 317; State *v.* Kasper, 5 Wash. 174, 31 Pac. 636.

93. *Alabama.*— Bell *v.* State, 139 Ala. 124, 35 So. 1021; Huffman *v.* State, 89 Ala. 33, 8 So. 28.

Arkansas.— Wood *v.* State, 47 Ark. 488, 1 S. W. 709.

California.—People *v.* Gordon, 133 Cal. 328, 65 Pac. 746, 85 Am. St. Rep. 174; People *v.* Page, 116 Cal. 386, 48 Pac. 326; People *v.* Garcia, 25 Cal. 531; People *v.* Poggi, 19 Cal. 600.

Colorado.— Heller *v.* People, 2 Colo. App. 459, 31 Pac. 773.

Georgia.— Keys *v.* State, 112 Ga. 392, 37 S. E. 762, 81 Am. St. Rep. 63.

Illinois.— Ker *v.* People, 110 Ill. 627, 51 Am. Rep. 706; Lycan *v.* People, 107 Ill. 423.

Indiana.— Dean *v.* State, 147 Ind. 215, 46 N. E. 528; Stropes *v.* State, 120 Ind. 562, 22 N. E. 773.

Iowa.— State *v.* Jamison, 74 Iowa 602, 38 N. W. 508.

Louisiana.— State *v.* Jones, 109 La. 125, 33 So. 108; State *v.* Fricker, 45 La. Ann. 646, 12 So. 755; State *v.* Washington, 41 La. Ann. 778, 6 So. 633.

Maine.— State *v.* Walton, 62 Me. 106.

Massachusetts.— Com. *v.* Concannon, 5 Allen 502.

Missouri.— State *v.* Lipscomb, 160 Mo. 125, 60 S. W. 1081; State *v.* Adams, 108 Mo. 208, 18 S. W. 1000; State *v.* Noland, 111 Mo. 473, 19 S. W. 715; State *v.* Arnold, (Sup. 1886) 2 S. W. 269.

statute, without alleging the facts and circumstances more particularly.[94] Where the terms of the statute are broader than the intent of the legislature, the indictment must be so drawn as to effectuate the intention of the legislature by which the statute was framed;[95] but when the terms of the act are clear and unequivocal, there is no authority by which courts may narrow its prohibition or limit its operation.[96]

b. Negativing Exceptions. Where an exception is contained in the same clause of the act creating the offense, the indictment must show negatively that defendant does not come within the exception.[97]

3. CERTAINTY — a. General Rule. An indictment or information for embezzlement must allege with certainty such particulars as will furnish defendant with definite knowledge of the charge against him.[98]

Nevada.— State *v.* Trolson, 21 Nev. 419, 32 Pac. 930.

New Jersey.— State *v.* Reynolds, 65 N. J. L. 424, 47 Atl. 644; State *v.* Stimson, 24 N. J. L. 9, 478.

New York.— People *v.* Dorthy, 20 N. Y. App. Div. 308, 46 N. Y. Suppl. 970; People *v.* McHale, 15 N. Y. Suppl. 496.

Pennsylvania.—Com. *v.* Hill, 2 Pearson 432, 4 Luz. Leg. Obs. 52, 5 Luz. Leg. Rep. 241.

Texas.— Gibbs *v.* State, 41 Tex. 491. See also Crump *v.* State, 23 Tex. App. 615, 5 S. W. 182.

Utah.— People *v.* Hill, 3 Utah 334, 3 Pac. 75.

Washington.— State *v.* Turner, 10 Wash. 94, 38 Pac. 864; State *v.* Whiteman, 9 Wash. 402, 37 Pac. 659.

England.— Jones' Case, 2 East P. C. 576.

Permissible changes.— An indictment for embezzlement, in the words of La. Rev. St. § 905, defining the crime, with only such changes as are absolutely requisite to fit the statute into the frame of an indictment, is sufficient. State *v.* Jones, 109 La. 125, 33 So. 108.

94. McCann *v.* U. S., 2 Wyo. 274, holding that where an indictment merely charging defendant with embezzling, stealing, and purloining certain articles, without alleging the facts more particularly, charges a mere conclusion of law and is defective, although using the language of the statute. See also State *v.* Brandt, 41 Iowa 593, in which it is said, in the concurring opinion of Miller, C. J., and Cole, J., that where the statute defining an offense describes it in terms which constitute simply a legal conclusion, it is not sufficient to charge the offense in the language of the statute.

95. Stropes *v.* State, 120 Ind. 562, 22 N. E. 773.

96. State *v.* Stimson, 24 N. J. L. 9.

97. State *v.* Lanier, 88 N. C. 658. See also State *v.* Wilson, 101 N. C. 730, 7 S. E. 872, in which it was held that an averment that defendant when committing the act was not within, that is, was of, the age of eighteen years or more, thus negativing the idea that she was under sixteen years of age — the statute excepting persons under the age of sixteen years — did not invalidate the indictment, although the negation went beyond the statutory requirement, since the greater includes the less.

For form of indictment containing negation of exception see State *v.* Wilson, 101 N. C. 730, 7 S. E. 872.

98. *California.*— San Francisco *v.* Randall, 54 Cal. 408, construing Pen. Code, § 1476.

Georgia.— Hoyt *v.* State, 50 Ga. 313.

Indiana.— State *v.* Sarlls, 135 Ind. 195, 34 N. E. 1129.

Louisiana.— State *v.* Palmer, 32 La. Ann. 565.

Maryland.— State *v.* Nicholson, 67 Md. 1, 8 Atl. 817.

Massachusetts.— Com. *v.* Pratt, 137 Mass. 98; Com. *v.* Simpson, 9 Metc. 138.

Minnesota.— State *v.* Butler, 26 Minn. 90, 1 N. W. 821.

Missouri.— State *v.* Grisham, 90 Mo. 163, 2 S. W. 223.

New Hampshire.— State *v.* Messenger, 58 N. H. 348.

Pennsylvania.— Com. *v.* Koons, 1 Kulp 134.

Washington.— State *v.* Whitworth, 30 Wash. 47, 70 Pac. 254.

See 18 Cent. Dig. tit. "Embezzlement," § 38.

Instances.— An indictment containing in one count so much of the language of two sections of the statute of embezzlement as to leave it uncertain which of two different crimes of embezzlement is charged is insufficient. State *v.* Messenger, 58 N. H. 348. Similarly where each count of the indictment leaves it doubtful of which of two crimes defendant is charged, the indictment is demurrable. Com. *v.* Pratt, 137 Mass. 98. An indictment that the accused "did . . . receive and possess himself of divers sums of money from divers persons, amounting in the whole to" a certain sum is defective, in not alleging distinct acts of embezzlement. Com. *v.* Koons, 1 Kulp (Pa.) 134, 137.

"Certainty, to a certain intent in general, is all that is required in indictments, that is to say, the Court will presume in favor of the pleader, every proposition which by reasonable intendment is impliedly included in the pleading, though not expressed" (State *v.* Nicholson, 67 Md. 1, 4, 8 Atl. 817); and in any event it is important that the court should carefully avoid the extreme of requiring such particularity as effectually to shield the guilty and defeat the ends of justice (State *v.* Stimson, 24 N. J. L. 478). So if all the essential elements of the offense are alleged in the indictment, the judgment should

b. Bill of Particulars. Where, by statute, it is permissible to allege the offense in a general way, a bill of particulars should be furnished defendant upon proper application by him.[99]

4. JOINDER. The general rules of criminal pleading apply to indictments for embezzlement with reference to joinder of counts and election.[1]

5. PARTICULAR AVERMENTS — a. Intent.[2] Where the intent with which the act is committed is an essential element of the offense, an indictment or information for embezzlement must contain an averment of intent;[3] but where the offense is

not be arrested after trial and verdict for any mere technical vagueness or uncertainty. Thalheim *v.* State, 38 Fla. 169, 20 So. 938.

99. Thalheim *v.* State, 38 Fla. 169, 20 So. 938. See also Com. *v.* Roberts, 22 Pa. Co. Ct. 214; Rex *v.* Bootyman, 5 C. & P. 300, 24 E. C. L. 576; Rex *v.* Hodgson, 3 C. & P. 422, 14 E. C. L. 642.

1. Hutchinson *v.* Com., 82 Pa. St. 472; State *v.* Palmer, 32 La. Ann. 565; Com. *v.* Miller, 20 Pa. Co. Ct. 183, all holding that an indictment which charges distinct offenses in one count is void for duplicity.

Different forms of same offense.— An indictment for embezzlement is not bad because it consists of two counts, where it does not describe two distinct offenses, but merely different forms of the same offense. State *v.* Gilmore, 110 Mo. 1, 19 S. W. 218; Hutchinson *v.* Com., 82 Pa. St. 472; Com. *v.* Leisenring, 11 Phila. (Pa.) 389. See also Heineman *v.* State, 22 Tex. App. 44, 2 S. W. 619; State *v.* Blue, 17 Utah 175, 53 Pac. 978. But see State *v.* Palmer, 32 La. Ann. 565, in which the indictment was held bad under La. Rev. St. § 905, relating to distinct cases of embezzlement and breach of trust.

Embezzlement and larceny may be joined in two counts of the same indictment. Mayo *v.* State, 30 Ala. 32; Com. *v.* Simpson, 9 Metc. (Mass.) 138; Reg. *v.* Holman, 9 Cox C. C. 201, 8 Jur. N. S. 1082, 6 L. T. Rep. N. S. 474, L. & C. 177, 10 Wkly. Rep. 718; Rex *v.* Johnson, 3 M. & S. 539.

Election.— Where an indictment contains counts for both embezzlement and larceny, but only one offense is meant to be charged, the court will not compel prosecutor to elect on which count to proceed. State *v.* Porter, 26 Mo. 201. See also Ker *v.* People, 110 Ill. 627, 51 Am. Rep. 706. *Compare* Reg. *v.* Holman, 9 Cox C. C. 201, 8 Jur. N. S. 1082, L. & C. 177, 6 L. T. Rep. N. S. 474, 10 Wkly. Rep. 718.

2. **Intent as element of offense** see *supra*, I, B.

3. *Georgia.*— Hoyt *v.* State, 50 Ga. 313; Snell *v.* State, 50 Ga. 219.

Indiana.— Stropes *v.* State, 120 Ind. 562, 22 N. E. 773 (holding, under the act of March 5, 1883, making it the duty of a county officer to pay over to his successor all moneys remaining in his hands as such officer, and declaring him guilty of embezzlement for failure to do so, that an indictment, in addition to the words of the statute, must allege that the act charged was done feloniously); Beaty *v.* State, 82 Ind. 228.

Kentucky.— Com. *v.* Wilson, 7 Ky. L. Rep. 666.

Massachusetts.— Com. *v.* Pratt, 132 Mass. 246.

New Jersey.— State *v.* Lyon, 45 N. J. L. 272.

United States.— U. S. *v.* Voorhees, 9 Fed. 143.

See 18 Cent. Dig. tit. "Embezzlement," § 40.

For sufficiency of averment of intent see the following cases:

California.— People *v.* Garcia, 25 Cal. 531, to the effect that an indictment which charges the offense committed by a servant in withdrawing with property intrusted to him by his employer, with intent to steal the same, in the language of the statute, is sufficient, without using the word "feloniously."

Kansas.— State *v.* Patterson, 66 Kan. 447, 71 Pac. 860; State *v.* Combs, 47 Kan. 136, 27 Pac. 818, in which it was held that an information which alleges that a bailee of money unlawfully and feloniously embezzled and converted it to his own use, sufficiently characterizes the intent with which the offense was committed. See also State *v.* Smith, 38 Kan. 194, 16 Pac. 254.

Missouri.— State *v.* Noland, 111 Mo. 473, 486, 19 S. W. 715, to the effect that an indictment charging that defendant "did unlawfully, fraudulently and feloniously convert to his own use and embezzle," a certain sum, is sufficient, under Rev. St. § 3555, which does not in terms make the criminal intent an element of the crime, but merely denounces the guilt of one who "converts to his own use."

Ohio.— Mitchell *v.* State, 21 Ohio Cir. Ct. 24, 11 Ohio Cir. Dec. 446, to the effect that "did unlawfully and fraudulently embezzle and convert" is sufficient, without adding "with intent to embezzle," etc.

South Carolina.— State *v.* Shirer, 20 S. C. 392, 408, construing Gen. St. § 2493, which declares that any person committing a breach of trust with a fraudulent intent shall be held guilty of larceny, and holding an indictment sufficient which charged that defendant "did unlawfully and feloniously commit a breach of trust with fraudulent intent in this," and then stated the facts.

Texas.— Purcelly *v.* State, 29 Tex. App. 1, 13 S. W. 993 (in which the intent to deprive the owner having been averred it was held unnecessary to charge an intent to appropriate, under Pen. Code, art. 742*a*); Bridgers *v.* State, 8 Tex. App. 145 (to the effect that an indictment charging that defendant did "'embezzle, fraudulently misapply, and convert to his own use' certain chattels," is not objectionable because the embezzlement and

complete irrespective of a criminal intent, no averment of intent need be inserted.[4]

b. Description of Property — (i) *In General.* An indictment or information for embezzlement should describe the property alleged to have been embezzled with such certainty as to identify it, and give defendant full and fair information as to the charge, and be a bar against another prosecution. The same, but no greater, particularity of description is required as in an indictment for larceny.[5]

conversion were not characterized as fraudulent, and the fraudulent intent directly averred, since the indictment follows the language of the state (Pen. Code, art. 771*a*), and the terms employed import a fraudulent intent *ex vi termini*.

United States.— U. S. *v.* Forrest, 25 Fed. Cas. No. 15,131, 3 Cranch C. C. 56, to the effect that the word "feloniously" will not supply the place of "fraudulently" in an indictment under Act Cong. March 3, 1825, c. 65, § 16 (14 U. S. St. at L. 118), punishing any one employed in the bank of the United States who shall "fraudulently embezzle," etc.

"Feloniously," when the offense is a felony, should be used, although it is sufficient if it qualify the concluding averment of "steal and take." Rex *v.* Crighton, R. & R. 45. Where the offense is only a misdemeanor, however, an indictment need not aver that the criminal act was done "feloniously." State *v.* Hill, 91 N. C. 561.

4. Thalheim *v.* State, 38 Fla. 169, 20 So. 938 (holding under the Florida statute that intent must be alleged where the offense charged consists in the taking or secreting of property, but need not be alleged in an indictment for embezzlement); State *v.* Trolson, 21 Nev. 419, 32 Pac. 930; State *v.* Reynolds, 65 N. J. L. 424, 47 Atl. 644; State *v.* Stimson, 24 N. J. L. 9. *Compare* Stropes *v.* State, 120 Fed. 562, 22 N. E. 773.

5. *California.*—People *v.* Cox, 40 Cal. 275; People *v.* Peterson, 9 Cal. 313; People *v.* Cohen, 8 Cal. 42.

Florida.— Grant *v.* State, 35 Fla. 581, 17 So. 225, 48 Am. St. Rep. 263.

Louisiana.— State *v.* Muston, 21 La. Ann. 442; State *v.* Edson, 10 La. Ann. 229.

Massachusetts.— Com. *v.* Butterick, 100 Mass. 1, 97 Am. Dec. 65; Com. *v.* Smart, 6 Gray 15; Com. *v.* Merrifield, 4 Metc. 468. See also Com. *v.* Pratt, 137 Mass. 98.

Minnesota.— State *v.* Rue, 72 Minn. 296, 75 N. W. 235.

New York.— People *v.* Burr, 41 How. Pr. 293. *Compare* Bork *v.* People, 91 N. Y. 5.

Texas.— Duncan *v.* State, (Cr. App. 1902) 70 S. W. 543.

United States.— See also U. S. *v.* Vorhees, 9 Fed. 143.

England.— Reg. *v.* Keena, L. R. 1 C. C. 113, 11 Cox C. C. 123, 37 L. J. M. C. 43, 17 L. T. Rep. N. S. 515, 16 Wkly. Rep. 375; McGregor's Case, 3 B. & P. 106, 2 East P. C. 576, R. & R. 17; Rex *v.* Aslett, 1 B. & P. N. R. 1, 2 Leach C. C. 954, 958, R. & R. 49; Rex *v.* Turneaus, R. & R. 249.

Compare Sanders *v.* State, 86 Ga. 717, 12 S. E. 1058, to the effect that less particularity of description is required in an indictment for embezzlement than in one for larceny under Code, § 4398.

See 18 Cent. Dig. tit. "Embezzlement," § 41.

"All that is necessary in this respect is that the property must be described with sufficient certainty to enable the court to determine that the property is, in law, the subject of the crimes alleged in the indictment, and to enable the jury to discern that the property proved to have been feloniously taken is the same which is mentioned in the indictment." U. S. *v.* Jones, 69 Fed. 973, 982. Accordingly the following descriptions have been held sufficient: "Gold metal of the value of $23,000" (U. S. *v.* Jones, *supra*); "certain books, letter-files, knives, bank-shears, slates, and sealing wax to about the value of forty dollars" (Mayo *v.* State, 30 Ala. 32); "15 head of beef cattle, worth $20.00 per head" (Sanders *v.* State, 86 Ga. 717, 12 S. E. 1058); indictment charging agent, "for the purpose of collecting money on a certain lottery ticket," with embezzling the money, but not particularly describing ticket (Woodward *v.* State, 103 Ind. 127, 2 N. E. 321); "bonds of the United States of America, for the payment of money, issued by authority of law" of a specified "aggregate value" (Com. *v.* Butterick, 100 Mass. 1, 97 Am. Dec. 65); "fifty pieces of paper, each of a certain stated value" (Com. *v.* Parker, 165 Mass. 526, 43 N. E. 499); "thirteen hundred and twenty pairs of shoes, each pair of the value of one dollar" (Com. *v.* Shaw, 145 Mass. 349, 14 N. E. 159); "a deed of mortgage of certain land situate in Roxbury, in the county of Norfolk, before then made and executed by the said C. [defendant] to one D., and delivered to said D. by said C., of the property, goods, and chattels of the said D., and of the value," etc. (Com. *v.* Concannon, 5 Allen (Mass.) 502); "certain United States 5-20 government bonds, which were valuable securities of the value of $5,000" (State *v.* Meyers, 68 Mo. 266).

Where it is impossible to give a very exact description of the property embezzled, the best description practicable should be given, and if it is indefinite a reason for not giving a better description should be stated. Grant *v.* State, 35 Fla. 581, 17 So. 225, 48 Am. St. Rep. 263. See also Fleener *v.* State, 58 Ark. 98, 23 S. W. 1; State *v.* Ward, 48 Ark. 36, 2 S. W. 191, 3 Am. St. Rep. 213; State *v.* Burks, 159 Mo. 568, 60 S. W. 1100.

(II) *MONEY*—(A) *In General.* While the best description of which the circumstances will admit should be given of money alleged to have been embezzled,[6] and if a more particular description than that given in the indictment is to the grand jurors unknown, that fact should be stated,[7] yet in most states it is not necessary that the indictment or information should specify the coin, number, date, or kind of money in question.[8]

Time of objection.— The omission to describe the property alleged to have been embezzled is a fatal objection at any stage of the case at which the same may be presented, including a motion in arrest of judgment. Grant *v.* State, 35 Fla. 581, 17 So. 225, 48 Am. St. Rep. 263. See also People *v.* Cox, 40 Cal. 275; Com. *v.* Smart, 6 Gray (Mass.) 15.

6. Noble *v.* State, 59 Ala. 73 (holding that an indictment charging that accused "knowingly converted, or applied to his own use, one hundred and eighty dollars, or other large sum of money" is bad for want of certainty to a common intent); People *v.* Cox, 40 Cal. 275 (holding that the omission to state any description or character whatever of the stolen money is a fatal objection, whenever presented during the progress of the case); Territory *v.* Maxwell, 2 N. M. 250.

7. *Arkansas.*— Fleener *v.* State, 58 Ark. 98, 23 S. W. 1; State *v.* Ward, 48 Ark. 36, 2 S. W. 191, 3 Am. St. Rep. 213 [*following* State *v.* Thompson, 42 Ark. 517; Barton *v.* State, 29 Ark. 68].

Kansas.— State *v.* Combs, 47 Kan. 136, 27 Pac. 818.

Maryland.— See State *v.* Denton, 74 Md. 517, 22 Atl. 305, in which a count describing the money stolen as a certain sum of "current money, a more particular description of which said money the jurors aforesaid have not and cannot give," was held too indefinite.

Missouri.—State *v.* Arnold, (1886) 2 S. W. 269.

South Carolina.— State *v.* Shirer, 20 S. C. 392.

See 18 Cent. Dig. tit. "Embezzlement," § 42.

Contra, by statute, see Taylor *v.* State, 29 Tex. App. 466, 16 S. W. 302.

8. *Alabama.*—Willis *v.* State, 134 Ala. 429, 33 So. 226; Walker *v.* State, 117 Ala. 42, 23 So. 149; Lang *v.* State, 97 Ala. 41, 12 So. 183 (holding that under Code (1886), § 3810, it is sufficient to describe the property in general terms as "money," "bank-notes," "checks," "bills of exchange," or other evidence of debt, "of" or "to about the amount of" a certain sum); Huffman *v.* State, 89 Ala. 33, 8 So. 28.

California.— People *v.* Cobler, 108 Cal. 538, 41 Pac. 401; People *v.* Treadwell, 69 Cal. 226, 10 Pac. 502; People *v.* Poggi, 19 Cal. 600 [*overruling* People *v.* Cohen, 8 Cal. 42], holding that the words "of the coin of the United States" are not necessary in an indictment which alleges that the property embezzled was of the value of so many dollars. But see People *v.* Peterson, 9 Cal. 313.

Georgia.— Jackson *v.* State, 76 Ga. 551; Bullock *v.* State, 10 Ga. 47, 54 Am. Dec. 369, holding that on an indictment against a bank officer for embezzlement from the bank, the description of the bank-bills by amounts, value, by what bank issued, and by whom signed and countersigned, is sufficient, without specifying the numbers and dates of the bills.

Iowa.— State *v.* Alverson, 105 Iowa 152, 74 N. W. 770.

Kentucky.— Jones *v.* Com., 13 Bush 356, holding that "one twenty-dollar note . . . being of the United States currency commonly called greenbacks" is a sufficient description under Code Cr. Proc. § 135.

Louisiana.— State *v.* Thompson, 32 La. Ann. 796; State *v.* Palmer, 32 La. Ann. 565; State *v.* Shonhausen, 26 La. Ann. 421; State *v.* Carro, 26 La. Ann. 377, holding that "the sum of one hundred dollars in paper currency of the United States" is a substantial compliance with Rev. St. § 1061. See also State *v.* Muston, 21 La. Ann. 442, in which, however, the indictment, which merely charged the embezzlement of eleven dollars, was held insufficient under Act (1855), § 82.

Massachusetts.—Com. *v.* Bennett, 118 Mass. 443. *Compare* Com. *v.* Sawtelle, 11 Cush. 142.

Missouri.— State *v.* Noland, 111 Mo. 473, 19 S. W. 715 (holding that it is not necessary in an indictment under Rev. St. (1889) § 4111, to allege that the money embezzled "was lawful money of the United States"); State *v.* Pratt, 98 Mo. 482, 11 S. W. 977; State *v.* Arnold, (1886) 2 S. W. 269.

Nebraska.— State *v.* Knox, 17 Nebr. 683, 24 N. W. 382.

New Mexico.— Territory *v.* Maxwell, 2 N. M. 250.

New York.— People *v.* Hearne, 20 N. Y. Suppl. 806. See also Gordon *v.* Hostetter, 37 N. Y. 99, which was an action for damages to recover the amount embezzled, and it was held that the action was maintainable without proving the specific property, as by distinguishing the money from other like coin or bills.

Pennsylvania.— Com. *v.* Leisenring, 11 Phila. 392. See also Com. *v.* Meads, 14 York Leg. Rec. 130.

South Carolina.— State *v.* Shirer, 20 S. C. 392.

Texas.— Dowdy *v.* State, (Cr. App. 1901) 64 S. W. 253; Taylor *v.* State, 29 Tex. App. 466, 16 S. W. 302. But see Reside *v.* State, 10 Tex. App. 675.

Wyoming.— Edelhoff *v.* State, 5 Wyo. 19, 36 Pac. 627.

See 18 Cent. Dig. tit. "Embezzlement," § 42.

Contra.—Dobson *v.* State, 51 Ark. 119, 10 S. W. 18; State *v.* Thompson, 42 Ark. 517;

(B) *Public Funds.* An indictment or information against a public officer for embezzlement is not bad for failure to specify particularly each fund charged to have been embezzled. It is sufficient to allege and prove the felonious conversion to his own use of any money that came into his possession or was under his control by virtue of his office.[9]

c. Value. An indictment or information for embezzlement must as a general rule state the value of the money or other property alleged to have been embezzled,[10] although this may be done approximately,[11] or in the aggregate.[12] Where, however, the punishment prescribed by the statute is fixed irrespective of the value of the property converted, its value need not be alleged;[13] and in some cases a distinction is drawn between legal tender and other property, and it has been held that an allegation of value is indispensable if property or bank-bills, not a legal tender, have been embezzled; but that where the allegation is of the embezzlement of so many dollars in money, the amount designated expresses the value, the presumption being that it was lawful money.[14]

State *v.* Stimson, 24 N. J. L. 9. See also Moore *v.* U. S., 160 U. S. 268, 16 S. Ct. 294, 40 L. ed. 422; McBride *v.* U. S., 101 Fed. 821, 42 C. C. A. 38.

In England before 7 & 8 Geo. IV, c. 29, § 48, however, it was necessary in all cases to state specifically some article embezzled. Rex *v.* Tyers, R. & R. 298; Rex *v.* Furneaux, R. & R. 249.

Value of money see *infra*, IV, B, 5, c.

9. *California.*—People *v.* Hamilton, (1893) 32 Pac. 526, to the effect that an allegation that moneys were received by defendant "in his official capacity" was the allegation of a fact which fixed their character as "public moneys," under Pen. Code, § 426.

Indiana.— Hollingsworth *v.* State, 111 Ind. 289, 12 N. E. 490.

Kansas.— State *v.* Smith, 13 Kan. 274.

Michigan.— People *v.* McKinney, 10 Mich. 54.

Minnesota.— State *v.* Munch, 22 Minn. 67.

Missouri.— State *v.* Arnold, (Sup. 1886) 2 S. W. 269.

Nevada.— State *v.* Carrick, 16 Nev. 120.

New Jersey.— State *v.* Bartholomew, 69 N. J. L. 160, 54 Atl. 231.

United States.—Dimmick *v.* U. S., 121 Fed. 638, 57 C. C. A. 664; U. S. *v.* Bornemann, 36 Fed. 257. *Compare* Moore *v.* U. S., 160 U. S. 268, 16 S. Ct. 294, 40 L. ed. 422; McBride *v.* U. S., 101 Fed. 821, 42 C. C. A. 38.

See 18 Cent. Dig. tit. "Embezzlement," § 42.

Contra.— Peacock *v.* State, 36 Tex. 647.

10. *Alabama.*— Noble *v.* State, 59 Ala. 73.

California.—People *v.* Peterson, 9 Cal. 313; People *v.* Cohen, 8 Cal. 42.

Florida.— Grant *v.* State, 35 Fla. 581, 17 So. 225, 48 Am. St. Rep. 263.

Georgia.— Cody *v.* State, 100 Ga. 105, 28 S. E. 106.

Michigan.—People *v.* Donald, 48 Mich. 491, 12 N. W. 669.

New Jersey.—State *v.* Stimson, 24 N. J. L. 9.

New York.— Bork *v.* People, 16 Hun 476. But see People *v.* Bork, 96 N. Y. 188 [*reversing* 31 Hun 360], to the effect that under Laws (1875), c. 19, the value of the property converted is not an element of the crime of embezzlement.

Texas.— Reside *v.* State, 10 Tex. App. 675.

See 18 Cent. Dig. tit. "Embezzlement," § 43.

11. Walker *v.* State, 117 Ala. 42, 23 So. 149; Britton *v.* State, 77 Ala. 202; State *v.* Ring, 29 Minn. 78, 11 N. W. 233; Gerard *v.* State, 10 Tex. App. 690; Rex *v.* Grove, 1 C. & P. 635, 1 Moody C. C. 447, 32 E. C. L. 796; Rex *v.* Carson, R. & R. 225.

12. Mayo *v.* State, 30 Ala. 32; Com. *v.* Butterick, 100 Mass. 1, 97 Am. Dec. 65; State *v.* Mook, 40 Ohio St. 588; Reg. *v.* Balls, L. R. 1 C. C. 328, 12 Cox C. C. 96, 40 L. J. M. C. 148, 24 L. T. Rep. N. S. 760, 19 Wkly. Rep. 876.

13. *Alabama.*— Washington *v.* State, 72 Ala. 272.

California.— People *v.* Salorse, 62 Cal. 139.

Illinois.— McDaniels *v.* People, 118 Ill. 301, 8 N. E. 687.

Kansas.— State *v.* Small, 26 Kan. 209.

Massachusetts.— See Com. *v.* Warner, 173 Mass. 541, 54 N. E. 353.

New York.— See People *v.* Bork, 96 N. Y. 188 [*reversing* 31 Hun 360].

14. Bartley *v.* State, 53 Nebr. 310, 73 N. W. 744; Mills *v.* State, 53 Nebr. 263, 73 N. W. 761; State *v.* Knox, 17 Nebr. 683, 24 N. W. 382; State *v.* Stimson, 24 N. J. L. 9, holding that the value of government coin alleged to have been embezzled need not be stated in the indictment.

Public funds.— An indictment against a state treasurer for embezzlement of state funds need not state the value of the funds embezzled, nor that the same was unknown to the jury. State *v.* Munch, 22 Minn. 67.

Bank-notes, checks, and bills of exchange. —"For the purposes of a description of the offence in the information, bank-notes, checks, bills of exchange and other securities for money may be treated and described as money; but such securities are or may be of uncertain value; there is no legal presumption that their actual value corresponds to the sum which they nominally represent, or to any other sum whatsoever. It becomes just as necessary to allege value, therefore, when securities were the subject of larceny, as in other cases. The fact of their being called money in the information can make

d. Ownership — (I) *In General.* An indictment or information for embezzlement must show the ownership of the property alleged to have been embezzled with the same particularity as in a prosecution for larceny.[15]

no difference. They are not money in fact; they may not have had the value of money; and there is nothing in the absence of the allegation and proof of value which can determine the grade of the offence." People *v.* Donald, 48 Mich. 491, 492, 12 N. W. 669.

15. *Alabama.*— Willis *v.* State, 134 Ala. 429, 33 So. 226; Washington *v.* State, 72 Ala. 272.

California.— People *v.* Van Ewan, 111 Cal. 144, 43 Pac. 520; People *v.* Treadwell, 69 Cal. 226, 10 Pac. 502.

Florida.— Grant *v.* State, 35 Fla. 581, 17 So. 225, 48 Am. St. Rep. 263; Alden *v.* State, 18 Fla. 187.

Georgia.— Haupt *v.* State, 108 Ga. 64, 33 S. E. 831.

Illinois.— Rauguth *v.* People, 186 Ill. 93, 57 N. E. 832.

Louisiana.— State *v.* Roubles, 43 La. Ann. 200, 9 So. 435, 26 Am. St. Rep. 179; State *v.* Palmer, 32 La. Ann. 565. But see State *v.* Fricker, 45 La. Ann. 755, 12 So. 755, construing Acts (1888), No. 31, amending Rev. St. § 905, and holding that an information against an agent for the embezzlement of money received for his principal or by virtue of his trust or employment need not allege the ownership of the thing embezzled, but is sufficient if it follows the words of the statute.

Maryland.— State *v.* Tracey, 73 Md. 447, 21 Atl. 366 [*citing* McGregor's Case, 2 Leach C. C. 938; Rex *v.* Beacall, 1 Moody C. C. 15].

Massachusetts.— Com. *v.* Butterick, 100 Mass. 1, 97 Am. Dec. 65.

Minnesota.— State *v.* Butler, 26 Minn. 90, 1 N. W. 821.

Mississippi.— Polkinghorne *v.* State, (1890) 7 So. 347.

Missouri.— State *v.* Mohr, 68 Mo. 303.

New Jersey.— State *v.* Barr, 61 N. J. L. 131, 38 Atl. 817; State *v.* Lyon, 45 N. J. L. 272.

North Dakota.— State *v.* Collins, 4 N. D. 433, 61 N. W. 467.

Oregon.— State *v.* Stearns, 28 Oreg. 262, 42 Pac. 615.

Pennsylvania.— Com. *v.* Haggel, 7 Kulp 10.

Texas.— State *v.* Longworth, 41 Tex. 162; Wise *v.* State, 41 Tex. 139; Smith *v.* State, 34 Tex. Cr. 265, 30 S. W. 236; Stallings *v.* State, 29 Tex. App. 220, 15 S. W. 716; Leonard *v.* State, 7 Tex. App. 417; Griffin *v.* State, 4 Tex. App. 390.

England.— McGregor's Case, 3 B. & P. 106, 2 East P. C. 576, R. & R. 17; Reg. *v.* Adey, 3 C. & K. 339, 4 Cox C. C. 208, 1 Den. C. C. 571, 14 Jur. 556, 19 L. J. M. C. 149; Reg. *v.* Marks, 10 Cox C. C. 367; Reg. *v.* Pritchard, 8 Cox C. C. 461, 7 Jur. N. S. 557, L. & C. 34, 30 L. J. M. C. 169, 4 L. T. Rep. N. S. 340, 9 Wkly. Rep. 579; Reg. *v.* Woolley, 4 Cox C. C. 255; Reg. *v.* Bull, 1 Cox C. C. 137; Reg. *v.* White, 8 C. & P. 742, 34 E. C. L. 995; Rex *v.* Hall, 1 Moody C. C. 474; Rex *v.* Jenson, 1 Moody C. C. 434; Rex *v.* Beacall, 1 Moody C. C. 15.

See 18 Cent. Dig. tit. "Embezzlement," § 44.

Associations.— It is not necessary for an information, charging an officer of an association with embezzlement, to state the persons composing the association. People *v.* Mahlman, 82 Cal. 585, 23 Pac. 145. See also Kossakowski *v.* People, 177 Ill. 563, 53 N. E. 115, in which it is said that this is especially true where the laws of the state, under which a joint-stock association assumes to act, provide that such associations shall be deemed corporations.

Building and loan associations.— The fact that the name of a corporation charged to be the owner of the money embezzled indicated that it was a building and loan association did not justify the inference that it was such in fact, so as to sustain the indictment as charging an offense, under Code, § 1918. State *v.* Ames, 119 Iowa 680, 94 N. W. 231.

Corporations.— An indictment against an officer or agent of a corporation for embezzlement of its property should allege its incorporation (Fairleigh *v.* Com., 5 Ky. L. Rep. 854; Smith *v.* State, 34 Tex. Cr. 265, 30 S. W. 236), and give its corporate name as fixed by law (Alden *v.* State, 18 Fla. 187; Price *v.* State, 41 Tex. 215). The charter or act of incorporation, or the fact that it was incorporated under the laws of any state or foreign power, need not be alleged. Smith *v.* State, 34 Tex. Cr. 265, 30 S. W. 236; Leonard *v.* State, 7 Tex. App. 417. Thus it has been held that an indictment charging the embezzlement of the property of an "incorporated company, to-wit, the Singer Manufacturing Company" is sufficient (Stallings *v.* State, 29 Tex. App. 220, 15 S. W. 716), and proof of the *de facto* existence of the corporation is all that is required (People *v.* Carter, 122 Mich. 668, 81 N. W. 924).

Infants.— Where a minor placed in the hands of a third person, to deliver to his father certain bounty money received for enlisting in the United States service, which the third person unlawfully appropriated to his own use, an indictment for embezzlement, describing the money as the property of the father, was sustained. Com. *v.* Norton, 11 Allen (Mass.) 110. The court, however, did not base its decision upon the father's legal ownership of his minor son's earnings, but rather upon the trust assumed by defendant under the direction of the minor, and the constructive ownership of the father created thereby.

Partnership.— An indictment for the embezzlement of the money of a copartnership need not set out the names of the individual partners, under Wagner St. Mo. p. 458, § 35. State *v.* Mohr, 68 Mo. 303. See also State *v.* Butler, 26 Minn. 90, 1 N. W. 821.

(II) *Public Property.* In a prosecution for the embezzlement of public property, the indictment or information should ordinarily state the ownership of the property, if known.[16]

e. Possession or Custody. Possession of the property by defendant, as distinguished from its mere custody, being one of the constituent elements of the offense, must be alleged in an indictment or information for embezzlement,[17]

Private persons. It is not necessary that an indictment for embezzlement from a private individual state that the party whose property was embezzled was a "private person." Spurlock v. State, (Tex. Cr. App. 1903) 77 S. W. 447.

Inconsistent allegations.— Where the conversion was part of one transaction, an indictment charging embezzlement of property belonging to a decedent's estate is not subject to a motion to quash because the property is alleged to have been in the administrator to collect, and also in the administrator generally; but the court may compel an election. Schintz v. People, 178 Ill. 320, 52 N. E. 903.

Misnomer.— An indictment for embezzlement by an officer of a beneficial association is not fatally defective because it names the association as the "Sons of Progress," whereas the name of the order was the "Independent Order of Sons of Progress." Com. v. Vola, 14 Wkly. Notes Cas. (Pa.) 289.

Ownership unascertained.— Where a sheriff collected the bid of a purchaser at a foreclosure sale and converted the same to his own use before the making of the order by the court directing to whom the amount should be paid, an information against him need not allege to whom the money belonged. Conley v. State, 46 Nebr. 187, 64 N. W. 708.

Time of ownership.— The title to the property need not be specially averred to be in the parties who intrusted it to defendant down to the time when the crime was committed. It is sufficient that ownership at the date of delivery be duly proved, and that the crime occurred while the trust upon which the property was delivered continued. Com. v. Butterick, 100 Mass. 1, 97 Am. Dec. 81.

16. [illegible] Brady v. Territory, 1 Okla. 87, 29 Pac. 1 (holding that an indictment for embezzlement of money which does not allege to whom the money belonged is bad on demurrer); Armstrong v. State, 143 Ind. 635, 42 N. E. 926; [illegible] State v. Carlson, 30 Kan. 248, 1 Pac. 137; [illegible] State, 35 Nebr. 787, 53 N. W. 680; State [illegible], 37 Nebr. 264, 55 N. W. 950; [illegible] State [illegible], 43 N. J. L. 299; [illegible] State, 29 Tex. Crim. App. 482, 16 S. W. 538; [illegible] 539, 4 [illegible] 886, 1 S. W. 886; [illegible] "Embezzlement," § 85; [illegible] U. S. v. Wilson, 8 Fed. Cas. No. 16,730, Baldw. 78, 1 Am. L. J. 1; [illegible] 1 Bish. Cr. Proc. § 558.

Several ownership.— Where the substance of the offense consists in the conversion of public money, an indictment for embezzlement from several municipalities need not state the amount belonging to each (Brown v. State, 18 Ohio St. 496); and the same is true where the money belongs to the state and a county (State v. Fliab, 62 Mo. 393).

Facts showing ownership.— An indictment against a county clerk for misappropriating money received by him on a liquor license, which failed to state that the license was granted by the county court, was held defective; the clerk himself having no authority to grant such license, and the state having no right to the money, if the license was granted without authority. Com. v. Wilson, 7 Ky. L. Rep. 666.

Name of owner.— An indictment charging the embezzlement of moneys of "the city of J., a municipal corporation of C. county," etc., is not fatally defective, although the act of incorporation of the city of San José provided for a city government, to be a body corporate by the name and style of "The Mayor and Common Council of the City of San José." People v. Potter, 35 Cal. 110. "An organized borough or village" is a good description of an organized village. Brown v. State, 18 Ohio St. 496.

For form of allegation as to ownership see Whitney v. State, 53 Nebr. 287, 73 N. W. 696.

17. Alabama.— Britton v. State, 77 Ala. 202.

Florida.— Grant v. State, 35 Fla. 581, 17 So. 225, 48 Am. St. Rep. 263, holding that an indictment for the embezzlement of the proceeds of property intrusted to defendant must allege that such proceeds came into his hands.

Georgia.— Robson v. State, 83 Ga. 166, 9 S. E. [illegible]

Massachusetts.— Com. v. Doherty, 127 Mass. 20.

Texas.— State v. Longworth, 41 Tex. 162; [illegible] State, (Cr. App. 1896) 38 S. W. 192. See also Taylor v. State, 29 Tex. App. 466, 16 S. W. 322, in which it was held that where the indictment charges the employment of the accused, and that he embezzled money which came into his hands "by virtue of his said agency and employment," it is not necessary to aver that at the time of the conversion and embezzlement the money was in his possession and under his control by virtue of his agency.

Washington.— State v. Kasper, 5 Wash. [illegible] Pac. 536.

United States.— U. S. v. Barnaman, 36 Fed. [illegible]

See 18 Cent. Dig. tit. "Embezzlement," § 60.

although by the weight of authority it need not be stated from whom the property was received.[18]

f. Capacity or Character in Which Property Was Received or Held — (i) *In General.* The capacity or character in which the money or other property alleged to have been embezzled was received or held by the accused, and the fact that it came into his possession by reason of such fiduciary relation, should be alleged in the indictment or information.[19]

An indictment against a bank officer under La. Rev. St. § 907, need not state that the officer had the actual custody or possession of the money embezzled or converted. State *v.* Palmer, 32 La. Ann. 565.

Sufficiency of allegation.—In an information for embezzlement, an averment that the money "had come into" the hands of defendant is sufficient. People *v.* Walker, 142 Cal. 90, 75 Pac. 658. Where both are used in the statute, an indictment for embezzlement is not vitiated by the omission of either "possession" or "care," the other being used. Ker *v.* People, 110 Ill. 627, 51 Am. Rep. 706.

For form of information alleging possession of borrower see State *v.* Kasper, 5 Wash. 174, 31 Pac. 636.

18. *Georgia.*— Hays *v.* State, 114 Ga. 25, 40 S. E. 13.

Louisiana.— State *v.* Mathis, 106 La. 263, 30 So. 834; State *v.* Tompkins, 32 La. Ann. 620.

Missouri.— State *v.* Crosswhite, 130 Mo. 358, 32 S. W. 991, 51 Am. St. Rep. 571; State *v.* Flint, 62 Mo. 393. But see State *v.* Grisham, 90 Mo. 163, 2 S. W. 223.

Montana.— State *v.* Fournier, 12 Mont. 235, 29 Pac. 824 [*disapproving* People *v.* Bailey, 23 Cal. 577].

North Carolina.— State *v.* Lanier, 89 N. C. 517.

England.— Rex *v.* Beacall, 1 C. & P. 454, 12 E. C. L. 265; Rex *v.* Jenson, 1 Moody C. C. 434. See also Rex *v.* Hodgson, 3 C. & P. 422, 14 E. C. L. 642. See, however, Rex *v.* Bootyman, 5 C. & P. 300, 24 E. C. L. 576, to the effect that the judge may upon proper application by defendant grant an order for particulars of the charge, which ought at least to state the persons from whom the money is alleged to have been received.

Contra.— Ricord *v.* Central Pac. R. Co., 15 Nev. 167; Nassitts *v.* State, 36 Tex. Cr. 5, 34 S. W. 957.

19. *Arkansas.*— Ritter *v.* State, 70 Ark. 472, 69 S. W. 262.

California.— People *v.* Cohen, 8 Cal. 42.

Florida.— Alden *v.* State, 18 Fla. 187, to the effect that the name of the office should be set out.

Georgia.— Sanders *v.* State, 86 Ga. 717, 12 S. E. 1058.

Illinois.— Kibs *v.* People, 81 Ill. 599 [*distinguishing* Stinson *v.* People, 43 Ill. 397; Welsh *v.* People, 17 Ill. 339, which were convictions for larceny, as at common law].

Indiana.— Dean *v.* State, 147 Ind. 215, 46 N. E. 528; State *v.* Matthews, 129 Ind. 281, 28 N. E. 703.

Kentucky.— Com. *v.* Barney, 74 S. W. 181, 24 Ky. L. Rep. 2352, holding that an indictment, although charging an offense in the language of the statute, is insufficient if it fails to show the relation in which the accused stood to the owner of the property converted.

Louisiana.— State *v.* Washington, 41 La. Ann. 778, 6 So. 633.

Maine.— State *v.* Whitehouse, 95 Me. 179, 49 Atl. 869; State *v.* Stevenson, 91 Me. 107, 39 Atl. 471.

Massachusetts.— See Com. *v.* Simpson, 9 Metc. 138; Com. *v.* Wyman, 8 Metc. 247; Com. *v.* Merrifield, 4 Metc. 468.

Michigan.— People *v.* Tryon, 4 Mich. 665.

New York.— People *v.* Allen, 5 Den. 76.

North Carolina.— State *v.* Keith, 126 N. C. 1114, 36 S. E. 169.

Ohio.— Mitchell *v.* State, 21 Ohio Cir. Ct. 24, 11 Ohio Cir. Dec. 446.

Texas.— State *v.* Johnson, 21 Tex. 775; Smith *v.* State, 38 Tex. Cr. 232, 42 S. W. 302. But see Evans *v.* State, 40 Tex. Cr. 54, 48 S. W. 194, to the effect that where the allegations contained in an indictment sufficiently state the relations of the parties, it is not defective for failing to allege, in the words of the statute, that the property came into the possession of the accused, or under his care, by virtue of his agency, office, or employment.

Washington.— Terry *v.* State, 1 Wash. 277, 24 Pac. 447.

England.— Rex *v.* Johnson, 3 M. & S. 539; Rex *v.* Crighton, R. & R. 45. See, however, Rex *v.* Piper, 65 J. P. 10, to the effect that an allegation that defendant was a trustee is sufficient under the Larceny Act (1861), § 80, and that it need not be alleged that he is a trustee "on some express trust created by some deed, will, or instrument in writing."

Canada.— Reg. *v.* Stansfield, 8 Montreal Leg. N. 123.

See 18 Cent. Dig. tit. "Embezzlement," § 47.

But see State *v.* Jamison, 74 Iowa 602, 38 N. W. 508.

In California an information for embezzlement which fully states the facts constituting the crime is good, although it does not designate accused as "bailee," "trustee," or "agent," or formally put him in any of the classes named in the statute. People *v.* Neyce, 86 Cal. 393, 24 Pac. 1091; People *v.* Johnson, 71 Cal. 384, 12 Pac. 261. *Compare* People *v.* Treadwell, 69 Cal. 226, 10 Pac. 502. Nor need the information necessarily set out the particulars constituting the fiduciary relation. People *v.* Goodrich, 142 Cal. 216, 75 Pac. 796.

Corporate officers.— Under Ky. St. 1899, § 1202, providing that if any officer of a

(II) *SERVANTS.* An indictment or information for embezzlement against a servant should charge him as such, and allege that the money or other property came into his possession by virtue of such employment or service.[20]

(III) *AGENTS.* In a prosecution for embezzlement against an agent, the indictment or information must allege the agency and that the money or other property came into his possession or was under his care by virtue thereof.[21]

corporation shall embezzle or convert funds of the corporation, or funds placed in his care as an officer, he shall be fined, etc., an indictment of the president of a corporation, charging that certain money came into his hands by virtue of his position, and that he converted the same fraudulently, etc., is sufficient. Taylor *v.* Com., 75 S. W. 244, 25 Ky. L. Rep. 374.

Surplusage.—Where an indictment charged defendant with embezzlement as secretary and treasurer and officer, it was held that the words "and officer" were mere surplusage, and not fatal. Com. *v.* Leisenring, 11 Phila. (Pa.) 392.

Duplicity.— An information charging accused with embezzling certain property received by him as "agent, servant, employee, and bailee" of the owner, is not objectionable on the ground of duplicity. State *v.* Lillie, 21 Kan. 728.

The purpose for which the property was intrusted need not be alleged. Territory *v.* Maxwell, 2 N. M. 250. *Contra,* Com. *v.* Smart, 6 Gray (Mass.) 15.

20. People *v.* Allen, 5 Den. (N. Y.) 76; Budd *v.* State, 3 Humphr. (Tenn.) 483, 39 Am. Dec. 189. See also Gravatt *v.* State, 25 Ohio St. 162, to the effect that, when a person in the employ of another is in the discharge of his duties subject to the immediate control and direction of his employer, he may in an indictment for embezzlement be described as a servant. And see Reg. *v.* White, 8 C. & P. 742, 34 E. C. L. 995; Reg. *v.* Frankland, 9 Cox C. C. 273, 9 Jur. N. S. 388, 32 L. J. M. C. 69, 7 L. T. Rep. N. S. 799, L. & C. 276, 11 Wkly. Rep. 346; Reg. *v.* Bailey, 7 Cox C. C. 179, Dears. & B. 121, 2 Jur. N. S. 1171, 26 L. J. M. C. 4, 5 Wkly. Rep. 48; Reg. *v.* Welch, 2 C. & K. 296, 2 Cox C. C. 85, 1 Den. C. C. 199, 61 E. C. L. 296; Reg. *v.* Carpenter, L. R. 1 C. C. 29, 10 Cox C. C. 246, 12 Jur. N. S. 380, 35 L. J. M. C. 169, 14 L. T. Rep. N. S. 572, 14 Wkly. Rep. 773.

"Agent" cannot be used interchangeably with "servant" under 2 N. Y. Rev. St. p. 678, § 59. People *v.* Allen, 5 Den. (N. Y.) 76.

A collector of poor rates should be charged as the servant of the overseer (Reg. *v.* Adey, 3 C. & K. 339, 4 Cox C. C. 208, 1 Den. C. C. 571, 14 Jur. 556, 19 L. J. M. C. 149, 4 New Sess. Cas. 360, T. & M. 296), while an overseer or his assistant should be charged as the servant of the inhabitants (Reg. *v.* Smallman, [1897] 1 Q. B. 4, 18 Cox C. C. 451, 61 J. P. 312, 66 L. J. Q. B. 82, 75 T. L. Rep. N. S. 394, 45 Wkly. Rep. 249; Rex. *v.* Carpenter, L. R. 1 C. C. 29, 10 Cox C. C. 246, 12 Jur. N. S. 380, 35 L. J. M. C. 169, 14 L. T. Rep. N. S. 572, 14 Wkly. Rep. 773. See also Reg. *v.* Townsend, 2 C. & K. 168, 2 Cox C. C. 24, 1 Den. C. C. 167, 61 E. C. L. 168).

"Employee."— An indictment under Ind. Rev. St. (1881) § 1944, defining and prescribing the punishment for embezzlement by an "officer, agent, attorney, clerk, servant, or employee of any person or persons," is not bad, upon motion to quash, for simply charging that accused was an "employee" of a certain person, without stating the position held by him, or the capacity in which he was engaged. Ritter *v.* State, 111 Ind. 324, 12 N. E. 501.

An officer of a voluntary association may be indicted for embezzlement of the funds of the association as the servant of the trustees. Reg. *v.* Proud, 9 Cox C. C. 22, 8 Jur. N. S. 142, L. & C. 97, 31 L. J. M. C. 71, 5 L. T. Rep. N. S. 331, 10 Wkly. Rep. 62; Reg. *v.* Woolley, 4 Cox C. C. 251; Reg. *v.* Miller, 2 Moody C. C. 249; Rex *v.* Hall, 1 Moody C. C. 474. See also Reg. *v.* Redford, 11 Cox C. C. 367, 21 L. T. Rep. N. S. 508; Reg. *v.* Diprose, 11 Cox C. C. 185, 19 L. T. Rep. N. S. 292, 17 Wkly. Rep. 180; Reg. *v.* Blackburn, 11 Cox C. C. 157; Reg. *v.* Taffs, 4 Cox C. C. 169.

A servant in the employment of partners may be alleged to be the servant of either (Reg. *v.* White, 8 C. & P. 742, 34 E. C. L. 995; Rex *v.* Leech, 3 Stark. 70, 3 E. C. L. 598), or of all (Reg. *v.* Bailey, 7 Cox C. C. 179, Dears. & B. 121, 2 Jur. N. S. 1171); but where one partner has acted independently of the others in employing the servant, he should be alleged to be the servant of that partner (Reg. *v.* White, 8 C. & P. 742, 34 E. C. L. 995).

Authority of accused to receive the money or property need not be alleged. State *v.* Lipscomb, 160 Mo. 125, 60 S. W. 1081. And see *supra,* III, B, 2.

For forms of indictments and informations against servant see Ritter *v.* State, 111 Ind. 324, 12 N. E. 501; State *v.* Lipscomb, 160 Mo. 125, 60 S. W. 1081; State *v.* Fournier, 12 Mont. 235, 29 Pac. 824; Edelhoff *v.* State, 5 Wyo. 19, 36 Pac. 627, clerk of private corporation.

21. Fleener *v.* State, 58 Ark. 98, 23 S. W. 1; People *v.* Hanaw, 107 Mich. 337, 65 N. W. 231; Wise *v.* State, 41 Tex. 139; Griffin *v.* State, 4 Tex. App. 390. See also Com. *v.* Beeby, 3 Lanc. L. Rev. 358, in which the indictment was held bad, under the Pennsylvania act of March 31, 1860, section 114, because it did not describe defendant as conducting the business of an agent.

In Missouri, under Wagner St. p. 458, § 35, an indictment for embezzlement need not directly aver defendant's agency. It is sufficient if the agency distinctly appears. State *v.* Dodson, 72 Mo. 283.

(iv) *Bailees.* An indictment or information against a bailee for embezzlement must charge him as such;[22] it must directly allege that the property came into his possession or was under his care by virtue of the bailment;[23] and it must state the special circumstances which bring the case within the statute, and the nature, purpose, and character of the bailment.[24]

g. Conversion or Appropriation — (i) *In General.* In a prosecution for embezzlement the fraudulent conversion or appropriation of the money or other

Amendment.— An indictment alleging the embezzled property to have belonged to complainant, and to have been received by defendant as his agent, may be amended by adding the words "for the use of" complainant. People *v.* Hanaw, 107 Mich. 337, 65 N. W. 231.

The nature and purposes of the agency need not be detailed (State *v.* Meyers, 68 Mo. 266. See also Fleener *v.* State, 58 Ark. 98, 23 S. W. 1); nor need it be averred that defendant was a "professed agent," under a statute designating bankers, brokers, attorneys, merchants, or agents (Com. *v.* Newcomer, 49 Pa. St. 478. But see Com. *v.* Beeby, 3 Lanc. L. Rev. 358); but where the offense is confined by the statute to agents of a particular class, as agents for hire, an omission to charge that defendant was an agent for hire will be fatal (Terry *v.* State, 1 Wash. 277, 24 Pac. 447).

For forms of indictments and informations against agents see Lang *v.* State, 97 Ala. 41, 12 So. 183; Fleener *v.* State, 58 Ark. 98, 23 S. W. 1; State *v.* Trolson, 21 Nev. 419, 32 Pac. 930.

22. Hamuel *v.* State, 5 Mo. 260. *Compare* People *v.* Johnson, 71 Cal. 384, 12 Pac. 261, to the effect that if the terms of the contract between defendant and the person alleged to have been specially injured are specifically set forth, and the contract clearly shows that defendant was thereby constituted a bailee, and received the property in that capacity, an information or indictment will not be demurrable under Cal. Pen. Code, § 507, because defendant is not named as "bailee."

23. Gebhardt *v.* State, (Tex. Cr. App. 1894) 27 S. W. 136; Gaddy *v.* State, 8 Tex. App. 127. See, however, People *v.* Goodrich, 142 Cal. 216, 75 Pac. 796, holding that where an information for embezzlement alleged that defendant was intrusted as bailee with a launch for the purpose of taking it to a certain place, and there purchasing it, or, in case he did not purchase it, delivering it to its owner, and that defendant did not take the launch to the place agreed or purchase it, and embezzled the same, etc., the information sufficiently showed that defendant was intrusted with the launch as a bailee.

24. *California.*— People *v.* Poggi, 19 Cal. 600; People *v.* Peterson, 9 Cal. 313; People *v.* Cohen, 8 Cal. 42. See also People *v.* Flores, 64 Cal. 426, 1 Pac. 498.

Georgia.— Sanders *v.* State, 86 Ga. 717, 12 S. E. 1058; Williams *v.* State, 82 Ga. 286, 10 S. E. 208. See also Cody *v.* State, 100 Ga. 105, 28 S. E. 106.

Kansas.— State *v.* Griffith, 45 Kan. 142, 25 Pac. 616 [*distinguished* in State *v.* Combs, 47 Kan. 136, 27 Pac. 818, which was a motion in arrest of judgment, and not a motion to quash].

Maine.— State *v.* Walton, 62 Me. 106.

Minnesota.— State *v.* Mims, 26 Minn. 191, 2 N. W. 492.

Missouri.— State *v.* Grisham, 90 Mo. 163, 2 S. W. 223.

New Mexico.—Territory *v.* Heacock, 4 N. M. 354, 20 Pac. 171 [*following* Com. *v.* Williams, 3 Gray (Mass.) 461; White *v.* State, 20 Wis. 233].

Texas.— State *v.* Longworth, 41 Tex. 162; Wise *v.* State, 41 Tex. 139; Calkins *v.* State, 34 Tex. Cr. 251, 29 S. W. 1081. See also Bridgers *v.* State, 8 Tex. App. 145, in which it was held a hypercritical objection to an indictment that it described defendant as "the" commission merchant of another, instead of "a" commission merchant. *Compare* Goodwyn *v.* State, (Cr. App. 1901) 64 S. W. 251, in which it is said that it is not necessary to state any of the facts of the contract of bailment.

Wyoming.— Wilbur *v.* Territory, 3 Wyo. 268, 21 Pac. 698.

See 18 Cent. Dig. tit. "Embezzlement," § 50.

Contra.—State *v.* Chew Muck You, 20 Oreg. 215, 25 Pac. 355; People *v.* Hill, 3 Utah 334, 3 Pac. 75 [both *disapproving* People *v.* Poggi, 19 Cal. 600; People *v.* Cohen, 8 Cal. 42]; Webb *v.* York, 79 Fed. 616, 25 C. C. A. 133, construing the criminal code of California.

Bailment "for hire."— Under Minn. Gen. St. (1878) c. 95, § 24, which provides that if any person to whom property which may be the subject of larceny shall have been delivered to be carried for hire shall embezzle such property before its delivery to the person for whom it was intended he shall be guilty, etc., it was held that an indictment which failed to allege that the property was to be carried "for hire" was fatally defective. State *v.* Mims, 26 Minn. 191, 2 N. W. 492 [*following* Com. *v.* Williams, 6 Gray (Mass.) 1].

Surplusage.— An indictment charging that defendant, being "the bailee and trustee" of a note, the property of another, embezzled and converted it to his own use, charges larceny by a bailee; the word "trustee" not affecting its validity, nor charging conversion by a trustee. State *v.* Thompson, 28 Oreg. 296, 42 Pac. 1001. See also People *v.* Flores, 64 Cal. 426, 1 Pac. 498, in which an information otherwise unobjectionable was held not to be demurrable for describing defendant as "bailee *accommodatum.*"

For forms of indictments and informations against bailees see State *v.* Combs, 47 Kan. 136, 27 Pac. 818; State *v.* Hayes, 13 Mont.

property alleged to have been embezzled must be distinctly charged in the information or indictment;[25] but it is sufficient to state the fact of the conversion in the language of the statute, without specifying any particular mode;[26] and neither a demand by,[27] nor the non-consent of,[28] the principal or owner need be alleged, unless specifically required by the terms of the statute,[29] or where in the case of demand the embezzlement consists in a neglect or refusal to account for and pay over money.[30]

(II) *By Public Officers or Employees.* An indictment or information for embezzlement by public officers or employees should set out the facts constituting the conversion; a simple charge of unlawful conversion of public money is insufficient.[31]

116, 32 Pac. 415; Dowdey *v.* State, (Tex. Cr. App. 1901) 64 S. W. 253; Goodwyn *v.* State, (Tex. Cr. App. 1901) 64 S. W. 251; People *v.* Hill, 3 Utah 334, 3 Pac. 75.

25. *Florida.*— Grant *v.* State, 35 Fla. 581, 17 So. 225, 48 Am. St. Rep. 263.

Georgia.— Keys *v.* State, 112 Ga. 392, 37 S. E. 762, 81 Am. St. Rep. 63; Sanders *v.* State, 86 Ga. 717, 12 S. E. 1058.

Illinois.— Kibs *v.* People, 81 Ill. 599.

Indiana.— State *v.* Adamson, 114 Ind. 216, 16 N. E. 181.

Louisiana.— State *v.* Wolff, 34 La. Ann. 1153.

Massachusetts.— Com. *v.* Wyman, 8 Metc. 247.

Minnesota.— State *v.* Farrington, 59 Minn. 147, 60 N. W. 1088, 28 L. R. A. 395.

New Mexico.— Territory *v.* Heacock, 4 N. M. 354, 20 Pac. 171.

See 18 Cent. Dig. tit. "Embezzlement," § 51.

"Embezzle" includes in its meaning appropriation to one's own use, and therefore the use of the single word "embezzle" in the indictment or information contains within itself the charge that defendant appropriated the money or property to his own use. State *v.* Wolff, 34 La. Ann. 1153; Mills *v.* State, 53 Nebr. 263, 73 N. W. 761 [*citing* Hamilton *v.* State, 46 Nebr. 284, 64 N. W. 965]. *Contra*, McCann *v.* U. S., 2 Wyo. 274.

"Take, steal, and carry away."— An indictment which states that defendant feloniously embezzled and fraudulently converted to his own use money of his employer need not allege that he feloniously did "take, steal, and carry away" such money. State *v.* Reinhart, 26 Oreg. 466, 38 Pac. 822.

Alternative allegation.— An indictment for larceny after trust cannot be sustained where it charges in the alternative that defendant converted to his own use, or otherwise disposed of, the property. Sanders *v.* State, 86 Ga. 717, 12 S. E. 1058.

26. People *v.* Poggi, 19 Cal. 600; Cole *v.* State, 16 Tex. App. 461. See also State *v.* Kortgaard, 62 Minn. 7, 64 N. W. 51. But see Territory *v.* Heacock, 4 N. M. 354, 20 Pac. 171 [*following* Com. *v.* Smart, 6 Gray (Mass.) 15].

In Massachusetts it is now provided by statute that "it shall be sufficient to allege generally in the indictment an embezzlement" "of money to a certain amount, without specifying any particulars of such embezzlement."

Com. *v.* Bennett, 118 Mass. 443. But see, decided previously to the above statute, Com. *v.* Wyman, 8 Metc. 247, to the effect that the specific act of fraud with which defendant is charged should be alleged.

The nature and character of fraudulent reports made by accused need not be alleged. Hays *v.* State, 114 Ga. 25, 40 S. E. 13.

27. *California.*— People *v.* Van Ewan, 111 Cal. 144, 43 Pac. 520.

Louisiana.— State *v.* Flournoy, 46 La. Ann. 1518, 16 So. 454.

Massachusetts.— Com. *v.* Mead, 160 Mass. 319, 35 N. E. 1125.

Minnesota.— State *v.* Comings, 54 Minn. 359, 56 N. W. 50.

Nebraska.— Bartley *v.* State, 53 Nebr. 310, 73 N. W. 744.

New Jersey.—State *v.* Reynolds, 65 N. J. L. 424, 47 Atl. 644.

Wyoming.— Edelhoff *v.* State, 5 Wyo. 19, 36 Pac. 627.

See 18 Cent. Dig. tit. "Embezzlement," § 51.

28. Alderman *v.* State, 57 Ga. 367; State *v.* Rue, 72 Minn. 296, 75 N. W. 235.

29. *Georgia.*— Alderman *v.* State, 57 Ga. 367, demand and non-consent.

Indiana.— State *v.* Adamson, 114 Ind. 216, 16 N. E. 181, demand.

Iowa.— State *v.* Foster, 11 Iowa 291, non-consent.

Kansas.— State *v.* Hayes, 59 Kan. 61, 51 Pac. 905, demand and non-consent.

Minnesota.— State *v.* Mims, 26 Minn. 191, 2 N. W. 492, non-consent. *Compare* State *v.* Rue, 72 Minn. 296, 75 N. W. 235.

Texas.— State *v.* Longworth, 41 Tex. 162 (non-consent); Turner *v.* State, (Cr. App. 1895) 32 S. W. 767 (non-consent).

See 18 Cent. Dig. tit. "Embezzlement," § 51.

30. State *v.* Munch, 22 Minn. 67. *Compare* State *v.* New, 22 Minn. 76.

Where defendant was a factor intrusted with merchandise for sale, and the indictment alleged that he had fraudulently converted the proceeds to his own use, without alleging a demand or a refusal to pay, it was held that the indictment was insufficient. The mere use by a factor of the proceeds of goods sold is not *per se* fraudulent. Snell *v.* State, 50 Ga. 219.

31. *Georgia.*— See Hoyt *v.* State, 50 Ga. 313.

Indiana.— See State *v.* Hebel, 72 Ind. 361.

h. Against Public Officers — (I) *In General.* In an indictment or information against a public officer for embezzlement it is sufficient to follow the statute and allege the acts and facts therein declared to constitute the crime.[32] It is not necessary to negative matter of defense.[33]

(II) *Averments as to Office* — (A) *In General.* In a prosecution against a public officer for embezzlement, the indictment or information must set forth his official character.[34]

Iowa.— State v. Brandt, 41 Iowa 593.

Kentucky.— See Com. v. Lewis, 12 S. W. 266, 11 Ky. L. Rep. 421.

Minnesota.— See State v. Munch, 22 Minn. 67.

Ohio.— See State v. Johnson, 53 Ohio St. 307, 41 N. E. 256.

See 18 Cent. Dig. tit. "Embezzlement," § 52.

Contra.— People v. Ward, 134 Cal. 301, 66 Pac. 372 (holding that an allegation that a public officer committed the conversion "contrary to his trust as such officer" is sufficient); State v. Noland, 111 Mo. 473, 19 S. W. 715 (holding that it is necessary only to allege that defendant has converted the money to his own use); State v. Clarkson, 59 Mo. 149 (holding that the manner of effecting the conversion need not be set out); State v. Downing, 15 Wash. 413, 46 Pac. 646 [*following* State v. Isensee, 12 Wash. 254, 40 Pac. 985] (holding that an indictment which charges that defendant "unlawfully . . . fraudulently, and feloniously did take, convert to his own use and embezzle" public money is sufficient).

Failure to deposit funds.—Where an indictment against a government clerk for failing to deposit money when required by the secretary of the treasury, as required by Rev. St. § 5492 [U. S. Comp. St. (1901) p. 3705], charged that the money was received by defendant on Dec. 11, 1900, and that it was in his possession on Dec. 31, 1900, which was the last day of the quarter in which he could deposit the same in compliance with the rules of the treasury department, and that defendant failed to deposit the same on that day, it was not objectionable on the ground that it did not charge the accused with failure to deposit the money, but merely charged a failure to deposit on a specified date. Dimmick v. U. S., 121 Fed. 638, 57 C. C. A. 664.

32. *California.*— People v. Hamilton, (1893) 32 Pac. 526.

Florida.— Sigsbee v. State, 43 Fla. 524, 30 So. 816.

Georgia.— Bridges v. State, 103 Ga. 21, 29 S. E. 859; Cooper v. State, 101 Ga. 783, 29 S. E. 22.

Illinois.— Goodhue v. People, 94 Ill. 37.

Louisiana.— State v. Eames, 39 La. Ann. 986, 3 So. 93.

Maine.— State v. Walton, 62 Me. 106.

Maryland.— State v. Nicholson, 67 Md. 1, 8 Atl. 817.

Michigan.— People v. McKinney, 10 Mich. 54.

Mississippi.—Hemingway v. State, 68 Miss. 371, 8 So. 317.

North Carolina.— State v. Heaton, 81 N. C. 542.

Texas.— Crump v. State, 23 Tex. App. 615, 5 S. W. 182.

United States.—U. S. v. Dimmick, 112 Fed. 352.

See 18 Cent. Dig. tit. "Embezzlement," § 53.

Duplicity.— Where an averment, claimed to be duplicitous, refers to the same transaction as the other averments in the indictment, it is not to be treated as an averment of a distinct offense, and the indictment is not bad on account of it. Com. v. Carson, 21 Pa. Super. Ct. 48.

Misnomer of offense.— Under Wash. Pen. Code, § 57, providing that if any public officer shall misappropriate any money he shall be deemed guilty of a felony, an indictment against a county treasurer for misappropriating county funds is good, although it calls the offense "larceny." State v. Isensee, 12 Wash. 254, 40 Pac. 985.

Reference to statute unnecessary.— An allegation that defendant received the money in his official capacity is sufficient, without referring to the statute under which the information was drawn, or to any statute which created a duty, the antecedent existence of which constituted a factor connected with the offense. The general conclusion of the information *contra formam statuti* is sufficient People v. Hamilton, (Cal. 1893) 32 Pac. 526.

For forms of indictments and informations against public officers see People v. Hamilton, (Cal. 1893) 32 Pac. 526; People v. Gray, 66 Cal. 271, 5 Pac. 240; Bridges v. State, 103 Ga. 21, 29 S. E. 859; Cooper v. State, 101 Ga. 783, 29 S. E. 22; Whitney v. State, 53 Nebr. 287, 73 N. W. 696; State v. Downing, 15 Wash. 413, 46 Pac. 646; State v. Isenee, 12 Wash. 254, 40 Pac. 985.

For form of information against accessory see Mills v. State, 53 Nebr. 263, 73 N. W. 761.

Allegations concerning: Conversion see *supra*, IV, B, 5, g. Description of money or property embezzled see *supra*, IV, B, 5, b. Intent see *supra*, IV, B, 5, a. Ownership see *supra*, IV, B, 5, d. Possession see *supra*, IV, B, 5, e. Value see *supra*, IV, B, 5, c.

33. Britton v. State, 77 Ala. 202; State v. Nicholson, 67 Md. 1, 8 Atl. 817. See *supra*, IV, B, 2, b.

34. *Arizona.*— Brady v. Territory, (1900) 60 Pac. 698.

California.— People v. Doss, 39 Cal. 428; People v. Potter, 35 Cal. 110.

Iowa.— State v. Parsons, 54 Iowa 405, 6 N. W. 579.

Maine.— State v. Goss, 69 Me. 22.

(B) *As to Successor.* An indictment or information for embezzlement by a public officer in failing to deliver to his successor in office moneys in his hands need not set forth all the steps by which the successor became such public officer. An averment that he was duly elected or appointed, and that he qualified, is sufficient.[35]

(III) *AVERMENT AS TO RECEIPT OF MONEY.* It is necessary in a prosecution against a public officer or employee to allege that the money or other property was received or held by him in his official capacity, or by virtue of his employment.[36]

(IV) *AVERMENT AS TO FAILURE TO PAY OVER OR ACCOUNT.* An indictment or information against a custodian of public moneys should allege his failure to pay over or account for them.[37]

Minnesota.— State *v.* Munch, 22 Minn. 67.
Missouri.— State *v.* Hall, 126 Mo. 585, 29 S. W. 582.
United States.— U. S. *v.* Bornemann, 36 Fed. 257; U. S. *v.* Forrest, 25 Fed Cas. No. 15,131, 3 Cranch C. C. 56.
See 18 Cent. Dig. tit. "Embezzlement," § 54.
See, however, Bork *v.* People, 91 N. Y. 5 (holding that where the statute embraces "every person" embezzling the public funds, the official character of defendant need not be averred); State *v.* Raby, 31 Wash. 111, 71 Pac. 771; U. S. *v.* Royer, 122 Fed. 844 (holding that an indictment for embezzlement, under Rev. St. § 4053 [U. S. Comp. St. (1901) p. 2755], charging that defendant was the clerk in charge of a branch post-office, and as such clerk was intrusted with the sale of postage stamps and stamped envelopes, for which he refused and neglected to account, sufficiently alleges that defendant was "intrusted by law" with the sale of such stamps and stamped envelopes).

Appointment and qualification.— It is not necessary to allege when and how the officer was appointed and the authority for his appointment. State *v.* Goss, 69 Me. 22; State *v.* Nicholson, 67 Md. 1, 8 Atl. 817; Steiner *v.* State, 33 Tex. Cr. 291, 26 S. W. 214. *Contra*, State *v.* Flint, 62 Mo. 393. Thus the ordinance appointing defendant a city officer need not be set out in an indictment under Tex. Pen. Code, art. 786. Steiner *v.* State, *supra*. Nor need it be alleged that he has taken the oath and given the bond required by law. State *v.* Goss, *supra*. *Contra*, Wood *v.* State, 47 Ark. 488, 1 S. W. 709. See *supra*, III, B, 2, b.

Incorporation of city.— In an indictment under Tex. Pen. Code, art. 786, against a city officer for embezzlement, it is not necessary to allege that the city was incorporated. Steiner *v.* State, 33 Tex. Cr. 291, 26 S. W. 214.

Misnomer.— Where defendant was charged with embezzlement as "treasurer" of the borough of D, instead of "collector" of D, that being his official title, it appearing that under the borough laws the collector was required to act as treasurer and collect the moneys raised by taxation, the indictment was sufficient, in view of the criminal procedure act, forbidding the reversal of a judgment on an indictment for any defect therein other than one which may have prejudiced defendant. State *v.* Bartholomew, 69 N. J. L. 160, 54 Atl. 231.

Mode of allegation.— Official character may be alleged as well by a participial clause as by a direct affirmation. People *v.* Hamilton, (Cal. 1893) 32 Pac. 526; State *v.* Goss, 69 Me. 22; State *v.* Manley, 107 Mo. 364, 17 S. W. 800; U. S. *v.* Bornemann, 36 Fed. 257.

35. State *v.* Ring, 29 Minn. 78, 11 N. W. 233.

36. *Arizona.*— Brady *v.* Territory, (1900) 60 Pac. 698.
California.— People *v.* Cobler, 108 Cal. 538, 41 Pac. 401; People *v.* Hamilton, (1893) 32 Pac. 526.
Illinois.— Goodhue *v.* People, 94 Ill. 37.
Indiana.— State *v.* Hebel, 72 Ind. 361.
Maryland.— See State *v.* Nicholson, 67 Md. 1, 8 Atl. 817.
Michigan.— People *v.* Seeley, 117 Mich. 263, 75 N. W. 609.
Montana.— U. S. *v.* McElroy, 2 Mont. 494.
Texas.— Warswick *v.* State, 36 Tex. Cr. 63, 35 S. W. 386; Crump *v.* State, 23 Tex. App. 615, 5 S. W. 182.
United States.— Moore *v.* U. S., 160 U. S. 268, 16 S. Ct. 294, 40 L. ed. 422; U. S. *v.* Forrest, 25 Fed. Cas. No. 15,131, 3 Cranch C. C. 56.

37. *Arkansas.*— State *v.* Govan, 48 Ark. 76, 2 S. W. 347.
Indiana.— State *v.* Hebel, 72 Ind. 361.
Iowa.— State *v.* Parsons, 54 Iowa 405, 6 N. W. 579; State *v.* Brandt, 41 Iowa 593.
Maryland.— State *v.* Nicholson, 67 Md. 1, 8 Atl. 817.
Mississippi.— Hemingway *v.* State, 68 Miss. 371, 8 So. 317.
See, however, Goodhue *v.* People, 94 Ill. 37, in which it was held that an indictment alleging that defendant, the county treasurer, who "was duly elected to said office of public trust," did "feloniously and fraudulently embezzle a large sum of money" (stating the amount), which "was then and there in possession of such officer by virtue of his said office," was sufficient.

A settlement of accounts by the proper authority must also be alleged. State *v.* Govan, 48 Ark. 76, 2 S. W. 347 [*citing* State *v.* Hunnicut, 34 Ark. 562]. *Contra*, Com. *v.* Fisher,

1. **Time and Place.** The indictment should lay the venue,[38] and approximately state the time of the conversion.[39]

C. Issues, Proof, and Variance — 1. **In General.** In a prosecution for embezzlement all the material allegations of the indictment or information must be proved as laid.[40]

2. **Description of Property.** On a trial for embezzlement the proof must correspond with the allegations describing the money or other property alleged to have been embezzled, and must show the embezzlement of some of the specific things mentioned in the statute.[41]

113 Ky. 491, 68 S. W. 855, 24 Ky. L. Rep. 300.

38. State *v.* Mayberry, 9 Wash. 193, 37 Pac. 284.

Place of offense as determining: Jurisdiction see CRIMINAL LAW, 12 Cyc. 210. Venue see CRIMINAL LAW, 12 Cyc. 232.

39. People *v.* Hawkins, 106 Mich. 479, 64 N. W. 736, holding, however, that an information charging embezzlement between July 1, 1893, and Dec. 31, 1893, is sufficient, as to time. 2 Howell Annot. St. Mich. § 9421, providing that evidence may be given of any embezzlement committed within six months after the time stated in the indictment, and section 9534, providing that no indictment shall be held insufficient for omitting to state the time at which an offense was committed, where time is not of the essence of the offense. See also *infra*, IV, C, 5.

Between given dates.— The indictment may charge that the embezzlement was committed between two given dates. Bridges *v.* State, 103 Ga. 21, 29 S. E. 859.

40. *Georgia.*— Rucker *v.* State, 95 Ga. 465, 20 S. E. 269; Carter *v.* State, 53 Ga. 326.

Massachusetts.—Com. *v.* O'Keefe, 121 Mass. 59; Com. *v.* Shepard, 1 Allen 575; Com. *v.* Wyman, 8 Metc. 247.

Minnesota.— State *v.* Rue, 72 Minn. 296, 75 N. W. 235.

North Dakota.— State *v.* Wine, 7 N. D. 18, 72 N. W. 905.

Ohio.— State *v.* Whetstone, 8 Ohio S. & C. Pl. Dec. 260, 5 Ohio N. P. 514.

Pennsylvania.— Com. *v.* Gerdemann, 12 Phila. 397.

See 18 Cent. Dig. tit. "Embezzlement," § 55.

See, however, Com. *v.* Butterick, 100 Mass. 1, 97 Am. Dec. 65 (holding that an indictment for the embezzlement of a note taken to be discounted at a bank for another person is sustained by proof that the accused got it discounted on his own account, and the proceeds passed to his own credit, although he afterward paid part of the proceeds on the other's account, at his request); Calkins *v.* State, 18 Ohio St. 366, 98 Am. Dec. 121 (holding that an allegation that one fraudulently converted to his own use wheat, the property of a certain corporation, then under his care by virtue of his employment as clerk thereof, is established by proof that the wheat could not leave the warehouse except upon a shipping order issued by him to the foreman, and that he clandestinely set afloat in the market fictitious grain orders, and thereupon issued shipping orders, and appropriated the proceeds to his own use).

A mere technical variance between the allegations and proof will be disregarded. People *v.* Allen, (Cal. 1900) 62 Pac. 170; Crofton *v.* State, 79 Ga. 584, 4 S. E. 333; Milligan's Case, 6 City Hall Rec. (N. Y.) 69; Smith *v.* State, 34 Tex. Cr. 265, 30 S. W. 236. See also State *v.* Thompson, 28 Oreg. 296, 42 Pac. 1002.

Immaterial allegations need not be proved. State *v.* King, 81 Iowa 587, 47 N. W. 775; State *v.* Foley, 81 Iowa 36, 46 N. W. 746.

Unnecessary particularity.— Where a material allegation is made with unnecessary particularity, the proof must meet the allegation as made. State *v.* Norkewicz, 3 Pennew. (Del.) 299, 51 Atl. 601; State *v.* Newland, 7 Iowa 242, 71 Am. Dec. 444; Com. *v.* Smith, 6 Serg. & R. (Pa.) 568; Rex *v.* Craven, R. & R. 11.

A mere conclusion of law in an indictment need not be proven. Spalding *v.* People, 172 Ill. 40, 49 N. E. 993.

41. *Connecticut.*—State *v.* Hanley, 70 Conn. 265, 39 Atl. 148.

Florida.— Thalheim *v.* State, 38 Fla. 169, 20 So. 938.

Georgia.— Watson *v.* State, 64 Ga. 61.

Illinois.— Weimer *v.* People, 186 Ill. 503, 58 N. E. 378; Goodhue *v.* People, 94 Ill. 37.

Massachusetts.—Com. *v.* Merrifield, 4 Metc. 468.

Missouri.— State *v.* Schilb, 159 Mo. 130, 60 S. W. 82; State *v.* Dodson, 72 Mo. 283.

Texas.— Block *v.* State, 44 Tex. 620.

Washington.— State *v.* Hoshor, 26 Wash. 643, 67 Pac. 386.

See 18 Cent. Dig. tit. "Embezzlement," § 56.

Coins.— Where an indictment alleges the denomination of the coins embezzled, proof of the embezzlement of coin of equal aggregate value, without evidence of the denomination of any of the coins, is sufficient, where the nature of the case precludes the identification of the pieces. Riley *v.* State, 32 Tex. 763.

Currency.—Under an indictment for embezzling money, "consisting of ten-dollar and twenty-dollar bills, currency of the United States," evidence that the money embezzled consisted of "greenbacks," without any other description, creates no variance. Gady *v.* State, 83 Ala. 51, 3 So. 429 [*citing* Levy *v.* State, 79 Ala. 259; Duvall *v.* State, 63 Ala. 12]. *Compare* Block *v.* State, 44 Tex. 620,

3. Ownership and Possession of Property. Unless the proof supports the allegations of ownership and possession in an indictment for embezzlement, there can be no valid conviction.[42]

4. Value or Amount of Property. Ordinarily in a prosecution for embezzlement it is not necessary to prove the precise value or amount of the money or

to the effect that an indictment for embezzling money is not sustained by proof of embezzling greenbacks or national currency.

Money of several kinds.— Where the indictment charges the conversion of a sum of money comprising greenbacks, national banknotes, and gold and silver certificates, proof that the money collected and converted was any one of the four kinds is sufficient. Wallis *v.* State, 54 Ark. 611, 16 S. W. 821.

The receipt of checks may be proved under an indictment alleging the receipt of money, where defendant received them in payment of premiums, and then collected them. State *v.* Hopkins, 56 Vt. 250.

An immaterial descriptive allegation need not be proved; as for example an allegation that the money was lawful money of the United States. People *v.* Hearne, 20 N. Y. Suppl. 806. *Contra,* Watson *v.* State, 64 Ga. 61.

42. *Alabama.*— Washington *v.* State, 72 Ala. 272.

California.— People *v.* Leipsic, (1900) 62 Pac. 311.

Georgia.— Bridges *v.* State, 103 Ga. 21, 29 S. E. 859; McNish *v.* State, 88 Ga. 499, 14 S. E. 865; McCrary *v.* State, 81 Ga. 334, 6 S. E. 588; Carter *v.* State, 53 Ga. 326.

Illinois.— Rauguth *v.* People, 186 Ill. 93, 57 N. E. 832.

Iowa.— State *v.* Cooper, 102 Iowa 146, 71 N. W. 197.

Massachusetts.—Com. *v.* O'Keefe, 121 Mass. 59.

Minnesota.— See State *v.* Rue, 72 Minn. 296, 75 N. W. 235.

Mississippi.— See Polkinghorne *v.* State, (1890) 7 So. 347.

New Jersey.— State *v.* Reynolds, 65 N. J. L. 424, 47 Atl. 644.

Oregon.—State *v.* Morgan, 28 Oreg. 578, 42 Pac. 128.

Texas.— Livingston *v.* State, 16 Tex. App. 652. See also Warswick *v.* State, 36 Tex. Cr. 63, 35 S. W. 386.

See 18 Cent. Dig. tit. "Embezzlement," § 57.

A mere technical variance between the allegations and proof is immaterial. Ker *v.* People, 110 Ill. 627, 51 Am. Rep. 706; Com. *v.* Logue, 160 Mass. 551, 36 N. E. 475; State *v.* Brame, 61 Minn. 101, 63 N. W. 250; State *v.* Hays, 78 Mo. 600; State *v.* Heath, 8 Mo. App. 99.

Parol evidence to explain variance.—On the trial for embezzling cotton alleged to be owned by the First National Bank of Ft. Worth, receipts therefor made by accused and designating the owner as "1st Nat. Bank," together with parol evidence of the meaning of the expression, are admissible. Leonard *v.* State, 7 Tex. App. 417.

Proof of a qualified ownership may, however, be sufficient.

Alabama.— Reeves *v.* State, 95 Ala. 31, 11 So. 158. But see Washington *v.* State, 72 Ala. 272.

California.— People *v.* Treadwell, 69 Cal. 226, 10 Pac. 502.

Florida.— Meacham *v.* State, (1903) 33 So. 983.

Indiana.— Waterman *v.* State, 116 Ind. 51, 18 N. E. 63, consignee.

Louisiana.— State *v.* Palmer, 32 La. Ann. 565.

Massachusetts.— Com. *v.* Norton, 11 Allen 110, carrier.

Oregon.— State *v.* Littschke, 27 Oreg. 189, 40 Pac. 167, thief.

Texas.— Riley *v.* State, 32 Tex. 763 (carrier); Price *v.* State, (Cr. App. 1897) 40 S. W. 596 (carrier).

The corporate existence of a company is established by proving that it assumed to be and was notoriously acting as a corporation, so as to sustain an indictment charging a person with having been the clerk of a certain corporation, and with having fraudulently embezzled its property then under his care by virtue of his employment as clerk. Calkins *v.* State, 18 Ohio St. 366, 98 Am. Dec. 121. See also People *v.* Leonard, 106 Cal. 302, 39 Pac. 617; People *v.* Carter, 122 Mich. 668, 81 N. W. 924.

Proof of the election and installation of a corporate officer, and that while acting as such he embezzled the money, will support an indictment charging that defendant, "being then and there an officer, to wit, the financial secretary" of a private corporation, embezzled its money. It is immaterial that he gave no bond as required by the by laws. Com. *v.* Logue, 160 Mass. 551, 36 N. E. 475. See also State *v.* Heath, 8 Mo. App. 99.

Delivery by or to agent.— Proof of the delivery of money by an agent of the owner will not sustain an allegation that it was intrusted to defendant by the owner (McCrary *v.* State, 81 Ga. 334, 6 S. E. 588); but proof of a delivery to an agent of defendant, who delivered it to defendant, will sustain an allegation of delivery to him (State *v.* Hinckley, 38 Me. 21). So the fact that accused receipted for money as treasurer of an association, and that the money was intended by the depositor to be applied on the purchase of stock in the association, is sufficient to show the ownership of the association. People *v.* Carter, 122 Mich. 668, 81 N. W. 924.

Proof that defendant acted as attorney will support an allegation that he embezzled money which came into his possession as agent. State *v.* Brame, 61 Minn. 101, 63 N. W. 250.

other property alleged to have been embezzled.[43] Where, however, the offense is punishable as grand or petit larceny according to the value or amount embezzled, it is necessary, in order to a conviction for a felony, to prove the embezzlement of money or property to the extent at least of the value fixed by law as the minimum for grand larceny.[44]

5. TIME OF OFFENSE. In an indictment or information for embezzlement or in one for aiding and counseling embezzlement, the day named for the commission of the offense is not material, and evidence may be given referring to any other day before the finding of the indictment;[45] and in some jurisdictions it is provided by statute that evidence may be given of any embezzlement committed within six months next after the time stated in the indictment.[46]

43. *Alabama.*— Gady *v.* State, 83 Ala. 51, 3 So. 429; Britton *v.* State, 77 Ala. 202.

California.— People *v.* Gray, 66 Cal. 271, 5 Pac. 240.

Delaware.— State *v.* Sienkiewiez, (1902) 55 Atl. 346 (holding that it is not necessary for the state to prove the fraudulent conversion of all the property described in the indictment; conversion of any of the articles so described being sufficient); State *v.* Foster, 1 Pennew. 289, 40 Atl. 939.

Georgia.— Jackson *v.* State, 76 Ga. 551.

Massachusetts.— Com. *v.* Hussey, 111 Mass. 432.

Missouri.— State *v.* Pratt, 98 Mo. 482, 11 S. W. 977.

Rhode Island.— State *v.* Hunt, 25 R. I. 69, 54 Atl. 937.

Texas.— Goodwyn *v.* State, (Cr. App. 1901) 64 S. W. 251.

Washington.— State *v.* Lewis, 31 Wash. 75, 71 Pac. 778, holding that proof of the conversion of either a smaller or larger sum than that specified in an information against an agent for larceny will sustain a conviction.

United States.— U. S. *v.* Harper, 33 Fed. 471.

See 18 Cent. Dig. tit. "Embezzlement," § 58.

But see People *v.* Howe, 2 Thomps. & C. (N. Y.) 383, to the effect that an indictment for embezzling a specified sum is not sustained by proof that defendant had received various sums at various times from different individuals, a part of which he had paid over, and that the balance due constituted the sum charged against him in the indictment.

Various items may be proved to make up the amount charged. Weimer *v.* People, 186 Ill. 503, 58 N. E. 378.

Where the state relies on two certain sums having been embezzled, but there is nothing to show which sum it is prosecuting for, and it is not called on to make an election, and the court is not asked to limit the effect of the evidence as to one of the sums to the question of guilty knowledge, evidence of the embezzlement of either sum or part thereof is sufficient to sustain a conviction. Willis *v.* State, 134 Ala. 429, 33 So. 226.

44. Gerard *v.* State, 10 Tex. App. 690.

45. *Georgia.*— Haupt *v.* State, 108 Ga. 64, 33 S. E. 831.

Missouri.— State *v.* Pratt, 98 Mo. 482, 11 S. W. 977.

Nebraska.— Bolln *v.* State, 51 Nebr. 581, 71 N. W. 444.

Oregon.— State *v.* Reinhart, 26 Oreg. 466, 38 Pac. 822.

Rhode Island.— State *v.* Cushing, 11 R. I. 313.

United States.— Tyler *v.* U. S., 106 Fed. 137, 45 C. C. A. 247.

England.— Reg. *v.* Proud, 9 Cox C. C. 22, 8 Jur. N. S. 142, 31 L. J. M. C. 71, 5 L. T. Rep. N. S. 331, L. & C. 97, 10 Wkly. Rep. 62.

See 18 Cent. Dig. tit. "Embezzlement," § 59.

Limitations.— "The time need not be proved as stated, but that a time within the period not covered by the statute of limitations must be stated is too fundamental for discussion." State *v.* Lyon, 45 N. J. L. 272, 276.

Proof of conversion.— It is necessary to prove that the attorney had before the date of the complaint fraudulently converted to his own use the money alleged to have been embezzled. People *v.* Wyman, 102 Cal. 552, 36 Pac. 932.

Offense committed before taking effect of law.— Under an indictment which charges an embezzlement to have been committed after 74 Ohio Laws, p. 249, § 11, took effect, defendant cannot be convicted of an offense committed before such taking effect. Campbell *v.* State, 35 Ohio St. 70.

46. Com. *v.* Wyman, 8 Metc. (Mass.) 247 (bank officers not included in statute); People *v.* Gould, 118 Mich. 75, 76 N. W. 117; People *v.* Donald, 48 Mich. 491, 12 N. W. 669; State *v.* Holmes, 65 Minn. 230, 68 N. W. 11; State *v.* Kortgaard, 62 Minn. 7, 64 N. W. 51; State *v.* New, 22 Minn. 76; Secor *v.* State, 118 Wis. 621, 95 N. W. 942.

Prior embezzlements.— Under these statutes evidence may be given of an act of embezzlement committed on the date alleged in the indictment or information (State *v.* Kortgaard, 62 Minn. 7, 64 N. W. 51), but not of acts committed prior to that date (People *v.* Donald, 48 Mich. 491, 12 N. W. 669; State *v.* Cornhauser, 74 Wis. 42, 41 N. W. 959). This rule, however, does not exclude proof of any fact or circumstance which tends to prove the main issue in the case, for the reason that such fact or circumstance may itself have happened before the date alleged. Thalheim *v.* State, 38 Fla. 169, 20 So. 938. In Minne-

V. EVIDENCE.[47]

A. Burden of Proof and Presumptions. As in other criminal cases the burden of proving the commission of the crime and the criminal agency is upon the prosecution;[48] but where the state has made a *prima facie* case of embezzlement, as by proving facts which give rise to a presumption in its favor, it becomes incumbent upon defendant to adduce evidence in denial or explanation of the incriminating circumstances.[49]

B. Admissibility — 1. In General. The general principles governing the admissibility of evidence in other criminal prosecutions govern in prosecutions for embezzlement;[50] and evidence of any facts or circumstances tending to throw light upon the issue of guilt or innocence is ordinarily admissible.[51] As in

sota it is held that acts of embezzlement committed prior to the time stated in the indictment is inadmissible as evidence of the substantive offense under Minn. Gen. St. (1894) § 7262; but that if the state frames an indictment which is sufficient, and limits itself to evidence which is admissible, irrespective of that section, the six months' limitation will not apply, and the indictment can be sustained by evidence of an act of embezzlement committed prior to the time stated therein. State *v.* Holmes, 65 Minn. 230, 68 N. W. 11. See also State *v.* New, 22 Minn. 76, to the effect that evidence that an embezzlement charged was committed before the time laid in the indictment is competent, and is not affected by Minn. Gen. St. (1866) c. 108, § 23, which allows proof of embezzlement within six months after the time laid.

47. See, generally, Criminal Law, 12 Cyc. 379 *et seq.*

48. State *v.* Foster, 1 Pennew. (Del.) 289, 40 Atl. 939; State *v.* Fritchler, 54 Mo. 424; Strong *v.* State, 18 Tex. App. 19. And see Criminal Law, 12 Cyc. 379. See, however, Grillo *v.* State, 9 Ohio Cir. Ct. 394, 6 Ohio Cir. Dec. 90.

Acts of concealment.— On an indictment of a state treasurer for embezzlement the state is not bound to prove any acts of concealment in connection with the public money. Hemingway *v.* State, 68 Miss. 371, 8 So. 317.

Ownership.— In Alabama, on a prosecution against an agent for embezzlement, there is no burden on the state to prove that the money embezzled was the property of the principal. Willis *v.* State, 134 Ala. 429, 33 So. 226.

49. Hemingway *v.* State, 68 Miss. 371, 8 So. 317; Lambeth *v.* State, 3 Tenn. Cas. 754; Riley *v.* State, 32 Tex. 763; Bridgers *v.* State, 8 Tex. App. 145.

Eligibility to office will be presumed from an appointment regular in form, and by proper authority. State *v.* Ring, 29 Minn. 78, 11 N. W. 233.

Intent.—On a prosecution for embezzlement it is error to instruct that an appropriation of money alone raises a fraudulent intent, and casts on accused the burden to rebut the presumption, and that as accused introduced no evidence he failed to rebut the presumption. State *v.* McDonald, 133 N. C. 680, 45 S. E. 582.

Payment.— Where a treasurer is by law chargeable with all taxes paid him as having been paid in money, he will be presumed, in absence of proof to the contrary, to have received payment in money. State *v.* Ring, 29 Minn. 78, 11 N. W. 233.

50. See Criminal Law, 12 Cyc. 390 *et seq.*

51. *Alabama.*— Willis *v.* State, 134 Ala. 429, 33 So. 226; Walker *v.* State, 117 Ala. 42, 23 So. 149; Carr *v.* State, 104 Ala. 43, 16 So. 155; Reeves *v.* State, 95 Ala. 31, 11 So. 158.

Arizona.— Territory *v.* Meyer, 3 Ariz. 199, 24 Pac. 183.

California.— People *v.* Walker, 142 Cal. 90, 75 Pac. 658; People *v.* Ward, 134 Cal. 301, 66 Pac. 372; People *v.* Royce, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524; People *v.* Bidleman, 104 Cal. 608, 38 Pac. 502.

Connecticut.— State *v.* Hanley, 70 Conn. 265, 39 Atl. 148.

Delaware.— State *v.* Sienkiewiez, (1902) 55 Atl. 346.

Georgia.— Jackson *v.* State, 76 Ga. 551.

Indiana.— Hollingsworth *v.* State, 111 Ind. 289, 12 N. E. 490.

Iowa.— State *v.* Hutchinson, 60 Iowa 478, 15 N. W. 298.

Massachusetts.— Com. *v.* Sawtelle, 141 Mass. 140, 5 N. E. 312.

Michigan.—People *v.* Seeley, 117 Mich. 263, 75 N. W. 609; People *v.* McKinney, 10 Mich. 54.

Minnesota.— State *v.* Mims, 26 Minn. 183, 2 N. W. 494, 683.

Missouri.— State *v.* Woodward, 171 Mo. 593, 71 S. W. 1015.

New York.— People *v.* Sherman, 133 N. Y. 349, 31 N. E. 107 [*affirming* 16 N. Y. Suppl. 782]; Bork *v.* People, 1 N. Y. Cr. 379.

North Dakota.— State *v.* Hasledahl, 3 N. D. 36, 53 N. W. 430.

Oregon.— State *v.* Reinhart, 26 Oreg. 466, 38 Pac. 822.

Texas.— Jackson *v.* State, (Cr. App. 1902) 70 S. W. 760; Evans *v.* State, 40 Tex. Cr. 54, 48 S. W. 194; Strong *v.* State, 18 Tex. App. 19.

Virginia.— Shinn *v.* Com., 32 Gratt. 899.

Washington.— State *v.* Lewis, 31 Wash. 75, 71 Pac. 778.

Wyoming.— McCann *v.* U. S., 2 Wyo. 274.

United States.— Tyler *v.* U. S., 106 Fed. 137, 45 C. C. A. 247.

other cases, however, irrelevant, incompetent, or immaterial evidence is not admissible.[52]

2. INTENT. Since from its nature intent is incapable of direct proof, great latitude is necessarily allowed in proving this element of the offense. Broadly speaking, any evidence is admissible which has a tendency, even the slightest, to establish fraudulent intent on the one hand, or on the other hand to show the *bona fides* of the accused.[53]

See 18 Cent. Dig. tit. "Embezzlement," § 61.

Checking out deposit.— Where it was proved that defendant deposited money which he was charged with embezzling in a bank, evidence that he checked out the money so deposited was admissible as tending to show conversion of the funds. State *v.* Woodward, 171 Mo. 593, 71 S. W. 1015.

Course of dealing.— On trial of the president of a bank for embezzlement of its funds, evidence that it received deposits after he had left the state, that none of the depositors received back any of their money, and that the bank shortly afterward closed its doors, is admissible to show the insolvency of the bank at the time he took its funds, and to show a course of dealing intended to deceive its patrons. State *v.* Dix, 33 Wash. 405, 74 Pac. 570.

Denial of funds.— A refusal to pay over money shown to have been received by an officer, on the demand of one claiming to be his successor, for the sole reason that "he had no such funds in his hands or under his control to comply therewith," is admissible in evidence, without proof that the person making the demand was entitled to the office. State *v.* Mims, 26 Minn. 183, 2 N. W. 494, 683.

Expert evidence.— Upon the trial of a county treasurer for embezzlement, evidence of expert accountants who have examined the books and papers of the office as to the totals of the amounts received and paid out by him, as shown by such books and records, is admissible. Hollingsworth *v.* State, 111 Ind. 289, 12 N. E. 490. See also State *v.* Reinhart, 26 Oreg. 466, 38 Pac. 822, in which a summary taken by an expert from the books kept by defendant for his employer was held competent to show the condition of the employer's accounts.

Failure to enter receipt of money.—The failure of the state treasurer to charge himself, in the county where his office is kept, with the receipt of money, or his denial of its receipt there, is evidence of an embezzlement in that county. People *v.* McKinney, 10 Mich. 54.

Falsifying books.— It is competent to show that the books kept by accused have been falsified by fraudulent entries made with a view to conceal the embezzlement, whether they were made at the time of the act charged or afterward. Jackson *v.* State, 76 Ga. 551.

Impeaching settlements.— There is no rule that estops a defendant in a criminal prosecution from proving the actual fact in dispute, notwithstanding any admission or confession he may have made to the contrary. Thus it has been held that a county treasurer might impeach previous settlements made by him, in order to establish the defense that the embezzlement in fact occurred more than the statutory period before the finding of the indictment. State *v.* Hutchinson, 60 Iowa 478, 15 N. W. 298.

Itemized statement of shortage.— Where, on a prosecution against a railroad agent for embezzlement, it appeared that the corporation's auditor, in checking up defendant's books and accounts, made an itemized statement of defendant's shortage, which he presented to defendant, who paid the amount therein specified, keeping a copy of the statement, the statement was admissible in evidence. Willis *v.* State, 134 Ala. 429, 33 So. 226.

Test of admissibility.— Evidence is not to be rejected because it is not conclusive. It is admissible if it fairly tends to prove the point sought to be established. Com. *v.* Sawtelle, 141 Mass. 140, 5 N. E. 312.

52. *Alabama.*— Reeves *v.* State, 95 Ala. 31, 11 So. 158.

California.— People *v.* Bidleman, 104 Cal. 608, 38 Pac. 502.

Colorado.—Thorbell *v.* People, 11 Colo. 305, 17 Pac. 904.

Delaware.— State *v.* Sienkiewiez, (1902) 55 Atl. 346.

Georgia.— Bridges *v.* State, 110 Ga. 246, 34 S. E. 1037.

Louisiana.— State *v.* Sterling, 41 La. Ann. 679, 6 So. 583.

Missouri.— State *v.* Woodward, 171 Mo. 593, 71 S. W. 1015; State *v.* Silva, 130 Mo. 440, 32 S. W. 1007; State *v.* Noland, 111 Mo. 473, 19 S. W. 715.

New York.— Coats *v.* People, 4 Park. Cr. 662.

United States.— U. S. *v.* Forsythe, 25 Fed. Cas. No. 15,133, 6 McLean 584.

See 18 Cent. Dig. tit. "Embezzlement," § 61.

Offer of compromise.— Upon the prosecution of a collector of customs for embezzlement, an offer to make a deposit of a specific sum to secure the government for any balance that might be found against him, being nothing more than a proposed compromise to avoid the prosecution, cannot be received as evidence of indebtment to any specific amount. U. S. *v.* Forsythe, 25 Fed. Cas. No. 15,133, 6 McLean 584.

53. *Alabama.*— Willis *v.* State, 134 Ala. 429, 33 So. 226 (holding that where an agent's books show a shortage which he knows is as to money received by him as agent, knowingly withholding and failing to account for the amount of such shortage is

3. Possession or Custody of Property and Character Thereof. In a prosecution for embezzlement any facts and circumstances tending to show defendant's possession or custody of the property alleged to have been embezzled and the capacity in which it was received and held by him are admissible in evidence.[54]

evidence of criminal intent); Walker *v.* State, 117 Ala. 42, 23 So. 149; Lang *v.* State, 97 Ala. 41, 12 So. 183; Reeves *v.* State, 95 Ala. 31, 11 So. 158.

California.— People *v.* Tomlinson, 102 Cal. 19, 36 Pac. 506.

Georgia.— Govatos *v.* State, 116 Ga. 592, 42 S. E. 708.

Illinois.— Schintz *v.* People, 178 Ill. 320, 52 N. E. 903. *Compare* Hobbs *v.* People, 183 Ill. 336, 55 N. E. 692.

Massachusetts.— Com. *v.* Hurd, 123 Mass. 438; Com. *v.* Concannon, 5 Allen 502.

Nebraska.— Bartley *v.* State, 53 Nebr. 310, 73 N. W. 744, 55 Nebr. 294, 75 N. W. 832.

New York.—People *v.* Pollock, 51 Hun 613, 4 N. Y. Suppl. 297; Bork *v.* People, 1 N. Y. Cr. 379.

Oregon.— State *v.* Marco, 32 Oreg. 175, 50 Pac. 799; State *v.* Littschke, 27 Oreg. 189, 40 Pac. 167.

Texas.—Goodwyn *v.* State, (Cr. App. 1901) 64 S. W. 251; Dancy *v.* State, 41 Tex. Cr. 293, 53 S. W. 635, 886; Von Senden *v.* State, (Cr. App. 1898) 45 S. W. 725.

England.— Reg. *v.* Proud, 9 Cox C. C. 22, 8 Jur. N. S. 142, L. & C. 97, 31 L. J. M. C. 71, 5 L. T. Rep. N. S. 331, 10 Wkly. Rep. 62; Reg. *v.* Richardson, 8 Cox C. C. 448, 2 F. & F. 343; Rex *v.* Williams, 7 C. & P. 338, 32 E. C. L. 644.

See 18 Cent. Dig. tit. "Embezzlement," § 62.

Good faith.— Evidence that the person intrusting the money to defendant had stolen it, and that the rightful owner had demanded the same from defendant, is admissible to show good faith on his part in retaining the money. State *v.* Littschke, 27 Oreg. 189, 40 Pac. 167.

Financial condition of accused.— Evidence that at the time of the alleged embezzlement accused was in debt and in need of money is admissible to show motive. Govatos *v.* State, 116 Ga. 592, 42 S. E. 708. See also Bridges *v.* State, 103 Ga. 21, 29 S. E. 859; Bullock *v.* State, 10 Ga. 47, 54 Am. Dec. 369; U. S. *v.* Camp, 2 Ida. (Hasb.) 215, 10 Pac. 226. *Contra*, State *v.* Foster, 1 Pennew. (Del.) 289, 40 Atl. 939.

Flight of accused.— The fact that one intrusted with the custody of property has absconded with the proceeds of the sale thereof may be considered by the jury in determining whether the selling was felonious. Com. *v.* Hurd, 123 Mass. 438.

Plan to defraud.— In People *v.* Tomlinson, 102 Cal. 19, 36 Pac. 506, defendant advertised for help, and the prosecuting witness responded to the advertisement, and deposited money with defendant as security, which defendant converted to his own use. Soon after his employment, on January 12, defendant laid him off, alleging lack of business. It was held that a letter written January 20, to one who had responded to the same advertisement, stating that he wanted a clerk, and reciting the same conditions as those on which the prosecuting witness was employed, was admissible to show defendant's bad faith in laying off the prosecuting witness.

Other crimes.— Evidence that accused has committed offenses similar to that in question is frequently admissible on the question of intent or motive.

California.— People *v.* Connelly, (1894) 38 Pac. 42; People *v.* Gray, 66 Cal. 271, 5 Pac. 240.

Kentucky.— Taylor *v.* Com., 75 S. W. 244, 25 Ky. L. Rep. 374.

Massachusetts.— Com. *v.* Shepard, 1 Allen 575; Com. *v.* Tuckerman, 10 Gray 173.

Washington.— State *v.* Pittam, 32 Wash. 137, 72 Pac. 1042.

England.— Reg. *v.* Stephens, 16 Cox C. C. 387, 52 J. P. 823, 58 L. T. Rep. N. S. 776; Reg. *v.* Proud, 9 Cox C. C. 22, 8 Jur. N. S. 142, 31 L. J. M. C. 71, 5 L. T. Rep. N. S. 331, L. & C. 97, 10 Wkly. Rep. 62; Reg. *v.* Richardson, 8 Cox C. C. 448, 2 F. & F. 343.

See, however, Hoyt *v.* State, 50 Ga. 313; Kribs *v.* People, 82 Ill. 425; Edelhoff *v.* State, 5 Wyo. 19, 36 Pac. 627.

54. *Alabama.*— Stanley *v.* State, 88 Ala. 154, 7 So. 273, a prosecution for the embezzlement of solicitor's fees by a circuit clerk, in which it was held that evidence showing the conviction of defendants in the cases, confessions of judgment for fines and costs, the issue of executions, the collection of the fees by the sheriff, and the receipts of defendant for them, was admissible to show that defendant had received the fees in his official capacity.

California.— People *v.* Van Ewan, 111 Cal. 144, 43 Pac. 520, receipts by agent to debtors of principal.

Delaware.— State *v.* Sienkiewiez, (1902) 55 Atl. 346.

Iowa.— State *v.* Brooks, 85 Iowa 366, 52 N. W. 240, to the effect that the draft for the money alleged to have been embezzled is competent evidence to show how defendant acquired its possession.

Maryland.— Denton *v.* State, 77 Md. 527, 26 Atl. 1022, receipt of tax bill by clerk of county commissioners as such clerk.

Massachusetts.— Com. *v.* Smith, 129 Mass. 104, check from agent to principal admissible to show receipt of payment on sales made by him.

Missouri.— State *v.* Silva, 130 Mo. 440, 32 S. W. 1007, to the effect that the delivery to an officer of a corporation, the owner by purchase of all the assets of another corporation to which it succeeded, of packages of money addressed to the old corporation may be shown; and that usage and custom are

4. Disposition of Embezzled Property. In a prosecution for embezzlement evidence is admissible to show the disposition made by the accused of the property embezzled.[55]

5. Documentary Evidence — a. Private Documents. Private documents of various sorts,[56] if made by or under the direction of the accused before the finding of the indictment,[57] are admissible in evidence as in other cases.

b. Public Documents. Public records, documents, official statements and returns, and the like, or transcripts thereof, are admissible in evidence in a prosecution for embezzlement.[58]

admissible to show that he received the money by virtue of his employment.

New York.— People *v.* Dorthy, 20 N. Y. App. Div. 308, 46 N. Y. Suppl. 970, judgment-roll admitted to show defendant's employment as attorney.

Ohio.— Grillo *v.* State, 9 Ohio Cir. Ct. 394, 6 Ohio Cir. Dec. 90, to the effect that the position and duties of the servant of a club may be shown by proof of his position and duties in another society, the predecessor of the club, the servant having retained the same position and performed the same duties in the club as in the old society.

Texas.— Jackson *v.* State, (Cr. App. 1902) 70 S. W. 760, statement of defendant previous to arrest.

Washington.—State *v.* Kasper, 5 Wash. 174, 31 Pac. 636, to the effect that on a trial for larceny in borrowing and converting a chattel, the owner's salesman may testify that he did not sell the chattel to defendant or charge it to him.

See 18 Cent. Dig. tit. "Embezzlement," § 63.

55. People *v.* Bidleman, 104 Cal. 608, 38 Pac. 502 (holding that testimony as to what defendant said about opening a new ledger, and the condition of the books kept by him, and the possibility of making a trial balance, is competent to show his methods and conduct in disposing of the misappropriated moneys); State *v.* Brooks, 85 Iowa 366, 52 N. W. 240; Malcolmson *v.* State, 25 Tex. App. 267, 8 S. W. 468.

56. *Alabama.*— Butler *v.* State, 91 Ala. 87, 9 So. 191, bills of sale.

California.— People *v.* Leonard, 106 Cal. 302, 39 Pac. 617, cash books.

Iowa.— State *v.* Halstead, 73 Iowa 376, 35 N. W. 457, deposit slips.

Kentucky.— Lee *v.* Com., 1 S. W. 4, 8 Ky. L. Rep. 53, official reports.

Missouri.— State *v.* Noland, 111 Mo. 473, 19 S. W. 715, official checks.

New York.— Humphrey *v.* People, 18 Hun 393, bank-books.

See 18 Cent. Dig. tit. "Embezzlement," § 66.

Books of account are admissible. Willis *v.* State, 134 Ala. 429, 33 So. 226; People *v.* McKinney, 10 Mich. 54.

Receipts are admissible. People *v.* Van Ewan, 111 Cal. 144, 43 Pac. 520; People *v.* Bidleman, 104 Cal. 608, 38 Pac. 502; Bridges *v.* State, 103 Ga. 21, 29 S. E. 859; Dowdy *v.* State, (Tex. Cr. App. 1901) 64 S. W. 253.

57. State *v.* Thompson, 32 La. Ann. 796.

Before the books of a party can be admitted in evidence they are to be submitted to the inspection of the court, and if they do not appear to be a register of the daily business of the party, and to have been honestly and fairly kept, they are excluded. State *v.* Collins, 1 Marv. (Del.) 536, 41 Atl. 144.

Entries by third persons.— Accused is not bound by entries in a ledger of money received, if made by third persons. State *v.* Collins, 1 Marv. (Del.) 536, 41 Atl. 144. See also People *v.* Blackman, 127 Cal. 248, 59 Pac. 573; State *v.* Ames, 119 Iowa 680, 94 N. W. 231.

Letters.— Letters found in the office recently occupied by defendant, written by other officers of his principal, and touching on the matter of his agency, are admissible in evidence against him, where they appear to have been invited by other letters from him, and to have been acted upon in the course of his agency. Thalheim *v.* State, 38 Fla. 169, 20 So. 938.

58. *Alabama.*— Britton *v.* State, 77 Ala. 202.

Dakota.— U. S. *v.* Adams, 2 Dak. 305, 9 N. W. 718, quarterly returns of postmaster.

Georgia.— Shivers *v.* State, 53 Ga. 149, transcript of books of controller-general and treasurer.

Illinois.— Goodhue *v.* People, 94 Ill. 37, record of proceedings of county board.

Kansas.— State *v.* Patterson, 66 Kan. 447, 71 Pac. 860, account-books.

Michigan.—People *v.* Flock, 100 Mich. 512, 59 N. W. 237; People *v.* McKinney, 10 Mich. 54, annual reports of state treasurer.

Minnesota.— State *v.* Ring, 29 Minn. 78, 11 N. W. 233; State *v.* Mims, 26 Minn. 183, 2 N. W. 494, 683, indorsement on certificate of settlement.

New York.— Bork *v.* People, 16 Hun 476, 1 N. Y. Cr. 368, resolution of city council, tax rolls, and receipts.

United States.— Dimmick *v.* U. S., 121 Fed. 638, 57 C. C. A. 664 (holding, in a prosecution under such statute against a clerk of the mint for failure to deposit the proceeds of the sale of old materials, that a rule of the treasury department requiring that all funds received from the sale of such materials shall be separately deposited on the last day of each quarter in which it was received in the treasury of the United States, etc., is admissible); Tyler *v.* U. S., 106 Fed. 137, 45 C. C. A. 247 (holding that the controller's certificate of the organization of a bank and the extension of its powers and privileges, is

C. Weight and Sufficiency — 1. In General. In a prosecution for embezzlement the evidence must clearly show the commission of the offense, and bring the act within the statute.[59] Its weight and sufficiency are primarily a question for the jury,[60] under proper instructions from the court,[61] and a verdict of conviction will not be disturbed on appeal unless manifestly erroneous.[62] The offense

admissible in evidence in a prosecution against its teller for embezzlement).

See 18 Cent. Dig. tit. "Embezzlement," § 66.

If based upon hearsay such documents are not admissible. U. S. *v.* Forsythe, 25 Fed. Cas. No. 15,133, 6 McLean 584. See also People *v.* Page, 116 Cal. 386, 48 Pac. 326.

59. *Alabama.*— Grider *v.* State, 133 Ala. 188, 32 So. 254; Carr *v.* State, 104 Ala. 43, 16 So. 155.

California.— People *v.* Goodrich, 138 Cal. 472, 71 Pac. 509; People *v.* Page, 116 Cal. 386, 48 Pac. 326; People *v.* Van Seiver, (1895) 42 Pac. 451.

Illinois.— Rauguth *v.* People, 186 Ill. 93, 57 N. E. 832. See also McElroy *v.* People, 202 Ill. 473, 66 N. E. 1058.

Kansas.— State *v.* Vennum, 67 Kan. 868, 74 Pac. 268.

Massachusetts.—Com. *v.* O'Malley, 97 Mass. 584; Com. *v.* Shepard, 1 Allen 575.

New York.— People *v.* Pollock, 4 N. Y. Suppl. 297.

Pennsylvania.— Com. *v.* Harris, 168 Pa. St. 619, 32 Atl. 92.

Texas.— Brace *v.* State, 43 Tex. Cr. 48, 62 S. W. 1067; Victor *v.* State, 15 Tex. App. 90; Keeller *v.* State, 4 Tex. App. 527.

Wisconsin.— Dix *v.* State, 89 Wis. 250, 61 N. W. 760; Williamson *v.* State, 74 Wis. 263, 42 N. W. 111.

United States.— U. S. *v.* Crow, 25 Fed. Cas. No. 14,895, 1 Bond 51.

England.— Reg. *v.* Wolstenholme, 11 Cox C. C. 313; Reg. *v.* Perfitt, 8 C. & P. 288, 34 E. C. L. 739; Rex *v.* Jones, 7 C. & P. 833, 32 E. C. L. 897.

See 18 Cent. Dig. tit. "Embezzlement," § 67.

60. Willis *v.* State, 134 Ala. 429, 33 So. 226; Com. *v.* Gately, 126 Mass. 52; State *v.* Fair, 106 N. C. 760, 11 S. E. 593.

If there is any evidence reasonably sufficient to go to the jury, its weight is a question with which an appellate court has nothing to do. That is exclusively within the province of the jury. State *v.* Fair, 106 N. C. 760, 11 S. E. 593.

61. See *infra*, VI, C, 4.

62. *Alabama.*— Willis *v.* State, 134 Ala. 429, 33 So. 226.

California.—People *v.* Klee, (1902) 69 Pac. 696; People *v.* McMahan, 133 Cal. 278, 65 Pac. 571; People *v.* Gallagher, (1893) 33 Pac. 890.

Indiana.— Ritter *v.* State, 111 Ind. 324, 12 N. E. 501.

Iowa.—State *v.* Foley, 81 Iowa 36, 46 N. W. 746; State *v.* Pierce, 77 Iowa 245, 42 N. W. 181.

Louisiana.— State *v.* Collens, 37 La. Ann. 607.

Michigan.— People *v.* Husband, 36 Mich. 306.

Minnesota.— State *v.* McGregor, 88 Minn. 77, 92 N. W. 458; State *v.* Rue, 72 Minn. 296, 75 N. W. 235; State *v.* Fisher, 38 Minn. 378, 37 N. W. 948; State *v.* Czizek, 38 Minn. 192, 36 N. W. 457.

Missouri.— State *v.* Thomson, 155 Mo. 300, 55 S. W. 1013; State *v.* Samuels, 111 Mo. 566, 20 S. W. 316.

Nebraska.— Bartley *v.* State, 53 Nebr. 310, 73 N. W. 744, 55 Nebr. 294, 75 N. W. 832.

New York.— People *v.* Hazard, 28 N. Y, App. Div. 304, 50 N. Y. Suppl. 1023; People *v.* Smith, 6 N. Y. App. Div. 234, 39 N. Y. Suppl. 1009; People *v.* Hearne, 20 N. Y. Suppl. 806; People *v.* McHale, 15 N. Y. Suppl. 496.

Ohio.— Grillo *v.* State, 9 Ohio Cir. Ct. 394, 6 Ohio Cir. Dec. 90.

Oregon.— State *v.* Reinhart, 26 Oreg. 466, 38 Pac. 822; State *v.* Chew Muck You, 20 Oreg. 215, 25 Pac. 355.

Pennsylvania.— Com. *v.* Beale, 19 Pa. Super. Ct. 434; Com. *v.* Kaufman, 9 Pa. Super. Ct. 310.

Rhode Island.— See State *v.* Hunt, 25 R. I. 69, 54 Atl. 937.

Texas.— Smith *v.* State, 34 Tex. Cr. 265, 30 S. W. 236.

Wisconsin.— Secor *v.* State, 118 Wis. 621, 95 N. W. 942.

United States.— McKnight *v.* U. S., 122 Fed. 926, 61 C. C. A. 112 (holding that an entry in a book identified as the minute-book of a national bank, showing the election of defendant as a director and as president of the bank, together with evidence that he acted as such, is sufficient *prima facie* to support an averment that he was president of the bank in an indictment charging him with embezzlement as such officer); Dimmick *v.* U. S., 121 Fed. 638, 57 C. C. A. 664; Flower *v.* U. S., 116 Fed. 241, 53 C. C. A. 271.

England.— Reg. *v.* Aston, 2 C. & K. 413, 2 Cox C. C. 234, 61 E. C. L. 413; Reg. *v.* King, 12 Cox C. C. 73, 24 L. T. Rep. N. S. 670; Reg. *v.* Moah, 7 Cox C. C. 60, Dears. C. C. 626, 2 Jur. N. S. 213, 25 L. J. M. C. 66, 4 Wkly. Rep. 255; Rex *v.* Grove, 7 C. & P. 635, 1 Moody C. C. 447, 32 E. C. L. 796; Rex *v.* Beacall, 1 C. & P. 454, 12 E. C. L. 265; Rex *v.* Becall, 1 C. & P. 310, 12 E. C. L. 186.

See 18 Cent. Dig. tit. "Embezzlement," § 66.

Aiding and abetting embezzlement.— In People *v.* Gallagher, (Cal. 1893) 33 Pac. 890, the president of a corporation, to pay an indebtedness of the corporation, signed a blank check, payable to the secretary, with directions to fill in the amount, and pay the debt.

may be proved as well by indirect or circumstantial as by direct and positive evidence.[63]

2. As to Intent. The evidence should show an intent to defraud beyond a reasonable doubt,[64] but if there is sufficient evidence to go to the jury on the question of intent, a verdict of conviction will not be disturbed on appeal on the ground that it is against the weight of the evidence.[65]

3. As to Value. Any evidence tending to show that the property alleged to have been embezzled was of value is sufficient to sustain a conviction.[66]

4. As to Public Officers. There is no difference in principle between the evidence required to convict in a prosecution against a public officer and that required in a prosecution against a private individual. To support a conviction the evidence must show the official character of the accused, and bring the act alleged within the terms of the statute.[67]

He filled it in for a larger amount, and appropriated the entire sum. By previous appointment defendant went to a saloon near a bank, while the secretary drew the funds. They immediately went to another city, where defendant registered under an assumed name, procured currency for part of the coin, took most of the funds in a valise to a railroad station, where he obtained two tickets, paying therefor from the appropriated funds. Defendant when arrested had some of them on his person. It was held that this evidence was sufficient to warrant a conviction for aiding and abetting in the embezzlement.

An admission by an employee, charged with embezzlement in taking money in his employer's custody for transmission, that he had taken it, but had lost it at poker, and that he had been "rolling it a little too high," made to the company's agent, under whose orders he was, is sufficient to show that he used the money without the consent of the employer. Smith *v.* State, 34 Tex. Cr. 265, 30 S. W. 236.

Proof of a continuous series of conversions of money by an officer to the use of another, in pursuance of a conspiracy between them, will support a verdict finding the aggregate sum as the amount of a single embezzlement. Brown *v.* State, 18 Ohio St. 496.

The uncorroborated evidence of the books kept by defendant for his employer, and which he falsified to conceal his peculations, is sufficient to sustain a conviction. State *v.* Reinhart, 26 Oreg. 466, 38 Pac. 822.

63. State *v.* Foster, 1 Pennew. (Del.) 289, 40 Atl. 939; State *v.* Porter, 26 Mo. 201; New York Ferry Co. *v.* Moore, 102 N. Y. 667, 6 N. E. 293. And see cases cited *supra*, note 51.

64. McElroy *v.* People, 202 Ill. 473, 66 N. E. 1058 (holding that an agent who converts to her own use money of her employer, but without concealing the fact or denying the indebtedness, which she promises to pay, whereupon the employer suspends criminal prosecution against her, is not shown with sufficient certainty to have possessed the requisite criminal intent); State *v.* Wallick, 87 Iowa 369, 54 N. W. 246 (holding that if the evidence introduced by the prosecution is consistent with good faith on the part of the accused, there is no such intent to embezzle shown as is necessary under the statutes); State *v.* Cowdery, 79 Minn. 94, 81 N. W. 750, 48 L. R. A. 92.

An unexplained failure to pay over the money which the accused is charged with having embezzled does not of itself raise a presumption of a felonious appropriation sufficient to convict. State *v.* O'Kean, 35 La. Ann. 901.

65. *California.*— People *v.* De Lay, 80 Cal. 52, 22 Pac. 90.

Georgia.— Almond *v.* State, 110 Ga. 883, 36 S. E. 215, 78 Am. St. Rep. 140.

New York.— People *v.* Bradner, 10 N. Y. St. 853.

Texas.— See Golden *v.* State, 22 Tex. App. 1, 2 S. W. 531.

England.— Rex *v.* Williams, 7 C. & P. 338, 32 E. C. L. 644.

See 18 Cent. Dig. tit. "Embezzlement," § 68.

Circumstantial evidence.— The fraudulent intent may be proven by either direct or circumstantial evidence. State *v.* Foster, 1 Pennew. (Del.) 289, 40 Atl. 939.

Fraudulent intent is sufficiently established by proof that accused concealed the taking of the money until he was found out and taxed with it, although he then admitted it (Smith *v.* State, 34 Tex. Cr. 265, 30 S. W. 236); or by proof that defendant had put the goods beyond his control, and secured money and drinks on them (Harris *v.* State, (Tex. Cr. App. 1896) 34 S. W. 922).

66. Walker *v.* State, 117 Ala. 42, 23 So. 149; State *v.* Fourchy, 51 La. Ann. 228, 25 So. 109; State *v.* Thompson, 28 Oreg. 296, 42 Pac. 1002; Harris *v.* State, 21 Tex. App. 478, 2 S. W. 830. See *supra*, IV, C, 4.

67. *California.*— People *v.* Page, 116 Cal. 386, 48 Pac. 326; People *v.* Cobler, 108 Cal. 538, 41 Pac. 401.

Georgia.— Robson *v.* State, 83 Ga. 166, 9 S. E. 610.

Iowa.— State *v.* King, 81 Iowa 587, 47 N. W. 775; State *v.* Cowan, 74 Iowa 53, 36 N. W. 886.

Michigan.— People *v.* McKinney, 10 Mich. 54.

Minnesota.— State *v.* Mims, 26 Minn. 183, 2 N. W. 494, 683.

Mississippi.—Hemingway *v.* State, 68 Miss. 371, 8 So. 317.

Missouri.— State *v.* Mahan, 138 Mo. 112,

VI. TRIAL AND REVIEW.[68]

A. Reception of Evidence. The order in which testimony shall be introduced rests largely in the discretion of the court.[69]

B. Questions of Law and Fact. In a prosecution for embezzlement questions of law are to be determined by the court,[70] and questions of fact by the jury.[71]

C. Instructions — 1. In General. The general rules of law governing instructions to the jury in criminal cases generally apply in prosecutions for embezzlement.[72]

39 S. W. 465; State *v.* Findley, 101 Mo. 217, 14 S. W. 185.

See 18 Cent. Dig. tit. "Embezzlement," § 70.

Document based on hearsay.— Where a collector of customs is charged with embezzlement, a duly certified transcript from the treasury is not *prima facie* evidence, if the items thereof were not taken from the returns of defendant, but were returned by his successor from talking with persons who had paid duties into the office. U. S. *v.* Forsythe, 25 Fed. Cas. No. 15,133, 6 McLean 584.

Failure to account for and pay over public money is *prima facie* evidence under Nebr. Cr. Code, § 124. Whitney *v.* State, 53 Nebr. 287, 73 N. W. 696; Bolln *v.* State, 51 Nebr. 581, 71 N. W. 444.

Office record.— On the trial of the secretary of a board of education who was also county treasurer, for embezzlement of school funds, the records of the treasurer's office showing that defendant as secretary had on a certain date receipted to himself as treasurer for a certain sum belonging to the school-district were not conclusive as to the amount paid. Hockenberger *v.* State, 49 Nebr. 706, 68 N. W. 1037.

68. See, generally, CRIMINAL LAW.

69. Whitney *v.* State, 53 Nebr. 287, 73 N. W. 696; Coats *v.* People, 4 Park. Cr. (N. Y.) 662.

70. State *v.* Brown, 171 Mo. 477, 71 S. W. 1031, holding that the interpretation of a written contract, relied on by the state as establishing the relation of principal and agent between defendant and the prosecuting witness, is for the court.

71. Eggleston *v.* State, 129 Ala. 80, 30 So. 582, 87 Am. St. Rep. 17; Walker *v.* State, 117 Ala. 42, 23 So. 149; People *v.* Gordon, 133 Cal. 328, 65 Pac. 746. And see, *supra*, V, C.

"The intent with which the party appropriates the money or property to his own use is a question of fact, to be determined from the evidence in the particular case." State *v.* Trolson, 21 Nev. 419, 427, 32 Pac. 930 [*citing* People *v.* De Lay, 80 Cal. 52, 22 Pac. 90; People *v.* Galland, 55 Mich. 628, 22 N. W. 81].

Whether a claim of right to retain the fund was asserted by accused in good faith is for the jury. State *v.* Lewis, 31 Wash. 75, 71 Pac. 778.

Whether a relation of master and servant has existed between the prosecutor and accused is within the province of the jury. Reg. *v.* Chater, 9 Cox C. C. 1. See also Reg. *v.* Bowerman, [1891] 1 Q. B. 112, 17 Cox C. C. 151, 55 J. P. 373, 60 L. J. M. C. 13, 63 L. T. Rep. N. S. 532, 39 Wkly. Rep. 207; Reg. *v.* Foulkes, L. R. 2 C. C. 150, 13 Cox C. C. 63, 44 L. J. M. C. 65, 32 L. T. Rep. N. S. 407, 23 Wkly. Rep. 696.

72. *California.*— People *v.* Treadwell, 69 Cal. 226, 10 Pac. 502.

Georgia.— Fuller *v.* State, 73 Ga. 408, holding that where it does not clearly appear whether defendant was guilty, or whether his deficit arose from a neglect of duty in making collections, and the charge of the court is obscure on the distinction, there should be a new trial.

North Carolina.— State *v.* Foust, 114 N. C. 842, 19 S. E. 275.

Ohio.— Grillo *v.* State, 9 Ohio Cir. Ct. 394, 6 Ohio Cir. Dec. 90.

South Carolina.— State *v.* Ezzard, 40 S. C. 312, 18 S. E. 1025.

Texas.— Cooksie *v.* State, 26 Tex. App. 72, 9 S. W. 58; Henderson *v.* State, 1 Tex. App. 432.

Washington.—State *v.* Krug, 12 Wash. 288, 41 Pac. 126.

See 18 Cent. Dig. tit. "Embezzlement," § 72.

Necessity for charge.— The statutory terms "embezzled," "fraudulently misapplied," or "converted to his own use" are employed in their ordinary signification, and not in any technical sense requiring elucidation in the charge. Bridgers *v.* State, 8 Tex. App. 145.

Presenting defense.— The charge should present the defense set up by the accused. Taylor *v.* Com., 75 S. W. 244, 25 Ky. L. Rep. 374; Stallings *v.* State, (Tex. Cr. App. 1901) 63 S. W. 127. However "there is no duty upon the court to emphasize certain inconclusive circumstances from which the law raises no presumption. All that could be properly said on such inconclusive circumstances is that they are competent evidence for the jury's consideration, and this is sufficiently done by the admission itself of the circumstances in evidence." Hemingway *v.* State, 68 Miss. 371, 420, 8 So. 317.

Conformity to issues and evidence.— It is error to give an instruction not based upon some evidence and not within the issues. Willis *v.* State, 134 Ala. 429, 33 So. 226; Walker *v.* State, 117 Ala. 42, 23 So. 149; Lang *v.*

2. As to Intent. The jury should be instructed as to the necessity of finding that the act was committed with a fraudulent intent;[73] and conversely where there is evidence tending to negative the felonious intent the court should instruct the jury as to its effect.[74]

3. As to Possession. The jury should be instructed as to the possession or custody of the property, and the capacity or character in which it was held by defendant.[75]

4. As to Weight and Sufficiency of Evidence. It is ordinarily improper for the court to instruct the jury as to the weight and sufficiency of the evidence.[76]

State, 97 Ala. 41, 12 So. 183; Thalheim v. State, 38 Fla. 169, 20 So. 938; Schintz v. People, 178 Ill. 320, 52 N. E. 903; Jackson v. State, 44 Tex. Cr. 259, 70 S. W. 760; Malcolmson v. State, 25 Tex. App. 267, 8 S. W. 468. See also Territory v. Meyer, 3 Ariz. 199, 24 Pac. 183; State v. Crosswhite, 130 Mo. 358, 32 S. W. 991, 51 Am. St. Rep. 571. Thus in a prosecution of one canvassing for a paper on commissions for embezzling collected subscriptions, it is misleading to instruct that an agent selling goods on commission will be guilty of embezzlement in appropriating money collected, etc. McElroy v. People, 202 Ill. 473, 66 N. E. 1058. So where there was no evidence tending to show that defendant hired the horse alleged to have been embezzled, an instruction that a bailee in the present case is a person who hires a horse, etc., is erroneous. State v. Bonner, 178 Mo. 424, 77 S. W. 463. And on the trial of an agent for breach of trust with fraudulent intent, the court properly refused to charge that before larceny can be committed the property must have come into the possession of the person from whom it is alleged to have been stolen, without a qualification to show that possession by the agent is possession by the principal. State v. Ezzard, 40 S. C. 312, 18 S. E. 1025.

Construction of charge.— If the charge construed as a whole correctly presents the law applicable to the case, minor errors in particular parts are not ordinarily ground for new trial. Ritter v. State, 70 Ark. 472, 60 S. W. 262; People v. Leonard, 106 Cal. 302, 39 Pac. 607; Mills v. State, 53 Nebr. 263, 73 N. W. 761.

Harmless error.— A misdirection is no ground for a new trial where it has worked no prejudice to defendant.

California.— People v. Leonard, 106 Cal. 302, 39 Pac. 617.

Iowa.— State v. Brooks, 85 Iowa 366, 52 N. W. 240, holding that where the jury were instructed that, if the proofs warranted, defendant might be convicted of embezzlement, "either in the capacity of agent . . . or in the capacity of the person who received or collected money for the use and benefit" of the person alleged, the use of the words "and benefit," although not in the statute, did not enlarge the meaning of the instruction.

Mississippi.—Hemingway v. State, 68 Miss. 371, 8 So. 317.

Nebraska.—Whitney v. State, 53 Nebr. 287, 73 N. W. 696.

South Dakota.— State v. Serenson, 7 S. D. 277, 64 N. W. 130.

Washington.— State v. Lewis, 31 Wash. 75, 71 Pac. 778, holding that the mere use in an instruction of the word "attorney," in describing defendant in a prosecution for larceny, although the state had elected to rely on the relation of principal and agent and not on that of attorney and client, was not material error.

Wyoming.— Wilbur v. Territory, 3 Wyo. 268, 21 Pac. 698.

73. People v. Gordon, 133 Cal. 328, 65 Pac. 746; Taylor v. Com., 75 S. W. 244, 25 Ky. L. Rep. 374; State v. Rigall, 169 Mo. 659, 70 S. W. 150; State v. Schilb, 159 Mo. 130, 60 S. W. 82; State v. Noland, 111 Mo. 473, 19 S. W. 715; State v. Manley, 101 Mo. 364, 17 S. W. 800; State v. Temple, 63 N. J. L. 375, 43 Atl. 697.

Sufficiency.— If the court has properly and fully instructed as to fraudulent intent, it is not ordinarily error to refuse a request for a further special instruction. Brooks v. State, 26 Tex. App. 184, 9 S. W. 562; Dimmick v. U. S., 121 Fed. 638, 57 C. C. A. 664.

"Fraudulently, unlawfully, and feloniously," in an instruction, in and of themselves supply the idea of intentional and wilful wrongdoing, and no additional formula is needed. State v. Noland, 111 Mo. 473, 19 S. W. 715; State v. Manley, 107 Mo. 364, 17 S. W. 800.

Intent to deprive of ownership.— A conviction will not be set aside because the court in its instructions referred to the intent to deprive the owner, etc., "of the use thereof absolutely," instead of the intent to deprive such owner "of his ownership therein." State v. Pratt, 98 Mo. 482, 11 S. W. 977.

Intent to steal.— It is not necessary to charge that the conversion must be made with intent to steal the property. People v. Cobler, 108 Cal. 538, 41 Pac. 401.

74. Com. v. Swayne, 1 Pa. Super. Ct. 547, in which there was evidence that the property was withheld under a *bona fide* claim of right, and it was held that the court should have instructed the jury that such evidence negatived the felonious intent. See also Wadley v. Com., 98 Va. 803, 35 S. E. 452.

75. Thomas v. State, 36 Fla. 109, 18 So. 331; State v. Brooks, 85 Iowa 366, 52 N. W. 240; State v. Heath, 70 Mo. 565 [*reversing* 8 Mo. App. 99].

76. Butler v. State, 91 Ala. 87, 9 So. 191. See also State v. Cowan, 74 Iowa 53, 36 N. W. 886; Burnett v. State, 60 N. J. L. 255, 37 Atl. 622.

5. As to Grade of Offense. When there is a doubt of fact as to the grade of the offense, the jury should be instructed appropriately in regard to the minor degree; the presumption being that as between felony and misdemeanor the accused is innocent of the greater offense.[77]

D. Verdict. The verdict must be certain[78] and responsive to the indictment.[79]

E. New Trial. It is no ground for a new trial that defendant was tried under an act repealing that under which he supposed he was tried, and that he was thereby misled.[80]

Where, however, the facts are undisputed and sufficient to warrant it, the court may charge that they amount to embezzlement, if the jury find the intent. People *v.* Hawkins, 106 Mich. 479, 64 N. W. 736.

An instruction that if the jury find a given state of facts they shall convict is not an invasion of the province of the jury or a comment on the weight of the evidence, because it commands their verdict, for it leaves them free to find the facts according to their own view of the weight of the evidence. Hemingway *v.* State, 68 Miss. 371, 8 So. 317.

77. Loving *v.* State, 44 Tex. Cr. 373, 71 S. W. 277. See *supra*, III, A.

Where there is no evidence tending to show that the accused is guilty of an inferior degree of the offense, it is not error to fail to charge as to such degree. Taylor *v.* State, 29 Tex. App. 466, 16 S. W. 302.

78. Guenther *v.* State, 24 N. Y. 100, holding, however, that on an indictment containing nine counts for embezzlement of different grades and other counts for larceny, a verdict of "guilty of embezzlement" was not void for uncertainty, being equivalent to an acquittal on the counts for larceny.

General verdict.— Upon trial of an indictment for embezzlement of public property, in the absence of evidence as to the amount of loss, or of a request to direct a special finding in respect to such loss, a general verdict of guilty, unaccompanied by such a finding, is proper, since the statutory provision that the jury "may find and state with their verdict the amount of loss" is not mandatory. People *v.* Bork, 96 N. Y. 188.

A special verdict must affirm every material ingredient of the offense. Thus a verdict finding defendant "guilty of embezzlement of a sum of money less than $25," without stating that the money was the property of the person named in the indictment, or that the offense was committed in the county in which the court sat, is insufficient. Huffman *v.* State, 89 Ala. 33, 8 So. 28.

The grade of the offense must be shown by the verdict. Thalheim *v.* State, 38 Fla. 169, 20 So. 938. And see *supra*, III, A.

Recital of value.— It is not necessary, in a verdict finding defendant guilty of the embezzlement of a sum of money, to state the value of the money, in order to assess the punishment, because money is not to be valued in its own terms, and the courts judicially know that the different kinds of money current in this country circulate at their par value. State *v.* Eastman, 62 Kan. 353, 63 Pac. 697 [*disapproving* Gerard *v.* State, 10 Tex. App. 690].

Construction as to acquittal.— Where an indictment is founded on a statute providing that if a person to whom money or property is intrusted for hire shall embezzle the same he shall be deemed guilty of larceny, the jury find defendant not guilty of the offense charged but guilty of petit larceny, the verdict is one of acquittal. State *v.* Weydeman, 3 Wash. 399, 28 Pac. 749. Where, however, two counts of an indictment against a clerk of the United States mint charged embezzlement for failure to deposit funds in his hands, as required by U. S. Rev. St. § 5492 [U. S. Comp. St. (1901) p. 3705], and two other counts charged him with failure to deposit the same as directed by the secretary of the treasury, for which a punishment is provided by the same section, a verdict of guilty on the latter counts only did not operate as an acquittal on the ground that the crime of embezzlement charged was with reference to the same moneys referred to in such subsequent count. Dimmick *v.* U. S., 121 Fed. 638, 57 C. C. A. 664.

Construction as to place of commission.— Where defendant was indicted for embezzling a horse, wagon, and harness, and it appeared that he took the property into another county, in which he sold the horse, and that he retained the wagon and harness, the fact that the jury found him guilty as to the horse, and were silent as to the wagon and harness, does not show that they found the embezzlement to consist of the sale of the horse, so as to make the place of the commission of the crime the county in which it was sold. People *v.* Fly, 107 Cal. 497, 40 Pac. 805.

79. State *v.* Reonnals, 14 La. Ann. 278 (to the effect that on an indictment for embezzlement the accused cannot be found guilty of a breach of trust); Myers *v.* State, 4 Ohio Cir. Ct. 570, 2 Ohio Cir. Dec. 712 (holding that where the indictment charges but one offense, a verdict based on a finding of several offenses is erroneous, and should be set aside). And see State *v.* Burks, 159 Mo. 568, 60 S. W. 1100.

In Louisiana there may be a conviction of larceny under an indictment for embezzlement. State *v.* Poland, 33 La. Ann. 1161.

In Texas there may be a conviction for embezzlement on a prosecution for theft. Whitworth *v.* State, 11 Tex. App. 414. See also Huntsman *v.* State, 12 Tex. App. 619; Simco *v.* State, 8 Tex. App. 406.

80. Com. *v.* Slingluff, 3 Montg. Co. Rep. (Pa.) 205.

F. Appeal and Error. Mere irregularities or non-prejudicial errors in the trial of an indictment for embezzlement are no ground for reversal.[81]

G. Sentence and Punishment.[82] The punishment for embezzlement is fixed by statute, and is usually fine and imprisonment,[83] and the sentence cannot exceed the punishment as fixed.[84]

EMBLEMENTS.[1] A crop growing upon land;[2] a crop which grows yearly, and is raised annually by expense and labor, or great manurance or industry;[3] a crop which is the result of special labor and cultivation, and which commonly compensates such labor within the year;[4] the annual product of things sown or planted;[5] the produce or fruit of land sown or planted; the growing crop of those vegetable productions of the soil, such as grain, garden roots and the like which are not spontaneous, but require an outlay of cost and labor in one part of the year, the recompense for which is to arise in the shape of a crop in another part of the same year;[6] a product of the earth which is annual, and is raised by yearly manurance and labor, and essentially owes its annual existence to the cultivation of man;[7] a thing which grows by the manurance and industry of the owner.[8] The term may include not only corn and grain of all kinds, but everything of an

81. *Iowa.*— State *v.* Brooks, 85 Iowa 366, 52 N. W. 240.

Minnesota.— State *v.* Rue, 72 Minn. 296, 75 N. W. 235.

South Dakota.— State *v.* Wright, 15 S. D. 628, 91 N. W. 311.

Texas.— Farmer *v.* State, (Cr. App. 1896) 34 S. W. 620; Crump *v.* State, 23 Tex. App. 615, 5 S. W. 182.

Washington.— State *v.* Kasper, 5 Wash. 174, 31 Pac. 636.

See also *supra*, note 72.

82. Mitigation of punishment see *supra*, III, B, 4, 5.

83. U. S. *v.* Bloomgarb, 24 Fed. Cas. No. 14,613.

84. Whitworth *v.* U. S., 114 Fed. 302, 52 C. C. A. 214, in which the costs of the prosecution were superadded to the fine, which the statute fixed at the amount embezzled.

Cumulative sentence.—Where, however, the offender is convicted on a number of counts in an indictment charging a number of distinct embezzlements, a cumulative sentence may be imposed. State *v.* Hawkins, 5 N. J. L. J. 56.

Construction of sentence.— Where both embezzlement and larceny are charged in the indictment, the sentence will be construed to be for that offense to whose prescribed punishment it conforms. Griffith *v.* State, 36 Ind. 406.

1. **Sometimes called** "*fructus industriales*," in contradistinction to "*fructus naturales*," which, while unsevered from the soil, belonged to the realty. Sparrow *v.* Pond, 49 Minn. 412, 417, 52 N. W. 36, 32 Am. St. Rep. 571, 16 L. R. A. 103.

Distinction between *fructus industriales* and *fructus naturales* as applied to "emblements" see State *v.* Crook, 132 N. C. 1053, 1057, 44 S. E. 32.

Distinction between "emblements" and "annual crops" as used in an act concerning decedents' estates see Evans *v.* Hardy, 76 Ind. 527, 532.

2. Bouvier L. Dict. [*quoted* in Cottle *v.* Spitzer, 65 Cal. 456, 458, 4 Pac. 435, 52 Am. Rep. 305, where it is said that the term is nearly synonymous with "crops"].

3. Rogers *v.* Elliott, 59 N. H. 201, 202, 47 Am. Rep. 192.

4. Owens *v.* Lewis, 46 Ind. 488, 508, 15 Am. Rep. 295 [*citing* 3 Redfield Wills 151].

5. Hamilton *v.* Austin, 36 Hun (N. Y.) 138, 142.

6. Evans *v.* Hardy, 76 Ind. 527, 531 [*quoting* Webster Dict., and *citing* Lansingburgh Bank *v.* Crary, 1 Barb. (N. Y.) 542; Green *v.* Armstrong, 1 Den. (N. Y.) 550; Bouvier L. Dict.; 1 Hilliard Real Prop. (4th ed.) p. 18, § 16; Taylor Landl. & Ten. § 534; Toller Ex. 193; 3 Washburn Real Prop. (4th ed.) 599].

7. Sparrow *v.* Pond, 49 Minn. 412, 417, 52 N. W. 36, 32 Am. St. Rep. 571, 16 L. R. A. 103, where Mitchell, J., delivering the opinion of the court, said: "This class included grain, garden vegetables, and the like."

"Emblements" do not include fruits which grow on trees which are not planted yearly (Sparrow *v.* Pond, 49 Minn. 412, 417, 52 N. W. 36, 32 Am. St. Rep. 571, 16 L. R. A. 103; Rogers *v.* Elliott, 59 N. H. 201, 202, 47 Am. Rep. 192); nor perennial bushes (Sparrow *v.* Pond, 49 Minn. 412, 418, 52 N. W. 36, 32 Am. St. Rep. 571, 16 L. R. A. 103); or the roots or bushes from which hops and berries grow (Hamilton *v.* Austin, 36 Hun (N. Y.) 138, 142); grass (Evans *v.* Hardy, 76 Ind. 527, 531; Perley *v.* Chase, 79 Me. 519, 522, 11 Atl. 418; Sparrow *v.* Pond, 49 Minn. 412, 418, 52 N. W. 36, 32 Am. St. Rep. 571, 16 L. R. A. 103); trees and the like (Evans *v.* Hardy, 76 Ind. 527, 531); or nursery trees (Hamilton *v.* Austin, 36 Hun (N. Y.) 138, 142).

8. Sparrow *v.* Pond, 49 Minn. 412, 418, 52 N. W. 36, 32 Am. St. Rep. 571, 16 L. R. A. 103; Graves *v.* Weld, 5 B. & Ad. 105, 119, 2 L. J. K. B. 176, 2 N. & M. 725, 27 E. C. L. 53.

artificial and annual profit, that is produced by labor and manurance,[9] corn and other growth of the earth which are produced annually, not spontaneously but by labor and industry and thence are called *fructus industriales*;[10] also, a crop left growing on premises by an outgoing tenant;[11] the profit which the tenant of an estate is entitled to receive out of the crops which he has planted, and which have not been harvested when his estate terminates.[12] (See, generally, CROPS; LANDLORD AND TENANT.)

EMBRACE.[13] To encircle; to encompass; to surround or inclose; to include, as parts of a whole, or as subordinate divisions of a part; to comprehend,—as, natural philosophy embraces many sciences.[14]

9. Owens *v.* Lewis, 46 Ind. 488, 508, 15 Am. Rep. 295 [*citing* 1 Williams Ex. 631].

"Hops, berries and the like are emblements." Hamilton *v.* Austin, 36 Hun (N. Y.) 138, 142. See also Graves *v.* Weld, 5 B. & Ad. 105, 119, 2 L. J. K. B. 176, 2 N. & M. 725, 27 E. C. L. 53 [*citing* Latham *v.* Atwood, Cro. Car. 515]. And *compare* Sparrow *v.* Pond, 49 Minn. 412, 418, 52 N. W. 36, 32 Am. St. Rep. 571, 16 L. R. A. 103.

10. Reiff *v.* Reiff, 64 Pa. St. 134, 137.

11. Wood *v.* Noack, 84 Wis. 398, 401, 54 N. W. 785.

12. Tiedeman Real Prop. § 70 [*quoted* in Miller *v.* Wohlford, 119 Ind. 305, 309, 21 N. E. 894].

13. "Embrace" as applied to the taxation of a company doing business in a colony see Marshall *v.* Orpen, [1895] A. C. 606, 610, 64 L. J. P. C. 177, 72 L. T. Rep. N. S. 783, 11 Reports 560.

14. Webster Dict. [*quoted* in Hibberd *v.* Slack, 84 Fed. 571, 578].

EMBRACERY

By Arthur P. Will *

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Obstructing Justice in General, see Obstructing Justice.

I. DEFINITION.

Embracery is an attempt to corrupt, influence, or instruct the jury, or in any way incline them to be more favorable to one side than to the other, by money, promises, threats, or persuasions, whether the juror on whom the attempt is made give any verdict or not, and whether the verdict be true or false.[1]

1. Grannis *v.* Branden, 5 Day (Conn.) 260, 5 Am. Dec. 143; Brown *v.* Beauchamp, 5 T. B. Mon. (Ky.) 413, 17 Am. Dec. 81; State *v.* Sales, 2 Nev. 268; Gibbs *v.* Dewey, 5 Cow. (N. Y.) 503; 2 Archbold Cr. Pr. & Pl. 1666; Bacon Abr. Juries, M, 3; 4 Blackstone Comm. 140; Coke, Litt. 157*b*, 369*a*; Hawkins P. C. (Curw. ed.) 466; 1 Roscoe Cr. Ev. (7th ed.) 690; 1 Russell Crimes 264.

Species of maintenance.— When committed by a person not a party in interest in the cause, embracery is a species of maintenance and is an old offense at common law. Gibbs *v.* Dewey, 5 Cow. (N. Y.) 503; State *v.* Brown, 95 N. C. 685.

Bribery distinguished.— Embracery, as has just been seen, is the corrupt attempt to influence a juror by money, promises, threats, or persuasion. Bribery is the voluntary giving or receiving of anything of value in corrupt payment for an official act done or to be done. See Bribery, 5 Cyc. 1039. The two crimes differ therefore in three respects, namely: (1) In bribery there must (see Bribery, 5 Cyc. 1040) and in embracery there need not (see cases cited *supra*) be a thing of value given or promised. In this aspect embracery is the broader offense. (2) In embracery the attempt must be directed against a juror (see cases cited *supra*. See also *infra*, V), while any public officer who corruptly accepts payment or a promise of payment for the doing of an official act is guilty of bribery. See Bribery, 5 Cyc. 1040. In this aspect bribery is the broader offense. (3) In the case of bribery both giver and taker are guilty of the crime. See Bribery, 5 Cyc. 1039. In the case of embracery, how-

* Author of "A Treatise on the Law of Circumstantial Evidence"; "Amicus Curiæ," 2 Cyc. 281.

II. ELEMENTS.

A. Corrupt Intent. A corrupt purpose is essential to the commission of the offense.[2] Consequently intoxication may be a defense;[3] nor is a person guilty because he uses language calculated to influence a verdict in the presence of the jury if he does so unawares.[4]

B. Overt Act. The mere intention to influence a jury, although it be expressed in words, is not sufficient. There must be an attempt to carry into effect the corrupt purpose by some direct or indirect approach to and communication with the jury.[5]

III. ATTEMPTS AND SOLICITATIONS.

Embracery being itself an attempt, there is no such crime recognized by law as an attempt to commit embracery,[6] but there may be a solicitation to embracery.[7]

IV. ACTS CONSTITUTING OFFENSE.

The gist of the offense is an overt attempt with corrupt intent to influence the decision of a juror, and any act which has a tendency to effect that object falls within the prohibition of the law.[8] It is immaterial whether the juror is approached directly or indirectly,[9] and it is also immaterial by what means he is sought to be influenced.[10]

V. PERSONS SOLICITED.

To constitute embracery the person attempted to be influenced must have been a juror.[11] It is sufficient, however, if he had been summoned as a tales juror. He need not have been impaneled in the trial.[12] It constitutes the offense

ever, only the person seeking to influence the juror is guilty. Embracery being the attempt corruptly to influence a juror, the juror himself cannot in the nature of the case be guilty of it (see, generally, cases cited *supra*), although a loose *dictum* may be found to the contrary (Grannis *v.* Branden, 5 Day (Conn.) 260, 5 Am. Dec. 143). If, however, the juror accepts a thing of value or the promise of it in consideration of a corrupt decision, then while he is not guilty of embracery he commits the offense of bribery (see, generally, BRIBERY, 5 Cyc. 1039–1041), and in this event the giver or promisor is guilty of both offenses (see cases cited *supra*. See also BRIBERY, 5 Cyc. 1039–1041).

2. State *v.* Brown, 95 N. C. 685.

3. White *v.* State, 103 Ala. 72, 16 So. 63, holding, however, that to escape punishment defendant must have been so intoxicated that he did not know what he was doing and was incapable of discerning right from wrong.

4. Com. *v.* Kauffmann, 1 Phila. (Pa.) 534.

5. State *v.* Brown, 95 N. C. 685, where the act of counsel for a party to a cause in going to the officer in charge of the jury and saying that he had come to give them instructions and asking the officer to let him know if they needed any was held not to amount to the offense.

6. State *v.* Sales, 2 Nev. 268.

7. State *v.* Sales, 2 Nev. 268, where it is said that to solicit an attorney to use money to influence the jury is a crime. See also Hawkins P. C. (Curw. ed.) 467.

8. State *v.* Williams, 136 Mo. 293, 38 S. W. 75.

Soliciting juror not to attend trial see OBSTRUCTING JUSTICE.

Soliciting officer to summon particular person as juror see OBSTRUCTING JUSTICE.

9. State *v.* Brown, 95 N. C. 685. Although the accused does not speak directly to the jurors, yet if in their hearing and knowing them to be jurors he uses language calculated to influence their verdict, the offense is complete. Com. *v.* Kauffmann, 1 Phila. (Pa.) 534.

10. Caruthers *v.* State, 74 Ala. 406; Gibbs *v.* Dewey, 5 Cow. (N. Y.) 503 (unauthorized delivery of paper to jury by witness); Com. *v.* McBride, 16 Phila. (Pa.) 436 (appeals to aid prisoners of like religion, politics, or views on temperance); Com. *v.* Crans, 2 Pa. L. J. Rep. 172, 3 Pa. L. J. 442 (letter).

Discussion with juror.—To tell a juror anything about the case in which he is summoned, or to discuss with him in conversation the evidence and principles on which the case should be decided, with a view to influencing his action, constitutes the offense. Grannis *v.* Branden, 5 Day (Conn.) 260, 5 Am. Dec. 143; Com. *v.* Kauffmann, 1 Phila. (Pa.) 534; I. *v.* F., Noy 102.

Bribery.— Under a statute making it bribery to offer "a gift, gratuity or thing of value," etc., one may be convicted who offered to give his labor "to chop cotton for a week," since the word "gratuity" embraces any recompense or benefit of pecuniary value. Caruthers *v.* State, 74 Ala. 406.

11. See cases cited *supra*, note 1.

12. State *v.* Glaudi, 43 La. Ann. 914, 9 So. 925; State *v.* McCrystol, 43 La. Ann. 907, 9 So. 922; State *v.* Williams, 136 Mo. 293, 38 S. W. 75; Com. *v.* Kauffmann, 1 Phila. (Pa.) 534.

Regularity of panel.— In Missouri it is

of embracery to attempt to influence the action of a grand juror[13] as well as a petit juror.

VI. FAILURE OF ATTEMPT.

It is not the result of the interference which makes the crime, but the attempt to instill an idea which shall influence the juror.[14] It is immaterial that the juror tampered with was not in fact influenced.[15] The offense is consummated when the attempt is made, whether a verdict is found in accordance with the wishes of the accused or not, whether the juror gives any verdict or not, and whether the verdict be true or false.[16]

VII. CRIMINAL PROSECUTION.

A. Indictment and Information[17] — **1. FORM AND SUFFICIENCY.**[18] Several indictments found at different times but alleging the same facts in different forms may be treated as one.[19] The indictment must charge the crime with reasonable certainty.[20] Ultimate facts and not evidence should be stated.[21]

2. VARIANCE. If the proof conforms substantially to the allegations of the indictment it is sufficient.[22]

B. Evidence.[23] The rules of evidence prevailing in criminal prosecutions generally are applicable in prosecutions for embracery.[24]

immaterial that the panel was irregularly summoned. In any event objection to the irregularity of the panel cannot be raised collaterally in a prosecution for embracery. State *v.* Williams, 136 Mo. 293, 38 S. W. 75.

13. People *v.* Glen, 64 N. Y. App. Div. 167, 71 N. Y. Suppl. 893, 15 N. Y. Cr. 547; Doan's Case, 5 Pa. Dist. 211, 17 Pa. Co. Ct. 521; Com. *v.* Crans, 2 Pa. L. J. Rep. 172, 3 Pa. L. J. 442.

14. Coke Litt. 368*b*.

15. State *v.* Williams, 136 Mo. 293, 38 S. W. 75.

16. State *v.* Williams, 136 Mo. 293, 38 S. W. 75; Com. *v.* Kauffmann, 1 Phila. (Pa.) 534.

17. See, generally, INDICTMENTS AND INFORMATIONS.

18. For forms of indictments and informations see White *v.* State, 103 Ala. 72, 16 So. 63; Caruthers *v.* State, 74 Ala. 406; State *v.* Dankwardt, 107 Iowa 704, 77 N. W. 495; State *v.* McCrystol, 43 La. Ann. 907, 9 So. 922; State *v.* Williams, 136 Mo. 293, 38 S. W. 75; State *v.* Freeman, 15 Vt. 723; Davis Prec. 113 and note [*cited* in 2 Bishop Cr. Proc. § 344; 2 Wharton Prec. 1022].

19. State *v.* Brown, 95 N. C. 685.

20. State *v.* Dankwardt, 107 Iowa 704, 77 N. W. 495.

Description of acts done.— The acts constituting the alleged attempt to influence the juror should be set out in the indictment. State *v.* Brown, 95 N. C. 685.

Intent.—An indictment charging defendant with unlawfully and feloniously attempting improperly to influence a juror by requesting him to see that the right was done and that it would not be to his loss and by the use of similar language sufficiently shows that the words were not used innocently and with proper intent. State *v.* Dankwardt, 107 Iowa 704, 77 N. W. 495.

Person solicited.— An indictment which charges an offer to bribe a juror and which alleges that the juror was employed at the time with eleven others in the trial of a designated offense need not allege that he had been summoned or impaneled. Caruthers *v.* State, 74 Ala. 406. An indictment charging that the accused "did unlawfully attempt to influence another as a juror . . . with intent to improperly influence his actions and findings as a juror in said cause" sufficiently charges that accused knew that the person in question was a juror. State *v.* Dankwardt, 107 Iowa 704, 77 N. W. 495.

Trial of previous case.— An indictment alleging that a particular term of court was held and that the trial was had before the chief judge is insufficient without showing that a quorum of the judges was present. State *v.* Freeman, 15 Vt. 723.

21. State *v.* Dankwardt, 107 Iowa 704, 77 N. W. 495.

22. State *v.* Dankwardt, 107 Iowa 704, 77 N. W. 495, holding also that the omission in an indictment of the abbreviation "jr." after the name of a party to the suit in which the crime is alleged to have been committed is not material. So in the trial of one "Caruthers" for an offer to bribe a juror a writing signed "Carethers," which was shown to have come from defendant and to have been transmitted by his authority to the juror, was held admissible. Caruthers *v.* State, 74 Ala. 406.

Intent.— Under a statute which provides for the punishment of one who shall offer or promise a bribe to a juror with intent "to bias the mind or influence the decision of the juror," the two alternative intents are not the same. White *v.* State, 103 Ala. 72, 16 So. 63.

Person solicited.— Where an indictment alleges that the person improperly attempted to be influenced was a member of the grand jury previously summoned, proof that his name had been drawn from the jury box and published but that he had not been formally summoned when the attempt was made is an immaterial variance. People *v.* Glen, 64 N. Y. App. Div. 167, 71 N. Y. Suppl. 893, 15 N. Y. Cr. 547.

23. See, generally, CRIMINAL LAW.

24. White *v.* State, 103 Ala. 72, 16 So. 63, holding that the burden is on the state to

C. Punishment. Embracery is a misdemeanor and is generally punishable by fine and imprisonment.[25]

VIII. CIVIL LIABILITY.

In some jurisdictions the person aggrieved by the corrupt influencing of a juror may maintain a penal action against both the embracer and the juror to recover a forfeiture prescribed by statute.[26]

EMERGENCY. Any event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency;[1] a sudden or unexpected happening; an unforeseen occurrence or condition.[2]

EMIGRANT.[3] A person who emigrates or quits one country or region to settle in another.[4] (See, generally, ALIENS; CITIZENS.)

EMIGRANT AGENT. A person engaged in hiring laborers within the state to be employed beyond the limits thereof;[5] any person engaged in hiring laborers or soliciting emigrants in the state to be employed beyond the limits of the state.[6] (See, generally, ALIENS.)

EMIGRATE. To remove from one country or state to another, for the purpose of residence.[7] (See, generally, ALIENS; CITIZENS.)

EMIGRATION. The act of changing one's domicile from one country or state to another.[8] (Emigration: In General, see ALIENS. Constituting Expatriation, see CITIZENS.)

prove beyond a reasonable doubt every material allegation of the charge.

Attempts on other jurors.— To establish the corrupt intent it is admissible to show that defendant attempted to corrupt other jurors. State *v.* Williams, 136 Mo. 293, 38 S. W. 75.

Conclusions.— On an issue whether accused was intoxicated, a witness who has long known him may testify that he spoke with his usual intelligence. It being impossible for the witness to reproduce the manner, tone of voice, and other conditions, he might state those conditions as a collective fact. White *v.* State, 103 Ala. 72, 16 So. 63.

Corroboration.— It is improper to admit in corroboration evidence that the witness had previously expressed a belief that accused had attempted to influence a juror; he not having stated his grounds of belief at the time. Com. *v.* Kay, 14 Pa. Super. Ct. 376.

Evidence of pending suit.— To show that a cause is pending, the indictment, docket, and entries therein may be introduced in evidence. White *v.* State, 103 Ala. 72, 16 So. 63.

Evidence of service as juror.— The complaint, answer, and minutes of court in the original suit are admissible to show that the juror served therein. People *v.* Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129.

25. Gibbs *v.* Dewey, 5 Cow. (N. Y.) 503.

26. N. Y. Code Civ. Proc. §§ 1193, 1194, evidently modeled after 38 Edw. III, c. 12, since repealed by 6 Geo. IV, c. 50, § 62.

1. Webster Dict. [*quoted* in People *v.* Board of Sup'rs, 21 Ill. App. 271, 274].

Emergency requiring a temporary appointment of diplomatic officer see 2 Cyc. 262.

"Medical emergency" within the meaning of a statute relating to physicians and surgeons see People *v.* Lee Wah, 71 Cal. 80, 82, 11 Pac. 851.

2. Century Dict. [*quoted* in Sheehan *v.* New York, 37 Misc. (N. Y.) 432, 433, 75 N. Y. Suppl. 802].

3. **"Emigrant laborers,"** as used in the representation that a ship "will carry emigrant labourers not over forty," applies to men only. Richards *v.* Hayward, 2 M. & G. 574, 590, 2 Scott N. R. 670, 40 E. C. L. 750.

"Emigrant passengers," as used in the act of congress of March 2, 1882, regulating the number of emigrant passengers to be carried by ships see The Danube, 55 Fed. 993, 995.

Emigrant transportation considered see 9 Cyc. 211 note 15.

4. Webster Int. Dict. [*quoted* in Williams *v.* Fears, 110 Ga. 584, 586, 35 S. E. 699, 50 L. R. A. 685; Varner *v.* State, 110 Ga. 595, 596, 36 S. E. 93]. See also Woodson *v.* State, 114 Ga. 844, 846, 40 S. E. 1013.

5. Varner *v.* State, 110 Ga. 595, 596, 36 S. E. 93; Williams *v.* Fears, 110 Ga. 584, 586, 35 S. E. 699, 50 L. R. A. 685 [*affirmed* in 179 U. S. 270, 273, 21 S. Ct. 128, 45 L. ed. 186]; State *v.* Hunt, 129 N. C. 686, 687, 40 S. E. 216, 85 Am. St. Rep. 758.

6. 22 S. C. St. at L. [*quoted* in State *v.* Napier, 63 S. C. 60, 65, 41 S. E. 13].

7. Webster Int. Dict. [*quoted* in Williams *v.* Fears, 110 Ga. 584, 586, 35 S. E. 699, 50 L. R. A. 685].

8. It is to be distinguished from "expatriation." The latter means the abandonment of one's country and renunciation of one's citizenship in it, while emigration denotes merely the removal of person and property to a foreign state. The former is usually the consequence of the latter. Emigration is also used of the removal from one section to another of the same country. Black L. Dict. See also McIlvaine *v.* Coxe, 2 Cranch (U. S.) 280, 2 L. ed. 279.

EMINENT DOMAIN

By Everett W. Pattison*

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CROSS-REFERENCES

For Matters Relating to:
Condemnation Proceedings:
Affecting Dower, see DOWER.
As Color of Title, see ADVERSE POSSESSION.
In Federal Courts, see COURTS.
Confiscation of Property of Enemy, see WAR.
Constitutional Provisions:
Generally, see CONSTITUTIONAL LAW.
Relating to:
Class Legislation, see CONSTITUTIONAL LAW.
Deprivation of Property, see CONSTITUTIONAL LAW.
Due Process of Law, see CONSTITUTIONAL LAW.
Impairment of Obligation of Contract, see CONSTITUTIONAL LAW.
Impairment of Vested Rights, see CONSTITUTIONAL LAW.
Dedication of Property to Public Use, see DEDICATION.
Exercise of Power of Eminent Domain:
As Breach of Covenant, see COVENANTS.
As Conversion, see CONVERSION.
Taking Property For Canal Purposes, see CANALS.

I. DEFINITION.

Eminent domain is the right of the nation or the state or of those to whom the power has been lawfully delegated to condemn private property for public use and to appropriate the ownership and possession of such property for such use upon paying the owner a due compensation to be ascertained according to law.[1]

II. SOURCE AND ORIGIN OF THE POWER.

Eminent domain is a right inherent in all sovereignties, and therefore would exist without any constitutional recognition; and its exercise by the government does not involve the commission of a tort.[2] The right of eminent domain ante-

1. People *v.* Humphrey, 23 Mich. 471, 474, 9 Am. Rep. 94; Hale *v.* Lawrence, 21 N. J. L. 714, 728, 47 Am. Dec. 190; Giesy *v.* Cincinnati, etc., R. Co., 4 Ohio St. 308, 325; West River Bridge Co. *v.* Dix, 6 How. (U. S.) 507, 536, 12 L. ed. 535; Black Const. L. 350; Bouvier L. Dict.

Other definitions are: "The sovereign power vested in the State to take private property for the public use, providing first a just compensation therefor." Trenton Cut-Off R. Co. *v.* Newtown Electric St. R. Co., 8 Pa. Dist. 549, 552. "A superior right to apply private property to public use." 1 Redfield Railw. § 63 [*quoted* in Weir *v.* St. Paul, etc., R. Co., 18 Minn. 155].

"A superior right inherent in society, and exercised by the sovereign power, or upon delegation from it, whereby the subject-matter of rights of property may be taken from the owner and appropriated for the general welfare." Abbott L. Dict.

"The right belonging to society, or to the sovereign, of disposing, in cases of necessity, and for the public safety, of all the wealth contained in the State, is called the Eminent Domain." Jones *v.* Walker, 13 Fed. Cas. No. 7,507, 2 Paine 688, 711.

"The right of every government to appropriate, otherwise than by taxation and its police authority, . . . private property for public use." Dillon Mun. Corp. (4th ed.) § 584.

"The right to resume the possession of private property for the public use." Bloodgood *v.* Mohawk, etc., R. Co., 18 Wend. (N. Y.) 9, 13, 31 Am. Dec. 313 [*quoted* in Weir *v.* St. Paul, etc., R. Co., 18 Minn. 155].

"The right to take private property for public purposes." Weir *v.* St. Paul, etc., R. Co., 18 Minn. 155 [*citing* Buffalo, etc., R. Co. *v.* Brainard, 9 N. Y. 100].

"The right which a government retains over the estates of individuals to resume them for public use." Wharton L. Dict.

"The ultimate right of the sovereign power to appropriate, not only the public property, but the private property of all citizens within the territorial sovereignty, to public purposes." Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420, 641, 9 L. ed. 773, 938.

Eminent domain is in the nature of a compulsory purchase of the property of the citizen for the purpose of applying it to public use. Mills Em. Dom. § 1 [*citing* Moody *v.* Jacksonville, etc., R. Co., 20 Fla. 597, 606]. See also Boston, etc., R. Corp. *v.* Old Colony R. Corp., 12 Cush. (Mass.) 605.

Eminent domain, the highest and most exact idea of property, remains in the government, or in the aggregate body of the people in their sovereign capacity; and they have a right to resume the possession of the property in the manner directed by the constitution and laws of the state, and whenever the public interest requires it. Beekman *v.* Saratoga, etc., R. Co., 3 Paige (N. Y.) 45, 73, 22 Am. Dec. 679.

"The right of eminent domain is an attribute of sovereignty, and confers upon the Legislature authority to take private property for public uses, when the public exigencies require it, subject only to that provision in our constitution which exacts just compensation." Wells *v.* Somerset, etc., R. Co., 47 Me. 345, 348.

2. *Idaho.*— Hollister *v.* State, (1903) 71 Pac. 541.

Mississippi.— Brown *v.* Beatty, 34 Miss. 227, 69 Am. Dec. 389.

Missouri.— Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301; Kansas City *v.* Marsh Oil Co., 140 Mo. 458, 41 S. W. 943.

North Carolina.— Raleigh, etc., R. Co. *v.* Davis, 19 N. C. 451.

Washington.— Samish River Boom Co. *v.* Union Boom Co., 32 Wash. 586, 73 Pac. 670.

United States.— Merriam *v.* U. S., 29 Ct. Cl. 250.

See 18 Cent. Dig. tit. "Eminent Domain," § 1.

Implied conditions imposed on owner of property.— Title to property is always held upon the implied condition that it must be surrendered to the government, either in whole or in part, when the public necessities, evinced according to the established forms of law, demand. Hale *v.* Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190; People *v.* New York, 32 Barb. (N. Y.) 102; Mack *v.* Easton, etc., R. Co., 10 Pa. Dist. 102.

"The right of eminent domain is a transcendent right. It is indispensable to the administration of government; for sometimes the legitimate operations of government may

dates constitutions,[3] which are only declaratory of previously existing universal law,[4] and is not conferred but limited by them.[5] The right can only be denied[6] or restricted[7] by fundamental law and is "a right inherent in society."[8] The power to take private property for the common welfare is generally held to remain dormant in the state until the terms and conditions upon which it is to be exercised have been prescribed by appropriate legislation.[9] The title in fee of all property is held subject to the public user, of the necessity or expediency of which use the government itself must judge.[10] And it is on the ground of the general public good that the legislature grants to companies or bodies the compulsory power of taking the property of individuals;[11] and any contract which attempts

be embarrassed by unreasonable and perverse refusal of individuals to part, on fair terms, with property imperatively needed for public use, and the power to compel such individuals to give up their property, on receiving its fair equivalent, must reside somewhere, or there is danger of an absolute interruption of measures essential to the common weal." Leisse *v.* St. Louis, etc., R. Co., 2 Mo. App. 105, 109.

Private inconvenience necessarily involved. — The right of eminent domain involves in its very existence the possible suffering of private inconvenience for the public good. Rittenhouse *v.* Creasy, 12 Luz. Leg. Reg. (Pa.) 14. "The power arises out of that natural principle which teaches that private convenience must yield to the public wants." Lance's Appeal, 55 Pa. St. 16, 25, 93 Am. Dec. 722.

English decisions. — In Atty.-Gen. *v.* Tomline, 12 Ch. D. 214, 232, Fry, J., quotes with approval the following from the decision in Hudson *v.* Tabor, 2 Q. B. D. 290, 46 L. J. Q. B. 463, 36 L. T. Rep. N. S. 492, 25 Wkly. Rep. 740. "The King has probably, from the very earliest times, had a right, as part of the prerogative, to defend the realm against waste of the sea, and to order the construction of defences at the expense generally of those who are to be benefited by them."

3. Steele *v.* Madison County, 83 Ala. 304, 3 So. 761.

4. People *v.* White, 11 Barb. (N. Y.) 26.

5. Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301; Kansas City *v.* Marsh Oil Co., 140 Mo. 458, 41 S. W. 943; Bidwell *v.* Murray, 40 Hun (N. Y.) 190; People *v.* Lawrence, 54 Barb. (N. Y.) 589; Samish River Boom Co. *v.* Union Boom Co., 32 Wash. 586, 73 Pac. 670.

6. Roanoke City *v.* Berkowitz, 80 Va. 616.

7. *Michigan.* — Swan *v.* Williams, 2 Mich. 427.

Minnesota. — Weir *v.* St. Paul, etc., R. Co., 18 Minn. 155.

Missouri. — Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453; Kansas City *v.* Marsh Oil Co., 140 Mo. 458, 41 S. W. 943.

Ohio. — Cincinnati, etc., R. Co. *v.* Cincinnati, 62 Ohio St. 465, 57 N. E. 229, 49 L. R. A. 566.

Pennsylvania. — Philadelphia, etc., R. Co. *v.* Lawrence, 10 Phila. 604.

Texas. — Asher *v.* Jones County, 29 Tex. Civ. App. 353, 68 S. W. 551.

See 18 Cent. Dig. tit. "Eminent Domain," § 1.

8. Raleigh, etc., R. Co. *v.* Davis, 19 N. C. 451.

9. *Georgia.* — Parham *v.* Decatur County Inferior Ct., 9 Ga. 341.

Illinois. — Sholl *v.* German Coal Co., 118 Ill. 427, 10 N. E. 199, 59 Am. Rep. 379.

Indiana. — Leeds *v.* Richmond, 102 Ind. 372, 1 N. E. 711; Allen *v.* Jones, 47 Ind. 438; Indianapolis Water Works Co. *v.* Burkhart, 41 Ind. 364.

New York. — Dyckman *v.* New York, 5 N. Y. 434.

Tennessee. — Barrow *v.* Page, 5 Hayw. 97.

United States. — Foltz *v.* St. Louis, etc., R. Co., 60 Fed. 316, 8 C. C. A. 635.

See also Dillon Mun. Corp. § 469; Cooley Const. Lim. 759.

10. *Georgia.* — Young *v.* Harrison, 6 Ga. 130.

Illinois. — Stevenson *v.* Loehr, 57 Ill. 509, 11 Am. Rep. 36; Johnson *v.* Joliet, etc., R. Co., 23 Ill. 202.

Kentucky. — O'Hara *v.* Lexington, etc., R. Co., 1 Dana 232; Henry *v.* Underwood, 1 Dana 245.

Maine. — Spring *v.* Russell, 7 Me. 273.

Maryland. — Moale *v.* Baltimore, 5 Md. 314, 61 Am. Dec. 276.

Massachusetts. — Perry *v.* Wilson, 7 Mass. 393.

New Jersey. — Scudder *v.* Trenton Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756.

New York. — People *v.* New York, 32 Barb. 102; People *v.* White, 11 Barb. 26.

Ohio. — Cooper *v.* Williams, 4 Ohio 253, 22 Am. Dec. 745.

Pennsylvania. — McMasters *v.* Com., 3 Watts 292; Mack *v.* Easton, etc., R. Co., 10 Pa. Dist. 102.

South Carolina. — Stark *v.* McGowen, 1 Nott & M. 397; Lindsay *v.* East Bay St. Com'rs, 2 Bay 38.

Tennessee. — Harding *v.* Goodlett, 3 Yerg. 41, 24 Am. Dec. 546.

United States. — Bonaparte *v.* Camden, etc., R. Co., 3 Fed. Cas. No. 1,617, Baldw. 205.

See 18 Cent. Dig. tit. "Eminent Domain," § 1.

11. Tuttle *v.* Moore, 3 Indian Terr. 712, 64 S. W. 585; Lance's Appeal, 55 Pa. St. 16, 93 Am. Dec. 722; Ayr Harbour Trustees *v.* Oswald, 8 App. Cas. 623; Gray *v.* Liverpool,

to bind any such company or body not to use the power is void[12] as against public policy.[13] The legislature itself, having the right by constitution to take private property for public purposes, cannot divest itself of such right by contract,[14] and much less can one legislature deprive any subsequent legislature of the power.[15] Since all real estate is held subject to the right of eminent domain, the only distinction between the holding before and after a judgment in condemnation proceedings is that thereafter the price which the public must pay is fixed.[16] In the exercise of the power of eminent domain there is nothing in the nature of a contract between the owner and the state or the corporation to which the power is delegated; the owner's assent is not required, and his objections are of no avail; all that is required is that a just compensation shall be made to the owner.[17]

III. THE CONSTITUTIONAL PROVISIONS.

The provisions of the several state constitutions differ considerably in phraseology from each other, and in many states the provisions have been subject to frequent changes. Nearly all of the constitutions provide that private property cannot be taken or applied to public use without just compensation being made to the owner, and many of them require compensation to be made in advance of the taking of the property or that it be secured by a deposit of money or otherwise. These provisions also usually declare the method of ascertaining the amount of compensation, some of them providing that the same shall be determined by a jury of twelve men while others provide for an assessment by viewers or commissioners and give the owner the right of appeal from their preliminary assessment, and to either party on the appeal the right to a determination of the amount by jury. They also usually provide either that private property can only be taken for public use or that it can only be taken for public use except in enumerated instances (the usual exception being the taking of private property for private ways). Other provisions found in some of the constitutions are that the question whether the use be really public shall be a judicial one and determined as such without regard to any legislative assertion that the use is public; that the amount allowed shall be irrespective of any benefit from any improvement by the corporation seeking to condemn the property; that the fee of land taken for railroad tracks or other highways shall remain in the owner subject to the use for which it is taken.[18]

IV. EMINENT DOMAIN DISTINGUISHED FROM OTHER POWERS.

A. Taxation — 1. IN GENERAL. The power of taxation and eminent domain have always been clearly distinguished.[19] Sales for taxes and taking private

etc., R. Co., 9 Beav. 391, 10 Jur. 364, 4 R. & Can. Cas. 235.

12. Cornwall *v.* Louisville, etc., R. Co., 87 Ky. 72, 7 S. W. 553, 9 Ky. L. Rep. 924; Ayr Harbour Trustees *v.* Oswald, 8 App. Cas. 623.

It will not be presumed that a railroad intended to barter away such right and disable itself wholly or in part to perform its public functions, at least in the absence of clear words showing such intention. Jones *v.* Pittsburg, etc., R. Co., 11 Pa. Super. Ct. 202.

13. West Virginia Transp. Co. *v.* Ohio River Pipe-Line Co., 22 W. Va. 600, 46 Am. Rep. 527.

14. East-Hartford *v.* Hartford Bridge Co., 17 Conn. 79; Spring Grove Cemetery *v.* Cincinnati, etc., R. Co., 1 Ohio Dec. (Reprint) 316, 7 West. L. J. 251; Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420, 9 L. ed. 773, 938.

15. Backus *v.* Lebanon, 11 N. H. 19, 35 Am. Dec. 466; Lock Haven Bridge Co. *v.* Clinton County, 157 Pa. St. 379, 27 Atl. 726.

16. Price *v.* Engelking, 58 Ill. App. 547.

17. Lamb *v.* Schottler, 54 Cal. 319; Harness *v.* Chesapeake, etc., Canal Co., 1 Md. Ch. 248; Garrison *v.* New York City, 21 Wall. (U. S.) 196, 22 L. ed. 612. And see Sholes *v.* State, 2 Pinn. (Wis.) 499, 2 Chandl. (Wis.) 182.

18. See the constitutional provisions of the several states; and the cases *infra* this article *passim*.

19. *Connecticut.*— Booth *v.* Woodbury, 32 Conn. 118; Nichols *v.* Bridgeport, 23 Conn. 189, 60 Am. Dec. 636.

property for public use are both referable to the sovereign power, but one is for the recovery of a debt due the government, the consideration for which is the protection of person and property, and for the enforcement of a duty by the taxpayer, the performance of which is essential to the maintenance of government; while the other is the appropriation of private property for the public use, full compensation therefor being first made.[20] The exercise of the right of eminent domain operates upon individuals and without regard to the amount or value exacted from any other individual or class of individuals,[21] and the taking of private property for public use must always be done under judicial or quasi-judicial proceedings, while sales for taxes may be made by the summary action of the collector.[22] Constitutional provisions prohibiting the taking of private property for public use, except upon just compensation, do not in any manner restrict the power of taxation. Such provisions constitute a limitation, not on the taxing power, but on the right of eminent domain.[23]

2. SPECIAL ASSESSMENTS. The constitutional provisions have no application to special taxes for local improvements, and do not render void the acts requiring the cost of such improvements to be assessed against the adjoining property.[24]

Indiana.— Logansport *v.* Seybold, 59 Ind. 225; Aurora *v.* West, 9 Ind. 74.

New Jersey.— Van Wagoner *v.* Paterson, 67 N. J. L. 455, 51 Atl. 922.

New York.— Howell *v.* Buffalo, 37 N. Y. 267.

Pennsylvania.— *In re* Washington Ave., 69 Pa. St. 352, 8 Am. Rep. 255.

See 18 Cent. Dig. tit. "Eminent Domain," § 9.

20. *Maryland.*— Moale *v.* Baltimore, 5 Md. 314, 61 Am. Dec. 276.

Mississippi.— Griffin *v.* Dogan, 48 Miss. 11.

New York.— People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266.

Pennsylvania.— *In re* Washington Ave., 69 Pa. St. 352, 8 Am. Rep. 255.

Texas.— Norris *v.* Waco, 57 Tex. 635.

Wisconsin.— Stone *v.* Little Yellow Drainage Dist., 118 Wis. 388, 95 N. W. 405.

See 18 Cent. Dig. tit. "Eminent Domain," § 9.

The power of eminent domain acts only by a direct taking of the property for a public use, and by way of a compensation for the taking, in obedience to a constitutional injunction forbidding the property of the citizen to be otherwise taken. *In re* Washington Ave., 69 Pa. St. 352, 8 Am. Rep. 255.

21. People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266.

"Taxation exacts money from individuals as and for their contributory share of the public burdens. A tax is generally understood to mean the imposition of a duty or impost for the support of government. . . . Private property may be taken under the power of eminent domain for public purposes, if just compensation therefor be made. But for private purposes it cannot be wrested from its owner even with compensation." Brewer Brick Co. *v.* Brewer, 62 Me. 62, 70, 16 Am. Rep. 395.

22. Griffin *v.* Dogan, 48 Miss. 11.

23. Martin *v.* Dix, 52 Miss. 53, 24 Am. Rep. 661; Cincinnati, etc., R. Co. *v.* Cincinnati, 62 Ohio St. 465, 57 N. E. 229, 49 L. R. A. 566; Kimball *v.* Grantsville City, 19 Utah 368, 57 Pac. 1, 45 L. R. A. 628; Gilman *v.* Sheboygan, 2 Black (U. S.) 510, 17 L. ed. 305.

The following acts are not the taking of private property for public use without compensation: A statute which authorizes a public corporation to borrow money and pay it by the proceeds of taxation. Gilman *v.* Sheboygan, 2 Black (U. S.) 510, 17 L. ed. 305. An act authorizing cities and towns on the line of a railroad to aid the company by subscription, and to levy a tax on the taxable property to pay such subscription, there being in such case no such inequality of taxation as to constitute a taking of property without compensation. Slack *v.* Maysville, etc., R. Co., 13 B. Mon. (Ky.) 1. The collection of a tax in addition to ordinary taxation, not exceeding a sum named in the act, to pay certain persons for services performed for the county. People *v.* Haws, 21 How. Pr. (N. Y.) 178. A statute and an ordinance, requiring of each male person between twenty-one and forty-five years of age to perform two days' work on the street or to pay three dollars in lieu thereof. State *v.* Topeka, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529. A statute conferring on cities the right to assess the whole cost of the connection with the sewer in a street in front of the abutting landowner. Van Wagoner *v.* Paterson, 67 N. J. L. 455, 51 Atl. 922. A statute providing for closing a tunnel and restoring a street to its original grade and for the relinquishment by a railroad company of its right to use steam within the city limits on payment to the company of a certain sum to be raised by assessment on landowners in the district affected. Litchfield *v.* McComber, 42 Barb. (N. Y.) 288; People *v.* Lawrence, 36 Barb. (N. Y.) 177.

24. *California.*— Banaz *v.* Smith, 133 Cal. 102, 65 Pac. 309; Chambers *v.* Satterlee, 40 Cal. 497; Walsh *v.* Mathews, 29 Cal. 123; Emery *v.* San Francisco Gas Co., 28 Cal. 345.

Georgia.— Hayden *v.* Atlanta, 70 Ga. 817.

Illinois.— White *v.* People, 94 Ill. 604.

Indiana.— Roundenbush *v.* Mitchell, 154 Ind. 616, 57 N. E. 510.

Missouri.— Keith *v.* Bingham, 100 Mo. 300,

But the right to impose the special burden is founded in the idea that the construction of the improvements is of special and peculiar benefit to private property in the immediate vicinity. Upon this theory the power absolutely depends, so that where there is not this special benefit there can be no valid assessment.[25] The proceeding by which a city takes private property for public use, under its power of eminent domain, is distinct in character from that by which it raises money, under its power of taxation, to make compensation for property so taken.

13 S. W. 683; McCormack *v.* Patchin, 53 Mo. 33, 14 Am. Rep. 440; Palmyra *v.* Morton, 25 Mo. 593; Springfield *v.* Baker, 56 Mo. App. 637.

New Jersey.— Sigler *v.* Fuller, 34 N. J. L. 227.

Ohio.— Hill *v.* Higdon, 5 Ohio St. 243, 67 Am. Dec. 289.

Pennsylvania.— Schall *v.* Norristown, 6 Leg. Gaz. 157.

Rhode Island.— *In re* Dorrance St., 4 R. I. 230.

Vermont.— Allen *v.* Drew, 44 Vt. 174.

Wisconsin.— Weeks *v.* Milwaukee, 10 Wis. 242.

See 18 Cent. Dig. tit. "Eminent Domain," § 11.

The earlier view held by the courts, the arguments in favor of which are set forth in Chicago *v.* Larned, 34 Ill. 203, and in People *v.* Brooklyn, 9 Barb. (N. Y.) 535, and like cases, has long since been abandoned. As is said by Judge Cooley: "That these assessments are an exercise of the taxing power has over and over again been affirmed, until the controversy must be regarded as closed." Cooley Tax. (2d ed.) 623.

The rule has been applied to assessments for special benefits to property in proximity to a proposed park (Kansas City *v.* Ward, 134 Mo. 172, 35 S. W. 600. *Compare* State *v.* Leffingwell, 54 Mo. 458), and to the erection of a levee to protect lands from overflow (Richman *v.* Muscatine County, 77 Iowa 513, 42 N. W. 422, 14 Am. St. Rep. 308, 4 L. R. A. 445).

Particular statutes held constitutional.—The Oregon statute, requiring the council to assess the cost of improvement of the half street immediately in front of the abutting lots to such lots, and providing that the cost to street intersections shall be assessed five-ninths to the corner lot, or the first fifty feet, and the remainder to the adjacent lot, or the next fifty feet, in the quarter block, does not impose a tax so in excess of, or out of proportion to, the benefits, as to violate the fifth amendment to the constitution. King *v.* Portland, 38 Oreg. 402, 63 Pac. 2, 55 L. R. A. 812. The Indiana statute as to local assessments is intended to make the assessment only *prima facie* correct, and does not include the right of the property-owner to have an assessment made according to the benefit accruing from the improvement. It is therefore not in conflict with the constitutional provision. Indianapolis *v.* Holt, 155 Ind. 222, 57 N. E. 966, 988, 1100. The charter of Montgomery, which provides that the property benefited by street paving shall be assessed a reasonable amount, not exceeding one-fourth of the cost of the improvement in front of the property, and in no case to exceed ten dollars per front foot, and providing the owner a method of correcting any assessment which he claims to have been incorrect or inequitable, is not in violation of the constitution. Montgomery *v.* Birdsong, 126 Ala. 632, 28 So. 522.

Effect of agreement to pay for improvements.— A statute imposing a tax upon a local district of the state for the construction of a canal is constitutional, although previous to the act a number of persons in such district had entered into a bond with the state to pay the whole expense of the improvement. Thomas *v.* Leland, 24 Wend. (N. Y.) 65.

25. *District of Columbia.*— Allman *v.* District of Columbia, 3 App. Cas. 8.

Kentucky.— Louisville *v.* Bitzer, 73 S. W. 1115, 24 Ky. L. Rep. 2263, 61 L. R. A. 434.

Minnesota.— State *v.* Pillsbury, 82 Minn. 359, 85 N. W. 175.

Missouri.— State *v.* Leffingwell, 54 Mo. 458.

Nebraska.— Cain *v.* Omaha, 42 Nebr. 120, 60 N. W. 368.

New York.— Matter of Tuthill, 36 N. Y. App. Div. 492, 55 N. Y. Suppl. 657 [*reversing* 50 N. Y. Suppl. 410]; Litchfield *v.* McComber, 42 Barb. 288.

Oregon.— Gaston *v.* Portland, 41 Oreg. 373, 69 Pac. 34, 445.

Pennsylvania.— Hammett *v.* Philadelphia, 65 Pa. St. 146, 3 Am. Rep. 615; Philadelphia *v.* Scott, 9 Phila. 171.

United States.— Norwood *v.* Baker, 172 U. S. 269, 19 S. Ct. 187, 43 L. ed. 443; Arnd *v.* Union Pac. R. Co., 120 Fed. 912, 57 C. C. A. 184.

See 18 Cent. Dig. tit. "Eminent Domain," § 11.

Applications of rule.—When the most probable, if not the necessary, consequence of the law, is to compel a small minority of taxpayers to provide at their sole expense an improvement of general utility and public interest, the construction of which costs more than double that of such improvements in general use, and from which when constructed the general public derives almost as much advantage as themselves, it becomes in the constitutional sense a taking and appropriation of their private property to the public use without compensation, and it cannot be sustained. Howell *v.* Bristol, 8 Bush (Ky.) 493. So proceedings by a village, under a state statute, by which ground for a street was condemned through plaintiff's property, the damages awarded were paid, and the amount of such damages, together with all

The first cannot be exercised except in obedience to the constitutional mandate that the compensation must be ascertained by a jury or board of commissioners of not less than three freeholders. But the constitution does not require that the benefits to another and distinct property be so ascertained.[26]

3. INCREASED RATE OF TAXATION CAUSED BY ALTERATION OF MUNICIPAL BOUNDARIES. The increased rate of taxation resulting from the incorporation of a city, or from the annexation thereto of territory, does not constitute the act of taking private property for public use,[27] except where the annexed territory is not so located as to constitute a proper addition to the city and the evident purpose thereof is to subject the property to taxation for the exclusive benefit of the city.[28]

4. IN AID OF RAILROADS. The acts authorizing counties, cities, and towns to subscribe to the capital stock of a railroad company, or to issue bonds to aid in the construction of a railroad, are not unconstitutional as taking private property for public use without just compensation,[29] but are a legitimate exercise of the taxing power. The clause prohibiting the taking of private property for public use without just compensation has no reference to taxation.[30]

B. The Police Power. Regulations to govern the use of property by its owners, so as to prevent its becoming pernicious to the citizens at large, and so that its use shall be consistent with the public welfare and the rights, security, and health of others do not constitute a taking within constitutional restrictions as to the taking of property, although they may interfere with private rights without providing for compensation.[31] Such interference with property is proper

the costs and expenses of the condemnation, were assessed back on the remaining property of plaintiff, lying on either side of the street, without inquiry as to special benefits, constituted a taking of plaintiff's property for public use without compensation, to the extent of the excess of the cost of opening the street over the benefits. Cincinnati, etc., R. Co. *v.* Cincinnati, 62 Ohio St. 465, 57 N. E. 229, 49 L. R. A. 566; Village of Norwood *v.* Baker, 172 U. S. 269, 19 S. Ct. 187, 43 L. ed. 443; Cowley *v.* Spokane, 99 Fed. 840. And it has also been held that a personal judgment against the owner for an assessment to pay for street improvement is void, since the property benefited might not sell for enough to pay the judgment, and thus his property would be subjected to the payment of an assessment for which he received no benefit. St. Louis *v.* Allen, 53 Mo. 44.

26. *Connecticut.*—Nichols *v.* Bridgeport, 23 Conn. 189, 60 Am. Dec. 636.

Illinois.— Briggs *v.* Union Drainage Dist. No. 1, 140 Ill. 53, 29 N. E. 721.

Massachusetts.— Weed *v.* Boston, 172 Mass. 28, 51 N. E. 204. 42 L. R. A. 642.

Michigan.— Williams *v.* Detroit, 2 Mich. 560.

Missouri.— St. Louis *v.* Buss, 159 Mo. 9, 59 S. W. 969.

New Jersey.— Agnes *v.* Newark, 35 N. J. L. 168.

Pennsylvania.— *In re* Washington Ave., 69 Pa. St. 352. 8 Am. Rep. 255.

See 18 Cent. Dig. tit. "Eminent Domain," § 11.

Although the charter may provide but one proceeding for the accomplishment of both these objects, yet they are as distinct in their character as are the powers from which they flow. St. Louis *v.* Buss, 159 Mo. 9, 59 S. W. 969.

27. Maltus *v.* Shields, 2 Metc. (Ky.) 553; Cheaney *v.* Hooser, 9 B. Mon. (Ky.) 330; Simms *v.* Paris, 1 S. W. 543, 8 Ky. L. Rep. 344; Hewitt's Appeal, 88 Pa. St. 55; Williams *v.* Nashville, 89 Tenn. 487, 15 S. W. 364; Wade *v.* Richmond, 18 Gratt. (Va.) 583.

See 18 Cent. Dig. tit. "Eminent Domain," § 12.

28. Courtney *v.* Louisville, 12 Bush (Ky.) 419; Covington *v.* Southgate, 15 B. Mon. (Ky.) 491; Bradshaw *v.* Omaha, 1 Nebr. 16.

29. *Alabama.*— Gibbson *v.* Mobile, etc., R. Co., 36 Ala. 410; Stem *v.* Mobile, 24 Ala. 591.

Kentucky.— Slack *v.* Maysville, etc., R. Co., 13 B. Mon. 1.

Nebraska.— Hallenbeck *v.* Hahn, 2 Nebr. 377.

Ohio.— Knox County Com'rs *v.* Nichols, 14 Ohio St. 260.

Pennsylvania.— Moers *v.* Reading, 21 Pa. St. 188; Sharpless *v.* Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759.

United States.—Chicago, etc., R. Co. *v.* Otoe County, 16 Wall. 667, 21 L. ed. 375.

See 18 Cent. Dig. tit. "Eminent Domain," § 10.

30. Chicago, etc., R. Co. *v.* Otoe County, 16 Wall. (U. S.) 667, 21 L. ed. 375.

31. *Connecticut.*— State *v.* Brennan, 25 Conn. 278.

Illinois.— Frazer *v.* Chicago, 186 Ill. 480, 57 N. E. 1055, 78 Am. St. Rep. 296, 51 L. R. A. 306.

Indiana.— Smith *v.* State, 155 Ind. 611, 58 N. E. 1044, 51 L. R. A. 404.

Louisiana.— State *v.* Schlemmer, 42 La. Ann. 1166, 8 So. 307, 10 L. R. A. 135.

Massachusetts.— Com. *v.* Tewksbury, 11 Metc. 55; Baker *v.* Boston, 12 Pick. 184, 22 Am. Dec. 421.

New Jersey.— State *v.* Wheeler, 44 N. J. L. 88.

under the police powers of the state.[32] So it has been held that the destruction of private property in case of necessity, as for instance to prevent the spread of a

New York.— Griffin *v.* Martin, 7 Barb. 297.
United States.— Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 L. ed. 979; Richmond, etc., R. Co. *v.* Richmond, 96 U. S. 521, 24 L. ed. 734; New Orleans Water-Works Co. *v.* St. Tammany Water-Works Co., 14 Fed. 194, 4 Woods 134.

See 18 Cent. Dig. tit. "Eminent Domain," § 4 *et seq.*

Applications of rule.— The following statutes have been held valid within the rule stated in the text: Statutes requiring a railroad company without compensation to construct and maintain street crossings over its railroad (Chicago, etc., R. Co. *v.* Chicago, 140 Ill. 309, 29 N. E. 1109), or to maintain a flagman wherever the road crosses highways (Delaware, etc., R. Co. *v.* East Orange Tp., 41 N. J. L. 127), or to construct such switches, side-tracks, and connections as will enable them to transfer cars to and from their lines (Atlantic, etc., R. Co. *v.* State, 42 Fla. 358, 29 So. 319, 89 Am. St. Rep. 233), statutes authorizing a recovery of double damages for injuries to stock straying on the right of way of a railroad company by reason of insufficient fences (Kingsbury *v.* Missouri, etc., R. Co., 156 Mo. 379, 57 S. W. 547), prohibiting the interment of the dead within certain parts of a city (Coates *v.* New York, 7 Cow. (N. Y.) 585), making a judgment for violation of the liquor law a lien on the property of a third person used with his knowledge and consent for the unlawful manufacture and sale of such liquors (Polk County *v.* Hierb, 37 Iowa 361), giving to town trustees power to exact a license of any person selling liquors within one mile of the town (Falmouth *v.* Watson, 5 Bush (Ky.) 660), providing penalties for permitting water from an overflowing well or spring to flow on streets or alleys (Skaggs *v.* Martinsville, 140 Ind. 476, 39 N. E. 241, 49 Am. St. Rep. 209, 33 L. R. A. 781), subjecting people of subdivisions of a state to the payment of damages for property therein situated destroyed by mobs (Darlington *v.* New York, 31 N. Y. 164, 28 How. Pr. (N. Y.) 352, 88 Am. Dec. 248), prohibiting the sale of refreshments within one mile of camp-meeting, without permission of those in charge (Com. *v.* Bearse, 132 Mass. 542, 42 Am. Rep. 450), prohibiting transient merchants from doing business without a license and imposing a penalty for its violation (Levy *v.* State, 161 Ind. 251, 68 N. E. 172), locating and building levees on land of riparian proprietors (Peart *v.* Meeker, 45 La. Ann. 421, 12 So. 490; Ruch *v.* New Orleans, 43 La. Ann. 275, 9 So. 473; Bass *v.* State, 34 La. Ann. 494), authorizing the taking of private property for the drainage of low lands (Winslow *v.* Winslow, 95 N. C. 24; Pool *v.* Trexler, 76 N. C. 297), authorizing the filling up of lots to provide against stagnant water and assessing the expense against the owner (Bliss *v.* Kraus, 16 Ohio St. 54), authorizing the taking of samples of milk to test the same (Com. *v.* Carter, 132 Mass. 12), prohibiting noxious trades within the limits of a city without consent of the authorities (Watertown *v.* Mayo, 109 Mass. 315, 12 Am. Rep. 694), providing for the destruction of diseased cattle (Livingston *v.* Ellis County, 130 Tex. Civ. App. 19, 68 S. W. 723), prohibiting the use of artificial means to increase the natural flow of gas from a well (Manufacturers Gas, etc., Co. *v.* Indiana Natural Gas, etc., Co., 155 Ind. 461, 57 N. E. 912, 50 L. R. A. 768), prohibiting one from permitting a growth of weeds on his premises (St. Louis *v.* Galt, 179 Mo. 8, 77 S. W. 876, 63 L. R. A. 778), and statutes requiring physicians without compensation to keep a registry of births and deaths at which they have professionally attended and to deposit a copy in the county clerk's office (Com. *v.* McConnell, 76 S. W. 41, 25 Ky. L. Rep. 552). So it has been held that special and general statutes preventing the discharge into streams of polluting matter of such kind and amount as will corrupt or impair the quality of the water are reasonable regulations of the exercise of private rights of property and need not provide for compensation to persons having the ordinary rights of riparian owners. Sprague *v.* Dorr, 185 Mass. 10, 69 N. E. 344.

Acts held not a valid exercise of police power.— Fixing of railroad rates by the railroad commission so low that they compel the company to operate at a loss (Matthews *v.* North Carolina, 106 Fed. 7), or reducing the rates charged by a water company so low that they are unjust and unreasonable (Spring Valley Waterworks Co. *v.* San Francisco, 124 Fed. 574); a provision for the weighing of coal at mines which without providing compensation requires a public record to be kept for public use (Millett *v.* People, 117 Ill. 294, 7 N. E. 631, 57 Am. Rep. 869); an act requiring tenement houses to be provided with a supply of Croton water at one or more places on each floor whenever the owner shall be so directed by the board of health under penalty of fine and imprisonment, no compensation being provided (New York City Health Dept. *v.* Trinity Church, 17 N. Y. Suppl. 510). So a city charter authorizing the common council to order riparian owners to build docks along a navigable river or harbor and on failure to do so within a time specified to have the work done and charge the costs of the special assessment upon the property upon or in front of which the docks are built, regardless of the question of special benefits accruing thereto, is not a valid exercise of the police power, but is a taking of private property for public use without compensation. Lathrop *v.* Racine, 119 Wis. 461, 97 N. W. 192.

32. Pontchartrain R. Co. *v.* Orleans Levee Dist., 49 La. Ann. 570, 21 So. 765; Bliss *v.* Kraus, 16 Ohio St. 54; Sweet *v.* Rechel, 37 Fed. 323. See also 8 Cyc. 864 note 64.

conflagration, is not an exercise of the right of eminent domain,[33] but is a natural right founded on the law of necessity.[34] It has also been held that the destruction of property constituting a nuisance, when done for the public safety or health, is not a taking of private property for public use without due compensation, or without due process of law, in the sense in which these terms are used in the constitution.[35] And statutes providing for the forfeiture and destruction of liquors unlawfully kept for sale are not in violation of the constitutional prohibition against taking private property for public use without compensation.[36]

V. WHO MAY EXERCISE POWER.

A. The United States. The United States government has the right of eminent domain in territory acquired by the United States either by conquest or purchase.[37] The right of eminent domain may be exercised by the United States within the several states, so far as is necessary to the enjoyment of the powers conferred upon the United States by the constitution.[38] So the constitution having granted to the United States the right to exercise exclusive legislation in all cases

33. *California.*— Surocco *v.* Geary, 3 Cal. 69, 58 Am. Dec. 385.

Iowa.— Field *v.* Des Moines, 39 Iowa 575, 28 Am. Rep. 46.

Minnesota.— McDonald *v.* Red Wing, 13 Minn. 38.

New Jersey.— American Print Works *v.* Lawrence, 21 N. J. L. 248, 23 N. J. L. 590, 57 Am. Dec. 420. But see Hale *v.* Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190.

New York.— Russell *v.* New York, 2 Den. 461; American Print Works *v.* Lawrence, 1 Code Rep. 14. *Compare* Reynolds *v.* Schultz, 4 Rob. 282, 34 How. Pr. 147.

Texas.—Watkins *v.* Walker County, 18 Tex. 585, 70 Am. Dec. 298.

See 18 Cent. Dig. tit. "Eminent Domain," § 7. See also 5 Cyc. 655.

But see Kemper *v.* Louisville, 14 Bush (Ky.) 87; Mithoff *v.* Carrollton, 12 La. Ann. 185.

Liability for property which might have been saved.— A city blowing up a building to prevent the spread of fire is liable to the owner of chattels therein if he could have saved the chattels if the building had not been blown up. Bishop *v.* Macon, 7 Ga. 200, 50 Am. Dec. 400.

34. American Print Works *v.* Lawrence, 21 N. J. L. 248, 23 N. J. L. 590, 57 Am. Dec. 420.

35. State *v.* Meek, 112 Iowa 338, 84 N. W. 3, 84 Am. St. Rep. 342, 51 L. R. A. 414; Manhattan Mfg., etc., Co. *v.* Van Keuren, 23 N. J. Eq. 251; Miller *v.* Craig, 11 N. J. Eq. 175; Sweet *v.* Rechel, 37 Fed. 323.

Illustration.— The legislature may authorize the destruction of a milldam detrimental to public health; and it is no objection to such a law that if the dam is a nuisance the inhabitants have the right to its removal without compensation, and if not a nuisance then the removable is unjustifiable. Miller *v.* Craig, 11 N. J. Eq. 175.

Where property becomes nuisance by act of party seeking to destroy.— Where owners of lots bordering on a river, under a grant from the government without reservation, had erected docks thereon, and used them for over twenty-five years without interruption, a city in which they were situated could not require their removal, they having become a nuisance by the act of the city, without compensating the owners. Chicago *v.* Laflin, 49 Ill. 172.

If the action of a city is merely colorable, and is designed under the pretense of abating a nuisance to compel lot owners to improve their property it cannot be sustained, since it is an attempt by indirection to subject private property to public use without compensation. Bliss *v.* Kraus, 16 Ohio St. 54. See also Morrison *v.* Morey, 146 Mo. 543, 48 S. W. 629.

Personal property in a building which is used for the conduct of a business constituting a nuisance is protected by the constitutional provision from summary sale or demolition by a municipal corporation, although such municipality is empowered by its charter to remove nuisances. Miller *v.* Burch, 32 Tex. 208, 5 Am. Rep. 242.

36. State *v.* Brennan's Liquors, 25 Conn. 278; State *v.* Snow, 3 R. I. 64.

37. People *v.* Folsom, 5 Cal. 373.

Effect of limiting appropriation.—The right to condemn the land forming a part of the Gettysburg battle-field is not affected by the fact that congress has limited the amount to be appropriated for the purpose. Nor can a railway company whose line runs through such land object that only a part of its land is taken. U. S. *v.* Gettysburg Electric R. Co., 160 U. S. 668, 16 S. Ct. 427, 40 L. ed. 576.

38. Kohl *v.* U. S., 91 U. S. 367, 23 L. ed. 449; *In re* Montgomery, 48 Fed. 896; *In re* Rugheimer, 36 Fed. 369. See *infra*, V, B.

Instances.— It may condemn lands for a highway (Chesapeake, etc., Canal Co. *v.* Union Bank, 5 Fed. Cas. No. 2,653, 4 Cranch C. C. 75); lands situated within a state for a post-office site (U. S. *v.* Inlots, 26 Fed. Cas. No. 15,441). And if the act of congress authorizing the condemnation of a site for public buildings in a city contains a proviso that

whatsoever over the District of Columbia,[39] it has power to condemn lands lying within the District.[40] And congress also possesses this power in the various territories.[41] The practice and proceedings should conform so far as may be to those existing in the courts of the state in which the proceedings are instituted.[42]

B. The States — 1. In General. The general right of eminent domain within the limits of a state is vested in the state government, in which the ultimate title to all the land within the state may be said to be;[43] and with this right the state never parts.[44] This right gives to the legislature the control of private property for the use of the public, provided just compensation be made,[45] and all grantees from the state as well as their assigns hold under this implied understanding.[46] The legislature may designate the public purposes to which such property is to be applied.[47] Public improvements constructed in the exercise of the eminent domain of the state need not remain in the control of the

the state shall relinquish jurisdiction over such site, the United States has authority to take and condemn the site when the proviso is fully met by an act of the legislature (*Ex p.* United States, 24 Pittsb. Leg. J. (Pa.) 105; *In re* Rugheimer, 36 Fed. 369); where the injury to private property is merely incidental to the exercise of the government's right to improve navigation, it is not a taking of private property for public use (Bedford *v.* U. S., 36 Ct. Cl. 474).

39. U. S. Const. art. 1, § 8, subd. 17.

40. Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170, for public park.

The provision of the Maryland statute, ceding the District of Columbia to the United States, that "nothing herein contained shall be so construed to vest in the United States any right of property in the soil, so as to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States," does not deprive the federal government of its right of eminent domain in the District. U. S. *v.* Cooper, 20 D. C. 104; Shoemaker *v.* U. S., 147 U. S. 282, 299, 13 S. Ct. 361, 37 L. ed. 170.

41. People *v.* Folsom, 5 Cal. 373; Tuttle *v.* Moore, 3 Indian Terr. 712, 64 S. W. 585; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 10 S. Ct. 965, 34 L. ed. 295 [*reversing* 33 Fed. 900].

Instance. — Thus congress may grant to a railroad company, incorporated under the laws of a state, the right of way through lands owned by the Cherokee nation, where the operation of the railroad will affect interstate commerce; and it is not necessary that such act shall in express words set forth the purpose for which it was passed, so as to show that its objects are such as to warrant the exercise of the right. Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 10 S. Ct. 965, 34 L. ed. 295 [*reversing* 33 Fed. 900].

42. Chappell *v.* U. S., 160 U. S. 499, 16 S. Ct. 397, 40 L. ed. 510; *In re* Rugheimer, 36 Fed. 369. Where there are no fixed forms of pleading in condemnation proceedings, as is the case in South Carolina, but the procedure is by petition by a person duly authorized, notice to the owner and a hearing by a court of record as to the necessity of taking the land, followed by an assessment of compensation by a jury, proceedings in the United States district court following such method are sufficient. *In re* Rugheimer, 36 Fed. 369. See also Chappell *v.* U. S., 160 U. S. 499, 16 S. Ct. 397, 40 L. ed. 510.

43. Gilmer *v.* Lime Point, 18 Cal. 229; Raleigh, etc., R. Co. *v.* Davis, 19 N. C. 451.

The power of eminent domain is dormant until called into being by an act of the legislature, and the party attempting to exercise it must be able to point out the statute conferring the power. *In re* Poughkeepsie Bridge Co., 108 N. Y. 483, 15 N. E. 601.

44. Smith *v.* Helmer, 7 Barb. (N. Y.) 416.

45. Young *v.* McKenzie, 3 Ga. 31.

46. Young *v.* McKenzie, 3 Ga. 31; Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301; McGowen *v.* Stark, 1 Nott & M. (S. C.) 387, 9 Am. Dec. 712; Lindsay *v.* East Bay St. Com'rs, 2 Bay (S. C.) 38; Harding *v.* Goodlett, 3 Yerg. (Tenn.) 41, 24 Am. Dec. 546.

Thus a grant by an owner of an exclusive right of way through his land, however small the parcel, is in conflict with the state's right of eminent domain. West Virginia Transp. Co. *v.* Ohio River Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527.

Act held not to operate as a surrender of right. — The Pennsylvania statute, incorporating the Lock Haven Bridge Company, which permits the state to purchase the bridge by paying a sum which, together with the dividends declared, shall equal the cost of construction and ten per cent per annum interest, is not a surrender of any right of eminent domain, so as to prevent the state from converting the company's property into a free bridge by condemnation. Lock Haven Bridge Co. *v.* Clinton County, 157 Pa. St. 379, 27 Atl. 726.

47. McGowen *v.* Stark, 1 Nott & M. (S. C.) 387, 9 Am. Dec. 712; Lindsay *v.* East Bay St. Com'rs, 2 Bay (S. C.) 38; Harding *v.* Goodlett, 3 Yerg. (Tenn.) 41, 24 Am. Dec. 546.

The fact that a state has delegated its control of certain streets to a municipality does not prevent the state from establishing the grade of the streets. Brand *v.* Multnomah County, 38 Oreg. 79, 60 Pac. 390, 62 Pac. 209, 84 Am. St. Rep. 772, 50 L. R. A. 389.

local authorities.[48] The state may exercise the right of eminent domain not only in its own behalf but also for the benefit of the United States and may condemn and turn over lands within its borders to the federal government for national purposes, the view being taken that the national use is a public use.[49] It may also authorize the taking of land within its territory by the United States in proceedings instituted by the latter for that purpose.[50] So it may appropriate to public use Indian lands within its borders, although the right was previously granted to another state to purchase those lands.[51] But it cannot authorize a municipality to divert the waters of an unnavigable interstate stream to the injury of riparian owners of the stream in another state.[52]

2. As Affected by the Federal Constitution. The fifth amendment to the United States constitution, declaring that private property shall not be taken for public use without just compensation, is a restriction upon the legislative functions of the federal government, not upon those of a state.[53]

C. Territories. Where the act organizing a territory provides that the legislative power shall extend to all rightful subjects of legislation consistent with the constitution of the United States and with the organic act, this confers upon the territorial government the right of eminent domain.[54]

D. On Delegation of Power — 1. Right to Delegate Power. The right of eminent domain may be exercised either directly by the agents of the government, or through the medium of corporate bodies, or of individual enterprises, by virtue of a delegation of the power.[55] The right of eminent domain, however, can only be delegated for public purposes, as private property cannot be taken for private uses.[56] Corporations to which the power of eminent domain

48. Lancey *v.* King County, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817.

49. Matter of League Island, 1 Brewst. (Pa.) 524; Lancey *v.* King County, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817. *Contra*, People *v.* Humphrey, 23 Mich. 471, 9 Am. Rep. 94, which takes the view that the right of eminent domain in any sovereignty exists only for its own purposes.

50. Gilmer *v.* Lime Point, 18 Cal. 229; Reddall *v.* Bryan, 14 Md. 444, 74 Am. Dec. 550; Burt *v.* Merchants' Ins. Co., 106 Mass. 356, 8 Am. Rep. 339; *In re* Appointment U. S. Com'rs, 96 N. Y. 227. *Contra*, Darlington *v.* U. S., 82 Pa. St. 382, 22 Am. Rep. 766.

51. Wadsworth *v.* Buffalo Hydraulic Assoc., 15 Barb. (N. Y.) 83.

52. Pine *v.* New York City, 112 Fed. 98, 50 C. C. A. 145 [*reversed* in 185 U. S. 93, 22 S. Ct. 592, 46 L. ed. 820].

53. *Arkansas.*— Cairo, etc., R. Co. *v.* Turner, 31 Ark. 494, 25 Am. Rep. 564.

Delaware.— Wilson *v.* Baltimore, etc., R. Co., 5 Del. Ch. 524.

Louisiana.—Renthorp *v.* Bourg, 4 Mart. 97; Territory *v.* Hattick, 2 Mart. 87.

New Hampshire.— Concord R. Co. *v.* Greely, 17 N. H. 47.

New York.— Livingston *v.* New York, 8 Wend. 85, 22 Am. Dec. 622.

Utah.— Kimball *v.* Grantsville City, 19 Utah 368, 57 Pac. 1, 45 L. R. A. 628.

United States.— Withers *v.* Buckley, 20 How. 84, 15 L. ed. 816; Fox *v.* Ohio, 5 How. 410, 12 L. ed. 213; Barron *v.* Baltimore, 7 Pet. 243, 8 L. ed. 672; Bonaparte *v.* Camden, etc., R. Co., 3 Fed. Cas. No. 1,617, Baldw. 205.

It does not create any new principle of restriction on either the national or state government which did not exist before. It is declaratory of the common-law principle applicable to all republican governments. Parham *v.* Justices Decatur County Inferior Ct., 9 Ga. 341; Young *v.* McKenzie, 3 Ga. 31.

54. Sanford *v.* Tucson, (Ariz. 1903) 71 Pac. 903; Oury *v.* Goodwin, 3 Ariz. 255, 26 Pac. 370; Swan *v.* Williams, 2 Mich. 427; Warren *v.* First Div. St. Paul, etc., R. Co., 18 Minn. 384.

55. *Louisiana.*— Harrison *v.* New Orleans Pac. R. Co., 34 La. Ann. 462, 44 Am. Rep. 438.

Missouri.— Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301.

New Hampshire.— Ash *v.* Cummings, 50 N. H. 591; Backus *v.* Lebanon, 11 N. H. 19, 35 Am. Dec. 466.

New York.— Beekman *v.* Saratoga, etc., R. Co., 3 Paige 45, 22 Am. Dec. 679.

North Dakota.— Lidgerwood *v.* Michalek, (1903) 97 N. W. 541.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Lawrence, 10 Phila. 604.

Tennessee.— Knox County *v.* Kennedy, 92 Tenn. 1, 20 S. W. 311.

See 18 Cent. Dig. tit. "Eminent Domain," § 24.

56. Philadelphia, etc., R. Co. *v.* Lawrence, 10 Phila. (Pa.) 604.

The holder of a franchise for the operation of a street railway in a city, although privately interested in the enterprise, is nevertheless an agency or instrumentality in the hands of the public authorities for the accomplishment of public purposes and benefits.

has been delegated are vested with the sovereign power to take private property for public use.[57]

2. The Statutory Authority — a. Necessity of Statutory Authority. Inasmuch as the right of eminent domain is one which lies dormant in the state until legislative action is had pointing out the occasion, mode, conditions, and agencies for its exercise,[58] the right to exercise the power must be conferred by statute, either in express words or by necessary implication.[59] The power should not be gathered from doubtful inferences, but should be unmistakably expressed.[60]

b. Construction of Statutes Conferring Power. The power of eminent domain being in derogation of the common right, acts conferring it are to be strictly construed, and are not to be extended beyond their plain provisions.[61] The right to exercise the power is strictly limited to the purposes specified in the

Watson *v.* Fairmont, etc., R. Co., 49 W. Va. 528, 39 S. E. 193.

57. Tinsman *v.* Belvidere Delaware R. Co., 26 N. J. L. 148, 69 Am. Dec. 565; Ten Eyck *v.* Delaware, etc., Canal Co., 18 N. J. L. 200, 37 Am. Dec. 233; Long *v.* Pennsylvania R. Co., 9 Lanc. Bar (Pa.) 93.

58. Allen *v.* Jones, 47 Ind. 438, 442 [*citing* Dyckman *v.* New York, 5 N. Y. 434; Cooley Const. Lim. 537]. See also *supra*, note 9.

59. *Connecticut.*— Waterbury *v.* Platt, 75 Conn. 387, 53 Atl. 958, 60 L. R. A. 211.

Georgia.— Markham *v.* Howell, 33 Ga. 508.

Kansas.— State *v.* Armell, 8 Kan. 288.

Massachusetts.— Providence, etc., R. Co. *v.* Norwich, etc., R. Co., 138 Mass. 277; Boston, etc., R. Corp. *v.* Salem, etc., R. Co., 2 Gray 1.

Michigan.— Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308.

New Jersey.— Akers *v.* United New Jersey R., etc., Co., 43 N. J. L. 110.

Washington.— Tacoma *v.* State, 4 Wash. 64, 29 Pac. 847.

United States.— U. S. *v.* Rauers, 70 Fed. 748.

Statute held not to confer power.— The act of congress of March 3, 1893, providing for the proper preservation of the lines of battle at Gettysburg, Pa., and appropriating money for the purpose, does not authorize the procurement of real estate, such as to justify condemnation proceedings under the act of Aug. 1, 1888. U. S. *v.* Certain Tract of Land, 70 Fed. 940.

60. Waterbury *v.* Platt, 75 Conn. 387, 53 Atl. 958, 60 L. R. A. 211.

Silence is negation.— In the construction of powers given to a corporation to take land by eminent domain, every reasonable doubt is to be resolved adversely. The affirmative must be shown and silence is negation. Providence, etc., R. Co., Petitioner, 17 R. I. 324, 21 Atl. 965.

"Unless both the letter and spirit of the statute relied upon clearly confer the power claimed, it can not be exercised." Ligare *v.* Chicago, 139 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179.

61. *Illinois.*— Harvey *v.* Aurora, etc., R. Co., 174 Ill. 295, 51 N. E. 163; Weckler *v.* Chicago, 61 Ill. 142; East St. Louis *v.* St. John, 47 Ill. 463; Goddard *v.* Chicago, etc., R. Co., 104 Ill. App. 526 [*affirmed* in 202 Ill. 362, 66 N. E. 1066].

Indiana.— Eward *v.* Lawrenceburgh, etc., R. Co., 7 Ind. 711.

Massachusetts.— Thacher *v.* Dartmouth Bridge Co., 8 Pick. 501.

Missouri.— Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301; State *v.* Farrelly, 36 Mo. App. 282.

New York.— *In re* Amsterdam Water Com'rs, 96 N. Y. 351; Erie R. Co. *v.* Steward, 61 N. Y. App. Div. 480, 70 N. Y. Suppl. 698; Sharp *v.* Johnson, 4 Hill 92, 40 Am. Dec. 259; Sharpe *v.* Speir, 4 Hill 76.

Ohio.— Moorhead *v.* Little Miami R. Co., 17 Ohio 340.

Pennsylvania.— Lance's Appeal, 55 Pa. St. 16, 93 Am. Dec. 722; Philadelphia, etc., R. Co. *v.* Lawrence, 10 Phila. 604; Lodge *v.* Railroad Co., 1 Leg. Gaz. 131.

Rhode Island.— Howe *v.* Norman, 13 R. I. 488.

United States.— U. S. *v.* Rauers, 70 Fed. 748.

England.— Lamb *v.* North London R. Co., L. R. 4 Ch. 522, 21 L. T. Rep. N. S. 98, 17 Wkly. Rep. 746; Ayr Harbour Trustees *v.* Oswald, 8 App. Cas. 623; Simpson *v.* South Staffordshire Waterworks Co., 4 De G. J. & S. 679, 11 Jur. N. S. 453, 34 L. J. Ch. 380, 12 L. T. Rep. N. S. 360, 13 Wkly. Rep. 729, 908, 69 Eng. Ch. 519; Barker *v.* North Staffordshire R. Co., 2 De G. & Sm. 55, 12 Jur. 324, 575, 589, 5 R. & Can. Cas. 401; Sparrow *v.* Oxford, etc., R. Co., 9 Hare 436, 41 Eng. Ch. 436; North London R. Co. *v.* Metropolitan Bd. of Works, 1 Johns. 405, 5 Jur. N. S. 1121, 28 L. J. Ch. 909, 7 Wkly. Rep. 640; *Ex p.* Eton College, 15 Jur. 45, 20 L. J. Ch. 1.

See 18 Cent. Dig. tit. "Eminent Domain," § 44.

Particular acts construed.— Where a railroad charter authorized the company to take the land under the statute of 1852, or any other statute which had been or might thereafter be passed, it was held that the company could take land under the statute of 1845. Taylor *v.* Pettijohn, 24 Ill. 312. For other cases construing particular statutes see the following cases:

Indiana.— Eward *v.* Lawrenceburgh, etc., R. Co., 7 Ind. 711.

Massachusetts.— Monatiquot River Mills *v.* Braintree Water Supply Co., 149 Mass. 478, 21 N. E. 761, 4 L. R. A. 272; Pickman *v.*

statute conferring it.[62] The proposed use of the lands of the owner must be clearly embraced within the legitimate object of the power conferred.[63] Where there is any doubt in regard to the extent of the power the landowner must have the benefit of that doubt.[64] Statutes conferring the power of eminent domain on private corporations do not render compulsory or obligatory the exercise of those powers.[65]

3. To Whom Power May Be Delegated — a. Municipalities. The right of eminent domain is not inherent in a municipality but may be conferred upon it by appropriate legislation.[66] It has no more right than any other corporation to

Peabody, 145 Mass. 480, 14 N. E. 751; Providence, etc., R. Co. *v.* Norwich, etc., R. Co., 138 Mass. 277.

New Jersey.— Wirth *v.* Jersey City, 56 N. J. L. 216, 27 Atl. 1065; Watson *v.* Acquackanonck Water Co., 36 N. J. L. 195; Gridley *v.* Darcey, 11 N. J. L. 292; Colwell *v.* May's Landing Water Power Co., 19 N. J. Eq. 245; Morris, etc., R. Co. *v.* Newark, 10 N. J. Eq. 352.

New York.— *In re* Union El. R. Co., 113 N. Y. 275, 21 N. E. 81; People *v.* Asten, 4 Hun 461; Smith *v.* Helmer, 7 Barb. 416; *In re* Long Island R. Co., 21 N. Y. Suppl. 489.

Ohio.— State *v.* Salem Water Co., 5 Ohio Cir. Ct. 58; Gawn *v.* Wilson, 9 Ohio S. & C. Pl. Dec. 683, 7 Ohio N. P. 33.

Pennsylvania.— Trenton Cut-Off R. Co. *v.* Newtown Electric St. R. Co., 8 Pa. Dist. 549; Lodge *v.* Railroad Co., 1 Leg. Gaz. 131.

Washington.— Cascades R. Co. *v.* Sohns, 1 Wash. Terr. 557.

United States.— Davenport, etc., R. Co. *v.* Renwick, 102 U. S. 180, 26 L. ed. 51; U. S. *v.* Rauers, 70 Fed. 748; Illinois *v.* Illinois Cent. R. Co., 33 Fed. 730.

England.— Ferrar *v.* London Sewer Com'rs, L. R. 4 Exch. 227, 38 L. J. Exch. 102, 21 L. T. Rep. N. S. 295, 17 Wkly. Rep. 709; Broadbent *v.* Imperial Gas Co., 7 De G. M. & G. 436, 3 Jur. N. S. 221, 26 L. J. Ch. 276, 5 Wkly. Rep. 272, 56 Eng. Ch. 337; Simpson *v.* South Staffordshire Waterworks Co., 4 De G. J & S. 679, 11 Jur. N. S. 453, 34 L. J. Ch. 380, 12 L. T. Rep. N. S. 360, 13 Wkly. Rep. 729, 908, 69 Eng. Ch. 519; Dungey *v.* London, 38 L. J. C. P. 298, 20 L. T. Rep. N. S. 921, 17 Wkly. Rep. 1106; Baker *v.* St. Marylebone Vestry, 35 L. T. Rep. N. S. 129, 24 Wkly. Rep. 848.

See 18 Cent. Dig. tit. "Eminent Domain," § 43.

62. *Georgia.*— Hopkins *v.* Florida Cent. R. Co., 97 Ga. 107, 25 S. E. 452.

Illinois.— Harvey *v.* Aurora, etc., R. Co., 174 Ill. 295, 51 N. E. 163; Ligare *v.* Chicago, 139 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179; Chicago, etc., R. Co. *v.* Galt, 133 Ill. 657, 23 N. E. 425, 24 N. E. 674; East St. Louis *v.* St. John, 47 Ill. 463; Goddard *v.* Chicago, etc., R. Co., 104 Ill. App. 526.

Kentucky.— Cornwall *v.* Louisville, etc., R. Co., 87 Ky. 72, 7 S. W. 553, 9 Ky. L. Rep. 924; Postal Tel. Cable Co. *v.* Mobile, etc., R. Co., 54 S. W. 727, 21 Ky. L. Rep. 1188.

Maine.— Thompson *v.* Androscoggin Bridge, 5 Me. 62.

Missouri.— Fore *v.* Hoke, 48 Mo. App. 254.

New Jersey.— Cheyney *v.* Atlantic City Water Works Co., 55 N. J. L. 235, 26 Atl. 95; Ballantine *v.* Kearny Tp., 52 N. J. L. 338, 19 Atl. 792.

New Mexico.— Albuquerque Land, etc., Co. *v.* Gutierrez, 10 N. M. 177, 61 Pac. 357.

New York.— People *v.* Northern Cent. R. Co., 164 N. Y. 289, 58 N. E. 138; *In re* South Beach R. Co., 119 N. Y. 141, 23 N. E. 486; *In re* Poughkeepsie Bridge Co., 108 N. Y. 483, 15 N. E. 601; Erie R. Co. *v.* Stewart, 61 N. Y. App. Div. 480, 70 N. Y. Suppl. 698.

Ohio.— Currier *v.* Marietta, etc., R. Co., 11 Ohio St. 228; Cooper *v.* Williams, 5 Ohio 391, 24 Am. Dec. 299 [*affirming* 4 Ohio 253, 22 Am. Dec. 745].

Pennsylvania.— Pittsburgh Junction Co.'s Appeal, 122 Pa. St. 511, 6 Atl. 564, 9 Am. St. Rep. 128.

Virginia.— Charlottesville *v.* Maury, 96 Va. 383, 31 S. E. 520.

United States.— Payne *v.* Kansas, etc., R. Co., 46 Fed. 546.

England.— Liverpool *v.* Chorley Water-Works Co., 2 De G. M. & G. 852, 51 Eng. Ch. 666, 42 Eng. Reprint 1105; London, etc., R. Co. *v.* London, 19 L. T. Rep. N. S. 250; Lee *v.* Milner, 2 Y. & Coll. Exch. 611.

See 18 Cent. Dig. tit. "Eminent Domain," § 142.

Illustration.— Thus a statute authorizing a millowner to obtain a right to overflow the lands of another does not confer the right to overflow a highway. Venard *v.* Cross, 8 Kan. 248.

63. *In re* Poughkeepsie Bridge Co., 108 N. Y. 483, 15 N. E. 601; *In re* Staten Island Rapid Transit Co., 103 N. Y. 252, 257, 8 N. E. 548; Syracuse *v.* Benedict, 86 Hun (N. Y.) 343, 33 N. Y. Suppl. 944; Matter of New York City, 74 N. Y. App. Div. 197, 77 N. Y. Suppl. 737.

64. Simpson *v.* South Staffordshire Waterworks Co., 4 De G. J. & S. 679, 11 Jur. N. S. 453, 34 L. J. Ch. 380, 12 L. T. Rep. N. S. 360, 13 Wkly. Rep. 729, 908, 69 Eng. Ch. 519.

65. Scottish North-eastern R. Co. *v.* Stewart, 5 Jur. N. S. 607, 3 Macq. 382, 7 Wkly. Rep. 458. See also Edinburgh, etc., R. Co. *v.* Philip, 3 Jur. N. S. 249, 2 Macq. 514, 5 Wkly. Rep. 377; Astley *v.* Manchester, etc., R. Co., 2 De G. & J. 453, 4 Jur. N. S. 567, 27 L. J. Ch. 478, 6 Wkly. Rep. 561, 59 Eng. Ch. 359.

66. *Colorado.*—Warner *v.* Gunnison, 2 Colo. App. 430, 31 Pac. 238.

Georgia.— Butler *v.* Thomasville, 74 Ga. 570; Bibb County *v.* Harris, 71 Ga. 250.

condemn property unless authority to do so is provided by the legislature in express terms or by necessary implication.[67] Statutes delegating the power must specify that the taking of property is to be for a public use.[68] The right of eminent domain is not conferred by statutes authorizing the city to make public improvements, such as streets or alleys,[69] or wharves, docks, or piers,[70] or sewers or drains, etc.;[71] or by a statute authorizing the city to issue bonds for the opening of a street and stating the purpose of the appropriation;[72] or by a statute empowering a city to authorize the laying of railroad tracks in streets, but which makes no provision for compensation to the owners of the land in the street;[73] or by a charter providing that the owner must be compensated, if no provision is made for ascertaining the amount;[74] or by statutes which do not prescribe the methods of condemnation.[75] The power may of course be exercised when conferred in express terms by the statute, provided there is nothing in the constitution to prohibit it.[76]

Minnesota.— Milwaukee, etc., R. Co. *v.* Faribault, 23 Minn. 167.

Missouri.— Kansas City *v.* Marsh Oil Co., 140 Mo. 458, 41 S. W. 943.

New York.— *In re* Buffalo, 15 N. Y. Suppl. 123.

North Dakota.— Ledgerwood *v.* Michalek, (1903) 97 N. W. 541; Noble Tp. *v.* Aasen, 8 N. D. 77, 76 N. W. 990.

Oregon.— Dallas *v.* Hallock, 44 Oreg. 246, 75 Pac. 204.

Pennsylvania.— Philadelphia, etc., R. Co.'s Appeal, 2 Walk. 291.

Wisconsin.— Smith *v.* Gould, 59 Wis. 631, 18 N. W. 457.

See 18 Cent. Dig. tit. "Eminent Domain," § 27 *et seq.*

In Illinois the statute gives an incorporated town and a village like powers to condemn land. Phillips *v.* Scales Mound, 195 Ill. 353, 63 N. E. 180.

The power delegated to the officers of a municipality to condemn land cannot be destroyed by the acts of the municipality, or by any agreement between the municipality and an individual. Brimmer *v.* Boston, 102 Mass. 19.

67. Brunswick, etc., R. Co. *v.* Waycross, 94 Ga. 102, 21 S. E. 145; Butler *v.* Thomasville, 74 Ga. 570; Bibb County *v.* Harris, 71 Ga. 250; Allen *v.* Jones, 47 Ind. 438; State *v.* Graves, 19 Md. 351, 81 Am. Dec. 639; Philadelphia, etc., R. Co.'s Appeal, 2 Walk. (Pa.) 291.

68. *In re* Theresa Drainage Dist., 90 Wis. 301, 63 N. W. 288.

Specification of purpose.— A city charter authorizing a city "to do all things necessary to be done by corporations" invests it with the right of eminent domain, although the specific purposes for which the right may be exercised are not designated. Memphis *v.* Wright, 6 Yerg. (Tenn.) 497, 27 Am. Dec. 489. See also Slingerland *v.* Newark, 54 N. J. L. 62, 23 Atl. 129, holding a statute authorizing a municipality to exercise the power "for any lawful public use or purpose," to be valid, the view being taken that the qualifying word "lawful" limits the uses intended to such as are sanctioned by the legislature, so that a city proceeding under this act must show that it is seeking to acquire land for a purpose which the legislature either in general laws or in special laws applicable to that city has expressed its willingness to promote by the power of eminent domain.

69. Brunswick, etc., R. Co. *v.* Waycross, 94 Ga. 102, 21 S. E. 145; Tacoma *v.* State, 4 Wash. 64, 29 Pac. 847. But see *contra*, Chicago, etc., R. Co. *v.* Cicero, 154 Ill. 656, 39 N. E. 574.

70. Madison *v.* Daley, 58 Fed. 751.

71. Allen *v.* Jones, 47 Ind. 438.

72. St. Paul Union Depot Co. *v.* St. Paul, 30 Minn. 359, 15 N. W. 684.

73. Chamberlain *v.* Elizabethport Steam Cordage Co., 41 N. J. Eq. 43, 2 Atl. 775.

74. Mulligan *v.* Perth Amboy, 52 N. J. L. 132, 18 Atl. 670. *Compare* Woodruff *v.* Glendale, 26 Minn. 78, 1 N. W. 581.

75. Tacoma *v.* State, 4 Wash. 64, 29 Pac. 847.

76. Helena *v.* Rogan, 26 Mont. 452, 68 Pac. 798, 27 Mont. 135, 69 Pac. 709.

Instances in which the power has been granted.— Cal. Code Civ. Proc. § 1238, provides that the right of eminent domain may be exercised, for roads, streets and alleys. The act of April 25, 1863, authorized the city and county of San Francisco to widen streets and to provide compensation to the owners of land taken or damaged, but did not in express terms authorize the condemnation of land. It was held that the necessary land could be acquired by condemnation under the provisions of said section. The court further holds that the right to exercise the power of eminent domain by cities and villages in laying out and improving streets is impliedly given to the commission authorized by that amendment. San Francisco *v.* Kiernan, 98 Cal. 614, 33 Pac. 720. And as section 1238 provides further that any person may by exercise of eminent domain acquire private property for the use of canals, etc., for conducting water for the use of the inhabitants of any city, a city may condemn the waters of a creek for the use of its inhabitants, although its charter contains no special power of condemnation. Santa Cruz *v.* Enright, 95 Cal. 105, 30 Pac. 197.

b. Private Corporations — (I) *In General.* The cases in which private property may be taken for public use are not confined to those where the state in its sovereign capacity takes it, but private corporations may be authorized to take private property for the use of the corporation in case the object of the incorporation is a public benefit.[77] Such a corporation has no power to appropriate property to public use, unless the power is given to it either by the express words of the statute or by necessary implication therefrom.[78]

(II) *Railroad Companies* — (A) *In General.* The legislature has authority

77. Postal Tel.-Cable Co. *v.* Chicago, etc., R. Co., 30 Ind. App. 654, 66 N. E. 919; O'Hara *v.* Lexington, etc., R. Co., 1 Dana (Ky.) 232; Scudder *v.* Trenton Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756; *In re* Brooklyn Union Ferry Co., 98 N. Y. 139.

The supreme court of Connecticut, speaking of private corporations to whom this power has been delegated, says that they "although acting indeed under an authority derived from the state, do not act, properly speaking, in its behalf, or as its agent or representative, nor with a special reference to the benefit of the public, as in the case when roads or other public improvements are made under the immediate direction and superintendence of the state, or its agents, constituted for that purpose, and for the general accommodation or benefit of the community; but under a special grant of power, deemed to be acquired from the state, for a valuable consideration, and for the promotion of their own direct and private advantage." Bradley *v.* New York, etc., R. Co., 21 Conn. 294, 306.

Upon what classes of corporations the power may be conferred. The power may be delegated to companies organized for the transportation of natural gas (Carothers *v.* Philadelphia Co., 118 Pa. St. 468, 12 Atl. 314; *In re* Ohio Valley Gas Co., 6 Pa. Dist. 200), irrigation companies (Lake Koen Nav., etc., Co. *v.* Klein, 63 Kan 484, 65 Pac. 684; Albuquerque Land, etc., Co. *v.* Gutierrez, 10 N. M. 177, 61 Pac. 357), water companies (Benson *v.* Great Barrington Fire Dist., 183 Mass. 590, 67 N. E. 876), bridge companies (Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301; Phillips *v.* Postal Tel. Co., 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868), telephone and telegraph companies (State *v.* Midland Telephone, etc., Co., (N. J. Err. & App. 1902) 53 Atl. 1125), plank-road or turnpike companies (Fuselier *v.* Iberia Parish Police Jury, 109 La. 551, 33 So. 597), railroad companies (see *infra*, V, D, 3, b, (II)).

For what purposes power may be delegated. Under the New Hampshire constitution the legislature may authorize a manufacturing corporation to flow land with back water in order to increase its water-power, payment of compensation to be made therefor. Great Falls Mfg. Co. *v.* Fernald, 47 N. H. 444.

The power delegated to a private corporation must be construed, as where the power is delegated to municipal corporations, since the rules of construction do not depend on the question whether the corporation is a public or a private one. Bardstown, etc., R. Co. *v.* Metcalf, 4 Metc. (Ky.) 199, 81 Am. Dec. 541.

78. East St. Louis *v.* St. John, 47 Ill. 463; Thacher *v.* Dartmouth Bridge, 18 Pick. (Mass.) 501; Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301; Western Union Tel. Co. *v.* Pennsylvania R. Co., 123 Fed. 33, 59 C. C. A. 113.

Statutes conferring power. — Authority to a telegraph company to construct its line along a railroad is conferred by a statute which permits the condemnation of any lands of a corporation, whether acquired by purchase or by virtue of any provision in the charter of such corporation (Ft. Worth, etc., R. Co. *v.* Southwestern Tel., etc., Co., 96 Tex. 160, 71 S. W. 270, 60 L. R. A. 145); and if the statute authorizes a telegraph company to condemn land, that power is conferred upon a telephone company, since the telephone is but a change in detail, and not in substance, from the telegraph (Northwestern Tel. Exch. Co. *v.* Chicago, etc., R. Co., 76 Minn. 334, 79 N. W. 315; State *v.* New Jersey Cent. Telephone Co., 53 N. J. L. 341, 21 Atl. 460, 11 L. R. A. 664; Gulf, etc., R. Co. *v.* Southwestern Tel., etc., Co., 18 Tex. Civ. App. 500, 45 S. W. 151; San Antonio, etc., R. Co. *v.* Southwestern Tel., etc., Co., (Tex. Civ. App. 1900) 56 S. W. 201). So where a statute expressly authorizes a corporation to construct a bridge over a river it necessarily authorizes it to take land for the abutments. Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301. But it has been held that a statute for the incorporation of mining companies which authorized such a company to construct a railroad from its mine to another railroad, but made no provision for the appropriation of land, except the provision that the company should in respect to such railroad be subject and governed by the acts in relation to railroads, does not confer upon the mining company the power of eminent domain which was conferred on railroad companies generally. Miami Coal Co. *v.* Wigton, 19 Ohio St. 560. And it has also been held that water companies are not authorized to condemn the supply of water from springs on their lands which naturally flow over adjoining lands either by Tenn. Code, § 844 *et seq.* providing for the condemnation of real estate for general improvement purposes or section 2502 authorizing them to condemn lands necessary for the establishment of their reservoirs and works and the rights of way between their reservoirs and the towns to be supplied. Wa-

to grant to a railroad company the power to condemn private property;[79] but the statutes must confer the power either expressly or by necessary implication,[80] and

tauga Water Co. *v.* Scott, (Tenn. Sup. 1903) 76 S. W. 888.

79. *Alabama.*— Davis *v.* Tuscumbia, etc., R. Co., 4 Stew. & P. 421; Aldridge *v.* Tuscumbia, etc., R. Co., 2 Stew. & P. 199, 23 Am. Dec. 307.

Minnesota.— Weir *v.* St. Paul, etc., R. Co., 18 Minn. 155.

Mississippi.— Brown *v.* Beatty, 34 Miss. 227, 69 Am. Dec. 389.

New Jersey.— Middlesex, etc., Traction Co. *v.* Metlar, (Sup. 1903) 56 Atl. 142; National Docks R. Co. *v.* New Jersey Cent. R. Co., 32 N. J. Eq. 755.

New York.— Buffalo, etc., R. *v.* Brainard, 9 N. Y. 100; Bloodgood *v.* Mohawk, etc., R. Co., 18 Wend. 9, 31 Am. Dec. 313.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Philadelphia, etc., R. Co., 6 Pa. Dist. 269; Long *v.* Pennsylvania R. Co., 9 Lanc. Bar 98.

Vermont.—White River Tp. Co. *v.* Vermont Cent. R. Co., 21 Vt. 590.

See 18 Cent. Dig. tit. "Eminent Domain," § 25.

80. Boston, etc., R. Co. *v.* Cambridge, 166 Mass. 224, 24 N. E. 140; Phillips *v.* Dunkirk, etc., R. Co., 78 Pa. St. 177.

Lateral and branch roads.— In the case of lateral railroads the right to acquire lands by the exercise of the power of eminent domain is implied, as though it were a main line. Newhall *v.* Galena, etc., R. Co., 14 Ill. 273; Lower *v.* Chicago, etc., R. Co., 59 Iowa 563, 13 N. W. 718; Toledo, etc., R. Co. *v.* East Saginaw, etc., R. Co., 72 Mich. 206, 40 N. W. 436. Ala. Civ. Code, §§ 1172, 1173, providing for the condemnation of land for a branch road, apply only to corporations which have no power of condemnation by a special statute; and a railroad company, organized under the act of Feb. 17, 1899, authorizing such corporations to condemn land, has authority to acquire a right of way for a branch line, without complying with such sections. Tennessee Coal, etc., R. Co. *v.* Birmingham Southern R. Co., 128 Ala. 526, 29 So. 455.

Street railways.— The term "street railroad," being one applied to a railway passenger carrier whose road lies along and upon the streets of a city, town, or village, such a company has not the power of eminent domain unless it is expressly or by necessary implication granted. South, etc., Alabama R. Co. *v.* Highland Ave., etc., R. Co., 119 Ala. 105, 24 So. 114; Elliott Roads & Sts. (2d ed.) §§ 732, 738. If any power of condemnation can be implied from the authority to construct a street railroad it is limited to its right of way and the necessary structures incident to its business. South, etc., Alabama R. Co. *v.* Highland Ave., etc., R. Co., 119 Ala. 105, 24 So. 114. Under Ill. Rev. St. (1874) c. 66, § 1, relating to horse and dummy railways, the power to exercise the right of eminent domain is limited to cases of necessity, and an electric street railway which had obtained the right to lay its tracks along a public road could not abandon such road and condemn private property for its right of way, unless a necessity for such proceedings was shown. Harvey *v.* Aurora, etc., R. Co., 174 Ill. 295, 51 N. E. 163. Ill. Laws (1899), p. 331, granting to a street railroad, when necessary, the right to take property under the statute relating to eminent domain, does not authorize a street railway to take private property for a right of way, although the city ordinance authorizes it to lay its tracks on the streets over a part of its route, and over private property as to the remainder; the refusal of the council to permit the company to lay its tracks in the streets for the whole distance is not such a necessity as would authorize the company to exercise the power of eminent domain. Dewey *v.* Chicago, etc., Electric R. Co., 184 Ill. 426, 56 N. E. 804. N. Y. Laws (1890), c. 565, art. 1, § 2, authorizes the incorporation of both steam and street railway companies, and sections 4 and 7 give to every railroad corporation power to acquire the necessary real estate by condemnation. Section 90, after providing that street railway companies shall have power to construct and operate roads along the streets, etc., and to acquire title by condemnation, adds: "Nothing in this section shall be deemed to authorize a street railroad corporation to acquire real property within a city by condemnation." It was held that this clause does not prohibit the acquiring by condemnation of an easement to operate a street railway on a city street, the fee of which belongs to abutting owners; it applies to the acquirement by condemnation of land outside of the street, avenue, etc. Schenectady R. Co. *v.* Peck, 88 N. Y. App. Div. 201, 84 N. Y. Suppl. 759; Adee *v.* Nassau Electric R. Co., 72 N. Y. App. Div. 404, 410, 76 N. Y. Suppl. 589; Schenectady R. Co. *v.* Lyon, 41 Misc. (N. Y.) 506, 85 N. Y. Suppl. 40. But it is held in New York that where an act of the legislature, confirming the consent of the city council to the construction of a street railway through certain streets, failed because the council's consent was unauthorized, the legislature may confer an original grant of power to construct the road, independent of such consent, thus creating an enlargement of the power sought. People *v.* Law, 34 Barb. (N. Y.) 494, 22 How. Pr. (N. Y.) 109. A statute which gives to street railway companies the right to condemn a turnpike upon making compensation to the owner or owners thereof does not include the right as to the soil under the turnpike therefor as against the abutting landowner. Hinnershitz *v.* United Traction Co., 206 Pa. St. 91, 55 Atl. 841.

The power in a railroad charter to take land carries with it a right of way over the land under the maxim, "*Omne majus con-*

the power is strictly limited to the purposes mentioned in the statute.[81] The right to take land for railroad purposes also may be conferred upon individuals and upon partnerships as well as upon corporations.[82] The territorial legislatures possess a like power, where the act organizing them provides that the legislative power shall extend to all rightful subjects of legislation.[83] Where such power is delegated it is the duty of the courts to give the grant its full effect,[84] although the grant will be subject to such conditions as the legislature may impose.[85] This power cannot be delegated by the railroad company.[86]

(B) *Effect of Lease or Consolidation.* A railroad company does not lose its right to condemn lands by a lease of its road,[87] although the lessee is a foreign corporation;[88] but the lessee cannot exercise the right.[89] So a domestic corporation does not lose its right by consolidating with a foreign corporation,[90] but the consolidated company may exercise within the state the right of eminent domain.[91]

tinet in se minus." Philadelphia, etc., R. Co. *v.* Williams, 54 Pa. St. 103.

81. Chicago, etc., R. Co. *v.* Galt, 133 Ill. 657, 23 N. E. 425, 24 N. E. 674; Payne *v.* Kansas, etc., R. Co., 46 Fed. 546.

82. Moran *v.* Farley, (Cal. 1889) 21 Pac. 549; Moran *v.* Ross, 79 Cal. 159, 21 Pac. 547. A grant to a corporation to build a railroad is so far as the power to take property is concerned the same in its character, construction, and effect as if made to one or more individual persons not clothed with corporate privileges. Bradley *v.* New York, etc., R. Co., 21 Conn. 294.

83. Swan *v.* Williams, 2 Mich. 427; Warren *v.* First Div. St. Paul, etc., R. Co., 18 Minn. 384.

84. Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 454, 44 Am. Dec. 556; Weir *v.* St. Paul, etc., R. Co., 18 Minn. 155.

How full effect given.— Where the charter gives to a railroad company all powers, privileges, and immunities which are or may be necessary to carry into effect its purposes and objects, the court can give full effect to this provision only by so treating the powers of the company that it shall have the right in a constitutional manner to sequester both land and water, to take property, both corporeal and incorporeal, or to interfere with privileges which may lie in its way, for the necessary completion of the work it was empowered to construct. Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 454, 44 Am. Dec. 556.

85. Minneapolis, etc., R. Co. *v.* Nicolin, 76 Minn. 302, 79 N. W. 304; Pennsylvania R. Co. *v.* Magee, (Pa. 1888) 13 Atl. 839; Pennsylvania R. Co. *v.* Duncan, 111 Pa. St. 352, 5 Atl. 742; Chicago, etc., R. Co. *v.* Oshkosh, etc., R. Co., 107 Wis. 192, 83 N. W. 294.

Applications of rule.— A statute giving the right of eminent domain to railroad companies organized to convey person or property does not give such power to a company organized to carry persons only. Chicago, etc., R. Co. *v.* Oshkosh, etc., R. Co., 107 Wis. 192, 83 N. W. 294.

Limitations of rule.— Where a corporation becomes vested with the right of eminent domain, non-compliance with other provisions of the statute relating to its organization cannot be invoked as a defense to proceedings under the statute to condemn a right of way or an easement across the track of another road. Arkansas, etc., R. Co. *v.* St. Louis, etc., R. Co., 103 Fed. 747. And the rule that unless a railroad company intends in good faith to do what it has proposed in its articles of association it shall not be permitted to take property does not apply where the property has been taken, and the railroad has been constructed and in operation for years, although the road as built does not correspond with the original designation in its charter. So where a street railroad company has constructed its line as authorized by its charter, except such part as runs along a street projected over a navigable river, which cannot be graded, the road is in good faith completed as authorized. *In re* Metropolitan El. R. Co., 12 N. Y. Suppl. 506.

86. Delabole Slate Co. *v.* Bangor, etc., R. Co., 6 Northam. Co. Rep. (Pa.) 337.

87. Chicago, etc., R. Co. *v.* Illinois Cent. R. Co., 113 Ill. 156; *In re* New York, etc., R. Co., 99 N. Y. 12, 1 N. E. 27; Kip *v.* New York, etc., R. Co., 67 N. Y. 227; *In re* New York, etc., R. Co., 35 Hun (N. Y.) 220; *In re* Metropolitan El. R. Co., 2 N. Y. Suppl. 278; Cincinnati Southern R. Co. *v.* Handy, 8 Ohio Dec. (Reprint) 576, 9 Cinc. L. Bul. 32; State *v.* King County Super. Ct., 31 Wash. 445, 72 Pac. 89.

88. *In re* New York, etc., R. Co., 99 N. Y. 12, 1 N. E. 27 [*affirming* 35 Hun (N. Y.) 220].

89. Worcester *v.* Norwich, etc., R. Co., 109 Mass. 103; Lewis *v.* Germantown, etc., R. Co., 39 Leg. Int. (Pa.) 23.

Limitation of rule.— Where the company leasing a railroad had the power generally to condemn land, it could do so for the purpose of widening the leased road, whether the right of eminent domain belonging to the lessor company passed under the lease or not. Hespenheide's Appeal, 4 Pennyp. (Pa.) 71.

90. Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456, 11 N. W. 271; *In re* St. Paul, etc., R. Co., 36 Minn. 85, 30 N. W. 432; Oregon Short Line R. Co. *v.* Idaho Postal Tel. Cable Co., 111 Fed. 842, 49 C. C. A. 663 [*affirming* 104 Fed. 623]; Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

91. By the act of consolidation a consolidated company becomes a domestic corpo-

(c) *Effect of Sale.* The transfer of its property and franchise by one railroad company to another will not operate to vest in the latter the right of eminent domain;[92] but one company may by consent of the legislature take the power as successor to another to which it was originally granted;[93] nor is it necessary that such consent be declared in express terms.[94]

(III) *Foreign Corporations* — (A) *Power of State to Delegate.* In the absence of a constitutional inhibition, the legislature may authorize a foreign corporation to condemn lands in the state,[95] although the corporation possesses no such power in the state of its creation;[96] and although incidentally public uses in other states are also promoted,[97] and it may determine what interest in the lands shall be acquired by the foreign corporation.[98] So by subsequent legislation it may enlarge the powers originally granted;[99] but where a foreign corporation is placed on the same footing as a domestic corporation, it cannot acquire property by condemnation at a point where it had already exceeded the statutory limit provided for domestic corporations.[1]

(B) *Necessity of Statutory Authorization by Domestic States.* Without statutory authorization by the domestic state a foreign corporation cannot exercise the power of eminent domain,[2] although it may possess such power under the laws

ration. Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453; Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110; State *v.* Chicago, etc., R. Co., 25 Nebr. 165, 41 N. W. 128; State *v.* Missouri Pac. R. Co., 25 Nebr. 164, 41 N. W. 127; State *v.* Chicago, etc., R. Co., 25 Nebr. 156, 41 N. W. 125, 2 L. R. A. 564.

92. Abbott *v.* New York, etc., R. Co., 145 Mass. 450, 15 N. E. 91.

93. Abbott *v.* New York, etc., R. Co., 145 Mass. 450, 15 N. E. 91.

94. Brinkerhoff *v.* Newark, etc., Traction Co., 66 N. J. L. 478, 49 Atl. 812.

95. *Alabama.*— Columbus Waterworks Co. *v.* Long, 121 Ala. 245, 25 So. 702.

Arkansas.— Russell *v.* St. Louis, etc., R. Co., 71 Ark. 451, 75 S. W. 725.

Georgia.— Gardner *v.* Georgia R., etc., Co., 117 Ga. 522, 43 S. E. 863.

Massachusetts.— Abbott *v.* New York, etc., R. Co., 145 Mass. 450, 15 N. E. 91.

Missouri.— Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453; St. Louis, etc., R. Co. *v.* Lewright, 113 Mo. 660, 21 S. W. 210; Gray *v.* St. Louis, etc., R. Co., 81 Mo. 126; State *v.* Seay, 23 Mo. App. 623.

New York.— New York, etc., R. Co. *v.* Welsh, 143 N. Y. 411, 38 N. E. 378, 42 Am. St. Rep. 734; *In re* Townsend, 39 N. Y. 171.

See 18 Cent. Dig. tit. "Eminent Domain," § 36.

Domestic corporation auxiliary to foreign corporation.— A corporation of Idaho, although subordinate or auxiliary to a foreign corporation which owns the greater part of its stock and controls its management, may nevertheless condemn a right of way under the statutes of Idaho. Idaho Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 104 Fed. 623 [*affirmed* in 111 Fed. 842, 49 C. C. A. 663].

Delegation of power by city.— Under a statute giving cities the power to condemn private property for waterworks, and to confer that power upon individuals or corporations, a city may confer the power upon a foreign corporation. Dodge *v.* Council Bluffs, 57 Iowa 560, 10 N. W. 886.

96. Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453.

97. Columbus Waterworks Co. *v.* Long, 121 Ala. 245, 25 So. 702.

98. Morris Canal, etc., Co. *v.* Townsend, 24 Barb. (N. Y.) 658.

99. New York, etc., R. Co. *v.* Welsh, 143 N. Y. 411, 38 N. E. 378, 42 Am. St. Rep. 734 [*affirming* 69 Hun 615, 23 N. Y. Suppl. 195].

1. White *v.* Kansas City, etc., R., etc., Co., 101 Tenn. 95, 45 S. W. 1073.

2. *Georgia.*— Chestatee Pyrites Co. *v.* Cavenders Creek Gold Min. Co., 119 Ga. 354, 46 S. E. 422.

Louisiana.— Southwestern Tel. Co. *v.* Kansas City, etc., R. Co., 108 La. 691, 32 So. 958.

Missouri.— Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453.

New Hampshire.— Crosby *v.* Hanover, 36 N. H. 404.

West Virginia.— Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 17 W. Va. 812.

United States.— Postal Tel. Cable Co. *v.* Cleveland, etc., R. Co., 94 Fed. 234; Saunders *v.* Bluefield Waterworks, etc., Co., 58 Fed. 133.

See 18 Cent. Dig. tit. "Eminent Domain," § 36.

The power of eminent domain does not exist as a matter of comity between the states and a foreign corporation must have affirmative authority from the state in which it proposes to exercise the right. Chestatee Pyrites Co. *v.* Cavenders Creek Gold Min. Co., 119 Ga. 354, 46 S. E. 422.

In Nebraska a foreign corporation is forbidden, both by the constitution and by statute, to exercise this right, unless such corporation becomes incorporated under the Nebraska laws. Koenig *v.* Chicago, etc., R. Co., 27 Nebr. 699, 43 N. W. 423; State *v.* Chicago, etc., R. Co., 25 Nebr. 156, 41 N. W. 125, 2 L. R. A. 564; Trester *v.* Missouri Pac. R. Co., 23 Nebr. 242, 36 N. W. 502; State *v.* Scott, 22 Nebr. 628, 36 N. W. 121.

of the state of its creation.[3] A foreign corporation has no right to exercise the power, unless granted to it by the domestic state; and then only in case it does not violate the provisions of the state constitution.[4]

(c) *Statutes Conferring Power.* Statutes conferring the power upon domestic corporations by necessary implication deny the right to foreign corporations.[5] But the power is conferred by statutes domesticating foreign corporations on compliance with the statutory prerequisites to doing business in the domestic state,[6] by conferring on them the same powers as may be exercised by domestic corporations,[7] by giving the power to "any and all corporations" engaged in a designated business,[8] or by conferring the right upon "every railroad corporation" or "all existing corporations."[9] A federal statute conferring the power of eminent domain over any portion of the public domain does not give the right of eminent domain to condemn a right of way over private property.[10]

(iv) *Companies Incorporated Under General Laws.* Corporations organized under general laws have all the powers of condemnation granted by such general laws or by the statutes of the state.[11] This doctrine has been held to apply to electric railways,[12] to horse railways in a city,[13] and to street railways generally.[14] And the general statutes relating to the organization of telegraph lines and their power to condemn lands has been held to apply to telephone companies.[15]

c. Government Officers or Commissioners. The state has power to delegate

3. Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453; Saunders *v.* Bluefield Waterworks, etc., Co., 58 Fed. 133.

4. Southwestern Tel. Co. *v.* Kansas City, etc., R. Co., 108 La. 691, 32 So. 958; Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301; Western Union Tel. Co. *v.* Pennsylvania R. Co., 120 Fed. 362 [*affirmed* in 123 Fed. 33, 59 C. C. A. 113]; Foltz *v.* St. Louis, etc., R. Co., 60 Fed. 316, 8 C. C. A. 635.

5. Holbert *v.* St. Louis, etc., R. Co., 45 Iowa 23; State *v.* Scott, 22 Nebr. 628, 36 N. W. 121.

6. Russell *v.* St. Louis, etc., R. Co., 71 Ark. 451, 75 S. W. 725.

In Arkansas a foreign corporation which has not become domesticated cannot condemn lands in that state. St. Louis, etc., R. Co. *v.* Foltz, 52 Fed. 627.

7. Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301; San Antonio, etc., R. Co. *v.* Southwestern Tel., etc., Co., 93 Tex. 313, 55 S. W. 117, 77 Am. St. Rep. 884, 49 L. R. A. 459; Gulf, etc., R. Co. *v.* Southwestern Tel., etc., Co., 25 Tex. Civ. App. 488, 61 S. W. 406.

8. *In re* Ohio Valley Gas Co., 6 Pa. Dist. 200.

9. New York, etc., R. Co. *v.* Welsh, 143 N. Y. 411, 38 N. E. 378, 42 Am. St. Rep. 734 [*affirming* 23 N. Y. Suppl. 195]; *In re* Marks, 6 N. Y. Suppl. 105.

10. Western Union Tel. Co. *v.* Pennsylvania R. Co., 120 Fed. 362 [*affirming* 123 Fed. 33, 59 C. C. A. 113].

11. Lieberman *v.* Chicago, etc., R. Co., 141 Ill. 140, 30 N. E. 544; Newport, etc., Bridge Co. *v.* Gill, 53 S. W. 650, 21 Ky. L. Rep. 942; Coles *v.* Midland Telephone, etc., Co., 67 N. J. L. 490, 51 Atl. 448; Buffalo, etc., R. Co. *v.* Brainard, 9 N. Y. 100; Erie R. Co. *v.* Steward, 61 N. Y. App. Div. 480, 70 N. Y. Suppl. 698. And see Montana Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 114 Fed. 787.

Companies organized before enactment of statute.— A general statute providing that the mode of condemning land for railroads may be adopted by certain corporations "heretofore or hereafter organized under the general incorporation laws" applies to corporations organized before the condemnation statute was passed, and under special laws, if they have adopted the provisions of the constitution governing such companies. Newport, etc., Bridge Co. *v.* Gill, 53 S. W. 650, 21 Ky. L. Rep. 942.

Necessity of specific provisions.— Art. 1, § 4, subd. 2, of the general railroad law of New York authorizes railroad corporations to acquire by condemnation such real estate as may be necessary for the construction, maintenance, and accommodation of the road; but although the power of eminent domain is thus generally delegated the exercise of the power must be justified under some subsequent and specific provision of the statute. Erie R. Co. *v.* Steward, 61 N. Y. App. Div. 480, 70 N. Y. Suppl. 698.

12. Malott *v.* Collinsville, etc., Electric R. Co., 108 Fed. 313, 47 C. C. A. 345.

13. Metropolitan City R. Co. *v.* Chicago West Div. R. Co., 87 Ill. 317.

14. Matter of Rochester Electric R. Co., 57 Hun (N. Y.) 56, 10 N. Y. Suppl. 379.

15. San Antonio, etc., R. Co. *v.* Southwestern Tel., etc., Co., 93 Tex. 313, 55 S. W. 117, 77 Am. St. Rep. 884, 49 L. R. A. 459; State *v.* Central New Jersey Tel. Co., 53 N. J. L. 341, 21 Atl. 460, 11 L. R. A. 664. See also Atty.-Gen. *v.* Edison Telephone Co., 6 Q. B. D. 244, 50 L. J. Q. B. 145, 43 L. T. Rep. N. S. 697, 29 Wkly. Rep. 428.

to public officers, boards of trustees, managers of state institutions, county commissioners, and other like boards and officers, the right and duty of taking private property for public use upon making just compensation therefor.[16] Without statutory authorization exercise of the right of eminent domain by them is of course impossible;[17] and a statute which merely confers the power of making a public improvement without providing for the taking of private property or making compensation to the owners does not confer the right of eminent domain.[18]

d. Individuals. The legislature has power to confer upon an individual the right of eminent domain.[19]

4. Conditions Precedent to Exercise of Power. The power with all constitutional and statutory limitations and directions for its use must be strictly pursued.[20] A corporation or tribunal to which the power of eminent domain has

16. Hornaday *v.* State, 63 Kan. 499, 65 Pac. 656; Missouri, etc., R. Co. *v.* Cambern, (Kan. App. 1901) 63 Pac. 605; People *v.* Smith, 21 N. Y. 595; Matter of Thompson, 57 Hun (N. Y.) 419, 10 N. Y. Suppl. 705; Matter of Central Park Extension, 16 Abb. Pr. (N. Y.) 56; Leitzsey *v.* Columbia Water-Power Co., 47 S. C. 464, 25 S. E. 744, 34 L. R. A. 215.

17. Kohl *v.* Hannaford, 5 Ohio Dec. (Reprint) 306, 4 Am. L. Rec. 372.

Statutes held to confer power.— Statutes making it the duty of the secretary of the treasury to purchase lands for a custom-house and authorizing him to purchase said lands "at private sale or by condemnation" vest in him the power of eminent domain. Kohl *v.* U. S., 91 U. S. 367, 23 L. ed. 449. But see Kohl *v.* Hannaford, 5 Ohio Dec. (Reprint) 306, 4 Am. L. Rec. 372. So where an act of congress directed the secretary of war to select such land on the Columbia river, in Oregon, as he might deem necessary for the construction of a canal and locks, and to take possession of said land after purchase, and if he could not purchase, then to take possession as soon as the value was ascertained by a legal proceeding in the mode provided by the laws of Oregon for condemning lands, it was held that congress made the secretary of war the judge of the necessity of the selection of said land. U. S. *v.* Oregon R., etc., Co., 16 Fed. 524, 9 Sawy. 61.

18. People *v.* Finger, 24 Barb. (N. Y.) 341.

19. *California.*— Pool *v.* Simmons, 134 Cal. 621, 66 Pac. 872; Moran *v.* Ross, 79 Cal. 159, 21 Pac. 547.

Kansas.— Lake Koen Nav., etc., Co. *v.* Klein, 63 Kan. 484, 65 Pac. 684.

Montana.— Emerson *v.* Eldorado Ditch Co., 18 Mont. 247, 44 Pac. 969.

Pennsylvania.— Boyd *v.* Negley, 40 Pa. St. 377. *Contra,* Barrows *v.* Summerville, 33 Leg. Int. 23.

Utah.— Peterson *v.* Bean, 22 Utah 43, 61 Pac. 213.

Virginia.— Plecker *v.* Rhodes, 30 Gratt. 795. *Contra,* Loughbridge *v.* Harris, 42 Ga. 500; St. Peter *v.* Denison, 58 N. Y. 416, 17 Am. Rep. 258.

See 18 Cent. Dig. tit. "Eminent Domain," § 49.

Land for toll-bridge.— The legislature has power to authorize an individual to build a toll-bridge and to condemn land for the purpose. Plecker *v.* Rhodes, 30 Gratt. (Va.) 795.

Statute conferring power.—Under Cal. Code Civ. Proc. § 1238, providing for the condemnation of real estate for railway and other purposes, and section 1001 of the code, which authorizes any person without further legislation to acquire property for the purposes specified in section 1238, by consent of the owner or by condemnation proceedings, a private individual may cause land to be condemned for railway purposes. Section 14 of article 1 of the constitution does not restrict the condemnation of lands to railways under the control of corporations; nor does section 22 of article 12 of the constitution, which creates a railroad commission, with power to establish rates "for railroad and other transportation companies," limit the power to construct and operate railroads to corporations alone. Under the above sections the power may be conferred upon individuals and the right may be exercised by a partnership. Moran *v.* Ross, 79 Cal. 159, 21 Pac. 547.

Statutes not conferring power.— A statute enabling persons floating logs down a certain river to construct a chute or apron in connection with any dam in the river, and empowering them to reconstruct any booms in such manner as to allow logs to pass, upon paying to the owner or occupant of said boom all damage he may sustain by reason of the floating of logs or the alteration of dams or booms, does not authorize such persons to condemn a right in the stream and a strip of land along its banks. Matter of Thomson, 86 Hun (N. Y.) 405, 33 N. Y. Suppl. 467.

The execution of a contract between a state and one who has contracted to enlarge a canal is not a delegation of the state's power of condemnation, and the contractor has no power to enter on premises outside the limits of the canal. St. Peter *v.* Denison, 58 N. Y. 416, 17 Am. Rep. 258.

20. Allen *v.* Jones, 47 Ind. 438; Dillon Mun. Corp. § 469.

"It is a well-settled principle that, when the exercise of special authority delegated by statute to a particular person or to a special tribunal is dependent upon conditions precedent, all preliminaries which show the fulfillment of such conditions, and which confer

been delegated cannot take private property until it has complied strictly with all the steps contemplated by law.[21]

5. Exhaustion of Power — a. In General. A single exercise of the power of condemnation does not exhaust it, if a future exercise of the power becomes necessary to accomplish the objects for which the corporation was chartered.[22] Thus the power to condemn private property conferred by the charter of a railroad company is not exhausted by its first exercise, but is coextensive with the necessities to meet which it was granted.[23] But the power must be exercised

upon such person or tribunal the power to act, must clearly appear upon the face of the proceedings." U. S. *v.* Rauers, 70 Fed. 748, 750; *In re* Montgomery, 48 Fed. 896.

21. *Illinois.*— Gillinwater *v.* Mississippi, etc., R. Co., 13 Ill. 1.

New Jersey.— Morris, etc., R. Co. *v.* Newark, 10 N. J. Eq. 352.

New York.— *In re* Rochester Electric R. Co., 123 N. Y. 351, 25 N. E. 381 [*affirming* 57 Hun 56, 10 N. Y. Suppl. 379]; Citizens' Water-Works Co. *v.* Parry, 59 Hun 202, 13 N. Y. Suppl. 490.

Ohio.—Atlantic, etc., R. Co. *v.* Sullivant, 5 Ohio St. 276.

Pennsylvania.— Matter of Snyder Ave., 14 Phila. 346.

Virginia.— Mairs *v.* Gallahue, 9 Gratt. 94.

United States.— Binney *v.* Chesapeake, etc., Canal Co., 8 Pet. 214, 8 L. ed. 921; *In re* Montgomery, 48 Fed. 896; Bonaparte *v.* Camden, etc., R. Co., 3 Fed. Cas. No. 1,617, Baldw. 205.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 136, 137.

Applications of rule.— Thus the following statutory requirements must be complied with before the power of eminent domain may be exercised: Consent of municipality to construction of street railway along streets (*In re* Rochester Electric R. Co., 123 N. Y. 251, 25 N. E. 381 [*affirming* 57 Hun 56, 10 N. Y. Suppl. 379]); deposit of location and survey of route of road in the office of the secretary of state (Bonaparte *v.* Camden, etc., R. Co., 3 Fed. Cas. No. 1,617, Baldw. 205); and procuring from the legislature a law approving the route and termination of the road proposed to be constructed (Gillinwater *v.* Mississippi, etc., R. Co., 13 Ill. 1).

22. Bruce *v.* Delaware, etc., Canal Co., 19 Barb. (N. Y.) 371; McKeen *v.* Delaware Div. Canal Co., 49 Pa. St. 424. See also *infra*, X.

Thus a water company chartered to supply a city with water may condemn new lands and springs as often as the necessities of the city require it. Johnson *v.* Utica Water Works Co., 67 Barb. (N. Y.) 415; Schepp *v.* Reading, 2 Woodw. (Pa.) 460.

Erection of new lock-house.— If a lot of ground on which a lock-house has been erected prove to be inconvenient for its appropriated uses, the canal commissioners acting for the state may take possession of other ground for the purpose of erecting a new lock-house. Their power is not exhausted by the first appropriation. Ligat *v.* Com., 19 Pa. St. 456.

Acquisition of land adjacent to a town hall.— Where a town board which is authorized to acquire such land for public use adjacent to the town hall as it deems necessary or proper adopts a resolution to acquire two adjacent tracts, it does not thereby exhaust its authority, but may authorize the acquisition of another tract by a subsequent resolution. Jamaica *v.* Denton, 70 N. Y. Suppl. 837.

Location and construction of drainage ditches.— The location and construction of one ditch by the township trustees to drain certain territory does not exhaust the power of draining over that territory or confine it to deepening and widening a ditch previously made. The only limitation as to the number, course, and location of township ditches is that they shall be conducive to the public health, convenience, or welfare. Miller *v.* Weber, 1 Ohio Cir. Ct. 130, 1 Ohio Cir. Dec. 77 [*affirmed* 19 Cinc. L. Bul. 350].

23. *Florida.*— Florida Cent., etc., R. Co. *v.* Bell, 43 Fla. 359, 31 So. 259.

Georgia.— Gardner *v.* Georgia R., etc., Co., 117 Ga. 522, 43 S. E. 863.

Illinois.— "It would be a disastrous rule indeed to hold, that a railroad company must, in the first instance, acquire all the grounds it will ever need for its own convenience or the public accommodation." Chicago, etc., R. Co. *v.* Wilson, 17 Ill. 123, 127. And see Fisher *v.* Chicago, etc., R. Co., 104 Ill. 323.

Indiana.— Peck *v.* Louisville, etc., R. Co., 101 Ind. 366; Prather *v.* Jeffersonville, etc., R. Co., 52 Ind. 16.

Kansas.— Central Branch Union Pac. R. Co. *v.* Atchison, etc., R. Co., 26 Kan. 669.

Mississippi.— Ewing *v.* Alabama, etc., R. Co., 68 Miss. 551, 9 So. 295; Mississippi, etc., R. Co. *v.* Devaney, 42 Miss. 555, 2 Am. Rep. 608.

Nebraska.— Dietrichs *v.* Lincoln, etc., R. Co., 13 Nebr. 361, 13 N. W. 624.

Ohio.— Toledo, etc., R. Co. *v.* Daniels, 16 Ohio St. 390.

Pennsylvania.— Kier *v.* Boyd, 60 Pa. St. 33.

See 18 Cent. Dig. tit. "Eminent Domain," § 144.

Spur track to gravel-pit.— A railway company is authorized to acquire land by condemnation for a right of way for a spur track from its main line to its gravel-pit for the purpose of obtaining necessary gravel to enable it safely to maintain and operate its railroad; such a taking of land is for a public purpose. Minnesota, etc., R. Co. *v.* Nicolin, 76 Minn. 302, 79 N. W. 304.

Broadening right of way.— Where the charter of a railroad or turnpike company authorizes it to condemn land to a specified width

within the time limited by the charter of the company if there be a limitation.[24] The grant of power to locate and construct a railway carries with it the right to construct turnouts, sidings, and such conveniences as are usual in the necessary operation of the road.[25] A railroad company having laid out its road according to its charter as it was then understood has no power to condemn other lands for a branch or lateral road without fresh authority from the legislature.[26]

b. Power to Relocate. In the absence of express statutory authority a railway company having once exercised its discretion in the location and construction of its line has no power to condemn other lands for the purpose of changing or relocating the route.[27] But if such authority is expressly conferred by statute either in the charter of the company or by general law a railroad company may relocate its line as interest or convenience may require and to that end may condemn lands as freely as in its original location.[28] The act of condemnation is not complete

for its right of way and it first condemns a narrower strip, it may subsequently condemn the adjacent land to the extent permitted by its charter. Hopkins *v.* Philadelphia, etc., R. Co., 94 Md. 257, 51 Atl. 404; Childs *v.* New Jersey Cent. R. Co., 33 N. J. L. 323; Commonwealth Title Ins., etc., Co. *v.* Willow Grove, etc., Plank Road Co., 17 Montg. Co. Rep. (Pa.) 76.

24. Morris, etc., R. Co. *v.* New Jersey Cent. R. Co., 31 N. J. L. 205; Plymouth R. Co. *v.* Colwell, 39 Pa. St. 337, 80 Am. Dec. 526; Providence, etc., R. Co., Petitioner, 17 R. I. 324, 21 Atl. 965.

Limitation of time for construction.— But a provision in the charter of a railroad company that the road shall be completed and in good order for running cars within a certain time does not by implication restrict its power to exercise the right of eminent domain to such time (Brown *v.* Philadelphia, etc., R. Co., 58 Md. 539), unless the company fails to complete its road within the time limited by its charter (Peavey *v.* Calais R. Co., 30 Me. 498).

Attempt to revive the right.— Where the statute provided that no land could be taken for railroad purposes against the owner's consent except within two years after the approval of the location of the route by the railroad commissioners, it was held that after a railroad had once lost its power of condemnation it could not revive it by voting to readopt the old route and location and by securing anew the approval of the railroad commissioners. *In re* Hartford, etc., R. Co., 74 Conn. 662, 51 Atl. 943.

25. Lake Shore, etc., R. Co. *v.* Baltimore, etc., R. Co., 149 Ill. 272, 37 N. E. 91.

Power to condemn for a side-track.— "The power [of a railroad company] to make necessary side tracks means to make them when they become necessary; otherwise it would be the power to make unnecessary side tracks. Such a power may be exercised when necessary, and hence is not exhausted by one exercise." St. Louis, etc., R. Co. *v.* Petty, 57 Ark. 359, 369, 21 S. W. 884, 20 L. R. A. 434 [*quoting* Mills Em. Dom. § 58*a*].

26. Lake Shore, etc., R. Co. *v.* Baltimore, etc., R. Co., 149 Ill. 272, 37 N. E. 91; Morris, etc., R. Co. *v.* Central R. Co., 31 N. J. L. 205; Kyle *v.* Texas, etc., R. Co., 3 Tex. App. Civ. Cas. § 436.

27. *Connecticut.*— Hartford, etc., R. Co. *v.* Wagner, 73 Conn. 506, 48 Atl. 218.

Illinois.— Lake Shore, etc., R. Co. *v.* Baltimore, etc., R. Co., 149 Ill. 272, 37 N. E. 91; People *v.* Louisville, etc., R. Co., 120 Ill. 48, 10 N. E. 657.

Massachusetts.— Brigham *v.* Agricultural Branch R. Co., 1 Allen 316; Boston, etc., R. Corp. *v.* Midland R. Co., 1 Gray 340.

Mississippi.— Lusby *v.* Kansas City, etc., R. Co., 73 Miss. 360, 19 So. 239, 36 L. R. A. 510.

Missouri.—Atlantic, etc., R. Co. *v.* St. Louis, 3 Mo. App. 315.

New Jersey.— Morris, etc., R. Co. *v.* Central R. Co., 31 N. J. L. 205.

New York.— Erie R. Co. *v.* Steward, 170 N. Y. 172, 63 N. E. 118 [*affirming* 61 N. Y. App. Div. 480, 70 N. Y. Suppl. 698]; Mason *v.* Brooklyn City, etc., R. Co., 35 Barb. 373.

Ohio.— Little Miami R. Co. *v.* Naylor, 2 Ohio St. 235, 59 Am. Dec. 667; Moorehead *v.* Little Miami R. Co., 17 Ohio 340.

Pennsylvania.— Neal *v.* Pittsburgh, etc., R. Co., 2 Grant 37.

Rhode Island.— Providence, etc., R. Co., Petitioner, 17 R. I. 324, 21 Atl. 965.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 144, 145.

Shifting a track from one side of a street to the other is not a relocation within the meaning of the rule. Snyder *v.* Pennsylvania R. Co., 55 Pa. St. 340.

City council authorized to relocate.—Under a statute which gives the city council power to provide for and change the location, grade, and crossing of any railroad company within the city, a railroad company which has accepted a city ordinance locating the line of its road through the city cannot acquire title by condemnation proceedings to land in the city not included within such location. Tudor *v.* Chicago, etc., R. Co., (Ill. 1891) 27 N. E. 915.

28. *California.*— Eel River, etc., R. Co. *v.* Field, 67 Cal. 429, 7 Pac. 814.

Illinois.— McCartney *v.* Chicago, etc., R. Co., 112 Ill. 611.

Kentucky.— Fry *v.* Lexington, etc., R. Co., 2 Metc. 314.

until the damages assessed have been paid or tendered.[29] It has accordingly been held that an award of damages over the route first selected is not a final location of the road, and that until the compensation has been paid the company may upon payment of costs abandon the location and select another.[30] So also corporations for other than railroad purposes having located and condemned land for their use cannot change the location and condemn other land or condemn land in addition to that originally selected,[31] without express statutory authority.

6. Who May Object to Exercise of Power. A third person not interested in the land taken cannot raise the objection that the corporation is transcending its power.[32]

VI. The Use For Which Property May Be Appropriated.

A. Necessity That the Use Be Public — 1. Statement of Rule. Independently of express authority given by the constitution[33] a state legislature cannot authorize the taking of private property for a merely private use, even upon making compensation.[34] The doctrine of eminent domain is that private property

Minnesota.— Fletcher *v.* Chicago, etc., R. Co., 67 Minn. 339, 69 N. W. 1085; Hewitt *v.* St. Paul, etc., R. Co., 35 Minn. 226, 28 N. W. 255.

New York.— *In re* New York, etc., R. Co., 88 N. Y. 279.

Pennsylvania.— Roberts *v.* Philadelphia, etc., R. Co., 1 Phila. 262.

South Carolina.— South Carolina R. Co. *v.* Blake, 9 Rich. 228; *Ex p.* South Carolina R. Co., 2 Rich. 434.

See 18 Cent. Dig. tit. "Eminent Domain," § 144.

29. Chicago, etc., R. Co. *v.* Gates, 120 Ill. 86, 11 N. E. 527; Schreiber *v.* Chicago, etc., R. Co., 115 Ill. 340, 3 N. E. 427; Manchester, etc., R. Co. *v.* Keene, 62 N. H. 81; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 10 S. Ct. 965, 34 L. ed. 295; Baltimore, etc., R. Co. *v.* Nesbit, 10 How. (U. S.) 395, 13 L. ed. 469.

30. *Colorado.*— Denver, etc., R. Co. *v.* Lamborn, 8 Colo. 380, 8 Pac. 582.

Delaware.— Williams *v.* Odessa, etc., R. Co., 7 Del. Ch. 303, 44 Atl. 821.

Illinois.— Schreiber *v.* Chicago, etc., R. Co., 115 Ill. 340, 3 N. E. 427; Chicago, etc., R. Co. *v.* Hopkins, 90 Ill. 316; St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144.

Iowa.— Burlington, etc., R. Co. *v.* Sater, 1 Iowa 421. The route may be fixed, then changed, and changed as often as may be deemed necessary before construction, the company being liable to costs in connection with further assessments and such incidental liabilities as may arise from inconvenience or trouble or otherwise to land-holders. Mahaska County R. Co. *v.* Des Moines Valley R. Co., 28 Iowa 437; Gear *v.* Dubuque, etc., R. Co., 20 Iowa 523, 89 Am. Dec. 550.

Missouri.— North Missouri R. Co. *v.* Lackland, 25 Mo. 515.

Vermont.— Stacey *v.* Vermont Cent. R. Co., 27 Vt. 29.

But in Pennsylvania it has been held that after the assessment of damages the right thereto is vested in the owners and cannot be divested by a subsequent change of route (Beale *v.* Pennsylvania R. Co., 86 Pa. St. 509; Neal *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 19), although a railroad company may before the construction of its road and before damages are assessed change the location (Hagner *v.* Pennsylvania Schuylkill Valley R. Co., 154 Pa. St. 475, 25 Atl. 1082).

31. **Bridge approaches.**— The original location of a bridge approach is final and cannot be changed without express legislative authority. *In re* Poughkeepsie Bridge Co., 108 N. Y. 483, 15 N. E. 601.

Location of pipes of water company.— A water company which has once exercised its right of eminent domain in the location of pipe-lines will be enjoined from laying out over the same land an entirely new and additional route for supplying itself with water no matter how convenient or necessary the same may be. McKay *v.* Pennsylvania Water Co., 6 Pa. Dist. 364.

Change of bed of canal.— The purpose of the Pennsylvania act of March 17, 1869, relating to the straightening of canals was not only to permit of changes of location by straightening so as to facilitate transportation, but also the better to secure the safety of the person and property of those who had occasion to cross the canal. Under this act a canal company may condemn land so as to enable an overhead crossing to be built over both a canal and a neighboring railroad, although the removal of the canal and the construction of the railroad in the old canal bed are included in the improvements. Bigler *v.* Pennsylvania Canal Co., 177 Pa. St. 28, 35 Atl. 112.

32. Kettle River R. Co. *v.* Eastern R. Co., 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111; Liverpool *v.* Chorley Water-Works Co., 2 De G. M. & G. 852, 51 Eng. Ch. 666, 42 Eng. Reprint 1105; Lee *v.* Milner, 2 Y. & Coll. Exch. 611.

33. See constitutions of several states.

34. *Georgia.*— Loughbridge *v.* Harris, 42 Ga. 500.

Illinois.— Gaylord *v.* Chicago Sanitary Dist., 204 Ill. 576, 68 N. E. 522, 98 Am. St. Rep. 235, 63 L. R. A. 582; Nesbitt *v.* Trumbo, 39 Ill. 110, 89 Am. Dec. 290.

may be appropriated to public use upon compensation being made, but it cannot be taken for strictly private purposes without the consent of the owner, whether compensation is made or not. The assertion of a right on the part of the legislature to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest is not promoted thereby, is claiming a despotic power, and one inconsistent with every just principle and fundamental maxim of a free government.[35] The necessity that the use shall be public excludes the idea that property may be taken under semblance of public use and ultimately conveyed and appropriated to a private use.[36] But the fact that the charter powers of a corporation to which the power of eminent domain has been delegated embrace both private purposes and public uses does not deprive it of the right of eminent domain in the promotion of the public use.[37]

2. ON DELEGATION OF POWER. Where the power is delegated to a municipality, it must be exercised only for the benefit of the general public.[38]

3. AS AFFECTED BY OR INDEPENDENTLY OF CONSTITUTIONAL PROVISIONS. The lack of power to authorize the taking of private property for private uses does not depend upon any constitutional restriction, but upon the fact that it would not be an exercise of the power of making laws or rules of civil conduct which is a branch of civil power permitted to the legislature;[39] but aside from that the constitutional inhibition against taking private property for public use without compensation by necessary implication prohibits taking private property for private uses.[40]

Indiana.—Anderson *v.* Kerns Draining Co., 14 Ind. 199, 77 Am. Dec. 63.

Maryland.— Hoye *v.* Swan, 5 Md. 237.

Michigan.— Berrien Springs Water Power Co. *v.* Berrien Cir. Judge, (1903) 94 N. W. 379.

Missouri.— Dickey *v.* Tennison, 27 Mo. 373.

Nevada.— Dayton Gold, etc., Min. Co. *v.* Seawell, 11 Nev. 394.

New Jersey.— Jersey Co. Associates *v.* Jersey City, 8 N. J. Eq. 715; Scudder *v.* Trenton Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756.

New York.— Embury *v.* Conner, 3 N. Y. 511, 53 Am. Dec. 325 [*affirming* 2 Sandf. 98]; Bennett *v.* Boyle, 40 Barb. 551; Varick *v.* Smith, 5 Paige 137, 28 Am. Dec. 417.

North Carolina.— Stratford *v.* Greensboro, 124 N. C. 127, 32 S. E. 394.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Lawrence, 10 Phila. 604.

Utah.— Nash *v.* Clark, 27 Utah 158, 75 Pac. 371.

Washington.— Healy Lumber Co. *v.* Morris, 33 Wash. 490, 74 Pac. 681, 99 Am. St. Rep. 964, 63 L. R. A. 820.

Wisconsin.— Osborn *v.* Hart, 24 Wis. 89, 1 Am. Rep. 161.

Canada.— Fontaine *v.* Sherrington, 23 Quebec Super. Ct. 532.

See 18 Cent. Dig. tit. "Eminent Domain," § 51.

It would constitute a violation of the contract by which the land was originally granted by government to take it from one citizen and transfer it to another, even for full compensation. *In re* Tuthill, 163 N. Y. 133, 57 N. E. 303, 49 L. R. A. 781.

The power is conferred on citizens only when some existing public need is to be supplied, or some present public advantage is to be gained, but not with a view to contingent results, dependent upon the success of a projected speculation. Edgewood R. Co.'s Appeal, 79 Pa. St. 257.

Necessity combined with a public use must in all cases exist as conditions precedent to the legal right of a railway company to condemn property. Tracy *v.* Elizabethtown, etc., R. Co., 80 Ky. 259.

Except in cases of necessity arising from infancy, insanity, or other incompetency, the legislature has no power to authorize by special act the sale of private property for other than public use, without the owner's consent. Powers *v.* Bergen, 6 N. Y. 358.

35. See cases cited *supra*, note 34.

36. Dunham *v.* Williams, 36 Barb. (N. Y.) 136.

37. Lake Koen Nav., etc., Co. *v.* Klein, 63 Kan. 484, 65 Pac. 684.

38. Adams *v.* Ohio Falls Car Co., 131 Ind. 375, 31 N. E. 57; Nalle *v.* Austin, (Tex. Civ. App. 1893) 21 S. W. 375.

Conclusiveness of declaration of intent.— Where the legislature confers power on a city to acquire the fee of one of its streets, a declaration by the city council that the land of a certain street owned by individuals shall be taken in fee for public streets is conclusive upon the courts; the owners will not be permitted to show that the street is intended to be taken for a purpose other than that declared. *In re* Buffalo, 15 N. Y. Suppl. 123.

39. Coster *v.* Tide Water Co., 18 N. J. Eq. 54.

40. *Georgia.*— Hall *v.* Boyd, 14 Ga. 1.

Maine.—Allen *v.* Jay, 60 Me. 124, 11 Am. Rep. 185.

Maryland.— New Cent. Coal Co. *v.* George's Creek Coal, etc., Co., 37 Md. 537.

Michigan.— Berrien Springs Water Power Co. *v.* Berrien Cir. Judge, (1903) 94 N. W. 379.

New Hampshire.— Concord R. Co. *v.* Greely, 17 N. H. 47.

Nevertheless the constitutions of some of the states authorize the taking of private property for private uses in designated instances.[41]

4. Who May Object That Use Is Not Public. The right to object that an appropriation of private property by a municipality is not for a public use is not confined to the owner of the property sought to be appropriated; any taxpayer of the municipality subject to assessment of the cost of the taking may raise the objection.[42]

5. Waiver of Constitutional Protection. The benefit of the constitutional provision that the use must be public may be waived by the party interested.[43]

B. Determination of Character of Use. Whether the use for which the property is taken is a public use is a question of law to be settled by the judicial power,[44] and that too irrespective of any assertion by the legislature that the use is public. It cannot evade the constitutional limitation of its power to make a private use a public one by simply enacting that it is such.[45] It has been held,

41. See the constitutions of the several states.

Under Colo. Const. art. 2, § 14, private property cannot be taken for private use, unless by consent of the owner, except for private ways of necessity and except for reservoirs, drains, flumes, or ditches, and for milling purposes. It was held that the term "milling" is synonymous with the word "manufacturing," and an electric plant is a manufacturing establishment and comes within the provision. Lamborn *v.* Bell, 18 Colo. 346, 32 Pac. 989, 20 L. R. A. 241.

Under S. C. Const. art. 1, § 23, private property cannot be taken for private use without the consent of the owner, except in cases where this power is conferred on corporations by general statute. Boyd *v.* Winnsboro Granite Co., 66 S. C. 433, 45 S. E. 10.

42. Stratford *v.* Greensboro, 124 N. C. 127, 32 S. E. 394.

43. Embury *v.* Conner, 3 N. Y. 511, 53 Am. Dec. 325 [*reversing* 2 Sandf. 98]; Baker *v.* Braman, 6 Hill (N. Y.) 47, 40 Am. Dec. 387. A law providing for the transfer of property from one individual to another with the consent of the owner is not unconstitutional. Embury *v.* Conner, 3 N. Y. 511, 53 Am. Dec. 325 [*reversing* 2 Sandf. 98].

The action of a landowner in bringing suit for damages assessed in his favor is sufficient consent to the enforcement of an unconstitutional statute authorizing the taking of his property for a private purpose. To be binding upon him his consent need not be in writing. Baker *v.* Braman, 6 Hill (N. Y.) 47, 40 Am. Dec. 387.

44. *Illinois.*— Chicago, etc., R. Co. *v.* Lake, 71 Ill. 333.

Indiana.— Rensselaer *v.* Leopold, 106 Ind. 29, 5 N. E. 761.

Kansas.— Lake Koen Nav., etc., Co. *v.* Klein, 63 Kan. 484, 65 Pac. 684.

Kentucky.— Tracy *v.* Elizabethtown, etc., R. Co., 80 Ky. 259.

Maine.—Allen *v.* Jay, 60 Me. 124, 11 Am. Rep. 185.

Massachusetts.— Talbot *v.* Hudson, 16 Gray 417.

Minnesota.— *In re* St. Paul, etc., R. Co., 34 Minn. 227, 25 N. W. 345.

Missouri.— Cape Girardeau *v.* Houck, 129 Mo. 607, 31 S. W. 933; Joplin Consol. Min. Co. *v.* Joplin, 124 Mo. 129, 27 S. W. 406; State *v.* Engelmann, 106 Mo. 628, 17 S. W. 759.

Nebraska.— Welton *v.* Dickson, 38 Nebr. 767, 57 N. W. 559, 41 Am. St. Rep. 771, 22 L. R. A. 496.

New Hampshire.— Concord R. Co. *v.* Greely, 17 N. H. 47.

New Jersey.— Coster *v.* Tide Water Co., 18 N. J. Eq. 54; Scudder *v.* Trenton Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756.

New York.— Matter of Tuthill, 36 N. Y. App. Div. 492, 55 N. Y. Suppl. 657. *Compare* Bloomfield, etc., Natural Gas Light Co. *v.* Richardson, 63 Barb. 437.

North Carolina.— Call *v.* Wilkesboro, 115 N. C. 337, 20 S. E. 468.

Ohio.— McQuillen *v.* Hatton, 42 Ohio St. 202.

Oregon.—Apex Transp. Co. *v.* Garbade, 32 Oreg. 582, 52 Pac. 573; Bridal Veil Lumbering Co. *v.* Johnson, 30 Oreg. 205, 46 Pac. 790, 60 Am. St. Rep. 818, 34 L. R. A. 368.

Tennessee.— Memphis Freight Co. *v.* Memphis, 4 Coldw. 419.

Washington.— Healy Lumber Co. *v.* Morris, 33 Wash. 490, 74 Pac. 681, 99 Am. St. Rep. 964, 63 L. R. A. 820.

West Virginia.— Pittsburg, etc., R. Co. *v.* Benwood Iron Works, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680.

United States.— Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170; Denver R., etc., Co. *v.* Union Pac. R. Co., 34 Fed. 386; Horton *v.* Squankum, etc., Marl Co., 12 Fed. Cas. No. 6,710.

See 18 Cent. Dig. tit. "Eminent Domain," § 165.

45. *Massachusetts.*— Talbot *v.* Hudson, 16 Gray 417.

Missouri.— Kansas, etc., Coal R. Co. *v.* Northwestern Coal, etc., Co., 161 Mo. 288, 61 S. W. 684; Aldridge *v.* Spears, 101 Mo. 400, 14 S. W. 118; Kansas City *v.* Baird, 98 Mo. 215, 11 S. W. 243, 562; Savannah *v.* Hancock, 91 Mo. 54, 3 S. W. 215.

Vermont.— Tyler *v.* Beacher, 44 Vt. 648, 8 Am. Rep. 398.

Washington.— Healy Lumber Co. *v.* Morris, 33 Wash. 490, 74 Pac. 681, 99 Am. St. Rep. 964, 63 L. R. A. 820.

however, that if there is a legislative declaration that the use is a public one the courts will hold it to be such, unless it manifestly has no tendency to promote such use;[46] that there is a presumption in favor of the public character of the use arising from its having been authorized by the legislature.[47] It is also for the court to determine whether the proposed public use will be inconsistent with or subversive of a prior public use to which the lands sought to be taken had already been dedicated.[48]

C. What Is a Public Use — 1. In General. No general definition of what degree of public good will meet the constitutional requirement for a "public use" can be framed, as it is in every case a question of local policy.[49] Under certain general principles, however, upon which the decisions are based the term "public use" is usually intended to cover a use affecting the public in general or any number thereof, as distinguished from particular individuals.[50] If the special benefit to be derived from the lands sought to be appropriated is wholly for private persons, the use is a private one, and is not made a public use by the fact that the public has a theoretical right to use it,[51] or that the public will receive an incidental or prospective benefit therefrom.[52] And on the other hand if the use is in fact a public one its character is not changed by the fact that the con-

United States.— Denver R., etc., Co. *v.* Union Pac. R. Co., 34 Fed. 386.

See 18 Cent. Dig. tit. "Eminent Domain," § 165.

The determination by a municipality that the use for which it is appropriating property is public is subject to review by the courts. Stratford *v.* Greensboro, 124 N. C. 127, 32 S. E. 394; Apex Transp. Co. *v.* Garbade, 32 Oreg. 582, 52 Pac. 573, 54 Pac. 367, 882; Smith *v.* Gould, 59 Wis. 631, 18 N. W. 457.

46. Hazen *v.* Essex County, 12 Cush. (Mass.) 475; Welton *v.* Dickson, 38 Nebr. 767, 57 N. W. 559, 41 Am. St. Rep. 771, 22 L. R. A. 496.

47. Rensselaer *v.* Leopold, 106 Ind. 29, 5 N. E. 761; Hazen *v.* Essex County, 12 Cush. (Mass.) 475. See also Dietrich *v.* Murdock, 42 Mo. 279.

48. *In re* St. Paul, etc., R. Co., 34 Minn. 227, 25 N. W. 345.

49. Farnsworth *v.* Lime Rock R. Co., 83 Me. 440, 22 Atl. 373; Dayton Gold, etc., Min. Co. *v.* Seawell, 11 Nev. 394; *In re* Niagara Falls, etc., R. Co., 108 N. Y. 375, 15 N. E. 429; *In re* Rhode Island Suburban R. Co., 22 R. I. 457, 48 Atl. 591, 52 L. R. A. 879.

A public use has been defined as one which concerns the whole community in which it exists, as contradistinguished from a particular individual or a number of individuals. Gilmer *v.* Lime Point, 18 Cal. 229; Keller *v.* Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613.

A definition of the term "public use" for which land may be appropriated "should comprehend not only all the existing public purposes justifying such appropriation, but should anticipate the future exigencies of society, demanding new laws and varied exercise of the protecting and fostering aid to the State." Concord R. Co. *v.* Greely, 17 N. H. 47, 61.

50. *California.*— Gilmer *v.* Lime Point, 18 Cal. 229.

Indiana.— Ross *v.* Davis, 97 Ind. 79.

Maine.— Riche *v.* Bar Harbor Water Co., 75 Me. 91.

Massachusetts.— Talbot *v.* Hudson, 16 Gray 417.

Michigan.— Board of Health *v.* Van Hoesen, 87 Mich. 533, 49 N. W. 894, 14 L. R. A. 114.

New Jersey.— Coster *v.* Tide Water Co., 18 N. J. Eq. 54.

New York.— *In re* Burns, 155 N. Y. 23, 49 N. E. 246.

Ohio.— McQuillen *v.* Hatton, 42 Ohio St. 202.

Texas.— Keller *v.* Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613.

Utah.— Nash *v.* Clark, 27 Utah 158, 75 Pac. 371.

See 18 Cent. Dig. tit. "Eminent Domain," § 54.

A national use is a public use. Matter of League Island, 1 Brewst. (Pa.) 524; Lancey *v.* King County, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817.

A use to satisfy a great public want or public exigency is a public use. Gilmer *v.* Lime Point, 18 Cal. 229; Allen *v.* Jay, 60 Me. 124, 11 Am. Rep. 185.

But a use which may be monopolized or absorbed by a few, and from which the general public may and must alternatively be excluded, is in no sense a public use. Board of Health *v.* Van Hoesen, 87 Mich. 533, 49 N. W. 894, 14 L. R. A. 114.

51. De Camp *v.* Hibernia Underground R. Co., 47 N. J. L. 43; Pittsburg, etc., R. Co. *v.* Benwood Iron Works, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680.

52. *Georgia.*—Garbutt Lumber Co. *v.* Georgia, etc., R. Co., 111 Ga. 714, 36 S. E. 942.

Illinois.— Sholl *v.* German Coal Co., 118 Ill. 427, 10 N. E. 199, 59 Am. Rep. 379; Chicago, etc., R. Co. *v.* Wiltse, 116 Ill. 449, 6 N. E. 49.

New York.— *In re* Eureka Basin Warehouse, etc., Co., 96 N. Y. 42, 48, where Rapallo, J., says: "The fact that the use to which the property is intended to be put, or the structure intended to be built thereon, will tend incidentally to benefit the public by

trol of the property sought to be taken will be vested in private persons or private corporations who are actuated solely by motives of private gain, and that private purposes will be thereby incidentally served.[53] So a use is not rendered a private one by the mere fact that a part or even the whole of the cost of constructing the improvement is paid by individuals, although such individuals are the persons most benefited by the improvement.[54]

affording additional accommodations for business, commerce or manufactures, is not sufficient to bring the case within the operation of the right of eminent domain, so long as the structures are to remain under private ownership and control, and no right to their use or to direct their management is conferred upon the public."

North Carolina.— Stratford *v.* Greensboro, 124 N. C. 127, 32 S. E. 394.

Oregon.—Apex Transp. Co. *v.* Garbade, 32 Oreg. 582, 52 Pac. 573, 54 Pac. 367, 882.

Rhode Island.— *In re* Rhode Island Suburban R. Co., 22 R. I. 457, 48 Atl. 591, 52 L. R. A. 879.

Tennessee.— Ryan *v.* Louisville, etc., Terminal Co., 102 Tenn. 111, 50 S. W. 744, 45 L. R. A. 303.

Virginia.— Fallsburg Power, etc., Co. *v.* Alexander, 101 Va. 98, 43 S. E. 194, 99 Am. St. Rep. 855, 61 L. R. A. 129, holding that if an enterprise undertaken by a corporation is solely for a private purpose, it is a private not a public use, and the mere fact that its charter recognizes it as an "internal improvement company" is immaterial.

West Virginia.— Varner *v.* Martin, 21 W. Va. 534, holding that it will not suffice that the general prosperity of the community is promoted by the taking of private property from the owner and transferring its title and control to another, or to a corporation to be used by such other or by such corporation as its private property uncontrolled by law as to its use.

United States.— Weidenfeld *v.* Sugar Run R. Co., 48 Fed. 615.

See 18 Cent. Dig. tit. "Eminent Domain," § 54. But see *infra*, VI, D, 8.

53. *Colorado.*— Union Pac. R. Co. *v.* Colorado Postal Tel. Cable Co., 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106.

Illinois.— Dunham *v.* Hyde Park, 75 Ill. 371, holding that where the principal purpose in widening streets in a village was the enhancing of the value of all the real estate by increased accommodation for public travel and transportation, the fact that the trustees of the village were influenced in their action by the consideration of the incidental benefit they expected to their interest does not prevent the use from being a public one.

Indiana.— Ross *v.* Davis, 97 Ind. 79.

Maine.— Farnsworth *v.* Lime Rock R. Co., 83 Me. 440, 22 Atl. 373.

Michigan.— Berrien Springs Water Power Co. *v.* Berrien Cir. Judge, (1903) 94 N. W. 379; Swan *v.* Williams, 2 Mich. 427.

Montana.— Butte, etc., R. Co. *v.* Montana Union R. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298.

New Hampshire.— Concord R. Co. *v.* Greely, 17 N. H. 47.

New Jersey.— De Camp *v.* Hibernia Underground R. Co., 47 N. J. L. 43.

New York.— *In re* Burns, 155 N. Y. 23, 49 N. E. 246; Clarke *v.* Blackmar, 47 N. Y. 150; Bloomfield, etc., Natural Gas Light Co. *v.* Richardson, 63 Barb. 437; Harris *v.* Thompson, 9 Barb. 350; Bloodgood *v.* Mohawk, etc., R. Co., 18 Wend. 9, 31 Am. Dec. 313; Beekman *v.* Saratoga, etc., R. Co., 3 Paige 45, 22 Am. Dec. 679.

Ohio.— Willyard *v.* Hamilton, 7 Ohio, Pt. II, 111, 30 Am. Dec. 195.

Tennessee.— Ryan *v.* Louisville, etc., Terminal Co., 102 Tenn. 111, 50 S. W. 744, 45 L. R. A. 303.

Virginia.— Fallsburg Power, etc., Co. *v.* Alexander, 101 Va. 98, 43 S. E. 194, 99 Am. St. Rep. 855, 61 L. R. A. 129.

West Virginia.— Varner *v.* Martin, 21 W. Va. 534. There may be either a natural person or a public or private corporation organized for its own exclusive profits and emoluments, provided there is connected with it a public use to such a necessity or extent as will properly justify the interference of the state's sovereign power on its behalf. Valley City Salt Co. *v.* Brown, 7 W. Va. 191.

See 18 Cent. Dig. tit. "Eminent Domain," § 54.

54. *Arkansas.*— St. Louis, etc., R. Co. *v.* Petty, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434.

California.— Santa Ana *v.* Harlin, 99 Cal. 538, 34 Pac. 224.

Florida.— Edgerton *v.* Green Cove Springs, 19 Fla. 140.

Illinois.— Chicago, etc., R. Co. *v.* Naperville, 169 Ill. 25, 48 N. E. 335.

Massachusetts.— Denham *v.* Bristol County Com'rs, 108 Mass. 202.

New York.— Harris *v.* Thompson, 9 Barb. 350.

North Carolina.— Stratford *v.* Greensboro, 124 N. C. 127, 32 S. E. 394.

Pennsylvania.— Robbins *v.* Western Washington R. Co., 31 Pittsb. Leg. J. N. S. 181.

Illustrations.— Where land is rendered necessary for street purposes by the occupation of a portion of the street by subway walls, erected by a railroad company in accordance with a plan of track elevation deemed by the city to be for the public interest and safety, a condemnation of such land is not a condemnation of property for private use, although the railroad company bears the expense. Summerfield *v.* Chicago, 197 Ill. 270, 64 N. E. 490. And an act providing for the improvement of a dam across the Hudson river will not be held invalid be-

2. ESSENTIALS. Although it has been held that the test of a public use is whether the use will confer any great public benefit or be of any interest or advantage to the public,[55] by the weight of authority it is also essential to constitute a public use that the general public be to some extent entitled to control the property appropriated or to have the right to a fixed and definite use of it, not as a mere matter of favor or by permission of the owner, but as a matter of right.[56] It is not essential, however, that all the members of the community have

cause its operation tends to benefit individuals, or because those individuals share the burden of paying the damage to owners of contiguous lands and of supporting the dam. Harris *v.* Thompson, 9 Barb. (N. Y.) 350.

55. *Alabama.*—Aldridge *v.* Tuscumbia, etc., R. Co., 2 Stew. & P. 199, 203, 23 Am. Dec. 307, where Lipscomb, C. J., says: "Whatever is beneficially employed for the community, is a public use, and a distinction cannot be tolerated."

Connecticut.— Todd *v.* Austin, 34 Conn. 78.

Georgia.— Hand Gold Min. Co. *v.* Parker, 59 Ga. 419.

Maryland.— Bellona Co.'s Case, 3 Bland 442, where it was held that it is enough if it clearly appears that the application of private property to the proposed use will be attended by a material public benefit which would not otherwise be so immediately and effectually produced.

Nevada.— Dayton Gold, etc., Min. Co. *v.* Seawell, 11 Nev. 394.

New Jersey.— Hale *v.* Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190.

New York.— See *In re* Tuthill, 163 N. Y. 133, 139, 57 N. E. 303, 79 Am. St. Rep. 574, 49 L. R. A. 781, where Gray, J., in reference to taking of lands for drains, etc., to drain agricultural lands says: "Whether that is a public use, for which private property is authorized to be taken, will depend upon the object aimed at and whether the plan has such an obvious, or recognized, character of public utility, as to justify the exercise of the right of eminent domain, or of the power of taxation, in its favor."

Oregon.— Seely *v.* Sebastian, 4 Oreg. 25.

See 18 Cent. Dig. tit. "Eminent Domain," § 54.

"Public use" means public usefulness, utility, or advantage, or what is productive of general benefit. Olmstead *v.* Camp, 33 Conn. 532, 89 Am. Dec. 221.

56. *Illinois.*— Gaylord *v.* Chicago Sanitary Dist., 204 Ill. 576, 68 N. E. 522, 98 Am. St. Rep. 235, 63 L. R. A. 582; Sholl *v.* German Coal Co., 118 Ill. 427, 10 N. E. 199, 59 Am. Rep. 379, holding that if from the nature of the business and the way in which it is to be conducted it is clear no obligations will be assumed to the public or liability incurred, other than such as pertain to all strictly private enterprises, it may safely be concluded that the use is private and not public.

Maine.— Jordan *v.* Woodward, 40 Me. 317.

Michigan.— Berrien Springs Water Power Co. *v.* Berrien Cir. Judge, (1903) 94 N. W. 379. Not only must the purpose for which the land is taken be one in which the public has an interest, but the state must have a voice in the manner in which the public may avail itself of that use. Board of Health *v.* Van Hoesen, 87 Mich. 533, 49 N. W. 894, 14 L. R. A. 114.

Minnesota.— Chicago, etc., R. Co. *v.* Porter, 43 Minn. 527, 46 N. W. 75; Kettle River R. Co. *v.* Eastern R. Co., 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111.

Montana.— Butte, etc., R. Co. *v.* Montana Union R. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298.

New Jersey.— De Camp *v.* Hibernia Underground R. Co., 47 N. J. L. 43; Coster *v.* Tide Water Co., 18 N. J. Eq. 54, holding that the public use for which property may be taken by the power of eminent domain is the use of the property itself by the government, by the general public, or by some portion of it; not by particular individuals or for the benefit of certain estates.

New York.— *In re* Burns, 155 N. Y. 23, 49 N. E. 246; Pocantico Water-Works Co. *v.* Bird, 130 N. Y. 249, 29 N. E. 246 (holding that in order to make the use public a duty must devolve upon the person holding the property to furnish the public with the use intended); *In re* Niagara Falls, etc., R. Co., 108 N. Y. 375, 15 N. E. 429 (holding that the expressions "public interest" and "public use" are not synonymous); *In re* New York, etc., R. Co., 99 N. Y. 12, 24, 1 N. E. 27 (where Finch, J., speaking of a public use by a railroad company, said: "The test appears to be, not what it does or may choose to do, but what under the law it must do, and whether a public trust is impressed upon it"); *In re* Eureka Basin Warehouse, etc., Co., 96 N. Y. 42 (holding that so long as the improvements are to remain under private ownership or control, and no right to their use or to direct their management is conferred upon the public, the use is not a public one, for which land may be taken without the owner's consent).

Oregon.— Bridal Veil Lumbering Co. *v.* Johnson, 30 Oreg. 205, 46 Pac. 790, 60 Am. St. Rep. 818, 34 L. R. A. 368.

Rhode Island.— *In re* Rhode Island Suburban R. Co., 22 R. I. 457, 48 Atl. 591, 52 L. R. A. 879.

Tennessee.— Memphis Freight Co. *v.* Memphis, 4 Coldw. 419, holding that the use must be for the people at large, and must be compulsory by the public, and not optional with the corporators; and that a public convenience is not such a use.

West Virginia.—Fork Ridge Baptist Cemetery Assoc. *v.* Redd, 33 W. Va. 262, 10 S. E. 405; Varner *v.* Martin, 21 W. Va. 534, holding that where the property to be condemned

the same degree of interest in the use; it is sufficient that the general public or any considerable portion thereof have a right to the use.[57] It may be limited to the inhabitants of a small or restricted locality.[58] It has also been held that in order that a use may be public a necessity must exist for the exercise of the right of eminent domain;[59] but according to the prevailing doctrine it is not essential

is to come under the control of private persons or corporations, three qualifications are necessary to impose upon it such a public use as will justify its taking, viz: (1) The use which the public is to have of the property must be fixed and definite. The general public must have a right to a certain definite use of the private property, on terms and for charges fixed by law; and the owner of the property must be compelled by law to permit the general public to enjoy it. (2) This use of the property by the public must be a substantially beneficial one, which is obviously needful for the public, and which it could not do without, except by suffering great loss or inconvenience. (3) The necessity for condemnation must be obvious. *Compare* Valley City Salt Co. *v.* Brown, 7 W. Va. 191.

See 18 Cent. Dig. tit. "Eminent Domain," § 54.

Whether or not the use is a public one depends largely upon whether the property condemned is under the direct control and use of the government or in the direct use and occupation of the public at large, although under the control of private persons or of a private corporation, or whether it is in the direct use and control of private persons, and the general public has only an indirect and qualified use of the property condemned. Varner *v.* Martin, 21 W. Va. 534.

A use not common to the public, and over which the state has surrendered that control and regulation necessary to secure such common use, is not a public use. Board of Health *v.* Van Hoesen, 87 Mich. 533, 49 N. W. 894, 14 L. R. A. 114.

A contemplated possible limited use by a few not as a right but by way of permission or favor is not a public use. *In re* Split Rock Cable-Road Co., 128 N. Y. 408, 28 N. E. 506; *In re* Deansville Cemetery Assoc., 66 N. Y. 569, 23 Am. Rep. 86.

Anything which will satisfy a reasonable public demand for public facilities for travel, or for transmission of intelligence or commodities, and of which the general public under reasonable regulations will have a definite and fixed use independent of the will of the party in whom the title is vested is a public use. Stewart *v.* Great Northern R. Co., 65 Minn. 515, 68 N. W. 208, 33 L. R. A. 427; Concord R. Co. *v.* Greely, 17 N. H. 47; Ryan *v.* Louisville, etc., Terminal Co., 102 Tenn. 111, 50 S. W. 744, 45 L. R. A. 303.

57. *Alabama.*—Aldridge *v.* Tuscumbia, etc., R. Co., 2 Stew. & P. 199, 23 Am. Dec. 307.

California.—Gilmer *v.* Lime Point, 18 Cal. 229.

Indiana.—Ross *v.* Davis, 97 Ind. 79; O'Reiley *v.* Kankakee Valley Draining Co., 32 Ind. 169.

Maine.—Riche *v.* Bar Harbor Water Co., 75 Me. 91; Allen *v.* Jay, 60 Me. 124, 11 Am. Rep. 185.

Massachusetts.—Talbot *v.* Hudson, 16 Gray 417.

Minnesota.—Chicago, etc., R. Co. *v.* Porter, 43 Minn. 527, 46 N. W. 75.

Montana.—Butte, etc., R. Co. *v.* Montana Union R. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298.

New Jersey.—Coster *v.* Tide Water Co., 18 N. J. Eq. 54.

New York.—*In re* Burns, 155 N. Y. 23, 49 N. E. 246; Pocantico Water-Works Co. *v.* Bird, 130 N. Y. 249, 29 N. E. 246; Matter of Whitestown, 24 Misc. 150, 53 N. Y. Suppl. 397; Bloomfield, etc., Gas Light Co. *v.* Richardson, 63 Barb. 437.

Ohio.—Chesbrough *v.* Putnam, etc., Counties, 37 Ohio St. 508.

Oregon.—Bridal Veil Lumbering Co. *v.* Johnson, 30 Oreg. 205, 46 Pac. 790, 60 Am. St. Rep. 818, 34 L. R. A. 368.

West Virginia.—Varner *v.* Martin, 21 W. Va. 534.

See 18 Cent. Dig. tit. "Eminent Domain," § 54.

That some parties are more benefited than others by the use forms no objection thereto, if the public interest and convenience are thereby subserved. Ross *v.* Davis, 97 Ind. 79; *In re* Burns, 155 N. Y. 23, 49 N. E. 246; Hartwell *v.* Armstrong, 19 Barb. (N. Y.) 166.

58. *California.*—Gilmer *v.* Lime Point, 18 Cal. 229.

Massachusetts.—Talbot *v.* Hudson, 16 Gray 417.

Missouri.—Township Bd. of Education *v.* Hackmann, 48 Mo. 243.

New Jersey.—Coster *v.* Tide Water Co., 18 N. J. Eq. 54.

New York.—Pocantico Water-Works Co. *v.* Bird, 130 N. Y. 249, 29 N. E. 246; Bloomfield, etc., Gas Light Co. *v.* Richardson, 63 Barb. 437; Hartwell *v.* Armstrong, 19 Barb. 166.

Vermont.—Williams *v.* Newfane School Dist. No. 6, 33 Vt. 271.

An enterprise does not lose the character of a public use because of the fact that its use may be limited by circumstances to a comparatively small part of the public. Dietrich *v.* Murdock, 42 Mo. 279; De Camp *v.* Hibernia Underground R. Co., 47 N. J. L. 43.

59. *Indiana.*—Blackman *v.* Halves, 72 Ind. 515.

Maine.—Jordan *v.* Woodward, 40 Me. 317.

Michigan.—Ryerson *v.* Brown, 35 Mich. 333, 339, 24 Am. Rep. 564, where Cooley, C. J., says: "If, however, the use to which the property is to be devoted were one which would justify an exercise of the power [of

to the exercise of this right that the taking of the property in question should be absolutely necessary, as the question of necessity is one for the legislature and not for the courts unless delegated to them.[60] The conditions which make the use public must exist at the time of the taking.[61]

D. Particular Uses For Which Land May Be Taken — 1. Public Highways. The state has authority to appropriate a portion of the soil for public roads, and all private rights are held subject to this condition;[62] and, notwithstanding the fact that certain ways are designated in some statutes authorizing them as "private roads or ways," "pent roads," or "township ways or roads," they are nevertheless public ways for the purpose of exercising the right of eminent domain, where they are open to use by the general public.[63] In considering statutes pro-

"eminent domain"], it would still be imperative that a necessity should exist for its exercise."

Nevada.— Overman Silver Min. Co. *v.* Corcoran, 15 Nev. 147; Dayton Gold, etc., Min. Co. *v.* Seawell, 11 Nev. 394.

West Virginia.— Fork Ridge Baptist Cemetery Assoc. *v.* Redd, 33 W. Va. 262, 10 S. E. 405; Varner *v.* Martin, 21 W. Va. 534.

60. *California.*— Rialto Irrigating Dist. *v.* Brandon, 103 Cal. 384, 37 Pac. 484.

Indiana.— Indianapolis Water Works Co. *v.* Burkhart, 41 Ind. 364.

Kansas.— Challiss *v.* Atchison, etc., R. Co., 16 Kan. 117.

Kentucky.— Tracy *v.* Elizabethtown, etc., R. Co., 80 Ky. 259.

Montana.— Butte, etc., R. Co. *v.* Montana Union R. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298.

New York.— *In re* Brooklyn Union Ferry Co., 98 N. Y. 139; People *v.* Smith, 21 N. Y. 595; Buffalo, etc., R. Co. *v.* Brainard, 9 N. Y. 100, 109; Bloomfield, etc., Gas Light Co. *v.* Richardson, 63 Barb. 437.

Pennsylvania.— Harvey *v.* Lloyd, 3 Pa. St. 331.

Rhode Island.— *In re* Rhode Island Suburban R. Co., 22 R. I. 457, 48 Atl. 591, 52 L. R. A. 879.

Tennessee.—Anderson *v.* Turbeville, 6 Coldw. 150.

61. Avery *v.* Vermont Electric Co., 75 Vt. 235, 54 Atl. 179, 98 Am. St. Rep. 818, 59 L. R. A. 817. But the existence of the public use at the time the constitution was adopted is unnecessary. Concord R. Co. *v.* Greely, 17 N. H. 47.

62. The fact that the taking of land for a public highway is a taking for a public use is recognized in some of the decisions cited under almost every head and title of this article, and only a few decisions will be given here.

Florida.— Edgerton *v.* Green Cove Springs, 19 Fla. 140.

Iowa.— Phillips *v.* Watson, 63 Iowa 28, 18 N. W. 659.

North Carolina.— Stratford *v.* Greensboro, 124 N. C. 127, 32 S. E. 394.

Ohio.— Shaver *v.* Starrett, 4 Ohio St. 494.

Oregon.— Sullivan *v.* Cline, 33 Oreg. 260, 54 Pac. 154.

Pennsylvania.—Bouvier *v.* Philadelphia, 24 Leg. Int. 340.

South Carolina.— Lindsay *v.* East Bay St. Com'rs, 2 Bay 38.

See 18 Cent. Dig. tit. "Eminent Domain," § 56.

"To lay out and establish roads or highways is exclusively within the power and control of the Government. To do so is one of its most important and onerous duties." Sherman *v.* Buick, 32 Cal. 241, 252, 91 Am. Dec. 577.

63. *California.*— Madera County *v.* Raymond Granite Co., 139 Cal. 128, 72 Pac. 915; Monterey County *v.* Cushing, 83 Cal. 507, 23 Pac. 700; Sherman *v.* Buick, 32 Cal. 241, 91 Am. Dec. 577.

Delaware.— *In re* Hickman, 4 Harr. 580.

Idaho.— Latah County *v.* Peterson, 3 Ida. 398, 29 Pac. 1089, 16 L. R. A. 81.

Massachusetts.—Davis *v.* Smith, 130 Mass. 113; Denham *v.* Bristol County, 108 Mass. 202.

New Hampshire.— Proctor *v.* Andover, 42 N. H. 348.

New Jersey.— Perrine *v.* Farr, 22 N. J. L. 356.

Ohio.— Ferris *v.* Bramble, 5 Ohio St. 109.

Oregon.— Witham *v.* Osburn, 4 Oreg. 318, 18 Am. Rep. 287.

Pennsylvania.— See *In re* Pocopson Road, 16 Pa. St. 15.

Vermont.— Brock *v.* Barnet, 57 Vt. 172; Wolcott *v.* Whitcomb, 40 Vt. 40; Loveland *v.* Berlin, 27 Vt. 713; Whitingham *v.* Bowen, 22 Vt. 317; Warren *v.* Bunnell, 11 Vt. 600.

The term "private" road, it has been said, is used merely to designate a particular kind of public road, and notwithstanding the somewhat inaccurate designation the use is public. Sherman *v.* Buick, 32 Cal. 241, 91 Am. Dec. 577.

The use is not rendered any the less a public one because it is laid out and opened up on the application of an individual and primarily designed for his benefit (Masters *v.* McHolland, 12 Kan. 17; Denham *v.* Bristol County Com'rs, 108 Mass. 202; Fanning *v.* Gilliland, 37 Oreg. 369, 61 Pac. 636, 62 Pac. 209, 82 Am. St. Rep. 758; Townes *v.* Klamath County, 33 Oreg. 225, 53 Pac. 604; Brock *v.* Barnet, 57 Vt. 172), nor by the fact that the expense of opening it up and keeping it in repair devolves upon the petitioner for the road (Denham *v.* Bristol County Com'rs, 108 Mass. 202; Shaver *v.* Sterrett, 4 Ohio St. 494;

viding for the taking of private property for roads, the test of constitutionality is the use to which the road will be subject. If it is open for the public to use the statute is valid, otherwise where it is for the exclusive use of the petitioner.[64]

2. PRIVATE ROADS OR WAYS. The establishment of roads and ways for the benefit only of private individuals is not for a public use, and unless constitutional provisions expressly authorize it lands cannot be taken for such purpose,[65] and when an act authorizes a taking, and a private use is joined with a public use in such a way that the two cannot be separated, the act is void.[66] The constitutions of some states contain express provisions authorizing the taking of land for private rights of way in certain cases, but differ to a considerable degree in the extent to which the right is carried.[67] But in no event can land be taken for a private way without compensation.[68]

3. TURNPIKES, TOLL ROADS, AND TOLL-BRIDGES. A private corporation, created for the purpose of making a road which is to be open to public travel on payment of a fixed toll, may condemn lands for the purpose.[69] So too it has been decided

Townes *v.* Klamath County, 33 Oreg. 225, 53 Pac. 604).

64. Towns *v.* Klamath County, 33 Oreg. 225, 53 Pac. 604. And see *infra*, VI, D, 3.

65. *Alabama.*— Moore *v.* Wright, 34 Ala. 311.

Arkansas.— Roberts *v.* Williams, 15 Ark. 43.

Connecticut.— Miller *v.* Colonial Forestry Co., 73 Conn. 500, 48 Atl. 98.

Illinois.— Crear *v.* Crossly, 40 Ill. 175; Nesbitt *v.* Trumbo, 39 Ill. 110, 89 Am. Dec. 290.

Indiana.— Logan *v.* Stogsdale, 123 Ind. 372, 24 N. E. 135, 8 L. R. A. 58; Blackman *v.* Halves, 72 Ind. 515; Stewart *v.* Hartman, 46 Ind. 331; Wild *v.* Deig, 43 Ind. 455, 13 Am. Rep. 399.

Iowa.— Bankhead *v.* Brown, 25 Iowa 540.

Kentucky.— Shake *v.* Frazier, 94 Ky. 143, 21 S. W. 583, 14 Ky. L. Rep. 798; Robinson *v.* Swope, 12 Bush 21.

Missouri.— Dickey *v.* Tennison, 27 Mo. 373.

Nebraska.— Welton *v.* Dickson, 38 Nebr. 767, 57 N. W. 559, 41 Am. St. Rep. 771, 22 L. R. A. 496.

New Hampshire.— Underwood *v.* Bailey, 59 N. H. 480.

New York.— Taylor *v.* Porter, 4 Hill 140, 40 Am. Dec. 274.

Oregon.— Sullivan *v.* Cline, 33 Oreg. 260, 54 Pac. 154; Towns *v.* Klamath County, 33 Oreg. 225, 53 Pac. 604; Witham *v.* Osburn, 4 Oreg. 318, 18 Am. Rep. 287.

Pennsylvania.— Waddell's Appeal, 84 Pa. St. 90.

Tennessee.— Clack *v.* White, 2 Swan 540.

Vermont.— New England Trout, etc., Club *v.* Mather, 68 Vt. 338, 35 Atl. 323, 33 L. R. A. 569.

West Virginia.— Varner *v.* Martin, 21 W. Va. 534.

Wisconsin.— Osborn *v.* Hart, 24 Wis. 89, 1 Am. Rep. 161.

See 18 Cent. Dig. tit. "Eminent Domain," § 57.

66. Columbus Waterworks Co. *v.* Long, 121 Ala. 245, 25 So. 702.

67. See the constitutions of the several states.

In Alabama the general assembly is empowered to secure to persons or corporations the right of way over the lands of other persons or corporations. Const. (1875) art. 1, § 24; Steele *v.* Madison County, 83 Ala. 304, 3 So. 761.

In Colorado and Missouri the constitutions provide that private property shall not be taken for private use except for private ways of necessity, etc. Const. art. 2, § 14; Lamborn *v.* Bell, 18 Colo. 346, 32 Pac. 989, 20 L. R. A. 241; People *v.* Pitkin County, 11 Colo. 147, 17 Pac. 298; Const. (1875) art. 2, § 20; Barr *v.* Flynn, 20 Mo. App. 383.

68. Brewer *v.* Bowman, 9 Ga. 37; Perrine *v.* Farr, 22 N. J. L. 356.

69. *Massachusetts.*— Boston, etc., Mill-Dam Corp. *v.* Newman, 12 Pick. 467, 23 Am. Dec. 622.

New Hampshire.— *In re* Mt. Washington Road Co., 35 N. H. 134.

New York.— Heath *v.* Barman, 49 Barb. 496; Benedict *v.* Goit, 3 Barb. 459.

Ohio.— Cincinnati, etc., Turnpike Co. *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 259, 6 Ohio N. P. 233.

Pennsylvania.— *In re* Chambersburg, etc., Turnpike Road, 20 Pa. Super. Ct. 173.

See 18 Cent. Dig. tit. "Eminent Domain," § 58.

Necessity for use by public.— Although bridges and highways owned by private corporations may be used for their own profit, yet they must permit their use for the public convenience as common highways (Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301), and since they subserve all social and commercial intercourse, and thus promote the public welfare, the judiciary has uniformly sustained the constitutionality of legislative authority conferred on such corporations to take private property, so far as it may be essentially useful, upon paying the owner the assessed value for it (Arnold *v.* Covington, etc., Bridge Co., 1 Duv. (Ky.) 372; Heath *v.* Barman, 49 Barb. (N. Y.) 496).

Toll-house.— It is held that a turnpike cannot take land outside of the limited width for the purpose of erecting a toll-house. Kemper *v.* Cincinnati, etc., Turnpike Co., 11

in many well-considered cases that a toll-bridge is a public use for which land may be condemned.[70]

4. Railroad Purposes — a. In General. A taking of land by a railroad company for legitimate railroad purposes in the exercise of its power of eminent domain, granted to it by the legislature, is, although the company is a private corporation, a taking of private property for public use within the meaning of the constitution.[71] The right of the government to thus delegate the exercise of the power of eminent domain to effectuate such purpose is from the universality of its exercise no longer an open question.[72] Whether the use is public or private depends upon the right of the public to use the road, and to require the corporation as a common carrier to transport freight or passengers over it, and not upon the amount of business it does.[73] And the length of the line of road is not

Ohio 392. See also Detroit, etc., Plank-Road Co. *v.* Detroit, 81 Mich. 562, 46 N. W. 12.

70. *Kentucky.*— Arnold *v.* Covington, etc., Bridge Co., 1 Duv. 372.

Massachusetts.— Central Bridge Corp. *v.* Lowell, 15 Gray 106.

Missouri.— Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301.

Ohio.— Young *v.* Buckingham, 5 Ohio 485.

Texas.— Hudson *v.* Cuero Land, etc., Co., 47 Tex. 56, 26 Am. Rep. 289.

See 18 Cent. Dig. tit. "Eminent Domain," § 58.

In Texas the rule is subject to this limitation, that a toll-bridge company cannot exercise the right of condemnation in order to secure ground for its abutments, approaches, and toll-houses. International Bridge, etc., Co. *v.* McLane, 8 Tex. Civ. App. 665, 28 S. W. 454.

Condemnation by foreign corporation.—The mere fact that a foreign corporation is organized as a bridge company and that it has complied with the requirements of the Missouri statute relating to foreign corporations does not necessarily authorize it to condemn lands in Missouri for bridge purposes; it must be shown that its charter-powers are similar to those of Missouri corporations created for a like purpose. Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301.

71. *Arkansas.*— Cairo, etc., R. Co. *v.* Turner, 31 Ark. 494, 25 Am. Rep. 564.

California.— Stockton, etc., R. Co. *v.* Stockton, 41 Cal. 147; San Francisco, etc., R. Co. *v.* Caldwell, 31 Cal. 367; Contra Costa Coal Mines R. Co. *v.* Moss, 23 Cal. 323.

Connecticut.— Bradley *v.* New York, etc., R. Co., 21 Conn. 294; Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716.

Delaware.— Whiteman *v.* Wilmington, etc., R. Co., 2 Harr. 514, 33 Am. Dec. 411.

Illinois.— Chicago, etc., R. Co. *v.* Ayres, 106 Ill. 511; Chicago, etc., R. Co. *v.* Smith, 62 Ill. 268, 14 Am. Rep. 99.

Iowa.— Noll *v.* Dubuque, etc., R. Co., 32 Iowa 66.

Louisiana.—Shreveport, etc., R. Co. *v.* Hollingsworth, 42 La. Ann. 749, 7 So. 693.

Maryland.— Shipley *v.* Baltimore, etc., R. Co., 34 Md. 336.

Michigan.— Swan *v.* Williams, 2 Mich. 427.

Minnesota.— Weir *v.* St. Paul, etc., R. Co., 18 Minn. 155.

Missouri.— Kansas, etc., Coal R. Co. *v.* Northwestern Coal, etc., Co., 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L. R. A. 936; Hannibal, etc., R. Co. *v.* Totman, 149 Mo. 657, 51 S. W. 412.

New Hampshire.—Perry *v.* Keene, 56 N. H. 514; Concord R. Co. *v.* Greely, 17 N. H. 47.

New York.— Buffalo, etc., R. Co. *v.* Brainard, 9 N. Y. 100; Bloodgood *v.* Mohawk, etc., R. Co., 18 Wend. 9, 31 Am. Dec. 313 [*affirming* 14 Wend. 51]; Beekman *v.* Saratoga, etc., R. Co., 3 Paige 45, 22 Am. Dec. 679.

North Carolina.— Raleigh, etc., R. Co. *v.* Davis, 19 N. C. 451.

South Carolina.— Louisville, etc., R. Co. *v.* Chappell, Rice 383.

Vermont.— White River Turnpike Co. *v.* Vermont Cent. R. Co., 21 Vt. 590.

United States.— Secombe *v.* Milwaukee, etc., R. Co., 23 Wall. 108, 23 L. ed. 67; Malott *v.* Collinsville, etc., Electric R. Co., 108 Fed. 313, 47 C. C. A. 345; Baltimore, etc., R. Co. *v.* Van Ness, 2 Fed. Cas. No. 830, 4 Cranch C. C. 595.

See 18 Cent. Dig. tit. "Eminent Domain," § 59.

If a railroad company is incorporated for a private use, as contradistinguished from a public use as above, it cannot exercise the right of eminent domain. Edgewood R. Co.'s Appeal, 79 Pa. St. 257. If a railroad company should undertake to condemn land for a purpose which was not within the scope of the powers legally granted to railroad companies, such a proceeding would not only be *ultra vires*, but would be a taking of land for a private use. Kansas, etc., Coal R. Co. *v.* Northwestern Coal, etc., Co., 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L. R. A. 936; Philadelphia, etc., R. Co.'s Petition, 203 Pa. St. 354, 53 Atl. 191.

Property of company, private property.— The property of a railroad company, so far as relates to its ownership and the profit and gain to be made from its use, is to all intents and purposes private property, although applied to a use in which the public have an interest. Pittsburg, etc., R. Co. *v.* Benwood Iron Works, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680.

72. Swan *v.* Williams, 2 Mich. 427.

73. Kettle River R. Co. *v.* Minnesota Eastern R. Co., 41 Minn. 461, 43 N. W. 469, 6

material in determining whether the use of land taken by the company is a public one.[74] Whatever is essential and indispensable to the construction, maintenance, and running of the road is allowed to be taken.[75] Accordingly the use of land for railroad tracks[76] or side-tracks[77] is a public use, and railroad companies may condemn lands for depots or stations for passengers and freight,[78] for convenient

L. R. A. 111; Kansas, etc., Coal R. Co. *v.* Northwestern Coal, etc., Co., 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L. R. A. 936; Concord R. Co. *v.* Greely, 17 N. H. 47; National Docks R. Co. *v.* New Jersey Cent. R. Co., 32 N. J. Eq. 755.

Right of passage on payment of toll.— A railroad will be regarded as one for public use when the public have a right of passage on paying a stipulated, reasonable, and uniform toll, whether the road is constructed by the state or a corporation. Swan *v.* Williams, 2 Mich. 427; Concord R. Co. *v.* Greely, 17 N. H. 47; Bonaparte *v.* Camden, etc., R. Co., 3 Fed. Cas. No. 1,617, Baldw. 205. But if the toll amounts to a prohibition, it is a monopoly, and the road is not for public use. Bonaparte *v.* Camden, etc., R. Co., 3 Fed. Cas. No. 1,617, Baldw. 205.

74. Kansas, etc., Coal R. Co. *v.* Northwestern Coal, etc., Co., 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L. R. A. 936.

75. New York, etc., R. Co. *v.* Gunnison, 1 Hun (N. Y.) 496. And see Summerfield *v.* Chicago, 197 Ill. 270, 64 N. E. 490.

76. *Arkansas.*— St. Louis, etc., R. Co. *v.* Petty, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434.

California.— Contra Costa Coal Mines R. Co. *v.* Moss, 23 Cal. 323.

Michigan.— Swan *v.* Williams, 2 Mich. 427.

Missouri.— Kansas, etc., Coal R. Co. *v.* Northwestern Coal, etc., Co., 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L. R. A. 936; St. Louis, etc., R. Co. *v.* Hannibal Union Depot Co., 125 Mo. 82, 28 S. W. 483; Chicago, etc., R. Co. *v.* McGrew, 104 Mo. 282, 15 S. W. 931; Dietrich *v.* Murdock, 42 Mo. 279.

New Jersey.— De Camp *v.* Hibernia Underground R. Co., 47 N. J. L. 43.

Ohio.— Giesy *v.* Cincinnati, etc., R. Co., 4 Ohio St. 308.

United States.— Arkansas, etc., R. Co. *v.* St. Louis, etc., R. Co., 103 Fed. 747; Colorado Eastern R. Co. *v.* Union Pac. R. Co., 41 Fed. 293.

See 18 Cent. Dig. tit. "Eminent Domain," § 59 *et seq.*

77. Protzman *v.* Indianapolis, etc., R. Co., 9 Ind. 467, 68 Am. Dec. 650; Ewing *v.* Alabama, etc., R. Co., 68 Miss. 551, 9 So. 295; Portland, etc., R. Co. *v.* Portland, 14 Oreg. 188, 12 Pac. 265, 58 Am. Rep. 299. And this may be done after the location and construction of the road, where it subsequently becomes necessary to enable it to transact its increasing business. Toledo, etc., R. Co. *v.* Daniels, 16 Ohio St. 390. But under Me. Rev. St. c. 51, § 2, the railroad commissioners have no jurisdiction to condemn land for tracks, as distinguished from side-tracks, nor for the general uses of the corporation, in addition to those specified in the statute, namely, for the location, construction, and convenient use of the road. Spofford *v.* Bucksport, etc., R. Co., 66 Me. 26.

78. *Georgia.*— Small *v.* Georgia Southern, etc., R. Co., 87 Ga. 602, 13 S. E. 694.

Indiana.— Protzman *v.* Indianapolis, etc., R. Co., 9 Ind. 467, 68 Am. Dec. 650.

Iowa.— Jager *v.* Dey, 80 Iowa 23, 45 N. W. 391.

Michigan.— Fort-St. Union Depot Co. *v.* Morton, 83 Mich. 265, 47 N. W. 228.

Mississippi.— Ewing *v.* Alabama, etc., R. Co., 68 Miss. 551, 9 So. 295.

Missouri.— Hannibal, etc., R. Co. *v.* Muder, 49 Mo. 165.

New Jersey.— State *v.* Mansfield Tp., 23 N. J. L. 510, 57 Am. Dec. 409.

New York.— *In re* Long Island R. Co., 143 N. Y. 67, 37 N. E. 636; *In re* Staten Island Rapid Transit Co., 103 N. Y. 251, 8 N. E. 548; *In re* New York Cent., etc., R. Co., 77 N. Y. 248; New York Cent., etc., R. Co. *v.* Metropolitan Gas-light Co., 63 N. Y. 326; New York, etc., R. Co. *v.* Kip, 46 N. Y. 546, 7 Am. Rep. 385 [*affirming* 11 Abb. Pr. N. S. 90].

Ohio.— Giesy *v.* Cincinnati, etc., R. Co., 4 Ohio St. 308.

Oregon.— Portland, etc., R. Co. *v.* Portland, 14 Oreg. 188, 12 Pac. 265, 58 Am. Rep. 299.

Tennessee.— Nashville, etc., R. Co. *v.* Cowardin, 11 Humphr. 347.

See 18 Cent. Dig. tit. "Eminent Domain," § 61.

Depots for cattle and live stock are within the purposes for which land may be taken. New York Cent., etc., R. Co. *v.* Metropolitan Gaslight Co., 5 Hun (N. Y.) 201 [*affirmed* in 63 N. Y. 326].

Elevated stations — Amount condemned.— It is no objection to the proceedings to condemn the land on which the stations of an elevated railroad are built that a small portion of such stations is used for news stands, since this does not show that stations of smaller size would adequately accommodate the traveling public. *In re* Metropolitan El. R. Co., 2 N. Y. Suppl. 278.

Warehouses.— It has been held that where a company is prohibited from acquiring land, except for the construction of the road, or for depots, toll-houses, "and other necessary works," such erections as are necessary for the road are included by implication, but that such implication does not include a warehouse. Cumberland Valley R. Co. *v.* McLanahan, 59 Pa. St. 23.

Right as affected by ownership of available land.— Where a company owned land at a beach leased by it to other parties who had fitted it up as a pleasure ground for the accommodation of visitors, to the beach, and a station built on this land would in a large

places for the storing of cars and locomotives,[79] for the construction of coal-chutes,[80] water stations,[81] turnouts or turn-tables,[82] tanks,[83] houses for bridge and switch tenders,[84] coal and wood yards,[85] lands for the purpose of approaches to its places of business,[86] for piling wood and lumber to be used on the road or brought to it for transportation,[87] to provide curves necessary to avoid collisions,[88] to make extensions of the track beyond the depot, reasonably necessary for the accommodation of trains while discharging and loading,[89] to swing a gate over, where it is compelled to maintain a fence along its road,[90] and land adjoining a right of way may be condemned for a dumping ground for earth removed in making a cut,[91] or for the purpose of obtaining gravel and other material for the construction and maintenance of the road.[92] On the other hand a railroad company cannot condemn private property for appurtenances not essential to the construction, maintenance, or operation of its road.[93] It has accordingly been held that it cannot condemn lands for building houses for its employees,[94] for car or locomotive factories,[95] for the storage of boats of passengers visiting a watering-place on the line of the road,[96] or for public highways.[97] So it cannot condemn land for the purpose of laying out, extending, or widening a street,[98] or for the purpose of speculation or sale, or to prevent interference by competing lines,[99] nor to build a road

measure destroy the usefulness of the place as a summer resort, whereby the railroad business would be injured, it was held that the company was entitled to condemn land for a passenger station, although the land which it had leased was available for that purpose. *In re* New York Cent., etc., R. Co., 59 Hun (N. Y.) 7, 5 Silv. Supreme (N. Y.) 353, 8 N. Y. Suppl. 290.

Effect of statutes limiting amount.— Under a statute limiting the amount of land to be taken by a railroad company to one hundred feet in width except for wood and water stations, or where a greater width is necessary for excavation and embankment, or for depositing waste earth, a railroad company has no right to condemn land outside a strip included in the designated width for depots or warehouses. Johnson *v.* Chicago, etc., R. Co., 58 Iowa 537, 12 N. W. 576. Nev. St. (1864–1865) p. 427, § 20, providing that state lands along the line of a railroad taken for station purposes shall not exceed two acres in extent, does not apply to the lands of individual owners. Virginia, etc., R. Co. *v.* Elliott, 5 Nev. 358.

79. Hannibal, etc., R. Co. *v.* Muder, 49 Mo. 165; State *v.* Mansfield Tp., 23 N. J. L. 510, 57 Am. Dec. 409; *In re* New York Cent., etc., R. Co., 77 N. Y. 248; New York, etc., R. Co. *v.* Kip, 46 N. Y. 546, 7 Am. Rep. 385.

80. Ewing *v.* Alabama, etc., R. Co., 68 Miss. 551, 9 So. 295.

81. Dillon *v.* Kansas City, etc., R. Co., 67 Kan. 687, 74 Pac. 251; Portland, etc., R. Co. *v.* Portland, 14 Oreg. 188, 12 Pac. 265, 58 Am. Rep. 299.

82. Knight *v.* Carrollton R. Co., 9 La. Ann. 284; New Orleans, etc., R. Co. *v.* New Orleans Second Municipality, 1 La. Ann. 128; Hannibal, etc., R. Co. *v.* Muder, 49 Mo. 165.

83. State *v.* Mansfield Tp., 23 N. J. L. 510, 57 Am. Dec. 409.

84. State *v.* Mansfield Tp., 23 N. J. L. 510, 57 Am. Dec. 409.

85. State *v.* Mansfield Tp., 23 N. J. L. 510, 57 Am. Dec. 409.

86. New York Cent., etc., R. Co. *v.* Metropolitan Gas-Light Co., 5 Hun (N. Y.) 201 [*affirmed* in 63 N. Y. 326]; Nashville, etc., R. Co. *v.* Cowardin, 11 Humphr. (Tenn.) 348.

87. Eldridge *v.* Smith, 34 Vt. 484.

88. *In re* Union El. R. Co., 4 N. Y. Suppl. 85.

89. Protzman *v.* Indianapolis, etc., R. Co., 9 Ind. 467, 68 Am. Dec. 650.

90. *In re* New York, etc., R. Co., 33 Hun (N. Y.) 148.

91. Ohio Southern R. Co. *v.* Hinkle, 1 Ohio S. C. Pl. Dec. 682, 1 Ohio N. P. 63.

92. Hopkins *v.* Florida Cent., etc., R. Co., 97 Ga. 107, 25 S. E. 452; Winklemans *v.* Des Moines Northwestern R. Co., 62 Iowa 11, 17 N. W. 82. See also Teter *v.* West Virginia Cent., etc., R. Co., 35 W. Va. 433, 14 S. E. 146. And *compare* New York, etc., R. Co. *v.* Gunnison, 1 Hun (N. Y.) 496, 3 Thomps. & C. (N. Y.) 632.

93. Curtis *v.* St. Paul, etc., R. Co., 20 Minn. 28; Rensselaer, etc., R. Co. *v.* Davis, 43 N. Y. 137; *In re* Rochester, etc., R. Co., 12 N. Y. Suppl. 566; *In re* Rhode Island Suburban R. Co., 22 R. I. 457, 48 Atl. 591, 52 L. R. A. 879; St. Louis, etc., R. Co. *v.* Thomas, 34 Fed. 774.

94. State *v.* Mansfield Tp., 23 N. J. L. 510, 57 Am. Dec. 409; Nashville, etc., R. Co. *v.* Cowardin, 11 Humphr. (Tenn.) 348; Eldridge *v.* Smith, 34 Vt. 484.

95. State *v.* Mansfield Tp., 23 N. J. L. 510, 57 Am. Dec. 409; Nashville, etc., R. Co. *v.* Cowardin, 11 Humphr. (Tenn.) 348; Eldridge *v.* Smith, 34 Vt. 484. *Contra*, Chicago, etc., R. Co. *v.* Wilson, 17 Ill. 123.

96. *In re* Rochester, etc., R. Co., 12 N. Y. Suppl. 566.

97. Curtis *v.* St. Paul, etc., R. Co., 20 Minn. 28; *In re* Rochester, etc., R. Co., 12 N. Y. Suppl. 566.

98. Morehouse *v.* Norwalk, 8 Ohio Dec. (Reprint) 199, 6 Cinc. L. Bul. 267.

99. Rensselaer, etc., R. Co. *v.* Davis, 43 N. Y. 137.

solely for passenger traffic and to convey sightseers along the Niagara river for a part of each year only.[1]

b. Branches, Switch Tracks, and Private Lines. A branch or lateral road, spur, or switch track necessary to the proper operation of the main line of a railroad,[2] or which may be necessary to connect important industries, or even a single industry, with the main line or other public highways, provided, however, that the general public has a right to use it,[3] although it may also subserve private

1. *In re* Niagara Falls, etc., R. Co., 108 N. Y. 375, 15 N. E. 429.

2. Tennessee Coal, etc., Co. *v.* Birmingham Southern R. Co., 128 Ala. 526, 29 So. 455; South Chicago R. Co. *v.* Dix, 109 Ill. 237; Lower *v.* Chicago, etc., R. Co., 59 Iowa 563, 13 N. W. 718; Toledo, etc., R. Co. *v.* Daniels, 16 Ohio St. 390 (side-tracks leading from the main road to depot buildings); Lewis *v.* Germantown, etc., R. Co., 16 Phila. (Pa.) 608.

Obtaining necessary gravel to enable it to safely maintain and operate its railroad is a public use for which a railway may condemn land for a right of way for a spur track from its main line to its gravel-pit. Minneapolis, etc., R. Co. *v.* Nicolin, 76 Minn. 302, 79 N. W. 304.

3. *Arkansas.*— St. Louis, etc., R. Co. *v.* Petty, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434.

Iowa.—Morrison *v.* Thistle Coal Co., (1903) 94 N. W. 507; Phillips *v.* Watson, 63 Iowa 28, 18 N. W. 659.

Maine.— Farnsworth *v.* Lime Rock R. Co., 83 Me. 440, 22 Atl. 373, limekiln.

Maryland.— New Cent. Coal Co. *v.* George's Creek Coal, etc., Co., 37 Md. 537.

Michigan.— Toledo, etc., R. Co. *v.* East Saginaw, etc., R. Co., 72 Mich. 206, 40 N. W. 436.

Minnesota.— Chicago, etc., R. Co. *v.* Porter, 43 Minn. 527, 46 N. W. 75; Kettle River R. Co. *v.* Eastern R. Co., 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111.

Missouri.— Kansas, etc., Coal R Co. *v.* Northwestern Coal, etc., Co., 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L. R. A. 936; Dietrich *v.* Murdock, 42 Mo. 279, holding that the fact that almost the entire volume of business which the company is expected to do is the transportation of the products of one private business company, whose stock-holders are the same as those of the railroad company, does not make the road any the less a railroad, nor the use any the less a public use, since under the laws of Missouri the company may be compelled to carry other freight and passengers.

Montana.— Butte, etc., R. Co. *v.* Montana Union R. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298.

New Jersey.— De Camp *v.* Hibernia Underground R. Co., 47 N. J. L. 43.

New York.— Clarke *v.* Blackmar, 47 N. Y. 150.

Ohio.— State *v.* Toledo R., etc., Co., 24 Ohio Cir. Ct. 321.

Pennsylvania.— Rudolph *v.* Pennsylvania Schuylkill Valley R. Co., 166 Pa. St. 430, 31 Atl. 131; Waddell's Appeal, 84 Pa. St. 90 (holding that the right of the legislature to authorize a construction of lateral railways over the land of another is predicated upon the fact that such railways shall be made to connect with some public improvements, railroads, or highways of some description); Brown *v.* Corey, 43 Pa. St. 495; Boyd *v.* Negley, 40 Pa. St. 377; Hays *v.* Risher, 32 Pa. St. 169; Shoenberger *v.* Mulhollan, 8 Pa. St. 134.

South Carolina.— *Ex p.* Bacot, 36 S. C. 125, 15 S. E. 204, 16 L. R. A. 586.

Virginia.— Zircle *v.* Southern R. Co., 102 Va. 17, 45 S. E. 802.

Wisconsin.— Chicago, etc., R. Co. *v.* Morehouse, 112 Wis. 1, 87 N. W. 849, 88 Am. St. Rep. 918, 56 L. R. A. 240, holding that it was immaterial in such case that the railway company had been induced to undertake the establishment of the spur track by the promise of the proprietor of a single industry to furnish a large amount of business and to bear a large part of the expense.

But see Pittsburg, etc., R. Co. *v.* Benwood Iron Works, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680, where it was held that a switch or branch road to reach a private manufactory, a steel mill, for the purpose of transporting freight to and from such mill, was a private and not a public use; and the mere fact that the public would have a right to use it did not make it a public benefit in the face of the fact that the only incentive for the road was private gain, and it was apparent that the general public had no interest in it.

See 18 Cent. Dig. tit. "Eminent Domain," § 66.

A branch railroad three miles in length, through a small, rich, agricultural valley, to a point where a sawmill was located, and a flour mill with a capacity of forty barrels per day, and which was constructed for the purpose of carrying products for other people, and also the coal from the mine of the company constructing the road, is a public use. Robbins *v.* Western Washington R. Co., 31 Pittsb. Leg. J. N. S. 181.

The connection of mines and ore-houses with a market is a public use. Butte, etc., R. Co. *v.* Montana Union R. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298.

Connecting a private mining operation with a public railroad by means of a branch or spur for the purpose of increasing the carrier's business and accommodating the trade and travel of the public is a public enterprise. Rochester, etc., Coal, etc., Co. *v.* Berwind-White Coal Min. Co., 24 Pa. Co. Ct. 104.

interests,[4] is a public use for which private property may be taken under the power of eminent domain. It is otherwise, however, if the track is intended to subserve private interests alone, or is not to connect with some public improvement, railroad, or highway,[5] as where it is intended merely to add to the earnings of the main line, or to increase its business,[6] or where it is constructed and owned by individuals for their own private use.[7]

A lumbering company, organized also for the construction of a railroad, which has constructed and has in operation a few miles of road for the use of the general public and for carrying freight and passengers may condemn a right of way, although the road is built through a sparsely settled country without any towns or other railroad at its termini, and although the road has not been equipped with coaches and no fare has been charged passengers. Bridal Veil Lumbering Co. *v.* Johnson, 30 Oreg. 205, 46 Pac. 790, 60 Am. St. Rep. 818, 34 L. R. A. 368.

4. *Arkansas.*— St. Louis, etc., R. Co. *v.* Petty, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434.

Illinois.— South Chicago R. Co. *v.* Dix, 109 Ill. 237.

Michigan.— Toledo, etc., R. Co. *v.* East Saginaw, etc., R. Co., 72 Mich. 206, 40 N. W. 436.

Minnesota.— Chicago, etc., R. Co. *v.* Porter, 43 Minn. 527, 46 N. W. 75.

New Jersey.— De Camp *v.* Hibernia Underground R. Co., 47 N. J. L. 43.

All termini of tracks and switches are more or less beneficial to private parties, but the public character of the use of the tracks is never affected by this. "It may be, in such cases, that it is expected, or even that it is intended, that such tracks will be used almost entirely by the manufacturing establishment, yet if there is no exclusion of an equal right of use by others, and this singleness of use is simply the result of location and convenience of access, it can not affect the question." Chicago Dock, etc., Co. *v.* Garrity, 115 Ill. 155, 167, 3 N. E. 448.

5. *Illinois.*— Sholl *v.* German Coal Co., 118 Ill. 427, 10 N. E. 199, 59 Am. Rep. 379.

Missouri.— Kansas, etc., Coal R. Co. *v.* Northwestern Coal, etc., Co., 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L. R. A. 936.

Pennsylvania.— Waddell's Appeal, 84 Pa. St. 90 (holding that the act of June 13, 1874, providing "for a right of way across or under the rivers or other streams of this commonwealth, for the better and more convenient mining of anthracite coal," confers authority to take private property for private use and is void); Keeling *v.* Griffin, 56 Pa. St. 305; Hays *v.* Risher, 32 Pa. St. 169 (holding that the taking of property for a lateral railroad is a taking of property for public use, and disapproving the statement in Harvey *v.* Thomas, 10 Watts 63, 36 Am. Dec. 141, that the use is a private use but that the constitution does not prohibit the taking of private property for private uses).

Texas.— Kyle *v.* Texas, etc., R. Co., 4 L. R. A. 275.

United States.— Weidenfeld *v.* Sugar Run R. Co., 48 Fed. 615.

See 18 Cent. Dig. tit. "Eminent Domain," § 66.

Illustrations.— Thus a tramway built for the sole purpose of facilitating the operation of a sawmill or lumber company (Garbutt Lumber Co. *v.* Georgia, etc., R. Co., 111 Ga. 714, 36 S. E. 942; Leigh *v.* Garysburg Mfg. Co., 132 N. C. 167, 43 S. E. 632) or a private line not connecting with any public highway or railroad and to be constructed merely for the purpose of private gain (*In re* Split Rock Cable-Road Co., 128 N. Y. 408, 28 N. E. 506; *In re* Niagara Falls, etc., R. Co., 108 N. Y. 375, 15 N. E. 429) is not a public use for which land may be condemned.

6. *Arkansas.*— St. Louis, etc., R. Co. *v.* Petty, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434.

Illinois.— Chicago, etc., R. Co. *v.* Wiltse, 116 Ill. 449, 6 N. E. 49 (for the purpose of handling the freight of certain brick-yards); South Chicago R. Co. *v.* Dix, 109 Ill. 237.

New York.— Erie R. Co. *v.* Steward, 61 N. Y. App. Div. 480, 70 N. Y. Suppl. 698.

Ohio.— Currier *v.* Marietta, etc., R. Co., 11 Ohio St. 228, holding that a railroad is not authorized to appropriate a temporary right of way to be used as a substitute for the main track while the same was in course of construction.

West Virginia.— Pittsburg, etc., R. Co. *v.* Benwood Iron Works, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680.

Wisconsin.—Maginnis *v.* Knickerbocker Ice Co., 112 Wis. 385, 88 N. W. 300, holding that the establishment of a railroad spur as a purely private enterprise cannot be legitimately aided by the power of eminent domain.

See 18 Cent. Dig. tit. "Eminent Domain," § 66.

7. *Colorado.*— People *v.* Pitkin County Dist. Ct., 11 Colo. 147, 17 Pac. 298.

Illinois.— Koelle *v.* Knecht, 99 Ill. 396.

Maine.— Green *v.* Portland, 32 Me. 431.

Minnesota.— Gustafson *v.* Hamm, 56 Minn. 334, 57 N. W. 1054, 22 L. R. A. 565.

Missouri.— Glaessner *v.* Anheuser-Busch Brewing Assoc., 100 Mo. 508, 13 S. W. 707.

Pennsylvania.— Barker *v.* Hartman Steel Co., 129 Pa. St. 551, 18 Atl. 553, holding that a manufacturing company cannot acquire by a lease from the railroad company the right of eminent domain vested in the latter so as to be enabled to construct and operate a railway upon the streets of a borough, even with the consent of the municipal authorities.

West Virginia.— Valley City Salt Co. *v.* Brown, 7 W. Va. 191, holding a subterranean

c. Street Railroads. The laying of the track of a street railroad on the surface of a street is an application of the street to a public use.[8]

d. Terminal Facilities. A corporation organized for the purpose of establishing a union depot for the accommodation of all railroads desiring access to it is of such a public character as to authorize the granting of the power of eminent domain to it.[9] Nor does the fact that a company created for terminal purposes only is authorized, after it has acquired property and constructed its depot, to provide accommodations for the public, such as hotels, restaurants, and news stands, convert the undertaking into a private enterprise.[10] So an enterprise is not a private one merely because the charter fixes no rate to be charged by the corporation for the use of its tracks as a terminal.[11]

5. Telegraph and Telephone Lines. A public telegraph or telephone line is a public improvement for which private property may be taken as for a public use;[12] and not only may the land of an individual be subjected to such use, but

right of way to connect a company's coal mine with its furnaces is not a public use.

See 18 Cent. Dig. tit. "Eminent Domain," § 66.

A skid road built so as to facilitate the logging business of a private company, inaccessible to the public, and not connecting at any point with the public highway, is not a road for public use. Apex Transp. Co. *v.* Garbade, 32 Oreg. 582, 52 Pac. 573, 54 Pac. 367, 882.

8. People *v.* Kerr, 27 N. Y. 188, 25 How. Pr. (N. Y.) 258 [*affirming* 37 Barb. 357 (*reversing* 20 How. Pr. 130)]; Toledo Electric St. R. Co. *v.* Toledo Consol. St. R. Co., 11 Ohio Dec. (Reprint) 365, 26 Cinc. L. Bul. 172; Ogden City R. Co. *v.* Ogden City, 7 Utah 207, 26 Pac. 288.

Oreg. Code (1887), §§ 3239, 3240, 3246, contemplates only corporations organized for the carriage of passengers and freight, whose roads are highways of travel and traffic, and does not confer the power of eminent domain on a street railway company operated to subserve local convenience in the carriage of passengers only. Thompson-Houston Electric Co. *v.* Simon, 20 Oreg. 60, 25 Pac. 147, 23 Am. St. Rep. 86, 10 L. R. A. 251.

N. Y. Laws (1890), c. 565, art. 1, authorizes the incorporation of both steam and street railway companies, and sections 4 and 7 of the statute declare that every railroad corporation may acquire necessary real estate by condemnation. Section 90 of the act, after providing that every street railway corporation on complying with section 91 shall have power to construct and operate its road on and along the streets, avenues, etc., described in its certificate of incorporation, and to acquire title by condemnation, contains this further provision: "Nothing in this section shall be deemed to authorize a street railroad corporation to acquire real property within a city by condemnation." The said section 91 provides that before a railway is constructed in a street, the consent of the local authorities and of the owners of one half in value of the abutting property must be obtained. It was held that the provision of section 90 above quoted does not prohibit a street railway company from acquiring by condemnation an easement to construct and operate its road on a city street, the fee of which belongs to the abutting owners. Adee *v.* Nassau Electric R. Co., 72 N. Y. App. Div. 404, 76 N. Y. Suppl. 589.

9. Fort-St. Union Depot Co. *v.* Morton, 83 Mich. 265, 47 N. W. 228; Kansas City, etc., R. Co. *v.* Baker, (Mo. Sup. 1904) 82 S. W. 85; Ryan *v.* Louisville, etc., Co., 102 Tenn. 111, 50 S. W. 744, 45 L. R. A. 303.

10. Ryan *v.* Louisville, etc., Co., 102 Tenn. 111, 50 S. W. 744, 45 L. R. A. 303.

11. Ryan *v.* Louisville, etc., Co., 102 Tenn. 111, 50 S. W. 744, 45 L. R. A. 303.

12. *Alabama.*— Mobile, etc., R. Co. *v.* Postal Tel. Cable Co., 120 Ala. 21, 24 So. 408; New Orleans, etc., R. Co. *v.* Southern, etc., Tel. Co., 53 Ala. 211.

Indiana.— Prather *v.* Western Union Tel. Co., 89 Ind. 501.

New Jersey.— Trenton, etc., Turnpike Co. *v.* American, etc., News Co., 43 N. J. L. 381.

Pennsylvania.— York Telephone Co. *v.* Keesey, 5 Pa. Dist. 366.

Wisconsin.— Wisconsin Telephone Co. *v.* Oshkosh, 62 Wis. 32, 21 N. W. 828.

United States.— Montana Postal Tel. Cable Co. *v.* Oregon Shore Line R. Co., 114 Fed. 787.

England.—Atty.-Gen. *v.* Edison Telephone Co., 6 Q. B. D. 244, 50 L. J. Q. B. 145, 43 L. T. Rep. N. S. 697, 29 Wkly. Rep. 428.

See 18 Cent. Dig. tit. "Eminent Domain," § 81.

Effect of statutes giving power of eminent domain to telegraph companies.— The telephone, being a new species of telegraph, presenting a change in detail but not in substance, the right of eminent domain conferred by statute on telegraph companies is applicable to telephone companies, although the latter be not mentioned in the statute. American Tel., etc., Co. *v.* Smith, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200; Northwestern Telephone Exch. Co. *v.* Chicago, etc., R. Co., 76 Minn. 334, 79 N. W. 315; State *v.* New Jersey Tel. Co., 53 N. J. L. 341, 21 Atl. 460, 11 L. R. A. 664; San Antonio, etc., R. Co. *v.* Southwestern Tel., etc., Co., (Tex. Civ. App. 1900) 56 S. W. 201; Gulf, etc., R. Co. *v.* Southwestern Tel., etc., Co., 18 Tex. Civ. App. 500, 45 S. W. 151.

also his easement in a public street or highway.[13] The right of eminent domain conferred on telegraph companies by the statutes of the state cannot be denied by defendant in a suit instituted for the condemnation of a right of way on the ground that it is only a pretended and not a real corporation. This question can only be raised by the state.[14]

6. WATERWORKS. The supplying of pure water by a private corporation to the inhabitants of a city, town, village, or other community is a measure of public utility for which private property may be taken under the right of eminent domain,[15] and for which the right of an individual to enjoy the flow of the water in its natural channel upon his land may be condemned.[16] To render the exercise of the power valid, it is not necessary that the water taken should be for

13. *Illinois.*— Postal Tel. Cable Co. *v.* Eaton, 170 Ill. 513, 49 N. E. 365, 62 Am. St. Rep. 390, 39 L. R. A. 722; Board of Trade Tel. Co. *v.* Barnett, 107 Ill. 507, 47 Am. Rep. 453; Union Electric Telephone, etc., Co. *v.* Applequiet, 104 Ill. App. 517.

Indiana.— Magee *v.* Overshiner, 150 Ind. 127, 49 N. E. 951, 65 Am. St. Rep. 358, 40 L. R. A. 370.

Maryland.— Chesapeake, etc., Co. *v.* Mackenzie, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219.

Massachusetts.— Pierce *v.* Drew, 136 Mass. 75, 49 Am. Rep. 7.

Mississippi.— Stowers *v.* Postal Tel. Cable Co., 68 Miss. 559, 9 So. 356, 24 Am. St. Rep. 290, 12 L. R. A. 864.

Missouri.— Julia Bldg. Assoc. *v.* Bell Telephone Co., 88 Mo. 258, 57 Am. Rep. 398.

Montana.— Hershfield *v.* Rocky Mountain Bell Tel. Co., 12 Mont. 102, 29 Pac. 883.

Nebraska.— Bronson *v.* Albion Telephone Co., (1903) 93 N. W. 201, 60 L. R. A. 426.

New Jersey.— Nicoll *v.* New York, etc., Telephone Co., 62 N. J. L. 156, 40 Atl. 627.

New York.— Blashfield *v.* Empire State Telephone, etc., Co., 147 N. Y. 520, 42 N. E. 2; Eels *v.* American Telephone, etc., Co., 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640 [*affirming* 65 Hun 516, 20 N. Y. Suppl. 600]; Metropolitan Telephone, etc., Co. *v.* Colwell Lead Co., 50 N. Y. Super. Ct. 488; Gray *v.* York State Telephone Co., 41 Misc. 108, 83 N. Y. Suppl. 920; Andrew *v.* Delhi, etc., Telephone Co., 36 Misc. 23, 72 N. Y. Suppl. 50 [*affirming* 66 N. Y. App. Div. 616, 73 N. Y. Suppl. 1129]; Blashfield *v.* Empire State Telephone, etc., Co., 18 N. Y. Suppl. 250.

North Dakota.— Donovan *v.* Allert, 11 N. D. 289, 91 N. W. 441, 95 Am. St. Rep. 720.

Ohio.— Smith *v.* Central Dist. Printing, etc., Co., 2 Ohio Cir. Ct. 259, 1 Ohio Cir. Dec. 475; Denver *v.* U. S. Telephone Co., 10 Ohio S. & C. Pl. Dec. 273.

Pennsylvania.— Lockhart *v.* Craig St. R. Co., 139 Pa. St. 419, 21 Atl. 26.

South Dakota.— Kirby *v.* Citizens' Telephone Co., (1903) 97 N. W. 3.

West Virginia.— Maxwell *v.* Central Dist., etc., Co., 51 W. Va. 121, 41 S. E. 125.

Wisconsin.— La Crosse City R. Co. *v.* Higbee, 107 Wis. 389, 83 N. W. 701, 51 L. R. A. 923; Krueger *v.* Wisconsin Telephone Co., 106 Wis. 96, 81 N. W. 1041, 50 L. R. A. 298; Hobart *v.* Milwaukee City R. Co., 27 Wis. 194, 9 Am. Rep. 461.

United States.— Pacific Postal Tel. Cable Co. *v.* Irvine, 49 Fed. 113.

14. Montana Postal Telephone Cable Co. *v.* Oregon Short Line R. Co., 114 Fed. 787.

15. *California.*— Spring Valley Water Works *v.* Drinkhouse, 92 Cal. 528, 28 Pac. 681; Lake Pleasanton Water Co. *v.* Contra Costa Water Co., 67 Cal. 659, 8 Pac. 501; St. Helena Water Co. *v.* Forbes, 62 Cal. 182, 45 Am. Rep. 659; People *v.* Stephens, 62 Cal. 209.

Colorado.— Denver Power, etc., Co. *v.* Denver, etc., R. Co., 30 Colo. 204, 69 Pac. 568, 60 L. R. A. 383.

Maine.— Riche *v.* Bar Harbor Water Co., 75 Me. 91.

Maryland.— Reddall *v.* Bryan, 14 Md. 444, 74 Am. Dec. 550.

Nevada.— Thorn *v.* Sweeney, 12 Nev. 251.

New Jersey.— Kountze *v.* Morris Aqueduct, 58 N. J. L. 303, 33 Atl. 252; State *v.* Newark, 54 N. J. L. 62, 23 Atl. 129; Olmsted *v.* Morris Aqueduct, 46 N. J. L. 495.

New York.— Matter of Gilroy, 32 N. Y. App. Div. 216, 52 N. Y. Suppl. 990; Canandaigue *v.* Benedict, 24 N. Y. App. Div. 348, 48 N. Y. Suppl. 679; *In re* New Rochelle Water Co., 46 Hun 525; Stamford Water Co. *v.* Stanley, 39 Hun 424; *In re* Malone Water-Works Co., 15 N. Y. Suppl. 649.

West Virginia.— Charleston Natural Gas Co. *v.* Low, 52 W. Va. 662, 44 S. E. 410.

See 18 Cent. Dig. tit. "Eminent Domain," § 75.

Reservoirs.— Land may be condemned by a water company for a reservoir. Spring Valley Water-Works *v.* Drinkhouse, 92 Cal. 528, 28 Pac. 681; Lake Pleasanton Water Co. *v.* Contra Costa Water Co., 67 Cal. 659, 8 Pac. 501; Denver Power, etc., Co. *v.* Denver, etc., R. Co., 30 Colo. 204, 69 Pac. 568, 60 L. R. A. 383; Cowdrey *v.* Woburn, 136 Mass. 409.

Taking lands for an aqueduct to a city or town is a taking for public use. Ellinghouse *v.* Taylor, 19 Mont. 462, 48 Pac. 757; Thorn *v.* Sweeney, 12 Nev. 251.

Supplying water for domestic use to a "farming neighborhood" not shown to be inhabited is not a public use. Aliso Water Co. *v.* Baker, 95 Cal. 268, 30 Pac. 537.

16. St. Helena Water Co. *v.* Forbes, 62 Cal. 182, 45 Am. Rep. 659.

immediate use,[17] that any contract should have previously been made to supply the public with water,[18] or that the statute authorizing the exercise of the power does not expressly require the water to be furnished on reasonable terms to all persons applying for it.[19] So the fact that a charge is made for the water does not make the use any the less a public one;[20] and the nature of the use is not changed by the fact that the corporation exercising the power disposes of the surplus water for an outside use,[21] or by the fact that it has not begun to furnish water to the public where such failure is due to the incomplete condition of the waterworks and it is proceeding in good faith to complete them.[22]

7. CANALS AND WATERWAYS. A canal or other waterway is for such a public purpose as to authorize private property to be taken for its construction or improvement.[23] Both the federal and the state governments may take or injure the rights of riparian owners on navigable streams for the purpose of improving navigation thereon.[24] The use of a waterway leading from forest lands to navigable water for the purpose of floating logs is a public use which will justify the exercise of the right of eminent domain in opening it as a highway.[25] But an upper riparian owner cannot by eminent domain collect the waters of a stream by a dam, and so discharge it as to injure a lower riparian owner, where his use of the water is only for his private benefit in floating his logs to market.[26]

8. DRAINS, LEVEES, AND SEWERS. Drains and levees necessary for public health, convenience, and welfare are a public use, for which private property may be taken.[27] Under some statutes it is held that drains can only be constructed for

17. *In re* Malone Water-Works Co., 15 N. Y. Suppl. 649.

18. *In re* Malone Water-Works Co., 15 N. Y. Suppl. 649.

19. Lumbard *v.* Stearns, 4 Cush. (Mass.) 60.

20. Long Island Water-Supply Co. *v.* Brooklyn, 166 U. S. 685, 17 S. Ct. 718, 41 L. ed. 1165.

21. State *v.* Newark, 54 N. J. L. 62, 23 Atl. 129; Pocantico Water Works Co. *v.* Bird, 130 N. Y. 249, 29 N. E. 246 [*modifying* 4 N. Y. Suppl. 317].

22. Pocantico Water Works Co. *v.* Bird, 130 N. Y. 249, 29 N. E. 246 [*modifying* 4 N. Y. Suppl. 317]. See also State *v.* Newark, 54 N. J. L. 62, 23 Atl. 129.

23. De Camp *v.* Dix, 159 N. Y. 436, 54 N. E. 63; Selden *v.* Delaware, etc., Canal Co., 29 N. Y. 634; Morgan *v.* King, 18 Barb. (N. Y.) 277; Canal Com'rs *v.* People, 5 Wend. (N. Y.) 423; State *v.* Glen, 52 N. C. 321; Walker *v.* Board of Public Works, 16 Ohio 540; Cooper *v.* Williams, 4 Ohio 253, 22 Am. Dec. 745 [*affirmed* in 5 Ohio 391, 24 Am. Dec. 299]; Scranton *v.* Wheeler, 179 U. S. 141, 21 S. Ct. 48, 45 L. ed. 126 [*affirming* 113 Mich. 565, 71 N. W. 1091, 67 Am. St. Rep. 484]; Brown *v.* U. S., 81 Fed. 55; Chesapeake, etc., Canal Co. *v.* Key, 5 Fed. Cas. No. 2,649, 3 Cranch C. C. 599.

A canal constructed by a lumber company to carry lumber to a city and to supply such city with water is for a public use. Dalles Lumbering Co. *v.* Urquhart, 16 Oreg. 67, 19 Pac. 78.

The construction of a flume to convey lumber from mills to a city is a work of such a public character as will authorize the condemnation of right of way therefor under the statutes of Oregon. Maffet *v.* Quine, 93 Fed. 347.

24. Homochitto River Com'rs *v.* Withers, 29 Miss. 21, 64 Am. Dec. 126; Barney *v.* Keokuk, 94 U. S. 324, 24 L. ed. 224; Avery *v.* Fox, 2 Fed. Cas. No. 674, 1 Abb. 246; Bedford *v.* U. S., 36 Ct. Cl. 474.

25. *In re* Burns, 155 N. Y. 23, 49 N. E. 246 [*reversing* 16 N. Y. App. Div. 507, 44 N. Y. Suppl. 930].

26. Brewster *v.* J. & J. Rogers Co., 42 N. Y. App. Div. 343, 59 N. Y. Suppl. 32.

27. *Arkansas.*— Cribbs *v.* Benedict, 64 Ark. 555, 44 S. W. 707.

Illinois.— Heffner *v.* Cass, etc., Counties, 193 Ill. 439, 62 N. E. 201, 58 L. R. A. 353; Chaplin *v.* Wheatland Tp. Highway Com'rs, 27 Ill. App. 643.

Indiana.— Poundstone *v.* Baldwin, 145 Ind. 139, 44 N. E. 191; Zigler *v.* Menges, 121 Ind. 99, 22 N. E. 782, 16 Am. St. Rep. 357; Heick *v.* Voight, 110 Ind. 279, 11 N. E. 306; Anderson *v.* Baker, 98 Ind. 587; Ross *v.* Davis, 97 Ind. 79; Chambers *v.* Kyle, 67 Ind. 206; Tillman *v.* Kircher, 64 Ind. 104; Anderson *v.* Kerns Draining Co., 14 Ind. 199, 77 Am. Dec. 63.

Iowa.— Patterson *v.* Baumer, 43 Iowa 477; Hatch *v.* Pottawattamie County, 43 Iowa 442.

Kentucky.— Duke *v.* O'Bryan, 100 Ky. 710, 39 S. W. 444, 824, 19 Ky. L. Rep. 81.

Louisiana.—Avery *v.* Iberville Police Jury, 12 La. Ann. 554; *In re* New Orleans Draining Co., 11 La. Ann. 338.

Massachusetts.— Bancroft *v.* Cambridge, 126 Mass. 438; Dingley *v.* Boston, 100 Mass. 544.

Minnesota.— State *v.* Polk County, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161.

Nebraska.— Jenal *v.* Green Island Draining Co., 12 Nebr. 163, 10 N. H. 547.

North Carolina.— Norfleet *v.* Cromwell, 70 N. C. 634, 16 Am. Rep. 787.

purposes of public health.[28] But while the element of public health is often made an important factor in statutes of this kind any public use, such as the improvement of highways,[29] the drainage of agricultural land,[30] or the improvement and reclamation of low, wet, and overflowing lands[31] is sufficient to support and sustain them. So a public sewer is also a public use for which land may be condemned.[32] In order that a drain or levee may be a public use it is not enough that private

Ohio.— Lake Erie, etc., R. Co. *v.* Hancock County, 63 Ohio St. 23, 57 N. E. 1009; Chesbrough *v.* Putnam, etc., Counties, 37 Ohio St. 508; Sessions *v.* Crunkilton, 20 Ohio St. 349; Thompson *v.* Wood County, 11 Ohio St. 678; Reeves *v.* Wood County, 8 Ohio St. 333; Thomas *v.* County Com'rs, 5 Ohio S. & C. Pl. Dec. 503, 5 Ohio N. P. 449.

Washington.— Lewis County *v.* Gordon, 20 Wash. 80, 54 Pac. 779.

Wisconsin.— *In re* Theresa Drainage Dist., 90 Wis. 301, 63 N. W. 288 (holding that it is only when it will make the homes of the public more healthful that any man's property can be taken for "sanitary purposes"); State *v.* Curtis, 86 Wis. 140, 56 N. W. 475; State *v.* Stewart, 74 Wis. 620, 43 N. W. 947, 6 L. R. A. 394; Smith *v.* Gould, 59 Wis. 631, 18 N. W. 457; Smeaton *v.* Martin, 57 Wis. 364, 15 N. W. 403.

United States.— Sweet *v.* Rechel, 159 U. S. 380, 16 S. Ct. 43, 40 L. ed. 188; Hagar *v.* Reclamation Dist. No. 108, 111 U. S. 701, 4 S. Ct. 663, 28 L. ed. 569.

See 18 Cent. Dig. tit. "Eminent Domain," § 77.

And see CONSTITUTIONAL LAW, 8 Cyc. 868; DRAINS, 14 Cyc. 1018; and, generally, LEVEES.

The public character of such works has been well set forth as follows: "Levees keep out the water. Irrigation canals bring in the water. Drains take out the water. The public has an interest in each kind of such laws. By keeping out the water, the health of the inhabitants is conserved and the value of the lands increased, and the revenues of the State enhanced. Thus the State is directly interested both for sanitary and financial reasons." Mound City Land, etc., Co. *v.* Miller, 170 Mo. 240, 251, 71 S. W. 721, 94 Am. St. Rep. 727, 60 L. R. A. 190.

28. Hull *v.* Baird, 73 Iowa 528, 35 N. W. 613; Kinnie *v.* Bare, 68 Mich. 625, 36 N. W. 672; *In re* Ryers, 72 N. Y. 1, 28 Am. Rep. 88; Hulburt *v.* Harris, 3 N. Y. App. Div. 30, 37 N. Y. Suppl. 1056; Catlin *v.* Munn, 37 Hun (N. Y.) 23; Burk *v.* Ayers, 19 Hun (N. Y.) 17; *In re* Chili, 5 Hun (N. Y.) 116.

29. Chaplin *v.* Wheatland Highway Com'rs, 129 Ill. 651, 22 N. E. 484; Colfax Highway Com'rs *v.* East Lake Fork Special Drainage Dist., 127 Ill. 581, 21 N. E. 206; Heick *v.* Voight, 110 Ind. 279, 11 N. E. 306; Anderson *v.* Baker, 98 Ind. 587; Smith *v.* Gould, 59 Wis. 631, 18 N. W. 457; Smeaton *v.* Martin, 57 Wis. 364, 15 N. W. 403.

Public bridges on public highways may be removed when necessary for the construction of ditches for the drainage of such highways. Heffner *v.* Cass, etc., Counties, 193 Ill. 439, 62 N. E. 201, 58 L. R. A. 353.

30. Lile *v.* Gibson, 91 Mo. App. 480.

The improvement of land for highways or for residences and for timber by a proper drainage is in the sense of the law improvement for agricultural and sanitary purposes. Colfax Highway Com'rs *v.* East Lake Fork Special Drainage Dist., 127 Ill. 581, 21 N. E. 206.

31. *Arkansas.*— Cribbs *v.* Benedict, 64 Ark. 555, 44 S. W. 707.

Kansas.—Missouri, etc., R. Co. *v.* Cambern, 66 Kan. 365, 71 Pac. 809.

Kentucky.— Duke *v.* O'Bryan, 100 Ky. 710, 39 S. W. 444, 824, 19 Ky. L. Rep. 81.

Nebraska.—Jenal *v.* Green Island Draining Co., 12 Nebr. 163, 10 N. W. 547.

New Jersey.— *In re* Pequest River Drainage Com'rs, 39 N. J. L. 433; *In re* Application for Drainage, 35 N. J. L. 497; Tide Water Co. *v.* Coster, 18 N. J. Eq. 518, 90 Am. Dec. 634.

New York.— *In re* Ryers, 72 N. Y. 1, 28 Am. Rep. 88; People *v.* Nearing, 27 N. Y. 306; Hartwell *v.* Armstrong, 19 Barb. 166.

North Carolina.— Norfleet *v.* Cromwell, 70 N. C. 634, 16 Am. Rep. 787, where it was held that the right of the state to condemn land for drains rests on the same foundation as its right in cases of public roads, mills, railroads, school-houses, etc.

Ohio.— Thomas *v.* County Com'rs, 5 Ohio S. & C. Pl. Dec. 503, 5 Ohio N. P. 449, holding that to effect the drainage of malarial lands and make them fit for habitation and use is a purpose sufficiently public to justify the exercise of the right of eminent domain.

Oregon.— Seely *v.* Sebastian, 4 Oreg. 25.

Washington.— Lewis County *v.* Gordon, 20 Wash. 80, 54 Pac. 779. See also Snohomish County *v.* Hayward, 11 Wash. 429, 39 Pac. 652; Askam *v.* King County, 9 Wash. 1, 36 Pac. 1097.

Wisconsin.— *In re* Theresa Drainage Dist., 90 Wis. 301, 63 N. W. 288.

United States.— Sweet *v.* Rechel, 159 U. S. 380, 16 S. Ct. 43, 40 L. ed. 188.

See 18 Cent. Dig. tit. "Eminent Domain," § 77.

See also CONSTITUTIONAL LAW, 8 Cyc. 868; DRAINS, 14 Cyc. 1018; and, generally, LEVEES.

A dam which causes the overflow of large tracts of land may be removed under the power of eminent domain and the tracts thereby reclaimed and rendered fit for agricultural purposes. Talbot *v.* Hudson, 16 Gray (Mass.) 417.

32. McDaniel *v.* Columbus, 91 Ga. 462, 17 S. E. 1011; Kingman, Petitioner, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417; Hildreth *v.* Lowell, 11 Gray (Mass.) 345. "Drainage laws are closely akin to sewer laws. In fact,

interests will be thereby subserved or that private property will be enhanced in value; there must be a public interest applicable to a community of persons to be benefited,[33] although a drain will not be deprived of its public character by the fact that some individuals are specially benefited by it or that private interests are subserved.[34] It is not necessary that the public at large shall be benefited, but only that part of the public affected by want of proper drainage.[35]

9. Dams For Mills and Water-Power. In earlier times when steam as a motive power was unknown and capital was small, the erection of dams and the flowage of lands for mill purposes and to create water-power was considered to be for a public use and the acts authorizing them were assumed to be valid.[36] And

the only difference between the two is that they are called sewers in cities and closely populated communities, while they are called drains in rural and agricultural communities, and the further difference that sewers are generally covered over to prevent the escape and dissemination of foul odors and noxious gases, and conceal the passage of their contents through the streets, while drains are open. There is, however, no difference in the legal principles applicable to the two. If one is constitutional, so is the other." Mound City Land, etc., Co. *v.* Miller, 170 Mo. 240, 252, 70 S. W. 721, 94 Am. St. Rep. 727, 60 L. R. A. 190.

In California a sewer is declared a public use by statute. Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604, also holding that the fact that a city had agreed to allow a hotel outside of the city limits to share in the use of the proposed sewer does not render the proposed use any the less a public use.

33. *California.*—Nickey *v.* Stearns Ranchos Co., 126 Cal. 150, 58 Pac. 459.

Indiana.—Gifford Drainage Dist. *v.* Shroer, 145 Ind. 572, 44 N. E. 636.

Iowa.— Fleming *v.* Hull, 73 Iowa 598, 35 N. W. 673.

Kentucky.— Duke *v.* O'Bryan, 100 Ky. 710, 39 S. W. 444, 824, 19 Ky. L. Rep. 81; Cypress Pond Draining Co. *v.* Hooper, 2 Metc. 350.

Nebraska.— Jenal *v.* Green Island Draining Co., 12 Nebr. 163, 10 N. W. 547.

New Jersey.— Kean *v.* Driggs Drainage Co., 45 N. J. L. 91 (holding an act authorizing the drainage of marsh and swamp land for the benefit of a private corporation unconstitutional); Coster *v.* Tide Water Co., 18 N. J. Eq. 54.

New York.— People *v.* Henion, 64 Hun 471, 19 N. Y. Suppl. 488.

Ohio.— Lake Erie, etc., R. Co. *v.* Hancock County, 63 Ohio St. 23, 57 N. E. 1009; Smith *v.* Atlantic, etc., R. Co., 25 Ohio St. 91 (holding the Ohio act of April 30, 1869, invalid because it authorized the construction of levees whenever the same would be conducive to the health, convenience, or welfare of any number of the citizens of the county, or whenever they were necessary for the protection of such citizens or any of them); Reeves *v.* Wood County, 8 Ohio St. 333.

Oregon.— Seely *v.* Sebastian, 4 Oreg. 25.

See 18 Cent. Dig. tit. "Eminent Domain," § 77.

Draining a man's farm to render it more productive is not a work of public utility for which property may be taken. Tillman *v.* Kircher, 64 Ind. 104; Anderson *v.* Kerns Draining Co., 14 Ind. 199, 77 Am. Dec. 63; McQuillen *v.* Hatton, 42 Ohio St. 202; Thomas *v.* County Com'rs, 5 Ohio S. & C. Pl. Dec. 503, 5 Ohio N. P. 449. But in Connecticut the draining law (Rev. St. (1854) p. 786) authorizes an owner of lands to drain them across the lands of adjoining proprietors, without reference to the question of public use or benefit. See French *v.* White, 24 Conn. 170.

If a proposed ditch will in any reasonable degree contribute to the public health, convenience, or welfare it is "conducive to the public health;" and it need not be absolutely necessary, and if the ditch as a whole is "conducive to the public health" it is immaterial that certain parts taken by themselves would not be so. Thomas *v.* County Com'rs, 5 Ohio S. & C. Pl. Dec. 503. 5 Ohio N. P. 449.

34. Ross *v.* Davis, 97 Ind. 79; Duke *v.* O'Bryan, 100 Ky. 710, 39 S. W. 444, 824, 19 Ky. L. Rep. 81; State *v.* Henry County Com'rs, 41 Ohio St. 423; Sessions *v.* Crunkilton, 20 Ohio St. 349.

35. O'Reiley *v.* Kankakee Valley Draining Co., 32 Ind. 169; Coster *v.* Tide Water Co., 18 N. J. Eq. 54; Lake Erie, etc., R. Co. *v.* Hancock County, 63 Ohio St. 23, 57 N. E. 1009; Chesbrough *v.* Putnam, etc., Counties, 37 Ohio St. 508; Lewis County *v.* Gordon, 20 Wash. 80, 54 Pac. 779.

A drain extending into more than one county is not prevented from being of public use by the fact that it will not be of public utility in one of the counties in which it extends; the question of public utility has reference to the drain as a whole without regard to the county lines that may cross it. Meranda *v.* Spurlin, 100 Ind. 380.

The word "public," as used in connection with the words "health, convenience, or welfare," has reference to the people of the neighborhood. Thomas *v.* County Com'rs, 5 Ohio S. & C. Pl. Dec. 503, 5 Ohio N. P. 449.

36. *Iowa.*— Gammell *v.* Potter, 6 Iowa 548.

Kentucky.—Shackleford *v.* Coffey, 4 J. J. Marsh. 40; Smith *v.* Connelly, 1 T. B. Mon. 58; McAfee *v.* Kennedy, 1 Litt. 92; Bibb *v.* Montjoy, 2 Bibb 1.

Massachusetts.— French *v.* Braintree Mfg.

although these reasons no longer exist such acts are in many jurisdictions now upheld, for any kind of mills, either on the ground that such mills are a great public benefit,[37] or on the ground of authority or long acquiescence and usage, although their constitutionality is seriously questioned.[38] In some jurisdictions, however, these acts have been held unconstitutional except in cases of strictly public mills.[39] These statutes originated particularly in reference to grist-mills,

Co., 23 Pick. 216; Cogswell *v.* Essex Mill Corp., 6 Pick. 94; Wolcott Woolen Mfg. Co. *v.* Upham, 5 Pick. 292; Stowell *v.* Flagg, 11 Mass. 364.

North Carolina.— Waddy *v.* Johnson, 27 N. C. 333.

Tennessee.— Harding *v.* Goodlett, 3 Yerg. 40, 24 Am. Dec. 546.

Virginia.— Crenshaw *v.* Slate River Co., 6 Rand. 245. See also Wroe *v.* Harris, 2 Wash. 126; Bernard *v.* Brewer, 2 Wash. 76; Mairs *v.* Gallahue, 9 Gratt. 94.

Wisconsin.— Pratt *v.* Brown, 3 Wis. 603.

See 18 Cent. Dig. tit. "Eminent Domain," § 82.

"Such statutes have been sustained on the ground of public necessity. They were first enacted prior to the discovery or utilization of steam, and there was no power other than that of animal or water, that was known, or at least which in those days could be economically used, for the purpose of procuring food and clothing. The establishment of mills and manufactories, therefore, was a public necessity, as well as a private benefit to the parties who constructed them." Fleming *v.* Hall, 73 Iowa 598, 602, 35 N. W. 673. "Originally, when the inhabitants were few, and their means of erecting expensive works were small, the erection of a mill was a great public benefit; and those who were willing to incur the expense were considered as public benefactors. Those who undertook the erection of a mill were permitted to select a site and flow the lands necessary for that purpose." Andover *v.* Sutton, 12 Metc. (Mass.) 182, 185.

37. *Connecticut.*— Occum Co. *v.* A. & W. Sprague Mfg. Co., 35 Conn. 496 (the court in this case seems to intimate that if the constitutionality of the mill acts was now a new question, they would not be sustained); Todd *v.* Austin, 34 Conn. 78; Olmstead *v.* Camp, 33 Conn. 532, 89 Am. Dec. 221.

Indiana.— Hankins *v.* Lawrence, 8 Blackf. 266.

Massachusetts.— Turner *v.* Nye, 154 Mass. 579, 28 N. E. 1048, 14 L. R. A. 487; Boston Mfg. Co. *v.* Burgin, 114 Mass. 340; Lowell *v.* Boston, 111 Mass. 454, 15 Am. Rep. 39; Hazen *v.* Essex Co., 12 Cush. 475; Murdock *v.* Stickney, 8 Cush. 113; Andover *v.* Sutton, 12 Metc. 182; Boston, etc., Mill-Dam Corp. *v.* Newman, 12 Pick. 467, 23 Am. Dec. 622.

New Hampshire.— Amoskeag Mfg. Co. *v.* Goodale, 62 N. H. 66; Amoskeag Mfg. Co. *v.* Worcester, 60 N. H. 522; Amoskeag Mfg. Co. *v.* Head, 56 N. H. 386; Ash *v.* Cummings, 50 N. H. 591; Great Falls Mfg. Co. *v.* Fernald, 47 N. H. 444.

New Jersey.— Scudder *v.* Trenton Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756.

United States.— Head *v.* Amoskeag Mfg. Co., 113 U. S. 9, 5 S. Ct. 441, 28 L. ed. 889.

See 18 Cent. Dig. tit. "Eminent Domain," § 82.

Under the Vermont statute the construction of a dam for the purpose of generating electricity for the operation of a railroad has been held not to be a public use, since while the railroad company must serve the public there was nothing binding the petitioner to serve the railroad or give equal advantages to all. Avery *v.* Vermont Electric Co., 75 Vt. 235, 54 Atl. 179, 98 Am. St. Rep. 818, 59 L. R. A. 817.

38. *Iowa.*— Burnham *v.* Thompson, 35 Iowa 421. In Fleming *v.* Hall, 73 Iowa 598, 35 N. W. 673, there is a *dictum* to the effect that if the mill acts were enacted now for the first time, it is possible, if not probable, that they could not be sustained.

Kansas.— Harding *v.* Funk, 8 Kan. 315, 324 (where Valentine, J., says: "It is not necessary for us to say what would be our decision upon this question if the same was a new question in this country. But it is not a new question. It has been long and well settled by legislative, executive, and judicial construction, practice, and usage; and we are not now at liberty to depart from such construction, practice, and usage"); Venard *v.* Cross, 8 Kan. 248.

Maine.— Jordan *v.* Woodward, 40 Me. 317.

Minnesota.— Miller *v.* Troost, 14 Minn. 365.

Nebraska.— Traver *v.* Merrick County, 14 Nebr. 327, 15 N. W. 690, 45 Am. Rep. 111.

Wisconsin.— The first case in this state upholding such statute was Newcomb *v.* Smith, 2 Pinn. 131, 1 Chandl. 71; and it has been followed, although reluctantly, upon the ground of *stare decisis* in Atty.-Gen. *v.* Eau Claire, 37 Wis. 400; Fisher *v.* Horicon Iron, etc., Co., 10 Wis. 351; Thien *v.* Voegtlander, 3 Wis. 461. And see Babb *v.* Mackey, 10 Wis. 371.

See 18 Cent. Dig. tit. "Eminent Domain," § 82.

39. *Alabama.*— Columbus Waterworks Co. *v.* Long, 121 Ala. 245, 25 So. 702 (holding that an act, providing for the taking of property for grist-mills, sawmills and paper-mills jointly, grist-mills alone being public mills, is void); Bottoms *v.* Brewer, 54 Ala. 288; Sadler *v.* Langham, 34 Ala. 311.

Georgia.— Loughbridge *v.* Harris, 42 Ga. 500.

Illinois.— Gaylord *v.* Chicago Sanitary Dist., 204 Ill. 576, 68 N. E. 522, 98 Am. St. Rep. 235, 63 L. R. A. 582.

Michigan.— Berrien Springs Water Power Co. *v.* Berrien Cir. Judge, (1903) 94 N. W. 879; Ryerson *v.* Brown, 35 Mich. 333, 24

as they were in many states regulated by statute and compelled by law to serve the public for a stipulated toll,[40] and in some states they are still restricted to such mills,[41] although in many others they extend to mills for mechanical and manufacturing purposes as well.[42] In most jurisdictions the power of taking land for such purposes has been considered as resting on the right of eminent domain,[43] although in Massachusetts[44] and in the federal courts it is based on the rights of

Am. Rep. 564. But see the earlier case of *In re* Hartwell, 2 Mich. N. P. 97.

New York.— Hay *v.* Cohoes, 3 Barb. 42, *dictum.*

Vermont.— Tyler *v.* Beacher, 44 Vt. 648, 8 Am. Rep. 398.

See 18 Cent. Dig. tit. "Eminent Domain," § 82.

40. *Alabama.*— Sadler *v.* Langham, 34 Ala. 311.

Connecticut.— Olmstead *v.* Camp, 33 Conn. 532, 89 Am. Dec. 221.

Kentucky.— Shackleford *v.* Coffey, 4 J. J. Marsh. 40; Bibb *v.* Montjoy, 2 Bibb 1.

Maine.— State *v.* Edwards, 86 Me. 102, 29 Atl. 947, 41 Am. St. Rep. 528, 25 L. R. A. 504.

Minnesota.— Miller *v.* Troost, 14 Minn. 365.

Nebraska.— Getchell *v.* Benton, 30 Nebr. 870, 47 N. W. 468; Traver *v.* Merrick County, 14 Nebr. 327, 15 N. W. 690, 45 Am. Rep. 111.

Tennessee.— Harding *v.* Goodlett, 3 Yerg. 41, 24 Am. Dec. 546.

Virginia.— Crenshaw *v.* Slate River Co., 6 Rand. 245.

West Virginia.— Varner *v.* Martin, 21 W. Va. 534.

See 18 Cent. Dig. tit. "Eminent Domain," § 82.

The statute in Vermont requires the owner of a grist-mill to grind well all grain received by him for that purpose at certain fixed rates for toll, yet he is not compelled by law to receive grain for grinding against his will, and his mill therefore is not a public use in the constitutional sense, and an act of the legislature authorizing the flowage of land by maintaining a dam to run such mill is an unconstitutional exercise of the right of eminent domain. Tyler *v.* Beacher, 44 Vt. 648, 8 Am. Rep. 398.

41. Columbus Waterworks Co. *v.* Long, 121 Ala. 245, 25 So. 702 (grist-mills alone under the statute are public mills); Bottoms *v.* Brewer, 54 Ala. 288; Gaylord *v.* Chicago Sanitary Dist., 204 Ill. 576, 68 N. E. 522, 98 Am. St. Rep. 235, 63 L. R. A. 582; Harding *v.* Goodlett, 3 Yerg. (Tenn.) 41, 24 Am. Dec. 546 (holding that, under Tenn. St. (1777) c. 23, land may be taken for the establishment of a grist-mill for public purposes but not for the establishment for sawmills or paper-mills).

42. *Connecticut.*—Todd *v.* Austin, 34 Conn. 78.

Indiana.— Hankins *v.* Lawrence, 8 Blackf. 266.

Iowa.— Burnham *v.* Thompson, 35 Iowa 421.

Massachusetts.— Hazen *v.* Essex Co., 12 Cush. 475; Boston, etc., Mill-Dam Corp. *v.* Newman, 12 Pick. 467, 23 Am. Dec. 622.

Nebraska.— Traver *v.* Merrick County, 14 Nebr. 327, 15 N. W. 690, 45 Am. Rep. 111.

New Hampshire.— Amoskeag Mfg. Co. *v.* Head, 56 N. H. 386; Ash *v.* Cummings, 50 N. H. 591; Great Falls Mfg. Co. *v.* Fernald, 47 N. H. 444.

See 18 Cent. Dig. tit. "Eminent Domain," § 82.

A beet sugar manufactory which does not manufacture sugar from beets for toll, although propelled by water, is not a mill for the running of which a dam be erected and water flowed on another's land within the meaning of Nebr. Comp. St. c. 57, § 1. Getchell *v.* Benton, 30 Nebr. 870, 47 N. W. 468.

43. See cases cited in preceding notes. In Pratt *v.* Brown, 3 Wis. 603, 613, the court says: "The theory is that the property of the person whose land is overflowed is taken for the 'public use' through the exercise of the right of eminent domain vested in the government. Upon no other theory or principle can the law be upheld for a moment."

The backing of water so as to overflow the lands of an individual if done under statutes authorizing it for the public benefit is a taking within the meaning of the constitution, in reference to the right of eminent domain. Pumpelly *v.* Green Bay, etc., Canal Co., 13 Wall. (U. S.) 166, 20 L. ed. 557.

44. Turner *v.* Nye, 154 Mass. 579, 582, 28 N. E. 1048, 14 L. R. A. 487 (where Morton, J., says: "It may be doubted whether, as new legislation, they [the mill acts] could be sustained as an exercise of the right of eminent domain"); Lowell *v.* Boston, 111 Mass. 404, 15 Am. Rep. 39; Gould *v.* Boston Duck Co., 13 Gray (Mass.) 442; Bates *v.* Weymouth Iron Co., 8 Cush. (Mass.) 548; Cary *v.* Daniels, 8 Metc. (Mass.) 466, 41 Am. Dec. 532; Fiske *v.* Framingham Mfg. Co., 12 Pick. (Mass.) 68. In Murdock *v.* Stickney, 8 Cush. (Mass.) 113, 116, Shaw, C. J., says: "The principle on which this law is founded is not, as has sometimes been supposed, the right of eminent domain, the sovereign right of taking private property for public use. It is not in any proper sense a taking of the property of an owner of the land flowed, nor is any compensation awarded by the public. It does not even authorize the mill-owner to use the land of another for a reservoir, against his consent; the owner of the land may, if he choose, dike out his own meadow and thereby prevent the flow of the water upon it. But the principle seems to

the riparian owners to use the stream for the public good, having due regard to the interest of all.[45] If the dam is erected for "public use," the fact that power is incidentally furnished for manufacturing purposes, unauthorized by statute, does not make the taking of the land unlawful.[46]

10. **Booms and Irrigation.** Lands on the banks of a river may be taken for boom purposes.[47] And irrigation is a public use, for which the legislature may authorize a private person or a corporation to exercise the power of eminent domain.[48]

11. **Ferries.** The legislature has power to grant the franchise of a ferry and to authorize condemnation of the land of a riparian owner as a landing-place.[49]

be this: A man may place a dam on his own land, in order to raise a head of water for mills, in the use of which the public have an interest; this is the extent of the direct authority given by the statute."

45. Head *v.* Amoskeag Mfg. Co., 113 U. S. 9, 21, 5 S. Ct. 441, 28 L. ed. 889, as was said by Gray, J., in this case: "We prefer to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all, and to the public good, is within the constitutional power of the legislature." It should be noted that this opinion was delivered by a former Massachusetts judge.

46. Harris *v.* Thompson, 9 Barb. (N. Y.) 350; Atty.-Gen. *v.* Eau Claire, 37 Wis. 400; Kaukauna Water-Power Co. *v.* Green Bay, etc., Canal Co., 142 U. S. 254, 12 S. Ct. 173, 35 L. ed. 1004 [*affirming* 70 Wis. 635, 35 N. W. 529, 36 N. W. 828].

A water company, under a charter granting it the right to take private waters "for the extinguishment of fires, and for domestic, sanitary, and other purposes," cannot use the water of a private stream for private manufacturing purposes as against the objection of mill-owners upon such stream, who are injured thereby; the words "other purposes" must be construed to mean other public purposes of the same character. *In re* Barre Water Co., 62 Vt. 27, 20 Atl. 109, 9 L. R. A. 195.

47. Cotton *v.* Mississippi, etc., Boom Co., 22 Minn. 372. It is held by the federal court that the legislature of Minnesota may authorize the fee of private property to be taken for a boom, to be built and operated by an incorporated company, where the legislature reserves control over the company and its charges. Patterson *v.* Mississippi, etc., Boom Co., 18 Fed. Cas. No. 10,829, 3 Dill. 465. See in this connection Brewster *v.* J. & J. Rogers Co., 169 N. Y. 73, 62 N. E. 164, 58 L. R. A. 495 [*affirming* 42 N. Y. App. Div. 343, 59 N. Y. Suppl. 32].

An act authorizing a person desiring to float logs down a river to make the necessary changes in the stream, and providing for the assessment of damages to riparian owners, is so far as it provides for the exercise of the right of eminent domain, unconstitutional, since the use is not a public one. Brewster *v.* J. & J. Rogers Co., 42 N. Y. App. Div. 343, 59 N. Y. Suppl. 32 [*affirmed* in 169 N. Y. 73, 62 N. E. 164].

48. *Arizona.*— Oury *v.* Goodwin, 3 Ariz. 255, 26 Pac. 376.

California.— Rialto Irrigating Dist. *v.* Brandon, 103 Cal. 384, 37 Pac. 484; Turlock Irr. Dist. *v.* Williams, 76 Cal. 360, 18 Pac. 379. See Aliso Water Co. *v.* Baker, 95 Cal. 268, 30 Pac. 537.

Kansas.— Lake Koen Nav., etc., Co. *v.* Klein, 63 Kan. 484, 65 Pac. 684.

Montana.— Ellinghouse *v.* Taylor, 19 Mont. 462, 48 Pac. 757.

Nebraska.— Alfalfa Irr. Dist. *v.* Collins, 46 Nebr. 411, 64 N. W. 1086; Paxton, etc., Irrigating Canal, etc., Co. *v.* Farmers', etc., Irr., etc., Co., 45 Nebr. 884, 64 N. W. 343, 50 Am. St. Rep. 585, 29 L. R. A. 853.

Oregon.— Umatilla Irr. Co. *v.* Barnhart, 22 Oreg. 389, 30 Pac. 37.

Texas.— McGhee Irr. Ditch Co. *v.* Hudson, 85 Tex. 587, 22 S. W. 398.

Utah.— Nash *v.* Clark, 27 Utah 158, 75 Pac. 371.

Washington.— Prescott Irr. Co. *v.* Flathers, 20 Wash. 454, 55 Pac. 635.

See 18 Cent. Dig. tit. "Eminent Domain," § 76.

Furnishing water to particular classes of persons.— Under a statute creating certain irrigation districts for the purpose of furnishing water to landowners only, and not for the general use on equal terms of the inhabitants of the district, the use declared is not such a public use as will justify an exercise of the power of eminent domain. Bradley *v.* Fallbrook Irr. Dist., 68 Fed. 948. But under a constitutional provision providing that all waters appropriated for any beneficial use, and the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts, necessarily used in connection therewith, shall be held to be a public use, the use of water to irrigate a particular tract of land, or to work a particular mine, is a public use, although such land or such mine is owned by a single individual. Ellinghouse *v.* Taylor, 19 Mont. 462, 48 Pac. 757.

49. Pool *v.* Simmons, 134 Cal. 621, 66 Pac. 872; Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301; Barrington *v.* Neuse River Ferry Co., 69 N. C. 165.

A horse ferry is so far a public work as to justify the taking of private property for its establishment. Day *v.* Stetson, 8 Me. 365.

But a statute authorizing lands to be taken for a railroad does not authorize the taking of land for a ferry.[50]

12. **Oil Pipe-Lines.** A company organized to transport oil by means of pipes or tubing is organized for a public use.[51]

13. **Electric Lighting Plants and Gas-Works.** The exercise of the right of eminent domain for the purpose of erecting and maintaining electric plants for public and private lighting is not for a private use.[52] But poles and wires cannot be placed along a private alley, the fee of which is in the abutting owners, to supply one owner with electric lights against the objection of the others, since this constitutes an additional easement to the ordinary uses of the alley, regardless of the height to which the wires are carried.[53]

14. **Wharves and Docks.** The taking of land for a wharf, dock, or pier is a taking for public use.[54]

15. **Fish-Culture and Fishways.** Statutes providing that land may be flowed for the purpose of creating a pond for fish-culture are constitutional;[55] and it has been held that this is so, although the pond is maintained only for the profit and advantage of the owner.[56] Statutes requiring the owner of any dam or obstruction to a watercourse to construct a fishway which will afford free passage for fish are also constitutional.[57]

16. **Cemeteries.** The appropriation of land for a public cemetery is an appropriation for a public use,[58] and so is the appropriation of land for the enlargement

50. Sandford *v.* Martin, 31 Iowa 67.

51. West Virginia Transp. Co. *v.* Volcanic Oil, etc., Co., 5 W. Va. 382.

52. *Illinois.*— Goddard *v.* Chicago, etc., R. Co., 104 Ill. App. 533; Goddard *v.* Chicago, etc., R. Co., 104 Ill. App. 526 [*affirmed* in 202 Ill. 362, 66 N. E. 1066].

Mississippi.— Gulf Coast Ice, etc., Co. *v.* Bowers, 80 Miss. 570, 32 So. 113.

Missouri.— State *v.* Allen, 178 Mo. 555, 77 S. W. 868.

New York.— Palmer *v.* Larchmont Electric Co., 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672 [*reversing* 6 N. Y. App. Div. 12, 39 N. Y. Suppl. 522]; Tiffany *v.* U. S. Illuminating Co., 51 N. Y. Super. Ct. 280 [*affirming* 67 How. Pr. 73]; People *v.* Thompson, 65 How. Pr. 407.

Ohio.— Callen *v.* Columbus Edison Electric Light Co., 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782.

Pennsylvania.— Haverford Electric Light Co. *v.* Hart, 13 Pa. Co. Ct. 369.

United States.— Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 114 Fed. 787.

See 18 Cent. Dig. tit. "Eminent Domain," § 80.

53. Carpenter *v.* Capital Electric Co., 178 Ill. 29, 52 N. E. 973, 69 Am. St. Rep. 286, 43 L. R. A. 645. See also Callen *v.* Columbus Edison Electric Light Co., 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782.

54. Jeffersonville *v.* Louisville, etc., Steam Ferry Co., 27 Ind. 100, 89 Am. Dec. 495.

Giving exclusive use to designated steamship companies.— The fact that a statute imposing on a city the duty of maintaining piers and bulkheads along its water front also vests it with power to give the exclusive use of some of the piers to particular steamship lines or to devote them to specified kinds of commerce does not make the use of such piers a private use. *In re* New York, 135 N. Y. 253, 31 N. E. 1043, 31 Am. St. Rep. 825 [*affirming* 18 N. Y. Suppl. 536].

Licensing sheds on piers to private persons.— A statute conferring authority on the department of docks of a city to license the erection and maintenance of sheds by private persons on the public piers for the protection of property received and discharged thereat renders the act void. People *v.* Baltimore, etc., R. Co., 117 N. Y. 150, 22 N. E. 1026, 23 N. E. 1144.

55. Turner *v.* Nye, 154 Mass. 579, 28 N. E. 1048, 14 L. R. A. 487.

56. Turner *v.* Nye, 154 Mass. 579, 28 N. E. 1048, 14 L. R. A. 487.

57. State *v.* Beardsley, 108 Iowa 396, 79 N. W. 138.

The rule in Pennsylvania is that a riparian owner has no such property in fish passing up the stream on which his land fronts as to entitle him to compensation if the erection of a dam across the stream prevents their passage. Shrunk *v.* Schuylkill Nav. Co., 14 Serg. & R. (Pa.) 71.

58. Westfield Cemetery Assoc. *v.* Danielson, 62 Conn. 319, 26 Atl. 345; New Haven Evergreen Cemetery Assoc. *v.* Beecher, 53 Conn. 551, 5 Atl. 353; Evergreen Cemetery Assoc. *v.* New Haven, 43 Conn. 234, 21 Am. Rep. 643; Farneman *v.* Mt. Pleasant Cemetery Assoc., 135 Ind. 344, 35 N. E. 271; Matter of Lyons Cemetery Assoc., 93 N. Y. App. Div. 19, 86 N. Y. Suppl. 960; Stannards Corners Rural Cemetery Assoc. *v.* Brandes, 14 Misc. (N. Y.) 270, 35 N. Y. Suppl. 1015.

The use does not cease to be a public one merely because the association owning the cemetery requires various sums for rights to build in different localities in the cemetery, and although the cost of the right may operate to practically exclude certain persons from buying land. New Haven Evergreen

of a cemetery for public use.[59] On the other hand where a cemetery is private and the general public have not and cannot acquire the right to bury in it, the use is considered a private one and land cannot be taken therefor by right of eminent domain.[60]

17. DEVELOPMENT AND OPERATION OF MINES. By the express provisions of the constitutions of some states a right of way may be condemned by a private party for ditches to convey water to lands for mining purposes,[61] and in one state where the principal industry is mining, the business of mining has been by statute declared a public use and the courts have so held.[62] In accordance with this view it has been held that a right of way may be condemned for a tunnel for operating a mine.[63] So in some jurisdictions without any express constitutional authority it has been held that a right of way may be condemned over lands for the carriage of water necessarily used in mining,[64] but in another it has been held that no such right exists.[65] There is also a conflict of authority as to whether land can be condemned for railroad tracks to a mine, the view being taken in some jurisdictions that this is a proper exercise of the right of eminent domain,[66] while in others the contrary view is sustained.[67] It has been held that one person has no right to build a flume through another's land to carry off the tailings from his own mine,[68] and where one owns two mining claims separated by the mining claim of another through which a tunnel had been constructed for private use, the owner of the two mines cannot condemn the tunnel for the purpose of enabling him to work his mines.[69]

18. PARKS, RESERVATIONS, ETC. Lands taken for public parks and squares, advantageous to the public for recreation, health, or business, are taken for a public use to which the right of eminent domain extends,[70] and on the same

Cemetery Assoc. *v.* Beecher, 53 Conn. 551, 5 Atl. 353.

59. Edwards *v.* Stonington Cemetery Assoc., 20 Conn. 466.

60. New Haven Evergreen Cemetery Assoc. *v.* Beecher, 53 Conn. 551, 5 Atl. 353; Board of Health *v.* Van Hoesen, 87 Mich. 533, 49 N. W. 894, 14 L. R. A. 114; *In re* Deansville Cemetery Assoc., 66 N. Y. 569, 23 Am. Rep. 86 [*reversing* 5 Hun 482].

61. Downing *v.* More, 12 Colo. 316, 20 Pac. 766; Tripp *v.* Overocker, 7 Colo. 72, 1 Pac. 695.

62. Overman Silver Min. Co. *v.* Corcoran, 15 Nev. 147; Dayton Gold, etc., Min. Co. *v.* Seawell, 11 Nev. 394; Byrnes *v.* Douglass, 83 Fed. 45, 27 C. C. A. 399 [*affirming* 59 Fed. 29].

63. Dayton Gold, etc., Min. Co. *v.* Seawell, 11 Nev. 394; Byrnes *v.* Douglass, 83 Fed. 45, 27 C. C. A. 399 [*affirming* 59 Fed. 29].

64. Hand Gold Min. Co. *v.* Parker, 59 Ga. 419.

65. Lorenz *v.* Jacob, 63 Cal. 73. But see Cummings *v.* Peters, 56 Cal. 593.

66. New Cent. Coal Co. *v.* George's Creek Coal, etc., Co., 37 Md. 537.

67. People *v.* Pitkin County Dist. Ct., 11 Colo. 147, 17 Pac. 298; Sholl *v.* German Coal Co., 118 Ill. 427, 10 N. E. 199, 59 Am. Rep. 379.

68. Consolidated Channel Co. *v.* Central Pac. R. Co., 51 Cal. 269.

69. Amador Queen Min. Co. *v.* Dewitt, 73 Cal. 482, 15 Pac. 74.

70. *District of Columbia.*—U. S. *v.* Cooper, 20 D. C. 104.

Kentucky.— Rowan *v.* Portland, 8 B. Mon. 232.

Missouri.— St. Louis County Ct. *v.* Griswold, 58 Mo. 175.

New Jersey.— Albright *v.* Sussex County Lake, etc., Commission, 68 N. J. L. 523, 53 Atl. 612.

New York.— People *v.* Adirondack R. Co., 160 N. Y. 225, 54 N. E. 689 [*affirmed* in 176 U. S. 335, 20 S. Ct. 460, 44 L. ed. 492]; *In re* Rochester, 137 N. Y. 243, 33 N. E. 320 [*affirming* 20 N. Y. Suppl. 506].

United States.— Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170.

See 18 Cent. Dig. tit. "Eminent Domain," § 86.

Blocks not contiguous.— It is no valid ground of objection that the lands embraced in the park are not all contiguous, and that there are intervening blocks and spaces not taken, if such intervening spaces are not so large as to interfere with the integrity or continuity of the plan, or the equalizing of the assessments. *In re* Central Park Com'rs, 63 Barb. (N. Y.) 282.

Several uses of land taken.— Where a town board is authorized to condemn land for use in connection with the town-hall, a petition to condemn land should not be denied, because the town wishes also to utilize the open space so created as a park, it appearing that such use would not conflict with the main purpose for which the petition was filed, which was the protection of the hall from fire and the affording of free access to it. Town Bd. of Jamaica *v.* Denton, 70 N. Y. Suppl. 837.

principle land may be taken for ornamental court-yards.[71] It has further been held that the state may in time of peace condemn land for the use of military encampments and state militia,[72] and the preserving and marking on the site of the battle of Gettysburg of the positions by the military organizations at that battle is a public use or purpose for which land may be condemned.[73] It has also been held that the taking of land for the establishment of free public fisheries is a public use.[74]

19. SITES FOR PUBLIC BUILDINGS. Lands may be taken under the power of eminent domain for public buildings,[75] such as county buildings,[76] public libraries,[77] public school-houses,[78] buildings for historical and geographical societies,[79] and for forts, lighthouses, and navy-yards;[80] all these are for public uses within the meaning of the constitutional provision.

20. MISCELLANEOUS. Land may be taken by the exercise of the right of eminent domain for the establishment of a public city market,[81] or for the erection of public grain warehouses or elevators, but not for an elevator to be used for the purpose of sale of grain solely on account of the person seeking to condemn it.[82] So land may be taken for the improvement of harbors and for furnishing better and more complete accommodations for the railroad and commercial interests of a city.[83] Taking of land by companies organized to supply gas to the public is a taking for a public use.[84] It is not a proper exercise of the power of eminent domain by a city to take lands, by inclosing them in harbor lines, for the sole purpose of preventing the erection of any buildings thereon which would obstruct the view of a public bridge.[85]

VII. PROPERTY SUBJECT TO APPROPRIATION.

A. In General. All kinds of property of whatever description are subject to the exercise of the power of eminent domain.[86] Not only land[87] and easements

71. Matter of New York, 57 N. Y. App. Div. 166, 68 N. Y. Suppl. 196 [*affirmed* in 167 N. Y. 624, 60 N. E. 1108].

72. State *v.* Heppenheimer, 54 N. J. L. 268, 23 Atl. 664.

73. U. S. *v.* Gettysburg Electric R. Co., 160 U. S. 668, 16 S. Ct. 427, 40 L. ed. 576. This necessarily overrules the circuit court decision in U. S. *v.* Certain Tract of Land, 67 Fed. 869.

74. Albright *v.* Sussex County Lake, etc., Commission, 68 N. J. L. 523, 53 Atl. 612. See also New England Trout, etc., Club *v.* Mather, 68 Vt. 338, 35 Atl. 323, 33 L. R. A. 569.

75. Rees' Appeal, (Pa. 1888) 12 Atl. 427.

76. Jockheck *v.* Shawnee County, 53 Kan. 780, 37 Pac. 621.

Clerk's office.— A county whose court-house and clerk's office are located within the limits of an incorporated city may condemn land in the city for a clerk's office. Norfolk County *v.* Cox, 98 Va. 270, 36 S. E. 380.

77. Laird *v.* Pittsburg, 205 Pa. St. 1, 54 Atl. 324, 61 L. R. A. 332.

78. Oakland Independent School Dist. *v.* Hewitt, 105 Iowa 663, 75 N. W. 497; Township Bd. of Education *v.* Hackmann, 48 Mo. 243; Long *v.* Fuller, 68 Pa. St. 170; Rittenhouse *v.* Creasy, 12 Luz. Leg. Reg. (Pa.) 14; Williams *v.* Newfane School Dist. No. 6, 33 Vt. 271.

A playground for a school is a public use. Oakland Independent School Dist. *v.* Hewitt, 105 Iowa 663, 75 N. W. 497.

Enlargement of school property.—A school-board may condemn land for the purpose of enlarging a school site upon which a school-house has already been erected. *In re* Springboro School Dist., 21 Pa. Co. Ct. 23.

79. Wilkes-Barre *v.* Wyoming Historical, etc., Soc., 134 Pa. St. 616, 19 Atl. 809.

80. Gilmer *v.* Lime Point, 18 Cal. 229; People *v.* Humphrey, 23 Mich. 471, 9 Am. Rep. 94; Matter of League Island, 1 Brewst. (Pa.) 524; Chappell *v.* U. S., 160 U. S. 499, 16 S. Ct. 397, 40 L. ed. 510.

81. Stewart *v.* Great Northern R. Co., 65 Minn. 515, 68 N. W. 208, 33 L. R. A. 427; *In re* Cooper, 28 Hun (N. Y.) 515.

82. Gurney *v.* Minneapolis Union El. Co., 63 Minn. 70, 65 N. W. 136, 30 L. R. A. 534; Brass *v.* North Dakota, 153 U. S. 391, 14 S. Ct. 857, 38 L. ed. 757; Munn *v.* Illinois, 94 U. S. 113, 24 L. ed. 77.

83. Moore *v.* Sanford, 151 Mass. 285, 24 N. E. 323, 7 L. R. A. 151.

84. People *v.* Stephens, 62 Cal. 209; Johnson's Appeal, (Pa. 1886) 7 Atl. 167; *In re* Ohio Valley Gas Co., 6 Pa. Dist. 200.

85. Farist Steel Co. *v.* Bridgeport, 60 Conn. 278, 22 Atl. 561, 13 L. R. A. 590.

86. New York, etc., R. Co. *v.* Boston, etc., R. Co., 36 Conn. 196; Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716, 17 Conn. 454, 44 Am. Dec. 556; Hollister *v.* State, (Ida. 1903) 71 Pac. 541; Richmond, etc., R. Co. *v.* Louisa R. Co., 13 How. (U. S.) 71, 14 L. ed. 55; West River Bridge Co. *v.* Dix, 6 How. (U. S.) 507, 12 L. ed. 535.

87. See *infra*, VII, B *et seq.*

therein,[88] but also all kinds of personal property may be taken under the power of eminent domain.[89] A claim of an American citizen against a foreign government is of such character that it is subject to the right,[90] as are also inventions secured by letters patent.[91] Shares of stock in a corporation may be taken for public use,[92] and also leasehold interests.[93] A contract is property which may be taken under condemnation proceedings.[94] The prohibition against impairing the obligation of a contract does not withdraw such property from the exercise of the right of eminent domain.[95] It has also been said that money is subject to the right of eminent domain.[96] But this proposition has likewise been denied.[97]

B. Land and Its Appurtenances. The term "real estate," as used in reference to the right of eminent domain, includes and covers all incorporeal hereditaments, easements, rights, and privileges necessary to the construction and operation of the works for which the land is condemned.[98]

C. Timber, Minerals, Stone, and Other Materials on the Land Taken. The constitutional provision applies as well to the taking of material, such as stone, gravel, earth, etc., for the purpose of constructing the public improvement as to the taking of the land itself upon which such material may be situated.[99] A railroad company having acquired a right of way is entitled to use so much of the timber, earth, gravel, stone, and other materials thereon as may be necessary for the proper construction or repair of its roadway, either in adjacent localities or elsewhere;[1] but the company cannot sell or otherwise convert such materials

88. See *infra*, VII, E.

89. Homochitto River Com'rs *v.* Withers, 29 Miss. 21, 64 Am. Dec. 126; Christy *v.* St. Louis, 20 Mo. 143, 61 Am. Dec. 598; People *v.* Brooklyn, 9 Barb. (N. Y.) 535; Southern Kansas R. Co. *v.* Oklahoma City, 12 Okla. 82, 69 Pac. 1050.

90. Meade *v.* U. S., 2 Ct. Cl. 224.

"**A man's choses in action, the debts due him,** are as much property and as sacred in the eye of the law as are his houses and lands, his horses and his cattle. And when taken for the public good, or released or cancelled to secure an object of public importance, are to be paid for in the same manner." Meade *v.* U. S., 2 Ct. Cl. 224, 275.

91. Brady *v.* Atlantic Works, 3 Fed. Cas. No. 1,794, 2 Ban. & A. 436, 4 Cliff. 408.

92. Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 455. A lease of one railroad company to another, for the purpose of securing more extended public highways, and to secure regular and easy communication with other states, is a public use which authorizes the taking of the interests of the dissenting stock-holders on payment of compensation. Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 130; Dickinson *v.* Consolidated Traction Co., 114 Fed. 232.

93. Pause *v.* Atlanta, 98 Ga. 92, 26 S. E. 489, 58 Am. St. Rep. 290.

94. Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, 17 S. Ct. 718, 41 L. ed. 1165; Richmond, etc., R. Co. *v.* Louisa R. Co., 13 How. (U. S.) 71, 14 L. ed. 55. See also Atlanta University *v.* Atlanta, 93 Ga. 468, 21 S. E. 74.

95. Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, 17 S. Ct. 718, 41 L. ed. 1165. See also CONSTITUTIONAL LAW, 8 Cyc. 975.

96. People *v.* Brooklyn, 9 Barb. (N. Y.) 535.

97. Emery *v.* San Francisco Gas Co., 28 Cal. 345; Burnett *v.* Sacramento, 12 Cal. 76, 73 Am. Dec. 518.

98. Googins *v.* Boston, etc., R. Co., 155 Mass. 505, 30 N. E. 71; *In re* Metropolitan El. R. Co., 2 N. Y. Suppl. 278; Southern Kansas R. Co. *v.* Oklahoma City, 12 Okla. 82, 69 Pac. 1050.

99. *California.*—Reclamation Dist. No. 542 *v.* Turner, 104 Cal. 334, 37 Pac. 138.

Illinois.— St. Louis, etc., R. Co. *v.* Illinois Inst. for Education of Blind, 43 Ill. 303, Walker, C. J., delivering opinion of the court.

Maine.— Ford *v.* Lincoln County Com'rs, 64 Me. 408.

Maryland.— Baltimore, etc., R. Co. *v.* Thompson, 10 Md. 76.

New York.— Water Com'rs *v.* Lawrence, 3 Edw. 552.

Ohio.— Bliss *v.* Hosmer, 15 Ohio 44; Bates *v.* Cooper, 5 Ohio 115.

See 18 Cent. Dig. tit. "Eminent Domain," § 105.

1. *Georgia.*— Hopkins *v.* Florida Cent., etc., R. Co., 97 Ga. 107, 25 S. E. 452.

Illinois.— St. Louis, etc., R. Co. *v.* Illinois Inst. for Education of Blind, 43 Ill. 303.

Iowa.— Preston *v.* Dubuque, etc., R. Co., 11 Iowa 15; Henry *v.* Dubuque, etc., R. Co., 2 Iowa 288.

Kansas.— Earlywine *v.* Topeka, etc., R. Co., 43 Kan. 746, 23 Pac. 940.

Maryland.— Baltimore, etc., R. Co. *v.* Thompson, 10 Md. 76.

Massachusetts.— Brainard *v.* Clapp, 10 Cush. 6, 57 Am. Dec. 74.

New Hampshire.— Chapin *v.* Sullivan R. Co., 39 N. H. 564, 75 Am. Dec. 237; Blake *v.* Rich, 34 N. H. 282.

New Jersey.— Taylor *v.* New York, etc., R. Co., 38 N. J. L. 28.

Pennsylvania.— Lyon *v.* Gormley, 53 Pa. St. 261.

to its own use except for the purposes above stated.[2] So also where the public have acquired an easement for a street or highway, and the surface of the land is above the grade, so that in order to reach the grade line it is necessary to remove the superincumbent material, this may be used on other portions of the street or road on the premises of other landowners; but only such material may be so used as is necessarily removed for the process of construction or repair.[3] And this rule applies to turnpike companies.[4]

D. Dwelling-Houses, Buildings, Etc.— 1. IN GENERAL. In the absence of statutory prohibition a dwelling-house or other building may be taken or removed under the right of eminent domain like any other species of real estate;[5] and the legislature may provide that in taking lands the buildings may be taken absolutely, or that no interest in the buildings shall be taken; but the owner may be compelled to remove them off the part taken, in case he has land left upon which they may be removed.[6] Nevertheless the statutes of many of the states contain provisions prohibiting the taking or destruction of dwelling-houses or other buildings;[7] but these statutes have been held not to apply to railroad companies authorized by general statute to take as much adjoining land as is necessary, when public necessity requires the widening of their roads;[8] and it has also been decided that a statute prohibiting a railroad company from invading the dwelling-house of any person for any space within sixty feet thereof does not prohibit the

Rhode Island.—Aldrich *v.* Drury, 8 R. I. 554, 5 Am. Rep. 624.

West Virginia.— Teter *v.* West Virginia Cent., etc., R. Co., 35 W. Va. 433, 14 S. E. 146.

The word "construction" as applied to a railroad implies something more than the mere making of the road-bed; it covers the preparation of the road for use in a safe and convenient manner. Hence the company has the right to remove timber not actually required to build the road, but which interferes with the running of the cars. Preston *v.* Dubuque, etc., R. Co., 11 Iowa 15.

A stream of water cannot be considered a "material." Baring *v.* Erdman, 2 Fed. Cas. No. 981.

Grass and bushes.— A railroad company has a right to remove and destroy the grass, bushes, and rubbish on its right of way for the purpose of diminishing the danger of fire. Hayden *v.* Skillings, 78 Me. 413, 6 Atl. 830.

In Missouri it has been held that the decree of condemnation vests in the company the title to the earth and minerals found above the grade of the road and whose excavation is necessary for the construction of the road, but minerals lying below the level of the road and whose excavation is not necessary in the construction of the road belong to the owner of the land condemned. Evans *v.* Haefner, 29 Mo. 141.

2. Aldrich *v.* Drury, 8 R. I. 554, 5 Am. Rep. 624.

3. New Haven *v.* Sergant, 38 Conn. 50, 9 Am. Rep. 360; Denniston *v.* Clark, 125 Mass. 216; Bissell *v.* Collins, 28 Mich. 277, 15 Am. Rep. 217; Hymes *v.* Esty, 133 N. Y. 342, 31 N. E. 105; Roberts *v.* Sadler, 104 N. Y. 229, 10 N. E. 428, 58 Am. Rep. 498.

Taking for a way land already used for that purpose takes all things existing upon it and adapted to its use as a way, such as flagstones, gravel, bridges, culverts, etc., so that the appraisal in such case should be of the land with all these incidents of its condition. Ford *v.* Lincoln County Com'rs, 64 Me. 408; Central Bridge Corp. *v.* Lowell, 15 Gray (Mass.) 110.

4. Kelly *v.* Donahoe, 2 Metc. (Ky.) 482; McClenachan *v.* Curwin, 3 Yeates (Pa.) 362.

5. Wells *v.* Somerset, etc., R. Co., 47 Me. 345; Mangles *v.* Hudson County, 55 N. J. L. 88, 25 Atl. 322, 17 L. R. A. 785.

6. Mangles *v.* Hudson County, 55 N. J. L. 88, 25 Atl. 322, 17 L. R. A. 785; Patchin *v.* Brooklyn, 2 Wend. (N. Y.) 377; Brocket *v.* Ohio, etc., R. Co., 14 Pa. St. 241, 53 Am. Dec. 534.

7. Charles St. Ave. Co. *v.* Merryman, 10 Md. 536; Burgess *v.* Clark, 35 N. C. 109; Fork Ridge Baptist Cemetery Assoc. *v.* Redd, 33 W. Va. 262, 10 S. E. 405; McConiha *v.* Guthrie, 21 W. Va. 134.

Statutes prohibiting exercise of power.—A statute, whereby the court is forbidden to confirm the report of the commissioners, if they take away houses, etc., by necessary implication forbids the commissioners to include them in their survey. Burgess *v.* Clark, 35 N. C. 109. But a statute prohibiting the laying out of a cemetery within twenty rods of a dwelling-house does not prevent the taking for cemetery purposes of a dwelling-house with the land on which it stands. Crowell *v.* Londonderry, 63 N. H. 42.

8. Marlor *v.* Philadelphia, etc., R. Co., 166 Pa. St. 524, 31 Atl. 255. *Compare* Weigold *v.* Pittsburg, etc., R. Co., 208 Pa. St. 81, 57 Atl. 188, holding that a constitutional provision that any association may construct a railroad between any points within the state does not repeal by implication a statute exempting dwelling-houses from condemnation by a railroad company.

company from laying out its road on its own land within sixty feet of a dwelling on another's land.[9]

2. Construction of Particular Terms — a. "Dwellings" and "Dwelling-Houses." In order that a dwelling-house may have the protection given by the statute the construction and occupancy thereof must be *bona fide*.[10] A *bona fide* occupancy by a tenant will, however, entitle the owner to the exemption.[11] The term "dwelling" or "dwelling-house" has been held to include curtilages, although the decisions are not harmonious.[12] The term "dwelling-house" has been held not to include a garden or orchard.[13] And a billiard room adjoining a hotel and used exclusively as a billiard room is not a "dwelling."[14]

b. Gardens and Orchards. A wild plum tree, a small grape vine, a wild currant bush, and some small rose-bushes do not constitute a garden,[15] and a lane through an orchard used as access to a mill with the owner's consent is not an orchard,[16] within the meaning of these statutes exempting gardens and orchards. Such statutes do not apply to gardens made upon a right of way after completion of the track but before the company had taken actual possession of the land on which the garden was made.[17] Under these statutes it has been held that the term "garden" includes only land actually in cultivation, and not all the land inclosed,[18] and that a highway may be extended through an orchard if the owner's beneficial use and enjoyment thereof is not interrupted.[19]

9. Richmond, etc., R. Co. *v.* Wicker, 13 Gratt. (Va.) 375.

10. Moving into a dwelling after a road has been projected merely to obtain the benefit of the statute will not suffice. Johnson *v.* Philadelphia, etc., Terminal R. Co., 33 Wkly. Notes Cas. (Pa.) 184. To the same effect see Hagner *v.* Pennsylvania, etc., R. Co., 154 Pa. St. 475, 25 Atl. 1082.

Putting up and occupying a shanty for the sole purpose of preventing the condemnation will not entitle the owner to the exemption. Morris *v.* Schallsville Branch Winchester, etc., Turnpike Road Co., 4 Bush (Ky.) 448.

11. Chesapeake, etc., R. Co. *v.* Pack, 6 W. Va. 397.

12. That dwelling-house includes curtilage see Swift's Appeal, 111 Pa. St. 516, 2 Atl. 539.

For the contrary view see Wells *v.* Somerset, etc., R. Co., 47 Me. 345.

Location of a railroad across the corner of a lot when it does not interfere with the use and enjoyment of a dwelling-house on another part of the lot one hundred and twenty-five feet distant is not within the prohibition of the meaning of the statute prohibiting the railroad to be so located as to pass through any dwelling-house. Rudolph *v.* Pennsylvania, etc., R. Co., 166 Pa. St. 430, 31 Atl. 131.

Appropriation of the rear of a lot is not in violation of such statutes, although access to the owner's outbuildings from an alley is thus destroyed, if the outhouses can be approached from the street in front by reducing the size of the grass plot and removing some flower-beds. The grass and flowers, however pleasant and ornamental, are not essential to the enjoyment of the dwelling. Lyle *v.* McKeesport, etc., R. Co., 131 Pa. St. 437, 18 Atl. 1111, 1112.

Road running through lawn and garden.— Where a proposed railroad passes through the tract on which a dwelling-house is situated, but does not change the route of the carriageway to the house, nor materially interfere with the use of the spring-house; where it is fifty feet distant from the barn, and does not pass between the house and barn, it is not within the prohibition of the statute, although it runs through and across the lawn and garden. Damon *v.* Baltimore, etc., R. Co., 119 Pa. St. 287, 13 Atl. 217.

Objection, how raised.— The question whether or not a proposed route passes through the curtilage of a dwelling-house which is exempt cannot be determined on exceptions to the report of the viewers and a motion to dismiss, where the alleged facts are denied. *In re* Lehigh, etc., R. Co., 7 Northam. Co. Rep. (Pa.) 77.

13. Wells *v.* Somerset, etc., R. Co., 47 Me. 345.

14. Pancoast *v.* Troth, 34 N. J. L. 377.

15. Ballou *v.* Elder, 95 Iowa 693, 64 N. W. 622.

16. People *v.* Dutchess County, 23 Wend. (N. Y.) 360.

17. Dargan *v.* Carolina Cent. R. Co., 131 N. C. 623, 42 S. E. 979, holding that any subsequent use by the owner of land condemned by the company is always subject to the actual necessity of the use of the land by the company for the purpose granted under the charter.

18. People *v.* Greenburgh, 57 N. Y. 549. *Compare* Seymour *v.* State, 19 Wis. 240, holding that a road cannot be laid out so as to deprive the owner of an orchard of the entire or partial enjoyment of his fruit trees, and it must be laid out at some reasonable distance from the trees; and that if the owner of a garden has laid it out with a small strip of grass or walk along the fence he cannot be required to surrender this for a highway up to the tilled portion of the garden. Seymour *v.* State, 19 Wis. 240.

19. Snyder *v.* Plass, 28 N. Y. 465.

c. Houses. Within the meaning of the English Lands Clauses Act of 1845[20] the word "house" includes everything which passes by that word under a conveyance or devise, and it is to be understood in the general and common acceptation.[21] It has been held to include gardens, orchards, stables, and outhouses.[22] The term does not, however, include land which is not necessary for the convenient use and occupation of the houses, but only for the personal use and convenience of the owner and occupier.[23] While the English statute protects owners from being obliged to sell a part only, if willing and able to sell the whole, it contains no words making it peremptory on the company, under notice of wanting part, to take the whole.[24]

d. Manufactories. The word "manufactory" as used in the English Lands Clauses Act[25] includes everything appurtenant to or essential to the conduct of the business. It includes appurtenances for supplying water-power,[26] land used for the deposit of ashes from the works,[27] and cottages used as warehouses separated from the main workshops by a road.[28] It also includes trades fixtures,[29] and the force of the statute cannot be evaded by tunneling under or bridging over property sought to be taken.[30]

e. Miscellaneous. The term "outhouse" includes a spring-house.[31] A cow

20. St. 8 & 9 Vict. c. 18, § 92, which provides that no party shall be required to sell or convey to the promoters of an undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell the whole.

21. Steele *v.* Midland R. Co., L. R. 1 Ch. 275, 12 Jur. N. S. 218, 14 L. T. Rep. N. S. 3, 14 Wkly. Rep. 367; King *v.* Wycombe R. Co., 28 Beav. 104, 6 Jur. N. S. 239, 29 L. J. Ch. 462, 2 L. T. Rep. N. S. 107; Fergusson *v.* London, etc., R. Co., 3 De G. J. & S. 653, 33 L. J. Ch. 29, 9 L. T. Rep. N. S. 134, 2 New Rep. 566, 11 Wkly. Rep. 1088, 68 Eng. Ch. 495; Grosvenor *v.* Hampstead Junction R. Co., 1 De G. & J. 446, 3 Jur. N. S. 1085, 26 L. J. Ch. 731, 5 Wkly. Rep. 812, 58 Eng. Ch. 346; Kerford *v.* Seacombe, etc., R. Co., 52 J. P. 487, 57 L. J. Ch. 270, 58 L. T. Rep. N. S. 445, 36 Wkly. Rep. 431; Hewson *v.* South-Western R. Co., 2 L. T. Rep. N. S. 369, 8 Wkly. Rep. 467.

Two houses with internal communication, and occupied as one, will be considered as one entire house. Siegenberg *v.* Metropolitan Dist. R. Co., 49 L. T. Rep. N. S. 554, 32 Wkly. Rep. 333. See Harvie *v.* South Devon R. Co., 32 L. T. Rep. N. S. 1, 23 Wkly. Rep. 202.

A wing to a hospital, joined to the main building by a wall only, but used for the same purpose as the main building, constitutes a part of the hospital. St. Thomas' Hospital *v.* Charing Cross R. Co., 1 Johns & H. 400, 7 Jur. N. S. 256, 30 L. J. Ch. 395, 4 L. T. Rep. N. S. 13. 9 Wkly. Rep. 411.

Where the house is unfinished, but the design is that the land taken by the railway shall when the house is finished form a part of the garden attached to the house, the company must take the whole property, including the unfinished house. Alexander *v.* Crystal Palace R. Co., 30 Beav. 556, 8 Jur. N. S. 833, 31 L. J. Ch. 500; Grosvenor *v.* Hampstead Junction R. Co., 1 De G. & J. 446, 3 Jur. N. S. 1085, 26 L. J. Ch. 731, 5 Wkly. Rep. 812, 58 Eng. Ch. 346.

22. Salter *v.* Metropolitan Dist. R. Co., L. R. 9 Eq. 432, 39 L. J. Ch. 567; King *v.* Wycombe R. Co., 28 Beav. 104, 6 Jur. N. S. 239, 29 L. J. Ch. 462, 2 L. T. Rep. N. S. 107; Cole *v.* West London, etc., R. Co., 27 Beav. 242, 5 Jur. N. S. 1114, 28 L. J. Ch. 767, 1 L. T. Rep. N. S. 178; Barnes *v.* Southsea R. Co., 27 Ch. D. 536, 51 L. T. Rep. N. S. 762, 32 Wkly. Rep. 976; Kerford *v.* Seacombe, etc., R. Co., 52 J. P. 487, 57 L. J. Ch. 270, 58 L. T. Rep. N. S. 445, 36 Wkly. Rep. 431; Hewson *v.* South-Western R. Co., 2 L. T. Rep. N. S. 369, 8 Wkly. Rep. 467.

23. Steele *v.* Midland R. Co., L. R. 1 Ch. 275, 12 Jur. N. S. 218, 14 L. T. Rep. N. S. 3, 14 Wkly. Rep. 367; Marson *v.* London, etc., R. Co., L. R. 6 Eq. 101, 37 L. J. Ch. 483, 18 L. T. Rep. N. S. 319; Fergusson *v.* London, etc., R. Co., 3 De G. J. & S. 653, 33 L. J. Ch. 29, 9 L. T. Rep. N. S. 134, 2 New Rep. 566, 11 Wkly. Rep. 1088, 68 Eng. Ch. 495.

24. Reg. *v.* London, etc., R. Co., 12 Q. B. 775, 12 Jur. 973, 17 L. J. Q. B. 326, 5 R. & Can. Cas. 669, 64 E. C. L. 775.

25. St. 8 & 9 Vict. c. 18, § 92.

26. Furniss *v.* Midland R. Co., L. R. 6 Eq. 473.

27. Sparrow *v.* Oxford, etc., R. Co., 2 De G. M. & G. 94, 16 Jur. 703, 21 L. J. Ch. 731, 51 Eng. Ch. 73, 42 Eng. Reprint 806.

28. Spackman *v.* Great Western R. Co., 1 Jur. N. S. 790.

29. Gibson *v.* Hammersmith, etc., R. Co., 2 Dr. & Sm. 603, 9 Jur. N. S. 221, 32 L. J. Ch. 337, 8 L. T. Rep. N. S. 43, 1 New Rep. 305, 11 Wkly. Rep. 299.

30. Furniss *v.* Midland R. Co., L. R. 6 Eq. 473; Sparrow *v.* Oxford, etc., R. Co., 2 De G. M. & G. 94, 16 Jur. 703, 21 L. J. Ch. 731, 51 Eng. Ch. 73, 42 Eng. Reprint 806; Pinchin *v.* London, etc., R. Co., 2 Eq. Rep. 1172, 1 Jur. N. S. 241, 1 Kay & J. 34, 3 Wkly. Rep. 52; same case on appeal, 5 De G. M. & G. 851, 3 Eq. Rep. 433, 1 Jur. N. S. 241, 24 L. J. Ch. 417, 3 Wkly. Rep. 125, 54 Eng. Ch. 667, 43 Eng. Reprint 1101.

31. Willoughby *v.* Shipman, 28 Mo. 50.

stable, wagon shed, and chicken houses are within the term "buildings and fixtures."[32] The term "buildings not erected" does not include a house so altered that only the party wall and the front foundation of the cellar wall is left of it.[33] Ground adjoining a sawmill and used for piling logs, the limits of which are not fixed by fences or visible boundaries, is not a "mill yard."[34]

E. Easements. An easement is an interest in land which is subject to condemnation, and for which the owner is entitled to compensation, as much so as if the land were taken to which the easement is appurtenant.[35] And when the statute uses the words "land" or "real estate" it will be held to include easements,[36] especially where the statute declares that those words shall include lands, hereditaments, and all rights thereto and interests therein.[37]

F. Franchises. A franchise must be surrendered up for a public use, like any other property, upon just compensation being made, although where the franchise belongs to a corporation it constitutes an inviolable contract with the state.[38] The grant of a franchise is of no higher order, and confers no more secure title, than a grant of land to an individual; and when the public neces-

32. Smart *v.* Hart, 75 Wis. 471, 44 N. W. 514.

33. Philadelphia *v.* Johnson, 11 Phila. (Pa.) 197.

34. People *v.* Kingman, 24 N. Y. 559.

35. *New Jersey.*— Albright *v.* Sussex County Lake, etc., Commission, 68 N. J. L. 523, 53 Atl. 612.

New York.— Ray *v.* New York Bay Extension R. Co., 34 N. Y. App. Div. 3, 53 N. Y. Suppl. 1052; Buffalo, etc., R. Co. *v.* Overton, 35 Hun 157.

Oklahoma.— Southern Kansas R. Co. *v.* Oklahoma City, 12 Okla. 82, 69 Pac. 1050.

Vermont.— Deavitt *v.* Washington County, 75 Vt. 156, 53 Atl. 563.

England.— Ford *v.* Metropolitan R. Co., 17 Q. B. D. 12, 50 J. P. 661, 55 L. J. Q. B. 296, 54 L. T. Rep. N. S. 718, 34 Wkly. Rep. 426; Eagle *v.* Charing Cross R. Co., L. R. 2 C. P. 638, 36 L. J. C. P. 297, 16 L. T. Rep. N. S. 593, 15 Wkly. Rep. 1016; Buccleuch *v.* Metropolitan Bd. of Works, L. R. 5 H. L. 418, 41 L. J. Exch. 137, 27 L. T. Rep. N. S. 1.

See 18 Cent. Dig. tit. "Eminent Domain," § 104.

An easement running with the land is acquired by a condemnation of the land. Deavitt *v.* Washington County, 75 Vt. 156, 53 Atl. 563.

New easements.— Where a water board is authorized to take "lands in fee, easements, rights, and other property," it may not only take existing easements, but may acquire new easements in land. Burnett *v.* Com., 169 Mass. 417, 48 N. E. 758.

A railroad company cannot deprive the owner of a farm through which its road runs of his right to a farm crossing, even upon payment of compensation. But it may extinguish such easement at the place where it was first located or used, in case the landowner can have the crossing at some other point. *In re* New York, etc., R. Co., 44 Hun (N. Y.) 194.

36. Ross *v.* Georgia, etc., R. Co., 33 S. C. 477, 12 S. E. 101.

37. Googins *v.* Boston, etc., R. Co., 155 Mass. 505, 30 N. E. 71.

38. *California.*— Indian Canon Road Co. *v.* Robinson, 13 Cal. 519.

Connecticut.— Hartford *v.* Hartford Bridge Co., 17 Conn. 79.

Georgia.— Shorter *v.* Smith, 9 Ga. 517.

Illinois.— Metropolitan City R. Co. *v.* Chicago West. Div. R. Co., 87 Ill. 317.

Maine.— Kennebec Water Dist. *v.* Waterville, 96 Me. 234, 52 Atl. 774, 97 Me. 185, 54 Atl. 9, 60 L. R. A. 856; State *v.* Noyes, 47 Me. 189.

Maryland.— Baltimore, etc., Turnpike Road *v.* Baltimore, etc., Pass. R. Co., 81 Md. 247, 31 Atl. 854.

Massachusetts.— Boston Water Power Co. *v.* Boston, etc., R. Corp., 23 Pick. 360.

Missouri.— Kansas, etc., Coal R. Co. *v.* Northwestern Coal, etc., Co., 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L. R. A. 936.

New Hampshire— Crosby *v.* Hanover, 36 N. H. 404; Backus *v.* Lebanon, 11 N. H. 19, 35 Am. Dec. 466; Peirce *v.* Somersworth, 10 N. H. 369; Barber *v.* Andover, 8 N. H. 398.

New Jersey.— Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 455.

New York.— Matter of Long Island Water Supply Co., 73 Hun 499, 26 N. Y. Suppl. 198.

Pennsylvania.— Philadelphia, etc., Ferry Pass. R. Co.'s Appeal, 102 Pa. St. 123; Lewis *v.* Germantown, etc., R. Co., 16 Phila. 621; Union Pass. R. Co. *v.* Continental R. Co., 11 Phila. 321; Philadelphia, etc., R. Co.'s Appeal, 1 Montg. Co. Rep. 129, 2 Walk. 291.

Tennessee.— Nashville, etc., Turnpike Co. *v.* Davidson County, 106 Tenn. 258, 61 S. W. 68.

Vermont.— White River Turnpike Co. *v.* Vermont Cent. R. Co., 21 Vt. 590; Armington *v.* Barnet, 15 Vt. 745, 40 Am. Dec. 705.

Virginia.—James River, etc., Co. *v.* Thompson, 3 Gratt. 270.

United States.— Richmond, etc., R. Co. *v.* Louisa R. Co., 13 How. 71, 14 L. ed. 55; West River Bridge Co. *v.* Dix, 6 How. 507, 12 L. ed. 535.

See 18 Cent. Dig. tit. "Eminent Domain," § 103.

sities require it, the one as well as the other may be taken for public purposes on making suitable compensation; nor does such an exercise of the right of eminent domain interfere with the inviolability of contracts.[39] The rule extends to street railroads,[40] to turnpike and plank-roads,[41] toll-bridges,[42] railroad rights of way,[43] to ferries,[44] to mill privileges,[45] and to water-rights.[46]

Reason for rule.— The rule "rests on the basis that public convenience and necessity are of paramount importance and obligation, to which, when duly ascertained and declared by the sovereign authority, all minor considerations and private rights and interests must be held, in a measure and to a certain extent, subordinate. By the grant of a franchise to individuals for one public purpose, the legislature do not forever debar themselves from giving to others new and paramount rights and privileges when required by public exigencies, although it may be necessary in the exercise of such rights and privileges to take and appropriate a franchise previously granted. If such were the rule, great public improvements, rendered necessary by the increasing wants of society in the development of civilization and the progress of the arts, might be prevented by the legislative grants which were wise and expedient in their time, but which the public necessities have outgrown and rendered obsolete." Central Bridge Corp. *v.* Lowell, 4 Gray (Mass.) 474, 481.

39. Richmond, etc., R. Co. *v.* Louisa R. Co., 13 How. (U. S.) 71, 14 L. ed. 55.

40. Louisville City R. Co. *v.* Louisville, 8 Bush (Ky.) 415; Covington St. R. Co. *v.* Covington, etc., St. R. Co., 1 Ky. L. Rep. 341.

Compensation.— A company operating a surface railroad is not entitled to compensation, as for the taking of its franchise, by reason of the impairment thereof caused by the construction of a competing elevated railway directly along and over its road. Sixth Ave. R. Co. *v.* Gilbert El. R. Co., 3 Abb. N. Cas. (N. Y.) 372.

41. Covington, etc., Turnpike Road Co. *v.* Sandford, 20 S. W. 1031, 14 Ky. L. Rep. 689; Brainard *v.* Missisquoi R. Co., 48 Vt. 107. And the landowner is not entitled to damages for the land taken for the second use, where he has been fully paid by the corporation first using it. Brainard *v.* Missisquoi R. Co., 48 Vt. 107.

42. *Connecticut.*— Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716, 17 Conn. 454, 44 Am. Dec. 556.

Georgia.— Atlanta University *v.* Atlanta, 93 Ga. 468, 21 S. E. 74.

Massachusetts.— Central Bridge Corp. *v.* Lowell, 4 Gray 474.

New Hampshire.— Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35.

Pennsylvania.— *In re* Towanda Bridge Co., 91 Pa. St. 216.

Tennessee.— Red River Bridge Co. *v.* Clarksville, 1 Sneed 176, 60 Am. Dec. 143.

Vermont.— West River Bridge Co. *v.* Dix, 16 Vt. 446 [*affirmed* in 6 How. (U. S.) 507, 12 L. ed. 535].

See 18 Cent. Dig. tit. "Eminent Domain," § 103.

A toll-bridge may be made a free bridge. *In re* Towanda Bridge Co., 91 Pa. St. 216; West River Bridge Co. *v.* Dix, 6 How. (U. S.) 507, 12 L. ed. 535 [*affirming* 16 Vt. 446].

Construction of provisions in railroad charter.— The provision in the charter of a railroad company that nothing contained in it should be construed to prejudice or impair any of the rights of a designated bridge company under a previous charter giving it the exclusive right to maintain a bridge was not intended to protect the bridge company against the exercise of the right of eminent domain, but to place its franchise on the same basis as other private property, and secure to it the same rights to compensation. Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 454, 44 Am. Dec. 556.

43. Boston, etc., R. Corp. *v.* Salem, etc., R. Co., 2 Gray (Mass.) 1. And see Union Elevator Co. *v.* Kansas City Suburban Belt R. Co., 135 Mo. 353, 36 S. W. 1071. If the route of the railroad has been laid out, but the road has not been constructed, the land may be condemned for another public use, subject to any rights the railroad company may have. *In re* New York, 51 Hun (N. Y.) 416, 5 N. Y. Suppl. 463. Thus a portion of the route may be devoted to park purposes, the two uses being such as may stand together. Suburban Rapid-Transit Co. *v.* New York, 128 N. Y. 510, 28 N. E. 525.

What is a taking.— Since a franchise for a right of way is in its very nature exclusive, a dispossession of any portion thereof in actual use is a taking of the franchise *pro tanto*. Fidelity Trust, etc., Co. *v.* Mobile St. R. Co., 53 Fed. 687. See also *infra*, X, D.

44. Leake County *v.* McFadden, 57 Miss. 618; Pittsburgh, etc., R. Co. *v.* Jones, 111 Pa. St. 204, 2 Atl. 410, 56 Am. Rep. 260.

Statutes not conferring power.—But a statute authorizing the board of county supervisors to appropriate all land necessary for public roads does not confer upon such board authority to appropriate a ferry franchise. Leake County *v.* McFadden, 57 Miss. 618.

45. Hazen *v.* Essex Co., 12 Cush. (Mass.) 475.

46. Boston Water Power Co. *v.* Boston, etc., R. Corp., 23 Pick. (Mass.) 360; Brady *v.* Atlantic City, 53 N. J. Eq. 440, 32 Atl. 271; *In re* Brooklyn, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270; Matter of White Plains Water Com'rs, 71 N. Y. App. Div. 544, 76 N. Y. Suppl. 11; Matter of Long Island Water Supply Co., 73 Hun (N. Y.) 499, 26 N. Y. Suppl. 198.

G. Water, Springs, Etc. Interest in waters, springs, etc.,[47] other than an interstate stream,[48] may be taken under the right of eminent domain, as for the purpose of supplying a city, town, or village with pure water,[49] for irrigating arid lands,[50] or for the purpose of supplying a railroad water station or other railroad purposes.[51]

H. Riparian Lands and Rights. Interests in riparian lands, including property or land on or under navigable streams, belonging to private persons,[52] may be taken by the sovereign power of the government in the exercise of the right

47. Hamor *v.* Bar Harbor Water Co., 78 Me. 127, 3 Atl. 40; Smith *v.* Rochester, 92 N. Y. 463, 44 Am. Rep. 393.

A non-navigable stream stands upon the same footing as other private property so far as the right of eminent domain is concerned. Smith *v.* Gould, 59 Wis. 631, 18 N. W. 457.

The works and improvements of a private water company may be taken by another water company under the right of eminent domain. Edgewood Water Co. *v.* Fray Water Co., 7 Pa. Co. Ct. 476.

A water-power which a riparian owner has with a *bona fide* intent turned to use and improved to any extent cannot be taken by a lower proprietor under Minn. Gen. St. (1866) c. 31, § 16. Miller *v.* Troost, 14 Minn. 365.

48. Pine *v.* New York, 112 Fed. 98, 50 C. C. A. 145 [*affirming* 103 Fed. 337, and *reversed* on another point in 185 U. S. 93, 22 S. Ct. 592, 46 L. ed. 820], holding that a state cannot, in the exercise of its power of eminent domain, authorize one of its municipalities to divert the water of a non-navigable interstate stream to the injury of riparian owners on such stream in another state.

49. Burden *v.* Stein, 27 Ala. 104, 62 Am. Dec. 758; Hamor *v.* Bar Harbor Water Co., 78 Me. 127, 3 Atl. 40; Ætna Mills *v.* Brookline, 127 Mass. 69; Ætna Mills *v.* Waltham, 126 Mass. 422; Bailey *v.* Woburn, 126 Mass. 416; Lumbard *v.* Stearns, 4 Cush. (Mass.) 60; *In re* Malone Water-Works Co., 15 N. Y. Suppl. 649.

Construction of statutes giving power.— A statute giving cities power for the purpose of obtaining an adequate supply of water to condemn streams "known as rivers or creeks" authorizes cities to condemn a small mountain stream which does not amount to a river or a creek. Shippensburg Borough's Water Case, 21 Pa. Co. Ct. 89. And under a statute authorizing a town to take the waters of a pond and to maintain dams and reservoirs the town has the power to take all the waters of the pond in its natural condition and also to build a dam over its outlet for the purpose of destroying it. Cowdrey *v.* Woburn, 136 Mass. 409. So under a statute authorizing a condemnation of land for a city water-plant and providing that the fee in the land shall be condemned, the right to condemn merely the use of water flowing through the land cannot be exercised. Charlottesville *v.* Maury, 96 Va. 383, 31 S. E. 520.

In Tennessee a water company cannot appropriate the supply of water which flows over land adjoining those belonging to the company, although the springs from which the water flows are located on the company's land, since the statute authorizing such condemnation makes no provision for compensation to the adjoining landowner. Watauga Water Co. *v.* Scott, (Sup. 1903) 76 S. W. 888.

A city may take a private system of waterworks situated in a subdivision which is annexed to the city. Smith *v.* Chicago, 107 Ill. App. 270 [*affirmed* in 204 Ill. 356, 68 N. E. 395].

50. Crawford Co. *v.* Hathaway, (Nebr. 1903) 93 N. W. 781, 60 L. R. A. 889; Umatilla Irr. Co. *v.* Barnhart, 22 Oreg. 389, 30 Pac. 37; McGhee Irr. Ditch Co. *v.* Hudson, 85 Tex. 587, 22 S. W. 398.

51. Bigelow *v.* Draper, 6 N. D. 152, 69 N. W. 570; Smithko *v.* Pittsburg, etc., R. Co., 5 Pa. Dist. 543; Baring *v.* Erdman, 2 Fed. Cas. No. 981.

A navigable stream cannot be condemned by a railroad company for the purpose of obstructing the stream so as to furnish a reservoir of fresh water for the company's use, where the statute relating to condemnation of land provides that it shall not be construed to authorize the erection of an obstruction across any navigable stream so as to prevent navigation. Gulf, etc., R. Co. *v.* Tacquard, 3 Tex. App. Civ. Cas. § 141.

Waters subject to use.— The authority to divert water for railroad purposes is not limited to the lands next to, and bounding upon, the railroad, but may under local circumstances extend to lands in a reasonable vicinity. It was held, however, in this case that where the canal commissioners of Pennsylvania had authority to construct and repair a railway, and to take materials from the adjoining lands for that purpose, but the railway had been completed without a permanent appropriation of a stream of water, a subsequent diversion of the stream could not be justified under the authority to construct and repair. Baring *v.* Erdman, 2 Fed. Cas. No. 981.

52. State *v.* King County Super. Ct., 31 Wash. 445, 72 Pac. 89; Yates *v.* Milwaukee, 10 Wall. (U. S.) 497, 19 L. ed. 984.

Illustrations.— Thus the land of riparian owners on navigable streams may be taken for the erection of a toll-bridge across such stream (Hudson *v.* Cuero Land, etc., Co., 47 Tex. 56, 26 Am. Rep. 289), for the construction of a tow-path in connection with a public canal (Carpenter *v.* State, 12 Ohio St. 457), or for the purpose of altering the

of eminent domain, as for the purposes of erecting a dam or reservoir to supply water to a certain town or community,[53] for a public road,[54] for railroad purposes,[55] or for the purpose of overflowage caused by the maintenance of a dam for a water-mill.[56]

I. Private Bridges, Cemeteries, Schools, Etc. A private bridge may be taken for a public bridge or highway,[57] or for a railroad,[58] or its value may be impaired by the erection of another bridge, just compensation being made in each case.[59] Land used for the purposes of school or worship[60] and for cemeteries[61] may be taken for a public use. And the trustees of a reclamation district organized for the purpose of reclaiming overflowed and swamp lands, and empowered

stream in order to facilitate navigation (Homochitto River Com'rs *v.* Withers, 29 Miss. 21, 64 Am. Dec. 126; Avery *v.* Fox, 2 Fed. Cas. No. 674, 1 Abb. 246).

Private wharf property and land under water may be taken under the power of eminent domain to provide a uniform system of wharves and piers in a city. *In re* New York, 18 N. Y. Suppl. 536.

Flats lying between high and low water mark may be taken for the enlargement of a burial-ground. Wyman *v.* Essex County, 157 Mass. 55, 31 N. E. 715.

In Pennsylvania it is held that, although the legislature may authorize a construction of a way across or under a public navigable river for the better and more convenient mining of anthracite coal, it cannot authorize such a way across rivers and streams not navigable, for such purposes. Pennsylvania Coal Co. *v.* Waddell, 8 Leg. Gaz. 37.

Under the Iowa law it has been held that as the bed of the Mississippi river and its banks to high-water mark belong to the state, and the title of the riparian owner extends only to the high-water mark, the authorities have a right to build wharves and levees on the banks below high water, and to make other improvements necessary to navigation or public passage by railways or otherwise, without the consent of, or compensation to, the riparian owner. Barney *v.* Keokuk, 94 U. S. 324, 24 L. ed. 224.

53. Pocantico Water-Works Co. *v.* Bird, 130 N. Y. 249, 29 N. E. 246 [*modifying* 4 N. Y. Suppl. 317], holding that the acquisition of land and riparian rights by a water-works company which has contracted with three villages to supply them with water is for a public use within the meaning of the law of eminent domain.

54. Balliet *v.* Com., 17 Pa. St. 509, 55 Am. Dec. 581, holding that the ground between high and low water mark is as liable to be taken for a highway or public use as any other.

55. Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen (Mass.) 221 (where it is held that an unrestricted grant of authority to construct a railroad from one designated point to another carries with it the authority to cross a navigable stream if the railroad cannot be reasonably constructed without doing so); Davenport, etc., R. Co. *v.* Renwick, 102 U. S. 180, 26 L. ed. 51.

Land under the water of a navigable stream may be condemned for railroad purposes, although owned by a private individual. Kerr *v.* West Shore R. Co., 127 N. Y. 269, 27 N. E. 833 [*affirming* 6 N. Y. Suppl. 958]; *In re* New York, etc., R. Co., 89 N. Y. 453 [*affirming* on this point 27 Hun 57]; *In re* New York Cent., etc., R. Co., 77 N. Y. 248, applying this rule to lands under the Hudson river, granted to the city of New York in trust for specific purposes.

56. Jordan *v.* Woodward, 40 Me. 317, but not as a depositary of lumber for the mill.

57. Smith *v.* Conway, 17 N. H. 586; Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35. Thus where a public road is created so as to cross a private bridge, such bridge thereupon becomes a public bridge, and its owner is entitled to compensation therefor. Blaine County *v.* Brewster, 32 Nebr. 264, 49 N. W. 183.

58. Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716, 17 Conn. 454, 44 Am. Dec. 556.

59. Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716, 17 Conn. 454, 44 Am. Dec. 556; Red River Bridge Co. *v.* Clarksville, 1 Sneed (Tenn.) 176, 60 Am. Dec. 143.

60. Belfast Academy *v.* Salmond, 11 Me. 109; Rittenhouse *v.* Creasy, 12 Luz. Leg. Reg. (Pa.) 14.

61. *In re* Board of Street Openings, etc., 133 N. Y. 329, 31 N. E. 102 [*affirming* 62 Hun 499, 16 N. Y. Suppl. 894].

Where a railroad company has no other feasible route, it may condemn a right of way through part of a cemetery which consists of a steep, rocky slope, fronting on a river, and which was never used for cemetery purposes, and was unfitted for such, it appearing that the graves in the rest of the cemetery would never be disturbed by such appropriation. *In re* Brighton, etc., R. Co., 30 Pittsb. Leg. J. (Pa.) 22.

A statute providing that no street, highway, etc., shall be opened through a cemetery without consent of its board only exempts such associations from condemnation proceedings under the general law. Woodmere Cemetery *v.* Roulo, 104 Mich. 595, 62 N. W. 1010.

A legislative exception of property devoted to a cemetery from the liability to be taken under eminent domain is an exercise of legislative discretion which must be repealed before such property can be subjected to condemnation. Hyde Park *v.* Oakwoods Cemetery Assoc., 119 Ill. 141, 7 N. E. 627.

to construct levees and embankments, may acquire levees, built by the owners of land for their own protection.[62]

J. Mortgaged Property. Mortgaged property may be taken under the right of eminent domain,[63] and the judgment of condemnation vests a complete easement in the condemning party as against the mortgagee.[64] The fact that property is subject to a mortgage does not exempt it from the operation of the laws of eminent domain.[65] And the interest acquired by the condemnation proceedings is paramount to the lien of a mortgage antedating those proceedings.[66] Where the condemning corporation is itself the mortgagor, the fact that the mortgage is foreclosed and the corporation thus loses its title will not prevent it from subsequently condemning the land.[67]

K. Homestead. A homestead may be condemned for public use without the consent of the owner.[68]

L. Property of Persons Under Disability. The exercise of this power is not affected by any disability of the landowner.[69]

M. Property Belonging to the United States. Public lands of the United States within a state subject to sale and settlement may be taken by the state under power of eminent domain.[70] But lands devoted to a particular use by the federal government,[71] and over which jurisdiction has been ceded to the United States,[72] cannot be so taken unless such use has been abandoned.[73]

N. Property Belonging to State. Where lands owned by the state are in actual use by it for a public purpose it cannot be condemned for another and inconsistent use under general statutory authority to condemn land. There must be express statutory authority, or the authority must arise from necessary implication;[74] and

62. Reclamation Dist. No. 542 *v.* Turner, 104 Cal. 334, 37 Pac. 1038.

63. Alabama, etc., R. Co. *v.* Kenney, 39 Ala. 307; Burns *v.* Rock County School Dist. No. 18, 61 Nebr. 351, 85 N. W. 284; North Hudson County R. Co. *v.* Booraem, 28 N. J. Eq. 450; Booraem *v.* Wood, 27 N. J. Eq. 371.

64. St. Louis, etc., R. Co. *v.* Nyce, 61 Kan. 394, 59 Pac. 1040, 48 L. R. A. 241; Wichita, etc., R. Co. *v.* Thayer, 54 Kan. 259, 38 Pac. 266; Chicago, etc., R. Co. *v.* Sheldon, 53 Kan. 169, 35 Pac. 1105; Miller *v.* Board of Mississippi Levee Com'rs, 78 Miss. 201, 28 So. 834, 877; Lehigh Coal, etc., Co. *v.* New Jersey Cent. R. Co., 35 N. J. Eq. 379; Platt *v.* Bright, 31 N. J. Eq. 81. *Compare* North Hudson County R. Co. *v.* Booraem, 28 N. J. Eq. 450; Booraem *v.* Wood, 27 N. J. Eq. 371; Fincke *v.* Buffalo, 5 N. Y. St. 237. Especially where the full value is paid into court (Platt *v.* Bright, 31 N. J. Eq. 81), or into the county treasury (Rand *v.* Ft. Scott, etc., R. Co., 50 Kan. 114, 31 Pac. 683).

In England mortgaged land cannot be taken until the interests of both the mortgagor and the mortgagee are ascertained, and the amount of compensation to each paid or secured. Ranken *v.* East India Dock, etc., R. Co., 12 Beav. 298, 14 Jur. 7, 19 L. J. Ch. 153.

65. Alabama, etc., R. Co. *v.* Kenney, 39 Ala. 307.

66. Fincke *v.* Buffalo, 5 N. Y. St. 237.

67. Thomas *v.* St. Louis, etc., R. Co., 164 Ill. 634, 46 N. E. 8; Lehigh Coal, etc., Co. *v.* New Jersey Cent. R. Co., 35 N. J. Eq. 379.

68. Jockheck *v.* Shawnee County, 53 Kan. 780, 37 Pac. 621.

69. East Tennessee, etc., R. Co. *v.* Love, 3 Head (Tenn.) 63, holding that the property of a married woman may be taken under the right of eminent domain.

70. People *v.* Pitkin County Dist. Ct., 11 Colo. 147, 17 Pac. 298; U. S. *v.* Railroad Bridge Co., 27 Fed. Cas. No. 16,114, 6 McLean 517. And see Pratt *v.* Brown, 3 Wis. 603, where it is held that the territory of Wisconsin could not exercise the right of eminent domain over lands owned by the United States so as to impair the title of the latter thereto.

A right of way for a railroad over lands belonging to the United States is within this rule, and the state within which such right of way is situated may condemn it under the power of eminent domain for the purpose of a connection or crossing to another railroad. Union Pac. R. Co. *v.* Leavenworth, etc., R. Co., 29 Fed. 728; Denver, etc., R. Co. *v.* Denver, etc., R. Co., 17 Fed. 867, 5 McCrary 443; Northern Pac. R. Co. *v.* St. Paul, etc., R. Co., 3 Fed. 702, 1 McCrary 302; Union Pac. R. Co. *v.* Burlington, etc., R. Co., 3 Fed. 106, 1 McCrary 452.

71. U. S. *v.* Chicago, 7 How. (U. S.) 185, 12 L. ed. 660 (holding that the city of Chicago has no right to open streets through property belonging to the United States and reserved for military purposes); U. S. *v.* Ames, 24 Fed. Cas. No. 14,441, 1 Woodb. & M. 76.

72. U. S. *v.* Ames, 24 Fed. Cas. No. 14,441, 1 Woodb. & M. 76.

73. U. S. *v.* Railroad Bridge Co., 27 Fed. Cas. No. 16,114, 6 McLean 517.

74. St. Louis, etc., R. Co. *v.* Illinois Inst. for Education of Blind, 43 Ill. 303; Davis

this is true, although the general statutes are sufficiently comprehensive to embrace any lands owned by the state.[75] It has been held, however, that lands owned by the state but not in actual use for public purposes are subject to condemnation in the same manner as land of private persons, that is to say that general statutory authority to condemn will authorize the taking of such lands,[76] and of course lands not in actual use by the state may be condemned where there is express statutory authority so to do.[77]

O. Property of Corporations. The question whether lands of a corporation already devoted to a public use can be taken under the power of eminent domain and the circumstances under which they may be taken is treated in a subsequent section.[78] For the purposes of this section it is sufficient to state that property of a corporation not devoted to a public use is subject to the exercise of the right of eminent domain the same as that of individuals.[79] There is no principle that demands that the real estate of private corporations shall be exempt from the rules which require appropriation of lands for public use.[80]

P. Property Previously Devoted to Public Use — 1. Power to Subject to Another Public Use — a. In General. The power of eminent domain is a prerogative of sovereignty. It is not exhausted by use and can only be limited by the public exigency upon which it is founded.[81] Hence property previously devoted to one public use may by exercise of the power of eminent domain be taken for a different public use.[82] The power may be exercised in favor of public uses over

v. Nichols, 39 Ill. App. 610; Matter of Utica, 73 Hun (N. Y.) 256, 26 N. Y. Suppl. 564.

75. St. Louis, etc., R. Co. *v.* Illinois Inst. for Education of Blind, 43 Ill. 303.

76. *In re* St. Paul, etc., R. Co., 34 Minn. 227, 25 N. W. 345. But see Atty.-Gen. *v.* Hudson Tunnel R. Co., 27 N. J. Eq. 176, in which it was said that the state is never presumed to have parted with any portion of its property, in the absence of conclusive proof of an intention so to do.

Where consent made necessary by statute. — Where a general statute forbids a railroad company to take land belonging to the state by eminent domain, and provides that consent of the riparian commissioners is necessary before taking state lands under water, a subsequent statute merely recognizing the corporate existence of a railroad and giving them time to complete their work will not be construed to give them power to take state lands under water. Atty.-Gen. *v.* Hudson Tunnel R. Co., 27 N. J. Eq. 176.

A railroad built on public tide lands of the state does not pass to the purchaser of the land, and the company may acquire the right of way by condemnation after the purchaser obtains the legal title. Lake Whatcom Logging Co. *v.* Callvert, 33 Wash. 126, 73 Pac. 1128.

77. Hollister *v.* State, (Ida. 1903) 71 Pac. 542.

78. See VII, P.

79. *In re* Bellona Co.'s Case, 3 Bland (Md.) 442; *In re* New York, etc., R. Co., 99 N. Y. 12, 1 N. E. 27; *In re* Rochester Water Com'rs, 66 N. Y. 413; New York Cent., etc., R. Co. *v.* Metropolitan Gaslight Co., 63 N. Y. 326.

80. New York Cent., etc., R. Co. *v.* Metropolitan Gaslight Co., 63 N. Y. 326.

81. Little Miami, etc., R. Co. *v.* Dayton, 23 Ohio St. 518; Giesy *v.* Cincinnati, etc., R. Co., 4 Ohio St. 308.

Strictly speaking there is no such thing as an extinction of the right of eminent domain. Property and private rights of every kind are subject to it, that which is already held under it no less than that which has never been subjected to it. New York, etc., R. Co. *v.* Boston, etc., R. Co., 36 Conn. 196.

82. *California.*— Southern Pac. R. Co. *v.* Southern California R. Co., 111 Cal. 221, 43 Pac. 602.

Connecticut.— Evergreen Cemetery Assoc. *v.* New Haven, 43 Conn. 234, 21 Am. Rep. 643; Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255, 4 Am. Rep. 63; Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716.

Georgia.—Augusta *v.* Georgia R., etc., Co., 98 Ga. 161, 26 S. E. 499; Atlanta University *v.* Atlanta, 93 Ga. 468, 21 S. E. 74.

Illinois.— Illinois Cent. R. Co. *v.* Normal, 175 Ill. 562, 51 N. E. 781; Chicago, etc., R. Co. *v.* Lake, 71 Ill. 333; Illinois, etc., Canal *v.* Chicago, etc., R. Co., 14 Ill. 314.

Indiana.—Indiana Power Co. *v.* St. Joseph, etc., Power Co., 159 Ind. 42, 63 N. E. 304, 64 N. E. 468; Terre Haute *v.* Evansville, 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189; Indianapolis, etc., R. Co. *v.* Indianapolis, etc., Rapid Transit Co., (App. 1903) 67 N. E. 1013; Indiana Postal Tel. Cable Co. *v.* Chicago, etc., R. Co., (App. 1903) 66 N. E. 919.

Iowa.— Chicago, etc., R. Co. *v.* Starkweather, 97 Iowa 159, 66 N. W. 87, 59 Am. St. Rep. 404, 31 L. R. A. 183.

Maryland.— *In re* Bellona Co.'s Case, 3 Bland 442.

Massachusetts.— Boston *v.* Brookline, 156 Mass. 172, 30 N. E. 611; Old Colony R. Co. *v.* Framingham Water Co., 153 Mass. 561, 27 N. E. 662, 13 L. R. A. 332; Cary Library *v.* Bliss, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765; *In re* Sunderland Bridge's Case, 122 Mass. 459; Worcester, etc., R. Co.

any and all property, private and even public, and the property and franchises of corporations as well as of individuals, although dedicated to public uses, may be taken for other public uses.[83] The legislature may authorize the appropriation of property already devoted to a public use to an entirely inconsistent public use, whenever the interests of the public so require;[84] and such an exercise of the right of eminent domain does not interfere with the inviolability of contracts.[85] The rule is subject, however, to the limitation that property devoted to public use cannot be taken to be used for the same purpose in the same manner,[86] as this would amount simply to the taking of property from one and giving it to another without any benefit or advantage whatever to the public.[87] Where there is no change in the use it becomes a matter of mere private concern without at all affecting the public interest.[88] The statutes in some jurisdictions expressly provide that the taking must be for a "more necessary public use."[89]

v. Railroad Com'rs, 118 Mass. 561; Eastern R. Co. *v.* Boston, etc., R. Co., 111 Mass. 125, 15 Am. Rep. 13; Central Bridge Corp. *v.* Lowell, 4 Gray 474; Boston, etc., R. Corp. *v.* Salem, etc., R. Co., 2 Gray 1; Springfield *v.* Connecticut R. Co., 4 Cush. 63; Boston Water Power Co. *v.* Boston, etc., R. Co., 23 Pick. 360.

Missouri.— Kansas, etc., R. Co. *v.* Northwestern Coal, etc., Co., 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L. R. A. 936; Kansas City *v.* Marsh Oil Co., 140 Mo. 458, 41 S. W. 943; St. Louis, etc., R. Co. *v.* Hannibal Union Depot Co., 125 Mo. 82, 28 S. W. 483; Kansas City, etc., R. Co. *v.* Kansas City, etc., R. Co., 118 Mo. 599, 24 S. W. 478.

New Hampshire.— Opinion of Justices, 6 N. H. 629, 33 Atl. 1078.

New Jersey.— Van Reipen *v.* Jersey City, 58 N. J. L. 262, 33 Atl. 740; Newark *v.* Watson, 56 N. J. L. 667, 29 Atl. 487, 24 L. R. A. 843.

New York.— *In re* New York, etc., R. Co., 99 N. Y. 12, 1 N. E. 27; *In re* Buffalo, 68 N. Y. 167; *In re* Prospect Park, etc., R. Co., 67 N. Y. 371; New York Cent., etc., R. Co. *v.* Metropolitan Gaslight Co., 63 N. Y. 326.

Ohio.— Little Miami, etc., R. Co. *v.* Dayton, 23 Ohio St. 510; Giesy *v.* Cincinnati, etc., R. Co., 4 Ohio St. 308; Spring Grove Cemetery *v.* Cincinnati, etc., R. Co., 1 Ohio Dec. (Reprint) 316, 7 West. L. J. 251.

Pennsylvania.— Scranton Gas, etc., Co. *v.* Northern Coal, etc., Co., 192 Pa. St. 80, 43 Atl. 470, 73 Am. St. Rep. 798; Twelfth-St. Market Co. *v.* Philadelphia, etc., R. Co., 142 Pa. St. 580, 21 Atl. 902, 989; Groff's Appeal, 128 Pa. St. 621, 18 Atl. 431; Philadelphia, etc., R. Co.'s Appeal, 120 Pa. St. 90, 13 Atl. 708.

South Dakota.— Winona, etc., R. Co. *v.* Watertown, 4 S. D. 323, 56 N. W. 1077.

Tennessee.— Turnpike Co. *v.* Davidson County, 106 Tenn. 258, 61 S. W. 68.

Texas.— Ft. Worth St. R. Co. *v.* Queen City R. Co., 71 Tex. 165, 9 S. W. 94.

Washington.— Samish River Boom Co. *v.* Union Boom Co., 32 Wash. 586, 73 Pac. 670.

United States.— Richmond, etc., R. Co. *v.* Louisa R. Co., 13 How. 71, 14 L. ed. 55; West River Bridge Co. *v.* Dix, 6 How. 507, 12 L. ed. 535; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 9 L. ed. 773, 938.

England.— British Cast Plate Manufactures *v.* Meredith, 4 T. R. 794.

See 18 Cent. Dig. tit. "Eminent Domain," § 107 *et seq.*

83. Southern Pac. R. Co. *v.* Southern California R. Co., 111 Cal. 221, 43 Pac. 602; Eastern R. Co. *v.* Boston, etc., R. Co., 111 Mass. 125, 15 Am. Rep. 13; Kansas, etc., R. Co. *v.* Northwestern Coal, etc., Co., 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L. R. A. 936; Twelfth-St. Market Co. *v.* Philadelphia, etc., R. Co., 142 Pa. St. 580, 21 Atl. 902, 989.

84. Augusta *v.* Georgia R., etc., Co., 98 Ga. 161, 26 S. E. 499; Chicago, etc., R. Co. *v.* Starkweather, 97 Iowa 159, 66 N. W. 87, 59 Am. St. Rep. 404, 31 L. R. A. 183.

85. Richmond, etc., R. Co. *v.* Louisa R. Co., 13 How. (U. S.) 71, 14 L. ed. 55.

86. *Illinois.*— St. Louis, etc., R. Co. *v.* Belleville City R. Co., 158 Ill. 390, 41 N. E. 916; Chicago West Div. R. Co. *v.* Metropolitan West Side El. R. Co., 152 Ill. 519, 38 N. E. 736; Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 112 Ill. 589.

Massachusetts.— Cary Library *v.* Bliss, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765.

Missouri.— Kansas, etc., Coal R. Co. *v.* North Western Coal, etc., Co., 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L. R. A. 936.

Oregon.— Oregon Cascade R. Co. *v.* Baily, 3 Oreg. 164.

Washington.— Samish River Boom Co. *v.* Union Boom Co., 32 Wash. 586, 73 Pac. 670.

United States.— West River Bridge Co. *v.* Dix, 6 How. 507, 12 L. ed. 535.

87. Samish River Boom Co. *v.* Union Boom Co., 32 Wash. 586, 73 Pac. 670.

88. Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 112 Ill. 589. To warrant the taking of property of one party already appropriated to public use and placing it wholly or in part in the hands of another party for a public use, it is essential that the new use be a different use, and also that the change from the present use shall be for the benefit of the public. Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 97 Ill. 506.

89. Helena *v.* Rogan, 26 Mont. 452, 68 Pac. 798; Butte, etc., R. Co. *v.* Montana Union R. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298. And see

b. The Statutory Authority — (I) *Where Property Taken Not in Use or Essential to Prior Use.* Land owned by a company whose business constitutes a public use, not in actual use nor essential to the exercise of its franchise, stands on the same footing as that of a private individual,[90] and may be condemned by another corporation under the general laws,[91] although the land is taken from the actual and profitable use of the owner.[92] Nevertheless there must be a liberal consideration of the future as well as the existing needs of the company whose land is sought to be appropriated, before it can be deprived of any portion thereof;[93] but the mere possibility that the land sought to be taken may at some future time become necessary to the exercise of the franchise of the company owning it does not exempt it from condemnation,[94] and neither does the fact that the property is put to a use not necessary to the exercise of the franchise.[95]

(II) *Where Taking Will Destroy or Materially Impair Prior Use.* Where property has been legally condemned or acquired by purchase for a public use and has been or is about to be appropriated for such use, it cannot be taken for another public use which will totally destroy or materially impair or interfere with the former use, unless the intention of the legislature that it should be so taken has been manifested in express terms or by necessary implication.[96] While,

Salt Lake City Water, etc., Power Co. *v.* Salt Lake City, 25 Utah 441, 71 Pac. 1067; Oregon Short Line R. Co. *v.* Idaho Postal Tel. Cable Co., 111 Fed. 842, 49 C. C. A. 663.

For illustrations of what are more necessary public uses see VII, P, 2, a, (II), d.

90. Peoria, etc., R. Co. *v.* Peoria, etc., R. Co., 66 Ill. 174; *In re* Rochester Water Com'rs, 66 N. Y. 413; *In re* Cleveland, etc., R. Co., 2 Pittsb. (Pa.) 348; Philadelphia, etc., R. Co.'s Appeal, 2 Walk. (Pa.) 291.

91. Cincinnati, etc., R. Co. *v.* Belle Centre, 48 Ohio St. 273, 27 N. E. 464; Youghiogheny Bridge Co. *v.* Pittsburg, etc., R. Co., 201 Pa. St. 457, 51 Atl. 115; Samish River Room Co. *v.* Union Boom Co., 32 Wash. 586, 73 Pac. 670; Wheeling Bridge Co. *v.* Wheeling, etc., Bridge Co., 34 W. Va. 155, 11 S. E. 1009.

Special legislation unnecessary. — It is not within the reason of the rule that property already appropriated to a public use cannot be taken for another public use, which will defeat or impair the former use unless power to make such second appropriation is granted expressly or by necessary implication. Cincinnati, etc., R. Co. *v.* Belle Centre, 48 Ohio St. 273, 27 N. E. 464.

Opposing corporations may be limited to the enjoyment of that property in actual use by them and that which is reasonably necessary for the safe, proper, and convenient management of their business and the accomplishment of the purposes of their creation. Butte, etc., R. Co. *v.* Montana Union R. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298.

92. Peoria, etc., R. Co. *v.* Peoria, etc., R. Co., 66 Ill. 174.

93. Pittsburg Junction R. Co.'s Appeal, 122 Pa. St. 511, 6 Atl. 564, 9 Am. St. Rep. 128; Western Union Tel. Co. *v.* Pennsylvania R. Co., 120 Fed. 362; Lake Shore, etc., R. Co. *v.* New York, etc., R. Co., 8 Fed. 858.

94. Butte, etc., R. Co. *v.* Montana Union R. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298. And see Colorado Eastern R. Co. *v.* Union Pac. R. Co., 41 Fed. 203.

95. Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812.

96. Mere general authority to exercise the power of eminent domain is under the circumstances insufficient.

Alabama.— Anniston, etc., R. Co. *v.* Jacksonville, etc., R. Co., 82 Ala. 297, 2 So. 710.

California.—Southern Pac. R. Co. *v.* Southern Cal. R. Co., 111 Cal. 221, 43 Pac. 602.

Connecticut.— New Haven Water Co. *v.* Wallingford, 72 Conn. 293, 44 Atl. 235; Evergreen Cemetery Assoc. *v.* New Haven, 43 Conn. 234, 21 Am. Rep. 643; Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255, 4 Am. Rep. 63.

Georgia.—Augusta *v.* Georgia R., etc., Co., 98 Ga. 161, 26 S. E. 499.

Illinois.— St. Louis, etc., R. Co. *v.* Postal Tel. Co., 173 Ill. 508, 51 N. E. 382; Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 97 Ill. 506; Central City Horse R. Co. *v.* Ft. Clark Horse R. Co., 81 Ill. 523; Chicago, etc., R. Co. *v.* Lake, 71 Ill. 333; St. Louis, etc., R. Co. *v.* Illinois Inst. for Education of Blind, 43 Ill. 303; Davis *v.* Nichols, 39 Ill. App. 610.

Indiana.— Baltimore, etc., R. Co. *v.* Jackson County, 156 Ind. 260, 58 N. E. 837, 59 N. E. 856; Gold *v.* Pittsburgh, etc., R. Co., 153 Ind. 232, 53 N. E. 285; Terre Haute *v.* Evansville, etc., R. Co., 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189; Steele *v.* Empsom, 142 Ind. 397, 41 N. E. 822; Ft. Wayne *v.* Lake Shore, etc., R. Co., 132 Ind. 558, 32 N. E. 215, 32 Am. St. Rep. 277, 18 L. R. A. 367; Seymour *v.* Jeffersonville, etc., R. Co., 126 Ind. 466, 26 N. E. 188; Valparaiso *v.* Chicago, etc., R. Co., 123 Ind. 467, 24 N. E. 249; Baltimore, etc., R. Co. *v.* North, 103 Ind. 486, 3 N. E. 144; Indianapolis, etc., R. Co. *v.* Indianapolis, etc., Rapid Transit Co., (App. 1903) 67 N. E. 1013; Postal Tel. Cable Co. *v.* Chicago, etc., R. Co., 30 Ind. App. 654, 66 N. E. 919.

within the limitations heretofore mentioned,[97] express statutory authorization is sufficient to authorize the taking of property devoted to public use, although it impair or destroy the prior use,[98] express authorization is unnecessary, it being sufficient if the right is conferred by necessary implication.[99] When it becomes important to inquire whether such power arises from necessary implication in a given case, the legislative intent has to be arrived at by applying the enactment to its subject-matter.[1] Such implication never arises except as a necessary condition

Iowa.— Chicago R. Co. *v.* Starkweather, 97 Iowa 159, 66 N. W. 87, 59 Am. St. Rep. 404, 31 L. R. A. 183.

Kansas.— Atchison, etc., R. Co. *v.* Kansas City, etc., R. Co., 67 Kan. 569, 70 Pac. 939, 73 Pac. 899.

Massachusetts.— Boston *v.* Brookline, 156 Mass. 172, 30 N. E. 611; Easthampton *v.* Hampshire, 154 Mass. 424, 28 N. E. 298, 13 L. R. A. 157; Old Colony R. Co. *v.* Framingham Water Co., 153 Mass. 561, 27 N. E. 662, 13 L. R. A. 332; Providence, etc., R. Co. *v.* Norwich, etc., R. Co., 138 Mass. 277; Boston, etc., R. Co. *v.* Lowell, etc., R. Co., 124 Mass. 368; Housatonic R. Co. *v.* Lee, etc., R. Co., 118 Mass. 391; Com. *v.* Haverhill, 7 Allen 523; Com. *v.* Old Colony, etc., R. Co., 14 Gray 93; Springfield *v.* Connecticut River R. Co., 4 Cush. 63; Boston Water Power Co. *v.* Boston, etc., R. Co., 23 Pick. 360; *In re* Wellington, 16 Pick. 87, 26 Am. Dec. 631; West Boston Bridge *v.* Middlesex County Com'rs, 10 Pick. 270; Kean *v.* Stetson, 5 Pick. 492.

Michigan.— Battle Creek, etc., R. Co. *v.* Tiffany, 99 Mich. 471, 58 N. W. 617.

Minnesota.— Minneapolis, etc., R. Co. *v.* Hartland, 85 Minn. 76, 88 N. W. 423; Northwestern Tel. Exch. Co. *v.* Chicago, etc., R. Co., 76 Minn. 334, 79 N. W. 315; Minneapolis Western R. Co. *v.* Minneapolis, etc., R. Co., 61 Minn. 502, 63 N. W. 1035; St. Paul Union Depot Co. *v.* St. Paul, 30 Minn. 359, 15 N. W. 684; Milwaukee, etc., R. Co. *v.* Faribault, 23 Minn. 167.

New Hampshire.— Crosby *v.* Hanover, 36 N. H. 404; Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35.

New Jersey.— New York, etc., R. Co. *v.* Paterson, 61 N. J. L. 408, 39 Atl. 680; Trenton, etc., Turnpike Co. *v.* American, etc., Commercial News Co., 43 N. J. L. 381; New Jersey Southern R. Co. *v.* Long Branch Com'rs, 39 N. J. L. 28; State *v.* Montclair R. Co., 35 N. J. L. 328; State *v.* Newark, 28 N. J. L. 529.

New York.— Suburban Rapid Transit Co. *v.* New York, 128 N. Y. 510, 28 N. E. 525; *In re* New York, etc., R. Co., 99 N. Y. 12, 1 N. E. 27; People *v.* Thompson, 98 N. Y. 6; Prospect Park, etc., R. Co. *v.* Williamson, 91 N. Y. 552; *In re* New York, etc., R. Co., 77 N. Y. 248; *In re* Buffalo, 68 N. Y. 167; *In re* Rochester Water Com'rs, 66 N. Y. 413; *In re* Boston, etc., R. Co., 53 N. Y. 574; Albany Northern R. Co. *v.* Brownell, 24 N. Y. 345; Matter of Buffalo, 72 Hun 422, 25 N. Y. Suppl. 218; Matter of Walden, 14 N. Y. St. 590.

North Carolina.— North Carolina, etc., R. Co. *v.* Carolina Cent. R. Co., 83 N. C. 489.

Ohio.— Little Miami, etc., R. Co. *v.* Dayton, 23 Ohio St. 510.

Oregon.— Oregon R. Co. *v.* Portland, 9 Oreg. 231.

Pennsylvania.— Scranton Gas, etc., Co. *v.* Northern Coal, etc., Co., 192 Pa. St. 80, 43 Atl. 470, 73 Am. St. Rep. 798; Groff's Appeal, 128 Pa. St. 621, 18 Atl. 431; Tyrone Tp. School-Dist., (1888) 15 Atl. 667; Pittsburg Junction R. Co.'s Appeal, 122 Pa. St. 511, 6 Atl. 564, 9 Am. St. Rep. 128; Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150; *In re* Towanda Bridge Co., 91 Pa. St. 216; Com. *v.* Pennsylvania Canal Co., 66 Pa. St. 41, 5 Am. Rep. 329.

South Dakota.— Winona, etc., R. Co. *v.* Watertown, 4 S. D. 323, 56 N. W. 1077.

Texas.— Sabine, etc., R. Co. *v.* Gulf, etc., R. Co., 92 Tex. 162, 46 S. W. 784.

Vermont.— Rutland-Canadian R. Co. *v.* Central Vermont R. Co., 72 Vt. 128, 47 Atl. 399; Barre R. Co. *v.* Montpelier, etc., R. Co., 61 Vt. 1, 17 Atl. 923, 15 Am. St. Rep. 877, 4 L. R. A. 785.

Virginia.— Alexandria, etc., R. Co. *v.* Alexandria, etc., R. Co., 75 Va. 780, 40 Am. Rep. 743.

Washington.— Samish River Boom Co. *v.* Union Boom Co., 32 Wash. 586, 73 Pac. 670.

West Virginia.— Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812.

United States.— Richmond, etc., R. Co. *v.* Louisa R. Co., 13 How. 71, 14 L. ed. 55; Oregon Short Line R. Co. *v.* Idaho Postal Tel. Cable Co., 111 Fed. 842, 49 C. C. A. 663.

See 18 Cent. Dig. tit. "Eminent Domain," § 107.

97. See *supra*, VII, P, 1, a.

98. Evergreen Cemetery Assoc. *v.* New Haven, 43 Conn. 234, 21 Am. Rep. 643; *In re* Boston, etc., R. Co., 53 N. Y. 574; Alexandria, etc., R. Co. *v.* Alexandria, etc., R. Co., 75 Va. 780, 40 Am. Rep. 743. See also cases cited *supra*, notes 96.

99. Evergreen Cemetery Assoc. *v.* New Haven, 43 Conn. 234, 21 Am. Rep. 643; Terre Haute *v.* Evansville, etc., R. Co., 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189; Old Colony R. Co. *v.* Framingham Water Co., 153 Mass. 561, 27 N. E. 662, 13 L. R. A. 332; *In re* New York, 135 N. Y. 253, 31 N. E. 1043, 31 Am. St. Rep. 825.

1. Augusta *v.* Georgia, etc., R. Co., 98 Ga. 161, 26 S. E. 499. In determining whether a power given in general terms to take lands was meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior use and the extent to which it will be impaired or diminished by

to the beneficial enjoyment and efficient exercise of the power expressly granted.[2] It is not enough that the property sought to be taken will be a convenience to the company seeking to appropriate it.[3] The implication does not arise if the powers expressly conferred can by reasonable intendment be exercised without the appropriation of property actually used for another public use;[4] and in no event can it be extended further than the necessities of the case require.[5] As regards the degree of necessity some decisions hold that no implication arises except from a necessity so absolute that without taking property previously devoted to a public use the grant itself would be defeated, and that the necessity must also arise from the very nature of things over which the corporation has no control.[6] Other decisions, however, hold that the necessity from which the implication may arise is not an absolute and unconditional necessity as determined by physical causes, but a reasonable necessity to be determined from considerations of practicability, economy, and facilities under the peculiar circumstances of the cases,[7] having due regard to senior rights and benefits to the public.[8]

(III) *WHERE TAKING WILL NOT MATERIALLY IMPAIR OR INTERFERE WITH PRIOR USE.* In the absence of some statutory provision expressly or by implication forbidding it,[9] property devoted to one public use may under general statutory authority be taken for another public use, where the taking will not materially impair or interfere with or is not inconsistent with the use already existing[10]

the taking for the subsequent use. *In re* Buffalo, 68 N. Y. 167.

2. *Connecticut.*— Evergreen Cemetery Assoc. *v.* New Haven, 43 Conn. 234, 21 Am. Rep. 643.

Massachusetts.— Springfield *v.* Connecticut River R. Co., 4 Cush. 63.

Minnesota.— Milwaukee, etc., R. Co. *v.* Faribault, 23 Minn. 167.

Ohio.— Hickok *v.* Hine, 23 Ohio St. 523, 13 Am. Rep. 255.

Vermont.— Rutland-Canadian R. Co. *v.* Central Vermont R. Co., 72 Vt. 128, 47 Atl. 399; Barre, etc., R. Co. *v.* Montpelier, etc., R. Co., 61 Vt. 1, 17 Atl. 923, 15 Am. St. Rep. 877.

Washington.— Seattle, etc., R. Co. *v.* Bellingham Bay, etc., R. Co., 29 Wash. 491, 69 Pac. 1107, 92 Am. St. Rep. 907.

United States.— Denver, etc., R. Co. *v.* Denver, etc., R. Co., 17 Fed. 867, 5 McCrary 443.

3. Sharon R. Co.'s Appeal, 122 Pa. St. 533, 17 Atl. 234, 9 Am. St. Rep. 133; Pittsburg Junction R. Co.'s Appeal, 122 Pa. St. 511, 6 Atl. 564, 9 Am. St. Rep. 128; Barre R. Co. *v.* Montpelier, etc., R. Co., 61 Vt. 1, 17 Atl. 923, 15 Am. St. Rep. 877, 4 L. R. A. 785.

4. *In re* Boston, etc., R. Co., 53 N. Y. 574.

5. Milwaukee, etc., R. Co. *v.* Faribault, 23 Minn. 167; Hickok *v.* Hine, 23 Ohio St. 523, 13 Am. Rep. 255; Rutland-Canadian R. Co. *v.* Central Vermont R. Co., 72 Vt. 128, 47 Atl. 389. See also National Docks, etc., R. Co. *v.* State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. Rep. 421.

6. Scranton Gas, etc., Co. *v.* Northern Coal, etc., Co., 192 Pa. St. 80, 43 Atl. 470, 73 Am. St. Rep. 798; Sharon R. Co.'s Appeal, 122 Pa. St. 533, 17 Atl. 234, 9 Am. St. Rep. 133; Pittsburg Junction R. Co.'s Appeal, 122 Pa. St. 511, 6 Atl. 564, 9 Am. St. Rep. 128; Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150. See also Sabine, etc., R. Co. *v.* Gulf, etc., R. Co., 92 Tex. 162, 46 S. W. 784, where it was held that the necessity must be so great as to make the new enterprise of paramount importance to the public and that the power can be exercised in no other practicable way.

7. Mobile, etc., R. Co. *v.* Alabama Midland R. Co., 87 Ala. 501, 6 So. 404; Springfield *v.* Connecticut River Co., 4 Cush. (Mass.) 63; Butte, etc., R. Co. *v.* Montana Union R. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298; Seattle, etc., R. Co. *v.* Bellingham Bay, etc., R. Co., 29 Wash. 491, 69 Pac. 1107, 92 Am. St. Rep. 907.

8. Butte, etc., R. Co. *v.* Montana Union R. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298.

9. Boston *v.* Brookline, 156 Mass. 172, 30 N. E. 611.

10. *Alabama.*— Mobile, etc., R. Co. *v.* Postal Tel. Cable Co., 120 Ala. 21, 24 So. 408; Mobile, etc., R. Co. *v.* Alabama Midland R. Co., 87 Ala. 501, 6 So. 404.

California.— Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604.

Indiana.— Steele *v.* Empsom, 142 Ind. 397, 41 N. E. 822; Cincinnati, etc., R. Co. *v.* Anderson, 139 Ind. 490, 38 N. E. 167, 47 Am. St. Rep. 285.

Massachusetts.— Boston *v.* Brookline, 156 Mass. 172, 30 N. E. 611; Easthampton *v.* Hampshire County Com'rs, 154 Mass. 424, 28 N. E. 298, 13 L. R. A. 157; Boston, etc., R. Co. *v.* Boston, 140 Mass. 87, 2 N. E. 943; Boston Water Power Co. *v.* Boston, etc., R. Co., 23 Pick. 360; *In re* Wellington, 16 Pick. 87, 26 Am. Dec. 631.

Minnesota.— Northwestern Tel. Exch. Co. *v.* Chicago, etc., R. Co., 76 Minn. 334, 79 N. W. 315.

New Jersey.—Starr *v.* Camden, etc., R. Co., 24 N. J. L. 592.

New York.—*In re* Rochester Water Com'rs, 66 N. Y. 413.

and is not detrimental to the public.[11] It is not material that some inconvenience may result to the prior occupant, if the conditions are such that the two uses can stand together.[12] The rule that power must be conferred expressly or by necessary implication applies only where the second use will destroy or injure the use to which the land was originally appropriated.[13]

2. Additional Burden on Railroads — a. Locating Railroad on Land or Right of Way of Another Railroad Company — (i) *In General.* The legislature may authorize one railroad company to take the property of another. The mere fact that land is owned by one railroad company does not forbid its acquisition by another,[14] even though the former may be thereby deprived of a part of its busi-

Ohio.— Little Miami, etc., R. Co. *v.* Dayton, 23 Ohio St. 510.

Virginia.— Tuckahoe Canal Co. *v.* Tuckahoe, etc., R. Co., 11 Leigh 42, 36 Am. Dec. 374.

West Virginia.— Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812.

United States.— Oregon Short Line R. Co. *v.* Idaho Postal Tel. Cable Co., 111 Fed. 842, 49 C. C. A. 663.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 116, 117.

11. *In re* Rochester Water Com'rs, 66 N. Y. 413; Matter of Folts St., 18 N. Y. App. Div. 568, 46 N. Y. Suppl. 43.

12. Augusta *v.* Georgia, R., etc., Co., 98 Ga. 161, 26 S. E. 499.

Where two public uses can stand together without material impairment or impediment of one by the other, they must so stand. Salt Lake City *v.* Salt Lake City Water, etc., Power Co., 24 Utah 249, 67 Pac. 672, 61 L. R. A. 648; Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

13. Baltimore, etc., R. Co. *v.* Jackson County, 156 Ind. 260, 58 N. E. 837, 59 N. E. 856; Gold *v.* Pittsburgh, etc., R. Co., 153 Ind. 232, 53 N. E. 285; Steele *v.* Empsom, 142 Ind. 397, 41 N. E. 822; Cincinnati, etc., R. Co. *v.* Anderson, 139 Ind. 490, 38 N. E. 167, 47 Am. St. Rep. 285; Postal Tel. Cable Co. *v.* Chicago, etc., R. Co., 30 Ind. App. 654, 66 N. E. 919; Matter of Folts St., 18 N. Y. App. Div. 568, 46 N. Y. Suppl. 43.

The question whether such interference or inconsistency would arise is not to be settled with reference to every possible manner in which the land might be used for the purpose for which it had been acquired, but with a reasonable regard to the way in which it would naturally and reasonably be used in putting it to that purpose. Boston *v.* Brookline, 156 Mass. 172, 30 N. E. 611; Springfield *v.* Connecticut River R. Co., 4 Cush. (Mass.) 63.

14. Atchison, etc., R. Co. *v.* Kansas City, etc., R. Co., 67 Kan. 569, 70 Pac. 939, 73 Pac. 899; Alexandria, etc., R. Co. *v.* Alexandria, etc., R. Co., 75 Va. 780, 40 Am. Rep. 743.

Mere priority of acquisition or even of occupation gives no exclusive right in so far as the condemnation franchises are of greater necessities than the other franchises. Grand Rapids, etc., R. Co. *v.* Grand Rapids, etc., R. Co., 35 Mich. 265, 24 Am. Rep. 545; Colorado Eastern R. Co. *v.* Union Pac. R. Co., 41 Fed. 293.

The title of a railroad company to its roadbed is limited to its use for the purposes of a railroad, and is necessarily subject to the exercise of all those powers reserved to the legislature to which the franchises of the road are subject; if the latter may be changed or modified, so may also the uses to which the land may be put. Albany Northern R. Co. *v.* Brownell, 24 N. Y. 345.

Using tracks of another company.— The legislature may, whenever in its judgment the public good requires it, authorize one railroad company to use the tracks of another.

Kentucky.— Covington St. R. Co. *v.* Covington, etc., St. R. Co., 1 Ky. L. Rep. 341.

Maryland.— North Baltimore Pass. R. Co. *v.* North Ave. R. Co., 75 Md. 233, 23 Atl. 466.

Missouri.— St. Louis R. Co. *v.* Southern R. Co., 105 Mo. 577, 16 S. W. 960; Union Depot R. Co. *v.* Southern R. Co., 105 Mo. 562, 16 S. W. 920.

New Hampshire.— Northern R. Co. *v.* Concord, etc., R. Co., 27 N. H. 183.

New York.— Sixth Ave. R. Co. *v.* Kerr, 72 N. Y. 330; Sixth Ave. R. Co. *v.* Kerr, 45 Barb. 138.

Ohio.— Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 50 Ohio St. 603, 36 N. E. 312; Kinsman St. R. Co. *v.* Broadway, etc., St. R. Co., 36 Ohio St. 239.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 111, 113.

The right to use a portion of another company's right of way longitudinally may be authorized by the legislature.

Alabama.— Anniston, etc., R. Co. *v.* Jacksonville, etc., R. Co., 82 Ala. 297, 2 So. 710; East, etc., R. Co. *v.* East Tennessee, etc., R. Co., 75 Ala. 275.

California.—Southern Pac. R. Co. *v.* Southern California R. Co., 111 Cal. 221, 43 Pac. 602; Indian Canon Road Co. *v.* Robinson, 13 Cal. 519.

Illinois.— Illinois Cent. R. Co. *v.* Chicago, etc., R. Co., 122 Ill. 473, 13 N. E. 140.

New York.— New York, etc., R. Co. *v.* Forty-second St., etc., R. Co., 26 How. Pr. 68.

Washington.— Seattle, etc., R. Co. *v.* Bellingham Bay, etc., R. Co., 29 Wash. 491, 69 Pac. 1107, 92 Am. St. Rep. 907.

See 18 Cent. Dig. tit. "Eminent Domain," § 111.

ness.[15] A limitation on the power of a railroad company to appropriate the property of another railroad company is that it cannot take the property of another company to apply it to the same use.[16] If the taking would result merely in a change of ownership without affecting the use of the property, it becomes a matter of mere private concern without at all affecting the public interest.[17] Nor can one railroad company take a fragment of a competing road constituting the most valuable part of it where this will destroy the usefulness and value of the remaining fragment.[18]

(II) *The Statutory Authority.* As regards the statutory authority for exercising the power, land of one railroad company not in actual use by it and not necessary to the operation of its road may be taken by another company under general authority to condemn in the same manner as that of an individual;[19] but in determining what property is necessary to the use of the company first acquiring it every reasonable intendment must be made in favor of such company, and there must be a liberal consideration of its future as well as its existing necessities touching the use of the existing tracks, the construction of additional ones, the convenient storage of its freight at all seasons, and the unembarrassed

15. Eastern R. Co. *v.* Boston, etc., R. Co., 111 Mass. 125, 15 Am. Rep. 13.

16. Contra Costa Coal Mines R. Co. *v.* Moss, 23 Cal. 323; Suburban R. Co. *v.* Metropolitan West Side El. R. Co., 193 Ill. 217, 61 N. E. 1090; Chicago West Div. R. Co. *v.* Metropolitan West Side El. R. Co., 152 Ill. 519, 38 N. E. 736; Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 112 Ill. 589; Minneapolis Western R. Co. *v.* Minneapolis, etc., R. Co., 61 Minn. 502, 63 N. W. 1035; *In re* Cleveland, etc., R. Co., 2 Pittsb. (Pa.) 348. See *supra*, VII, P, 1, a.

What is not a taking for the same use.— It is not a condemnation for the same public use as that to which the property was already applied, where a railroad company condemns for a right of way, and the construction of an abutment thereon for a bridge necessary to the right of way, a parcel of land which had previously been used by another railroad company for a dock or wharf for receiving and discharging freight. Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 112 Ill. 589. In a proceeding to condemn a part of the property of one railroad for the use of another leading from other and different points and regions of country the use is not the same as that of the prior road, but is rather a joint or coöperative use, to be exercised and enjoyed by both railroad companies, so as to furnish the public an additional line of travel and transportation and may be properly granted by legislative action. Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 97 Ill. 506.

17. Chicago West Div. R. Co. *v.* Metropolitan West Side El. R. Co., 152 Ill. 519, 38 N. E. 736; Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 112 Ill. 589.

Even express statutory authority would under these circumstances be insufficient to authorize a taking. Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 97 Ill. 506.

18. Central City Horse R. Co. *v.* Ft. Clark Horse R. Co., 81 Ill. 523.

19. *Illinois.*— St. Louis, etc., R. Co. *v.* Belleville City R. Co., 158 Ill. 390, 41 N. E. 916; Peoria, etc., R. Co. *v.* Peoria, etc., R. Co., 66 Ill. 174.

Kansas.— Atchison, etc., R. Co. *v.* Kansas City, etc., R. Co., 67 Kan. 569, 70 Pac. 939, 73 Pac. 899.

Louisiana.— Orleans, etc., R. Co. *v.* Jefferson, etc., R. Co., 51 La. Ann. 1605, 26 So. 278; Kansas City, etc., R. Co. *v.* Vicksburg, etc., R. Co., 49 La. Ann. 29, 21 So. 144.

Montana.— Butte, etc., R. Co. *v.* Montana Union R. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298.

New York.— *In re* Rochester, etc., R. Co., 110 N. Y. 119, 17 N. E. 678; New York Cent., etc., R. Co. *v.* Metropolitan Gaslight Co., 63 N. Y. 326.

Pennsylvania.— *In re* Cleveland, etc., R. Co., 2 Pittsb. 348.

West Virginia.— Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812.

Opposing corporations may be limited to the enjoyment of that property in actual use by them and that which is reasonably necessary for the safe, proper, and convenient management of their business and the accomplishment of the purposes of their creation. Butte, etc., R. Co. *v.* Montana Union R. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298.

Land held for speculation is liable to be taken in the same manner as property of private individuals. North Carolina, etc., R. Co. *v.* Carolina Cent. R. Co., 83 N. C. 489.

Property of a railroad company leased to a manufacturing company may be condemned under general statutory authority. St. Louis, etc., R. Co. *v.* Belleville City R. Co., 158 Ill. 390, 41 N. E. 916.

A small portion of the buttress of a bridge belonging to one railroad company but not necessary to the support of the bridge or to the exercise of the franchise of the company may be condemned by another railroad company. Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812.

Mere use of property in a manner not necessary for the proper exercise of a rail-

transaction of its freight business.[20] General authority will also be sufficient where the taking of one railroad company's property by another will not materially interfere with or impair the prior use,[21] but if the prior use will be wholly superseded or materially impaired by the taking, the power to condemn must be conferred either expressly or by necessary implication,[22] and this is so, whether

road company's franchise does not prevent its appropriation by another railroad company. Peoria, etc., R. Co. *v.* Peoria, etc., R. Co., 66 Ill. 174; Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812.

20. Pittsburgh Junction R. Co.'s Appeal, 122 Pa. St. 511, 6 Atl. 564, 9 Am. St. Rep. 128; Lake Shore, etc., R. Co. *v.* New York, etc., R. Co., 8 Fed. 858.

Land held for future use.— Land owned by a railroad company and which it expects at some future time to use for railroad purposes, but which it has held for five years without using in any way, is subject to condemnation for the right of way of another company. Colorado Eastern R. Co. *v.* Union Pac. R. Co., 41 Fed. 293.

21. Mobile, etc., R. Co. *v.* Alabama Midland R. Co., 87 Ala. 501, 6 So. 404; Anniston, etc., R. Co. *v.* Jacksonville, etc., R. Co., 82 Ala. 297, 2 So. 710; Shreveport, etc., R. Co. *v.* St. Louis, etc., R. Co., 51 La. Ann. 814, 25 So. 424; Northwestern, etc., R. Co. *v.* Chicago, etc., R. Co., 76 Minn. 334, 79 N. W. 315.

Crossing railroad yard.— Where a proposed construction of plaintiff company's road across defendant company's yard, upon an elevated structure occupying but a trifling part of the yard, would cause comparatively little injury, easily compensated in damages, and is absolutely necessary, the right to effect such crossing will be sustained. Pittsburgh Junction R. Co. *v.* Allegheny Valley R. Co., 146 Pa. St. 297, 23 Atl. 313.

22. *Kansas.*— Atchison, etc., R. Co. *v.* Kansas City, etc., R. Co., 67 Kan. 569, 70 Pac. 939, 73 Pac. 899.

Louisiana.— Kansas City, etc., R. Co. *v.* Vicksburg, etc., R. Co., 49 La. Ann. 29, 21 So. 144.

Massachusetts.— Boston, etc., R. Co. *v.* Lowell, etc., R. Co., 124 Mass. 368; Worcester, etc., R. Co. *v.* Railroad Com'rs, 118 Mass. 561; Housatonic R. Co. *v.* Lee, etc., R. Co., 118 Mass. 391.

Minnesota.—Minneapolis Western R. Co. *v.* Minneapolis, etc., R. Co., 61 Minn. 502, 63 N. W. 1035.

Pennsylvania.—Sharon R. Co.'s Appeal, 122 Pa. St. 533, 17 Atl. 234, 9 Am. St. Rep. 133; Pittsburgh Junction R. Co.'s Appeal, 122 Pa. St. 511, 6 Atl. 564, 9 Am. St. Rep. 128; Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150.

Texas.— Sabine, etc., R. Co. *v.* Gulf, etc., R. Co., 92 Tex. 162, 46 S. W. 784.

Vermont.— Barre R. Co. *v.* Montpelier, etc., R. Co., 61 Vt. 1, 17 Atl. 923, 15 Am. St. Rep. 877, 4 L. R. A. 785.

Virginia.— Alexandria, etc., R. Co. *v.* Alexandria, etc., R. Co., 75 Va. 780, 40 Am. Rep. 743.

West Virginia.— Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812.

United States.— Lake Shore, etc., R. Co. *v.* New York, etc., R. Co., 8 Fed. 858.

"An express legislative enactment is generally required in order to take property in use by a railroad company except where the proposed appropriation would not destroy or greatly injure the franchise of the company or render it difficult to prosecute the object thereof." Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812.

Longitudinal use of right of way.— It is generally held that the right to appropriate a portion of a railroad company's right of way longitudinally is not conferred by general authority to condemn; that the power must be conferred expressly or by necessary implication (Suburban R. Co. *v.* Metropolitan West Side El. R. Co., 193 Ill. 217, 61 N. E. 1090; Illinois Cent. R. Co. *v.* Chicago, etc., R. Co., 122 Ill. 473, 13 N. E. 140; Housatonic R. Co. *v.* Lee, etc., R. Co., 118 Mass. 391; Sharon R. Co.'s Appeal, 122 Pa. St. 533, 17 Atl. 234, 9 Am. St. Rep. 133); and in one state the statutes provide that the located route of an existing railway may be condemned solely for the purpose of crossing the same, unless the consent of the company whose property is sought to be condemned is obtained (United New Jersey R., etc., Co. *v.* National Docks, etc., Connecting R. Co., 52 N. J. L. 90, 18 Atl. 574; Morris, etc., R. Co. *v.* Hudson Tunnel R. Co., 38 N. J. L. 548). Nevertheless the power may be conferred by express provision or by necessary implication (South, etc., Alabama R. Co. *v.* Highland Ave., etc., R. Co., 119 Ala. 105, 24 So. 114; Mobile, etc., R. Co. *v.* Alabama Midland R. Co., 87 Ala. 501, 6 So. 404; Southern Pac. R. Co. *v.* Southern California R. Co., 111 Cal. 221, 43 Pac. 602; Butte, etc., R. Co. *v.* Montana Union R. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298; Seattle, etc., R. Co. *v.* Bellingham Bay, etc., R. Co., 29 Wash. 491, 69 Pac. 1107, 92 Am. St. Rep. 907); as where it appears by the statute or by the application of the statute to the subject-matter that the contemplated road cannot reasonably be built without appropriating land already devoted to public use, in which case an implication arises that the legislature intended that such appropriation might be made (Providence, etc., R. Co. *v.* Norwich, etc., R. Co., 138 Mass. 277; Boston, etc., R. Co. *v.* Lowell, etc., R. Co., 124 Mass. 368; Housatonic R. Co. *v.* Lee, etc., R. Co., 118 Mass. 391).

Taking part of railroad yard.— A railroad company cannot without express authority condemn a portion of another's railroad yards where the result would be to abso-

the land sought to be condemned was acquired by eminent domain or by purchase.[23] This implication only arises when the property sought to be appropriated is necessary to the exercise of the power expressly granted to the condemning company.[24] Such appropriation cannot be made merely for the sake of economy and convenience,[25] and by the express provisions of some statutes it must be for a more necessary public use.[26] As regards the degree of necessity, there is some conflict of authority. Some decisions hold that the necessity must be absolute as determined by physical causes;[27] while others hold that the necessity is a reasonable one under the circumstances of the particular case dependent upon the practicability of another route considered in connection with the relative cost to one and probable injury to the other.[28]

b. Crossing and Connecting of Railroads — (i) *In General.* The title of a railroad company to its right of way is subject to the right of another company to cross it with its track or to make connection with it.[29] The state may authorize

lutely take from the first company a portion of their yard for the sole use of the other. Sharon R. Co.'s Appeal, 122 Pa. St. 533, 17 Atl. 234, 9 Am. St. Rep. 133; Pittsburgh Junction R. Co.'s Appeal, 122 Pa. St. 511, 6 Atl. 564, 9 Am. St. Rep. 128; Sabine, etc., R. Co. v. Gulf, etc., R. Co., 92 Tex. 162, 46 S. W. 784.

23. Providence, etc., R. Co., Petitioner, 17 R. I. 324, 21 Atl. 965.

24. Mobile, etc., R. Co. v. Alabama Midland R. Co., 87 Ala. 501, 6 So. 404; Pennsylvania Schuylkill Valley R. Co. v. Schuylkill Nav. Co., 167 Pa. St. 576, 31 Atl. 858; Pittsburgh Junction R. Co. v. Allegheny Valley R. Co., 146 Pa. St. 297, 23 Atl. 313; Sharon R. Co.'s Appeal, 122 Pa. St. 533, 17 Atl. 234, 9 Am. St. Rep. 133; Lewis v. Germantown, etc., R. Co., 16 Phila. (Pa.) 621; Barre R. Co. v. Montpelier, etc., R. Co., 61 Vt. 1, 17 Atl. 923, 15 Am. St. Rep. 877, 4 L. R. A. 785; Denver, etc., R. Co. v. Denver, etc., R. Co., 17 Fed. 867.

Other practicable route.— In Missouri it has been held that the fact that the railroad company asking condemnation of a right of way over the land of another corporation might obtain a feasible route over the land of other proprietors does not exempt defendant from condemnation if there is no material interference with the prior use. St. Louis, etc., R. Co. v. Hannibal Union Depot Co., 125 Mo. 82, 28 S. W. 483.

25. Sharon R. Co.'s Appeal, 122 Pa. St. 533, 17 Atl. 234, 9 Am. St. Rep. 133; Barre R. Co. v. Montpelier, etc., R. Co., 61 Vt. 1, 17 Atl. 923, 15 Am. St. Rep. 877, 4 L. R. A. 785.

One railroad company will not be allowed to build its road through the yard of another, merely for the sake of avoiding a sharp curve. Barre R. Co. v. Montpelier, etc., R. Co., 61 Vt. 1, 17 Atl. 923, 15 Am. St. Rep. 877, 4 L. R. A. 785.

26. Southern Pac. R. Co. v. Southern California R. Co., 111 Cal. 221, 43 Pac. 602.

More necessary use illustrated.— Where a railroad company traversing the side of a mountain in a mining section has within its right of way tracts of ground not necessary to the proper, successful, and safe operation of its system of tracks and spurs, and not used by it in connection with any such operations, and in all reasonable probability not necessary for any such future use, if another road seeks the same objective points, and in doing so is obliged to take part of such unused right of way to avoid a considerably more circuitous route, at a different grade, of very much greater cost, and of serious damage to many mining properties in their subterranean and surface operations, and withal would be obliged by the topography of the mountains to parallel the adversary road a part of the way, under such conditions the use of the unused parts of the right of way of the one company by the other is a more necessary public use than that to which such unused portions are already appropriated. Butte, etc., R. Co. v. Montana Union R. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298.

27. Pittsburgh Junction R. Co. v. Allegheny Valley R. Co., 146 Pa. St. 297, 23 Atl. 313; Sharon R. Co.'s Appeal, 122 Pa. St. 533, 17 Atl. 234, 9 Am. St. Rep. 133; Lewis v. Germantown, etc., R. Co., 16 Phila. (Pa.) 621.

28. South Alabama, etc., R. Co. v. Highland Ave., etc., R. Co., 119 Ala. 105, 24 So. 114; Mobile, etc., R. Co. v. Alabama Midland R. Co., 87 Ala. 501, 6 So. 404; Butte, etc., R. Co. v. Montana Union R. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298; Seattle, etc., R. Co. v. Bellingham Bay, etc., R. Co., 29 Wash. 491, 69 Pac. 1107, 92 Am. St. Rep. 907.

By the term "practicable route" is meant only that the expense is not disproportionate to the probable benefits. And the taking is essential when, the public convenience being served equally well, the financial interests of the second company will gain more thereby than the probable injury to the first company. Mobile, etc., R. Co. v. Alabama Midland R. Co., 87 Ala. 501, 6 So. 404.

29. *Indiana.*— Newcastle, etc., R. Co. v. Peru, etc., R. Co., 3 Ind. 464.

Iowa.— Minneapolis, etc., R. Co. v. Chicago, etc., R. Co., 116 Iowa 681, 88 N. W. 1082.

Louisiana.—Houston, etc., R. Co. v. Kansas City, etc., R. Co., 109 La. 581, 33 So. 609.

the construction of other railroads across another railroad company's track whenever the public welfare so requires. Neither priority in the date of one charter over another nor the prior location and construction of one road over another affects this right.[30] No express statutory authority is necessary to authorize the crossing of one company's tracks by the tracks of another. The right will be implied from the general authority conferred on a railroad company to construct a railway between designated termini,[31] and the legislature may by express statu-

Michigan.— Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 62 Mich. 564, 29 N. W. 500, 4 Am. St. Rep. 875.

Minnesota.— Minneapolis Western R. Co. *v.* Minneapolis, etc., R. Co., 61 Minn. 502, 63 N. W. 1035.

Montana.— Butte, etc., R. Co. *v.* Montana Union R. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298.

New Jersey.— National Docks, etc., R. Connecting Co. *v.* State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. Rep. 421; New York, etc., R. Co. *v.* Drummond, 46 N. J. L. 644; Morris, etc., R. Co. *v.* Hudson Tunnel R. Co., 38 N. J. L. 548; National R. Co. *v.* Easton, etc., R. Co., 36 N. J. L. 181; Morris, etc., R. Co. *v.* New Jersey Cent. R. Co., 31 N. J. L. 205.

New York.— *In re* Kerr, 42 Barb. 119.

Ohio.— Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604.

Pennsylvania.— Pittsburgh Junction R. Co.'s Appeal, 122 Pa. St. 511, 6 Atl. 564, 9 Am. St. Rep. 128.

See 18 Cent. Dig. tit. "Eminent Domain," § 112.

A steam railroad company which has by permission of the city laid its tracks across a city street cannot prevent a street-car company from laying its track along such street and across the tracks of the steam company, where the street-car company is authorized to do so by the city. Chicago, etc., R. Co. *v.* West Chicago St. R. Co., 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485 [*affirming* 54 Ill. App. 273].

Road in hands of receiver.— Where another corporation petitions for leave to cross the tracks of a railroad which is in the possession of receivers, the permission will in a proper case be granted, to extend only through the receivership, the company seeking to cross giving bond to indemnify the company whose tracks are crossed or the successor of such company. Central Trust Co. *v.* Wabash, etc., R. Co., 26 Fed. 3.

Effect of crossing on right to condemn other land for connection.— The fact that one company has by condemnation obtained a crossing over another's tracks for its main line does not exhaust its right to condemn other lands of the same company for the purpose of making connection with a third road (Lake Shore, etc., R. Co. *v.* Baltimore, etc., R. Co., 149 Ill. 272, 37 N. E. 91; Sabine, etc., R. Co. *v.* Gulf, etc., R. Co., 92 Tex. 162, 46 S. W. 784), even though the first and last roads do not intersect (Sabine, etc., R. Co. *v.* Gulf, etc., R. Co., 92 Tex. 162, 46 S. W. 784; Sabine, etc., R. Co. *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1898) 47 S. W. 836). But *compare* Rutland-Canadian R. Co. *v.* Central Vermont R. Co., 72 Vt. 128, 47 Atl. 399. In this case the company was authorized by its charter to construct a railroad between certain places, having the right to cross or connect with any railroad. The company desired to connect with another railroad and could do so by running on the tracks of a third railroad and using its station. Such connection would be to the interest of both railroads and to the public. But it was held that it could not condemn a right of way along the third railroad's right of way, across its tracks, and through its engine-house, to make an independent connection with the second railroad.

The right of way of the Northern Pacific Railway is not property of the federal government, set apart for its own public use, so as to exempt it from the operation of the Nebraska statute respecting the crossing and connecting of railroads (Union Pac. R. Co. *v.* Burlington, etc., R. Co., 3 Fed. 106, 1 McCrary 452); nor is it exempt from the operation of a like statute of Kansas (Union Pac. R. Co. *v.* Leavenworth, etc., R. Co., 29 Fed. 728. See also Northern Pac. R. Co. *v.* St. Paul, etc., R. Co., 3 Fed. 702, 1 McCrary 302).

What is not a crossing.— Running through a railroad yard and crossing the yard tracks and switches therein is not a crossing of a railroad. Pittsburgh Junction R. Co.'s Appeal, 122 Pa. St. 511, 6 Atl. 564, 9 Am. St. Rep. 128.

30. Kansas City Suburban Belt R. Co. *v.* Kansas City, etc., R. Co., 118 Mo. 599, 24 S. W. 478.

31. East St. Louis, etc., R. Co. *v.* Belleville City R. Co., 159 Ill. 544, 42 N. E. 974; Houston, etc., R. Co. *v.* Kansas City, etc., R. Co., 109 La. 581, 33 So. 609; United New Jersey R., etc., Co. *v.* National Docks, etc., Connecting R. Co., 52 N. J. L. 90, 18 Atl. 574; Morris, etc., R. Co. *v.* Central R. Co., 31 N. J. L. 205; Perry County R. Extension Co. *v.* Newport, etc., R. Co., 150 Pa. St. 193, 24 Atl. 709. The company whose lands are crossed is in this respect upon the same footing as an individual, and a general grant of power is sufficient. Morris, etc., R. Co. *v.* New Jersey Cent. R. Co., 31 N. J. L. 205.

Instance.— Where the legislature grants to a railroad company a charter to build a railroad between certain points, and it becomes necessary for the company to cross another railroad or a turnpike also chartered by the legislature, such crossing may lawfully be made; and such crossing cannot be considered a condemnation of the franchise. Balti-

tory provision subject one company to this right of crossing by another.[32] The mere fact that the crossing will work an inconvenience to the company whose track is crossed does not affect the right,[33] so long as it does not prevent a reasonably fair enjoyment and exercise of the franchise of the company whose tracks it crosses;[34] but a crossing at a designated point will not be allowed where it will unreasonably interfere with the operation of the road proposed to be crossed and greatly impair its efficiency and unwarrantably increase the hazard of traveling.[35] It is no objection to the right of one road to cross the track of another that the two roads are parallel at some point;[36] and the right to cross is not limited to one crossing of the tracks.[37] In some of the states the company desiring to cross must obtain from the other a license, or must pay or secure to such other the appraised damages.[38]

(II) *Extent of Right Acquired.* The exercise of the right must be limited by the necessity of the condemning road.[39] In condemning a crossing over the land of another railroad all that is acquired is a right of way. The place of crossing remains in the common use of both railroads for the exercise of their respective franchises. The manner of crossing is not to be destructive of the ability of the road crossing to fully, fairly, and freely exercise its franchise.[40] The land of the company whose track is to be crossed cannot be appropriated to the exclusive use of the company seeking to cross.[41]

e. Streets, Highways, Etc. — (I) *Under Express Statutory Authorization.* It is perfectly competent for the legislature to authorize the laying out, extension, or opening up of streets, alleys, or highways across the right of way and other lands of a railroad company without regard to the use to which they were devoted, and however inconsistent therewith or destructive thereof the second use may be, and express legislative authority to this effect is found in some jurisdictions.[42] Where in accordance with statutes of this character land already

more, etc., Turnpike Co. *v.* Union R. Co., 35 Md. 224, 6 Am. Rep. 397.

32. *In re* Minneapolis, etc., R. Co., 36 Minn. 481, 32 N. W. 556; Morris, etc., R. Co. *v.* Hudson Tunnel R. Co., 38 N. J. L. 548.

33. Chicago, etc., R. Co. *v.* Illinois Cent. R. Co., 113 Ill. 156; Butte, etc., R. Co. *v.* Montana Union R. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298.

34. National Docks, etc., Connecting R. Co. *v.* State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. Rep. 421.

35. Lake Erie, etc., R. Co. *v.* Atlantic, etc., R. Co., 7 Ohio Dec. (Reprint) 364, 2 Cinc. L. Bul. 187; Seattle, etc., R. Co. *v.* State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217.

A company has not the right to cross sidetracks if it would not have under the same circumstances the right to cross the main track. Barre R. Co. *v.* Montpelier, etc., R. Co., 61 Vt. 1, 17 Atl. 923, 15 Am. St. Rep. 877, 4 L. R. A. 785.

36. *In re* Boston Hoosac Tunnel, etc., R. Co., 79 N. Y. 64.

37. *In re* Boston Hoosac Tunnel, etc., R. Co., 79 N. Y. 64.

38. Such is the provision of the constitution and laws of Minnesota. Northern Pac. R. Co. *v.* Barnesville, etc., R. Co., 4 Fed. 298, 2 McCrary 203.

39. National Docks, etc., Connecting R. Co. *v.* State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. Rep. 421; *In re* Boston Hoosac Tunnel, etc., R. Co., 79 N. Y. 64. See also *infra*, XIII.

40. Newcastle, etc., R. Co. *v.* Peru, etc., R. Co., 3 Ind. 464; National Docks, etc., Connecting R. Co. *v.* State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. Rep. 421; New York, etc., R. Co. *v.* Drummer, 46 N. J. L. 644; Lehigh Valley R. Co. *v.* Dover, etc., R. Co., 43 N. J. L. 528; New Jersey Southern R. Co. *v.* Long Branch Com'rs, 39 N. J. L. 28; State *v.* Easton, etc., R. Co., 36 N. J. L. 181; Sharon R. Co.'s Appeal, 122 Pa. St. 533, 17 Atl. 234, 9 Am. St. Rep. 133.

41. Kansas City, etc., R. Co. *v.* St. Louis, etc., Co., 118 Mo. 299; Chicago, etc., R. Co. *v.* Kansas City, etc., R. Co., 110 Mo. 510, 19 S. W. 826; United New Jersey R., etc., Co. *v.* National Docks, etc., Connecting R. Co., 52 N. J. L. 90, 18 Atl. 574; *In re* Boston Hoosac Tunnel, etc., R. Co., 79 N. Y. 64; Sharon R. Co.'s Appeal, 122 Pa. St. 533, 17 Atl. 234, 9 Am. St. Rep. 133.

Alteration of grade. — The law will not authorize a company to adopt a plan of crossing an existing railroad which will compel an alteration of the grade in order that the latter may continue its operations. United New Jersey R., etc., Co. *v.* National Docks, etc., Connecting R. Co., 52 N. J. L. 90, 18 Atl. 574.

42. Chicago, etc., R. Co. *v.* Morrison, 195 Ill. 271, 63 N. E. 96; Chicago, etc., R. Co. *v.* Chicago, 151 Ill. 348, 37 N. E. 842; Illinois Cent. R. Co. *v.* Chicago, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 530; Illinois Cent.

appropriated is condemned, it is altogether immaterial that the two uses cannot exist together.[43]

(II) *In Absence of Special Statutory Authorization.* Where the beneficial use of its property by a railroad company is not materially interfered with by the extension of streets or highways across its tracks or right of way or other property no special statutory authority is necessary to the exercise of this power.[44] But, in accordance with the general doctrine governing the taking of property already appropriated to public use, land once appropriated by a railroad company for a public use cannot, in the absence of statute expressly or by necessary implication authorizing it, be condemned for streets or highways, if such purposes would be inconsistent with and impair or destroy its use for railroad purposes.[45] This rule applies whether the railroad acquired its lands by purchase or eminent domain,[46] unless the company may use the property purchased for private purposes if it sees fit.[47] In applying these rules it has been held that a general statutory authority to condemn does not authorize the taking of land already lawfully appropriated and needed as a site for a depot.[48] It is never permissible to take property appropriated for depot purposes if the use of the property by the railroad will be essentially impaired or destroyed.[49] So it has been

R. Co. *v.* Chicago, 138 Ill. 453, 28 N. E. 740; Powell *v.* Greenburg, 150 Ind. 148, 49 N. E. 955; Terre Haute *v.* Evansville, etc., R. Co., 149 Ind. 174, 46 N. E. 77. See also Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255, 4 Am. Rep. 63.

Applications of rule.— Under statutes of the character under consideration streets may be extended over railroad yards. Chicago, etc., R. Co. *v.* Pontiac, 169 Ill. 155, 48 N. E. 485; Illinois Cent. R. Co. *v.* Chicago, 156 Ill. 98, 41 N. E. 45; Chicago, etc., R. Co. *v.* Chicago, 151 Ill. 348, 37 N. E. 842. It is immaterial that the tracks across which the streets are extended are used for the storing of cars, and that the two uses cannot exist together (Chicago, etc., R. Co. *v.* Morrison, 195 Ill. 271, 63 N. E. 96), and the fact that a company erected a house upon its right of way for occupancy for a section foreman does not exempt ground which it covers from condemnation for a street crossing (Illinois Cent. R. Co. *v.* Normal, 175 Ill. 562, 51 N. E. 781).

Repeal of statute.— A statute requiring a railroad company to maintain and construct crossings and approaches at public highways does not repeal by implication the statutes conferring upon municipal authorities the power to lay streets across a railroad right of way. Chicago, etc., R. Co. *v.* Chicago, 140 Ill. 309, 29 N. E. 1109.

43. Chicago, etc., R. Co. *v.* Morrison, 195 Ill. 271, 63 N. E. 96.

44. See cases cited *infra*, notes 52, 54.

45. General authority to condemn lands for streets or highways or extend them across railroad tracks does not authorize the appropriation for streets and highways of land of a railroad company for a use inconsistent with that of the company.

Illinois.— Chicago, etc., R. Co. *v.* Pontiac, 169 Ill. 155, 48 N. E. 485; Illinois Cent. R. Co. *v.* Chicago, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 530.

Indiana.— Cincinnati, etc., Co. *v.* Anderson, 139 Ind. 490, 38 N. E. 167, 47 Am. St. Rep. 285; Seymour *v.* Jacksonville, etc., R. Co., 126 Ind. 466, 26 N. E. 188.

Massachusetts.— Boston, etc., R. Co. *v.* Cambridge, 166 Mass. 224, 44 N. E. 140.

Michigan.— Battle Creek, etc., R. Co. *v.* Tiffany, 99 Mich. 471, 58 N. W. 617.

Minnesota.— Minneapolis, etc., R. Co. *v.* Hartland, 85 Minn. 76, 88 N. W. 423; St. Paul Union Depot Co. *v.* St. Paul, 30 Minn. 359, 15 N. W. 684; Milwaukee, etc., R. Co. *v.* Faribault, 23 Minn. 167.

Missouri.— Hannibal *v.* Hannibal, etc., R. Co., 49 Mo. 480.

New Jersey.— New York, etc., R. Co. *v.* Paterson, 61 N. J. L. 408, 39 Atl. 680.

New York.— Prospect Park, etc., R. Co. *v.* Williamson, 91 N. Y. 552; Albany Northern R. Co. *v.* Brownell, 24 N. Y. 345; *In re* Walden, 14 N. Y. St. 590.

South Dakota.— Winona, etc., R. Co. *v.* Watertown, 4 S. D. 323, 56 N. W. 1077.

See 18 Cent. Dig. tit. "Eminent Domain," § 108.

Where an opening of a city street would necessitate the shortening of side-tracks and turnouts of a railroad company, it is to the extent of the shortening and actual destruction of property rights inconsistent to the use in which the railroad company has already appropriated its right of way. Southern Kansas R. Co. *v.* Oklahoma City, 12 Okla. 82, 69 Pac. 1050.

46. St. Paul Union Depot Co. *v.* St. Paul, 30 Minn. 359, 15 N. W. 685.

47. Matter of Alexander Ave., 17 N. Y. Suppl. 933.

48. Valparaiso *v.* Chicago, etc., R. Co., 123 Ind. 467, 24 N. E. 249; St. Paul Union Depot Co. *v.* St. Paul, 30 Minn. 359, 15 N. W. 685; Prospect Park, etc., R. Co. *v.* Williamson, 91 N. Y. 552; Albany Northern R. Co. *v.* Brownell, 24 N. Y. 345; *In re* Walden, 14 N. Y. St. 590.

49. Minneapolis, etc., R. Co. *v.* Hartland, 85 Minn. 76, 88 N. W. 423; Milwaukee, etc., R. Co. *v.* Faribault, 23 Minn. 167; Winona,

held that property appropriated for engine-houses, car-shops, etc., cannot be condemned under general statutory authority,[50] and without express statutory authority land of a railroad company cannot be condemned for a street or highway to run longitudinally along the property of the railroad company.[51] With respect to railroad yards it is held that no special legislation is necessary to enable a municipality to extend a street over land used by a railroad company as a yard, provided the company is not thereby deprived of the beneficial use of the property,[52] otherwise if this will be the necessary effect of the extension.[53] The general authority to condemn lands for streets or highways or to extend them to cross railroad tracks has uniformly been held to authorize the extension of streets or highways across a railroad track without any other legislative authority.[54] While danger and delays are necessarily incident to railroad crossings, the uses may be so adjusted as to work no serious detriment to the public interest.[55]

(III) *EXTENT OF RIGHT ACQUIRED.* Where a street is extended over a railroad track the city does not acquire the fee but merely an easement.[56] It does not acquire the exclusive use but only a common right with the railroad company to the use of the land condemned.[57] Notwithstanding the condemnation the rail-

etc., R. Co. *v.* Watertown, 4 S. D. 323, 56 N. W. 1077.

Burden of proof.— It has been held that where a proposed street extends over and across a railroad right of way or depot ground, the burden is upon the railroad company to show that if so extended it will necessarily impair and destroy the use of such right of way for railway purposes. Minneapolis, etc., R. Co. *v.* Hartland, 85 Minn. 76, 88 N. W. 423.

50. St. Paul Union Depot Co. *v.* St. Paul, 30 Minn. 359, 15 N. W. 684; Albany, etc., R. Co. *v.* Brownell, 24 N. Y. 345; *In re* Walden, 14 N. Y. St. 590.

51. Seymour *v.* Jacksonville, etc., R. Co., 126 Ind. 466, 26 N. E. 188; St. Paul Union Depot Co. *v.* St. Paul, 30 Minn. 359, 15 N. W. 684; New Jersey Southern R. Co. *v.* Long Branch Com'rs, 39 N. J. L. 28. And see *In re* Great Bend Village Road, 2 Pa. Co. Ct. 335, holding that a public road cannot be laid out on land held by a railroad company along a right of way unless the company has abandoned it.

52. Battle Creek, etc., R. Co. *v.* Tiffany, 99 Mich. 471, 58 N. W. 617; Matter of Folts St., 18 N. Y. App. Div. 568, 46 N. Y. Suppl. 43. See also Detroit Park, etc., Com'rs *v.* Chicago, etc., R. Co., 93 Mich. 58, 52 N. W. 1083, holding that a railroad company cannot convert its right of way into store-room for its cars and call it a yard and thus prevent a street from crossing its right of way.

53. New York, etc., R. Co. *v.* Paterson, 61 N. J. L. 408, 39 Atl. 680; Baltimore, etc., R. Co. *v.* Bellaire, 7 Ohio Dec. (Reprint) 607, 4 Cinc. L. Bul. 201. And see Seymour *v.* Jacksonville, etc., R. Co., 126 Ind. 466, 26 N. E. 188.

54. *Connecticut.*—Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255, 4 Am. Rep. 63.

Indiana.— Lake Erie, etc., R. Co. *v.* Kokomo, 130 Ind. 224, 29 N. E. 780.

Iowa.— Albia *v.* Chicago, etc., R. Co., 102 Iowa 624, 71 N. W. 541.

Michigan.— Detroit, etc., Parks Com'rs *v.* Michigan Cent. R. Co., 90 Mich. 385, 51 N. W. 447.

Minnesota.— Minneapolis, etc., R. Co. *v.* Hartland, 85 Minn. 76, 88 N. W. 423; St. Paul, etc., R. Co. *v.* Minneapolis, 35 Minn. 141, 27 N. W. 500; St. Paul Union Depot Co. *v.* St. Paul, 30 Minn. 359, 15 N. W. 684; Milwaukee, etc., R. Co. *v.* Faribault, 23 Minn. 167.

Missouri.— Hannibal *v.* Hannibal, etc., R. Co., 49 Mo. 480.

New Jersey.— New York, etc., R. Co. *v.* Drummond, 46 N. J. L. 644; New Jersey Southern R. Co. *v.* Long Branch Com'rs, 39 N. J. L. 28; Jersey City *v.* Montclair R. Co., 35 N. J. L. 328.

New York.— Matter of Folts St., 18 N. Y. App. Div. 568, 46 N. Y. Suppl. 43.

Ohio.— Little Miami, etc., R. Co. *v.* Dayton, 23 Ohio St. 510.

See 18 Cent. Dig. tit. "Eminent Domain," § 108.

The rule that lands devoted to one public use cannot be taken for another without express legislative authority applies only to the taking of the beneficial use of the land from the grantee of the first public use and does not apply to the laying out of a street across a railroad right of way. Matter of Folts St., 18 N. Y. App. Div. 568, 46 N. Y. Suppl. 43.

55. St. Paul, etc., R. Co. *v.* Minneapolis, 35 Minn. 141, 27 N. W. 500.

56. Harris *v.* Chicago, 162 Ill. 288, 44 N. E. 337. See also *infra*, XIII.

57. Illinois Cent. R. Co. *v.* Normal, 175 Ill. 562, 51 N. E. 781; Illinois Cent. R. Co. *v.* Lostant, 167 Ill. 85, 47 N. E. 62; Chicago, etc., R. Co. *v.* Cicero, 157 Ill. 48, 41 N. E. 640; Chicago, etc., R. Co. *v.* Chicago, 149 Ill. 457, 37 N. E. 78; Illinois Cent. R. Co. *v.* Chicago, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 530; Illinois Cent. R. Co. *v.* Chicago, 138 Ill. 453, 28 N. E. 740; Chicago, etc., R. Co. *v.* Hogan, 105 Ill. App. 136.

road company continues to use it for its corporate purpose not inconsistent with its use as a street crossing.[58]

d. Telegraph Lines. It is very generally held that a telegraph company may condemn for the construction of its line a right of way which has been previously condemned by a railroad company for its right of way, where the construction and operation of the telegraph line will not destroy or materially interfere with the use of the way for a railroad.[59] If the use by the railroad company is not materially interfered with or destroyed, this power may be exercised under a general statutory authority to condemn land,[60] and statutes prohibiting the taking of property appropriated to a public use except for "a more necessary public use" do not prevent the appropriation for telegraph purposes of a portion of a railroad right of way not occupied by the tracks, the same being very generally considered "a more necessary public use."[61] In a number of jurisdictions statutes have been enacted specially relating to condemnation of property by telegraph companies.[62] Although

58. Chicago *v.* Cicero, 157 Ill. 48, 41 N. E. 640.

59. *Alabama.*— Mobile, etc., R. Co. *v.* Postal Tel. Cable Co., 120 Ala. 21, 24 So. 408.

Colorado.— Union Pac. R. Co. *v.* Colorado Postal Tel. Cable Co., 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106.

Louisiana.— Southwestern Tel. Co. *v.* Kansas City, etc., R. Co., 109 La. 892, 33 So. 910.

Ohio.— Cleveland, etc., R. Co. *v.* Ohio Postal Tel. Cable Co., 68 Ohio St. 306, 67 N. E. 890, 62 L. R. A. 941.

Tennessee.— Mobile, etc., R. Co. *v.* Postal Tel. Cable Co., 101 Tenn. 62, 46 S. W. 571, 41 L. R. A. 403.

Texas.— Southwestern Tel., etc., Co. *v.* Gulf, etc., R. Co., (Civ. App. 1899) 52 S. W. 106.

Utah.— Postal Tel. Cable Co. *v.* Oregon, etc., R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

Virginia.— Postal Tel. Cable Co. *v.* Farmville, etc., R. Co., 96 Va. 661, 32 S. E. 468.

United States.— Idaho Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 104 Fed. 623 [*affirmed* in 111 Fed. 842, 49 C. C. A. 663].

See 18 Cent. Dig. tit. "Eminent Domain," § 114.

Land which is a part of a railroad right of way, but is not used for any purpose by the railroad, and is not essential to the enjoyment of its franchise and property, may be appropriated by a telegraph company for the purpose of constructing and maintaining its lines; and the line may be constructed longitudinally on the railroad right of way. Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

Effect of power to obtain right of way over other property.— The mere fact that such a company can obtain a right of way over other property or in other ways is no defense to proceedings to condemn a right of way over railroad lands. Ft. Worth, etc., R. Co. *v.* Southwestern Tel., etc., Co., 96 Tex. 160, 71 S. W. 270, 60 L. R. A. 145; St. Louis, etc., R. Co. *v.* Southwestern Telephone, etc., Co., 121 Fed. 276, 58 C. C. A. 198. Thus a telegraph company will not be prevented from condemning a railroad right of way merely because there is a highway adjacent to the proposed route along which its line could be constructed. Union Pac. R. Co. *v.* Colorado Postal Tel. Cable Co., 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106.

60. Mobile, etc., R. Co. *v.* Postal Tel. Cable Co., 120 Ala. 21, 24 So. 408; Postal Tel. Cable Co. *v.* Chicago, etc., R. Co., 30 Ind. App. 654, 66 N. E. 919; Postal Tel. Cable Co. *v.* Oregon, etc., R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

61. Southern Pac. R. Co. *v.* Southern Cal. R. Co., 111 Cal. 221, 43 Pac. 602; Montana Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 114 Fed. 787; Idaho Postal Tel. Cable Co. *v.* Oregon, etc., R. Co., 104 Fed. 623 [*affirmed* in 111 Fed. 842, 49 C. C. A. 663]; Postal Tel. Cable Co. *v.* Oregon, etc., R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

62. A statute granting to telegraph and telephone companies the right to condemn a right of way along highways, railroads, and post-roads is constitutional. St. Louis, etc., R. Co. *v.* Southwestern Telephone, etc., Co., 121 Fed. 276, 58 C. C. A. 198.

Construction and operation of statutes.— The right to construct telegraph lines along a railroad right of way is conferred by statutes expressly providing for the construction of telegraph lines "upon the right of way of railroad companies" (South Carolina, etc., R. Co. *v.* American Telephone, etc., Co., 65 S. C. 459, 43 S. E. 970); by statutes authorizing the construction of such lines "along and parallel to any of the railroads of the state" (Southwestern Tel. Co. *v.* Kansas City, etc., R. Co., 109 La. Ann. 892, 33 So. 910; Postal Tel. Cable Co. *v.* Farmville, etc., R. Co., 96 Va. 661, 32 S. E. 468 [*overruling* Postal Tel. Cable Co. *v.* Norfolk, etc., R. Co., 88 Va. 920, 14 S. E. 803]); by statutes authorizing the construction of telegraph lines "along and upon any railroad" (St. Louis, etc., R. Co. *v.* Postal Tel. Co., 173 Ill. 508, 51 N. E. 382), or by statutes authorizing telegraph companies to appropriate for their purposes lands whether owned by private persons or by corporations (Ft. Worth, etc., R. Co. *v.* Southwestern Tel., etc., Co., 96 Tex. 160, 71 S. W. 270, 60 L. R. A.

the statute mentions telegraph companies only or telephone companies only, it nevertheless applies equally to telegraph and telephone companies.[63] If the railroad is in the possession of a federal court through its receiver, a telegraph company cannot without the consent of the federal court condemn any portion of the right of way by proceedings instituted in the state court.[64]

e. Other Burdens. General authority to condemn land for a park does not authorize the taking of land of a railroad in actual use for the purpose of its incorporation,[65] but land not actually necessary to the enjoyment of the franchise of a company may be condemned for a reservoir,[66] waterworks,[67] or a private way,[68] under general authority; and it is sufficient to authorize the construction of drainage ditches along a railroad right of way, as this does not materially interfere with the prior use.[69]

3. Additional Burden on Streets and Highways — a. Railroads. The legislature has power to authorize railroad companies to lay their tracks across highways[70] or turnpikes,[71] and it may authorize such companies to lay their tracks longitudinally in streets, highways,[72] or turnpikes,[73] or to take portions of streets

145). So a telegraph line is an internal improvement for which a right of way may be acquired along a railroad right of way within a statute conferring the right to take the property or easements of private corporations for public purposes and internal improvements. Mobile, etc., R. Co. *v.* Postal Tel. Cable Co., 101 Tenn. 62, 46 S. W. 571, 41 L. R. A. 403. The right is not conferred, however, by a statute authorizing the erection of fixtures and structures along and across "highways" (Western Union Tel. Co. *v.* Pennsylvania R. Co., 123 Fed. 33, 59 C. C. A. 113); or "over any public roads, streets, and highways" (New York City, etc., R. Co. *v.* Central Union Tel. Co., 21 Hun (N. Y.) 261); and a federal statute authorizing the construction of telegraph lines along any post-roads of the United States does not confer such right without condemnation in accordance with the laws of the state there situated (Postal Tel. Cable Co. *v.* Southern R. Co., 89 Fed. 190).

63. *Iowa.*— Franklin *v.* Northwestern Telephone Co., 69 Iowa 97, 28 N. W. 461; Iowa Union Telephone Co. *v.* Board of Equalization. 67 Iowa 250, 25 N. W. 155.

Minnesota.—Northwestern Telephone Exch. Co. *v.* Chicago, etc., R. Co., 76 Minn. 334, 79 N. W. 315.

New Jersey.— Duke *v.* Central New Jersey Telephone Co., 53 N. J. L. 341, 21 Atl. 460, 11 L. R. A. 664.

Texas.— San Antonio, etc., R. Co. *v.* Southwestern Tel., etc., Co., 93 Tex. 313, 55 S. W. 117, 77 Am. St. Rep. 884, 49 L. R. A. 459; Southwestern Tel., etc., Co. *v.* Gulf, etc., R. Co., (Civ. App. 1899) 52 S. W. 106; Gulf, etc., R. Co. *v.* Southwestern Tel., etc., Co., 18 Tex. Civ. App. 500, 45 S. W. 151.

Wisconsin.— Wisconsin Telephone Co. *v.* Oshkosh, 62 Wis. 32, 21 N. W. 828.

England.—Atty.-Gen. *v.* Edison Telephone Co., 6 Q. B. D. 244, 50 L. J. Q. B. 145, 43 L. T. Rep. N. S. 697, 29 Wkly. Rep. 428.

64. Western Union Tel. Co. *v.* Atlantic, etc., Tel. Co., 29 Fed. Cas. No. 17,445, 7 Biss. 367.

65. Matter of Buffalo, 72 Hun (N. Y.) 422, 25 N. Y. Suppl. 218.

66. Denver Power, etc., Co. *v.* Denver, etc., R. Co., 30 Colo. 204, 69 Pac. 568, 60 L. R. A. 383.

67. Old Colony R. Co. *v.* Framingham Water Co., 153 Mass. 561, 27 N. E. 662, 13 L. R. A. 332.

68. Eldredge *v.* Norfolk County, 185 Mass. 186, 70 N. E. 36.

69. Baltimore, etc., R. Co. *v.* Jackson County, 156 Ind. 260, 58 N. E. 837, 59 N. E. 856.

70. Milburn *v.* Cedar Rapids, 12 Iowa 246.

71. Cincinnati, etc., R. Co. *v.* Spring Grove Ave. Co., 9 Ohio Dec. (Reprint) 625, 15 Cinc. L. Bul. 384; White River Turnpike Co. *v.* Vermont Cent. R. Co., 21 Vt. 590.

72. *Georgia.*— Savannah, etc., R. Co. *v.* Savannah, 45 Ga. 602.

Iowa.— Chicago, etc., R. Co. *v.* Newton, 36 Iowa 299.

Kentucky.— Lexington, etc., R. Co. *v.* Applegate, 8 Dana 289, 33 Am. Dec. 497.

Massachusetts.— Springfield *v.* Connecticut River R. Co., 4 Cush. 63.

New Jersey.— Morris, etc., R. Co. *v.* Newark, 10 N. J. Eq. 352.

New York.— *In re* New York Cent., etc., R. Co., 77 N. Y. 248.

Constitutionality of statute.— An act authorizing a street railway company to condemn an easement in the roadway of a turnpike company is constitutional. Baltimore, etc., Turnpike Road *v.* Baltimore, etc., Pass. R. Co., 81 Md. 247, 31 Atl. 854.

Property of city.— The legislature may authorize the construction of a railroad along a public street or highway which is the property of the state, and not of a particular district or municipality. Yost *v.* Philadelphia, etc., R. Co., 29 Leg. Int. (Pa.) 85.

73. Baltimore, etc., Turnpike Road *v.* Baltimore, etc., Pass. R. Co., 81 Md. 247, 31 Atl. 854; Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Pass. R. Co., 6 Pa. Dist. 269, where it was held that this was so, notwithstanding the charter of the company granted

for depots,[74] or for structures to support elevated tracks.[75] General statutory authorization to construct a railroad is sufficient to authorize a crossing of streets, turnpikes, or highways,[76] but it does not *prima facie* confer power to lay out a road along a public highway or street.[77] Such authority must be given by express enactment or if it rests upon implication it must flow necessarily out of the law from which it is derived.[78] If conferred either by express words or by necessary implication this will be sufficient.[79] If the tracks of the company are laid across or longitudinally on streets or highways it acquires no exclusive use of the ground occupied, but only the use to be enjoyed in common with the public.[80] Where a railroad constructs its tracks across a highway or street it must in the absence of any statutory provision to the contrary leave the street or highway in a safe condition for the use of the public, and if a structure be necessary to the convenience and safety of the crossing it must be erected and maintained by the railroad company.[81] If a statute requires an order of court to authorize the construction of tracks across or along a street or highway, such order is a condition precedent of the right to do so.[82]

b. Poles and Wires. The rule is well settled that the legislature or the municipality on whom it has conferred the power of eminent domain may authorize the erection of poles and wires for telephone and lighting purposes on streets.[83]

in 1832, forbidding the location of its road on any turnpike further than to cross it, and that the act of March 17, 1869, confers such right and is to be read into all charters granted prior to the general act of 1849.

74. State *v.* Railroad Com'rs, 56 Conn. 308, 15 Atl. 756; Union Depot Co. *v.* St. Louis, 8 Mo. App. 412.

75. Summerfield *v.* Chicago, 197 Ill. 270, 64 N. E. 490.

76. Starr *v.* Camden, etc., R. Co., 24 N. J. L. 592; Cincinnati, etc., R. Co. *v.* Spring Grove Ave., Co., 9 Ohio Dec. (Reprint) 625, 15 Cinc. L. Bul. 384.

A statute authorizing the construction of a railroad across any right of way authorizes the construction of a railroad track across a turnpike. White River Turnpike Co. *v.* Vermont Cent. R. Co., 21 Vt. 590.

77. Louisville, etc., R. Co. *v.* Whitley County Ct., 95 Ky. 215, 24 S. W. 604, 15 Ky. L. Rep. 734, 44 Am. St. Rep. 220; Springfield *v.* Connecticut River R. Co., 4 Cush. (Mass.) 63.

78. State *v.* Hoboken, 35 N. J. L. 205; Morris, etc., R. Co. *v.* Newark, 10 N. J. Eq. 352.

79. Springfield *v.* Connecticut River R. Co., 4 Cush. (Mass.) 63.

How implication shown.— Authority by implication to construct a railroad along a public highway may result either from the language of the act or from its being shown by an application of the act to the subject-matter that the railroad cannot by reasonable intendment be laid in any other line. Springfield *v.* Connecticut River R. Co., 4 Cush. (Mass.) 63.

Construction of particular statutes.— The right has been held to be conferred by statute authorizing the laying of tracks over and under highways or streets (Milburn *v.* Cedar Rapids, 12 Iowa 246. And see Chicago, etc., R. Co. *v.* Newton, 36 Iowa 299); and it has been held that public highways or "lands" are within a statute authorizing the taking of lands (State *v.* Railroad Com'rs, 56 Conn. 308, 15 Atl. 756); and in another jurisdiction it has been held that the word "property" in a statute does not include public highways (Cake *v.* Philadelphia, etc., R. Co., 87 Pa. St. 307). A statute authorizing the construction of a railroad to a point of intersection of another railroad in the corporate limits of a street confers all requisite power to use so much of the streets as is necessary to the construction of the road as designated without the consent of the city or without awarding compensation. Clinton *v.* Cedar Rapids, etc., R. Co., 24 Iowa 455.

80. Chicago, etc., R. Co. *v.* West Chicago St. R. Co., 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485; Pittsburg, etc., R. Co. *v.* Reich, 101 Ill. 157.

81. People *v.* Chicago, etc., R. Co., 67 Ill. 118; Independence *v.* Missouri Pac. R. Co., 86 Mo. App. 585; Dyer County *v.* Chesapeake, etc., R. Co., 87 Tenn. 712, 11 S. W. 943. And see Louisville, etc., R. Co. *v.* Hart County, 50 S. W. 60, 20 Ky. L. Rep. 1820.

82. Osborne *v.* Jersey City, etc., R. Co., 27 Hun (N. Y.) 589.

83. Irwin *v.* Great Southern Telephone Co., 37 La. Ann. 63. And see Julia Bldg. Assoc. *v.* Bell Telephone Co., 88 Mo. 258, 57 Am. Rep. 398; Burnes *v.* St. Joseph, 91 Mo. App. 489; Plattsburg *v.* Peoples' Telephone Co., 88 Mo. App. 306; Roebling *v.* Trenton Pass. R. Co., 58 N. J. L. 666, 34 Atl. 1090, 33 L. R. A. 129; Halsey *v.* Rapid Transit St. R. Co., 47 N. J. Eq. 380, 20 Atl. 859.

Missouri statute.— Since 1865 there has been a statute in Missouri authorizing any telegraph company organized under the laws of that state to place its poles and wires along, over, and upon the public highways (see in this connection Burnes *v.* St. Joseph, 91 Mo. App. 489); but there never has been any law of that state granting such permission to any foreign telegraph company. And

And either may authorize the erection of poles and wires for such purposes on highways.[84]

4. LOCATING RAILWAY OVER PARK OR PARK OVER RAILWAY. As a general rule lands which have been devoted to park purposes cannot be condemned by a railroad company for its uses, since the two uses are inconsistent;[85] and for the same reason a park cannot be laid out over the right of way of a railroad company.[86]

5. LOCATING TELEGRAPH LINES ON RIGHT OF WAY OF ANOTHER TELEGRAPH COMPANY. A contract ceding to a telegraph company the exclusive right of operating and maintaining its lines over the right of way of a railroad company, even if otherwise valid, cannot debar the state in the exercise of the right of eminent domain from authorizing the establishment of another telegraph line over the same right of way.[87]

6. CHANGING CHARACTER OF ROAD. The legislature may authorize a turnpike or plank-road company to construct its road over an existing highway[88] or *vice versa*,[89] and may authorize the laying out of a street over a turnpike,[90] or, when the franchise of the turnpike has expired, make it a free public highway.[91] But in these cases there must be express legislative authority, or such authority must be necessarily implied.[92] A viaduct may be constructed over an existing high-

the sole right of the Western Union Telegraph Company to do business in that state arises out of the act of congress of July 24, 1866 (14 St. at L. pp. 221, 222), giving to telegraph companies rights along the military and post-roads of the United States (State *v.* Western Union Tel. Co., 165 Mo. 502, 65 S. W. 775). Rev. St. (1899) § 1251, relating to telephone companies, gives to such companies organized in that state the right to erect telephone poles in the streets; at the same time it does not deny the same right to individuals or foreign corporations, and these latter have therefore the right to engage in such business, and a municipality has a right to contract with them in regard to compensation for the use of these streets. Plattsburg *v.* Peoples' Telephone Co., 88 Mo. App. 306.

84. Philadelphia, etc., R. Co. *v.* Wilmington City R. Co., (Del. 1897) 38 Atl. 1067; Cater *v.* Northwestern Telephone Exch. Co., 60 Minn. 539, 63 N. W. 111, 51 Am. St. Rep. 543, 28 L. R. A. 310.

85. *In re* Boston, etc., R. Co., 53 N. Y. 574; *In re* New York, etc., R. Co., 20 Hun (N. Y.) 201. *Compare* Colby *v.* Toledo, 22 Ohio Cir. Ct. 732, 12 Ohio Cir. Dec. 347.

The public acquires a vested estate in a public square in a municipality, which neither the municipality itself nor the legislature can divert to the use of a railroad or to any other private use, although a railroad company is authorized by its charter to construct and operate a railway in, over, across, and along any and all avenues, streets, public grounds, squares, and alleys of a city, it nevertheless cannot lay a track through or across an inclosed public square dedicated by plat to the city. Jacksonville *v.* Jacksonville R. Co., 67 Ill. 540.

86. Suburban Rapid-Transit Co. *v.* New York, 128 N. Y. 510, 28 N. E. 525; *In re* New York, 57 Hun (N. Y.) 416, 5 N. Y. Suppl. 463. A railroad had acquired a franchise for its road through the Adirondack park, had filed in several counties its map, and had given notice to the owners of land, all at a time when the state had not acquired any interest in the land or taken any proceedings to condemn it. It was held that the railroad company had thus impressed the land with a lien in favor of its road to construct its road, so that any subsequent conveyance by the owner of such land to the state is subject to the company's right. People *v.* Adirondack R. Co., 39 N. Y. App. Div. 34, 56 N. Y. Suppl. 869.

87. New Orleans, etc., R. Co. *v.* Southern, etc., Tel. Co., 53 Ala. 211. And see Baltimore, etc., Tel. Co. *v.* Morgan's Louisiana, etc., R., etc., Co., 37 La. Ann. 883.

88. Douglass *v.* Boonsborough Turnpike R. Co., 22 Md. 219, 85 Am. Dec. 647; Williams *v.* Natural Bridge Plank Road Co., 21 Mo. 580.

89. Peirce *v.* Somersworth, 10 N. H. 369.

90. Barber *v.* Andover, 8 N. H. 398; *In re* Kensington Dist., 2 Rawle (Pa.) 445; Armington *v.* Barnet, 15 Vt. 745, 40 Am. Dec. 705.

91. McMullin *v.* Leitch, 83 Cal. 239, 23 Pac. 294; People *v.* Davidson, 79 Cal. 166, 21 Pac. 538; Backus *v.* Lebanon, 11 N. H. 19, 35 Am. Dec. 466; Barber *v.* Andover, 8 N. H. 398; Armington *v.* Barnet, 15 Vt. 745, 40 Am. Dec. 705.

92. Cumru Tp. *v.* Reading Turnpike Co., 2 Lanc. L. Rev. 75.

Particular statutes held to confer power.— Where a statute authorizes commissioners to open and lay out streets in a certain district as they might deem necessary for the establishment of a regular and convenient town plan, this vests them with authority to enter upon a turnpike and appropriate it for such use. *In re* Kensington Dist., 2 Rawle (Pa.) 445. So on the other hand a charter granted to a corporation to construct and maintain a turnpike road, to be constructed and laid on and over the bed of a certain designated public highway then existing, vested the company after the turnpike was completed with the exclusive title and ownership of such highway. And although after the subsequent

way.[92] And power may be conferred upon a municipality to convert a county road into a city street.[94]

7. NAVIGABLE RIVERS. The state may by its power of eminent domain change the course of a navigable river within its boundaries if the public good requires it, although the rights of private parties are prejudiced thereby;[95] and certain portions of the banks of a navigable river may be set aside to an exclusive use.[96] A railroad may be permitted to cross a navigable stream.[97]

VIII. NECESSITY AND EXPEDIENCY OF EXERCISING POWER.

A. Determination by Legislature. In the absence of some constitutional or statutory provision to the contrary the necessity and expediency of exercising the right of eminent domain are questions essentially political and not judicial in their character. The determination of those questions belong to the sovereign power; the legislative determination is final and conclusive, and the courts have no power to review it.[98] It rests with the legislature not only to determine when

adoption of the constitution of 1877, the limits of a city on the line of the turnpike were so extended as to throw the toll-house and part of the pike inside of the new limits, the city authorities could not without condemnation proceedings and making compensation to the corporation adopt such part of the road as a street, nor extend any streets across it. Savannah *v.* Vernon Shell Road Co., 88 Ga. 342, 14 S. E. 610.

93. Willis *v.* Winona City, 59 Minn. 27, 60 N. W. 814, 26 L. R. A. 142.

94. Huddleston *v.* Eugene, 34 Oreg. 343, 55 Pac. 868, 43 L. R. A. 444.

95. Homochitto River Com'rs *v.* Withers, 29 Miss. 21, 64 Am. Dec. 126.

Non-navigable streams.— A state cannot authorize one of its municipalities to divert the waters of an unnavigable interstate stream, to the injury of riparian proprietors in another state. Pine *v.* New York, 103 Fed. 337 [*affirmed* in 112 Fed. 98, 50 C. C. A. 145].

96. Memphis *v.* Wright, 6 Yerg. (Tenn.) 497, 27 Am. Dec. 489.

97. Pennsylvania Coal Co. *v.* Waddell, 8 Leg. Gaz. (Pa.) 37.

What statutes confer power.— An unrestricted grant of authority to construct a railroad from one designated point to another carries with it the authority to cross a navigable stream, if the railroad cannot reasonably be constructed without doing so. Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen (Mass.) 221. See also Balliet *v.* Com., 17 Pa. St. 509, 55 Am. Dec. 581.

98. *Alabama.*—Aldridge *v.* Tuscumbia, etc., R. Co., 2 Stew. & P. 199, 23 Am. Dec. 307.

Arkansas.— St. Louis, etc., R. Co. *v.* Petty, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434.

California.— Sherman *v.* Buick, 32 Cal. 241, 91 Am. Dec. 577; Gilmer *v.* Lyon Point, 18 Cal. 229. See also Contra Costa Coal Mines R. Co. *v.* Moss, 23 Cal. 323.

Colorado.— Gibson *v.* Cann, 28 Colo. 499, 66 Pac. 879.

Connecticut.— Waterbury *v.* Platt, 76 Conn. 435, 56 Atl. 856; New York, etc., R. Co. *v.* Long, 69 Conn. 424, 37 Atl. 1070; Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17.

Georgia.— Loughbridge *v.* Harris, 42 Ga. 500; Parham *v.* Decatur County Inferior Ct., 9 Ga. 341.

Illinois.— O'Hare *v.* Chicago, etc., R. Co., 139 Ill. 151, 28 N. E. 923; Chicago, etc., R. Co. *v.* Wiltse, 116 Ill. 449, 6 N. E. 49; Chicago, etc., R. Co. *v.* Lake, 71 Ill. 333; Chicago *v.* Wright, 69 Ill. 318.

Indiana.— Indianapolis Water Works Co. *v.* Burkhart, 41 Ind. 364.

Indian Territory.— Tuttle *v.* Moore, 3 Indian Terr. 712, 64 S. W. 585.

Iowa.— Barrett *v.* Kemp, 91 Iowa 296, 59 N. W. 76; Bankhead *v.* Brown, 25 Iowa 540.

Kansas.— Lake Koen Nav., etc., Co. *v.* Klein, 63 Kan. 484, 65 Pac. 684.

Kentucky.— Tracy *v.* Elizabethtown, etc., R. Co., 80 Ky. 259.

Maine.— State *v.* Noyes, 47 Me. 189; Spring *v.* Russell, 7 Me. 273.

Maryland.— New Cent. Coal Co. *v.* George's Creek Coal, etc., Co., 37 Md. 537.

Massachusetts.— Eastern R. Co. *v.* Boston, etc., R. Co., 111 Mass. 125, 15 Am. Rep. 13; Hingham, etc., Bridge, etc., Co. *v.* Norfolk County, 6 Allen 353; Talbot *v.* Hudson, 16 Gray 417; Com. *v.* Westborough, 3 Mass. 406.

Minnesota.— State *v.* Rapp, 39 Minn. 65, 38 N. W. 926; State Park Com'rs *v.* Henry, 38 Minn. 266, 36 N. W. 874.

Missouri.— Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 543; Kansas City *v.* Marsh Oil Co., 140 Mo. 458, 41 S. W. 943; Cape Girardeau *v.* Houck, 129 Mo. 607, 31 S. W. 933 [*affirming* 106 Mo. 628, 17 S. W. 759]; Joplin Consol. Min. Co. *v.* Joplin, 124 Mo. 129, 27 S. W. 406; Simpson *v.* Kansas City, 111 Mo. 237, 20 S. W. 38.

Nebraska.— Paxton, etc., Irrigating Canal, etc., Co. *v.* Farmers', etc., Irr., etc., Co., 45 Nebr. 884, 64 N. W. 343, 50 Am. St. Rep. 585, 29 L. R. A. 853.

New Hampshire.— In re Mt. Washington Road Co., 35 N. H. 134; Concord R. Co. *v.* Greely, 17 N. H. 47.

New Jersey.—Atkinson *v.* Bishop, 39 N. J. L. 226; Coster *v.* Tide Water Co., 18

the power of eminent domain may be exercised, but also the character, quality, method, and extent of such exercise.[99] And this power is unqualified, other than by the necessity of providing that compensation shall be made.[1] Nevertheless under the express provisions of the constitution of some states the question of necessity is made a judicial one, to be determined by the courts and not by the legislature.[2]

B. Determination on Delegation of Power to Condemn. While the legislature may itself exercise the right of determining the necessity for the exer-

N. J. Eq. 54; Morris, etc., R. Co. *v.* Newark, 10 N. J. Eq. 352.

New York.— *In re* New York Cent., etc., R. Co., 77 N. Y. 248; *In re* Fowler, 53 N. Y. 60; Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; People *v.* Smith, 21 N. Y. 595; Harris *v.* Thompson, 9 Barb. 350; Varick *v.* Smith, 5 Paige 137, 28 Am. Dec. 417.

North Carolina.— Call *v.* Wilkesboro, 115 N. C. 337, 20 S. E. 468.

Ohio.— Giesy *v.* Cincinnati, etc., R. Co., 4 Ohio St. 308.

Oregon.—Apex Transp. Co. *v.* Garbade, 32 Oreg. 582, 52 Pac. 573, 54 Pac. 367, 882; Bridal Veil Lumber Co. *v.* Johnson, 30 Oreg. 205, 46 Pac. 790, 60 Am. St. Rep. 818, 34 L. R. A. 368.

Pennsylvania.— Smedley *v.* Erwin, 51 Pa. St. 445.

Tennessee.—Anderson *v.* Turbeville, 6 Coldw. 150.

Texas.— Smith *v.* Taylor, 34 Tex. 589; Croley *v.* St. Louis, etc., R. Co., (Civ. App. 1900) 56 S. W. 615.

Utah.— Postal Tel. Cable Co. *v.* Oregon Short Line Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

Vermont.— Tyler *v.* Beacher, 44 Vt. 648, 8 Am. Rep. 398; Williams *v.* Newfane School Dist. No. 6, 33 Vt. 271. That this is not the rule under the present constitution see *infra*, note 2.

Virginia.—Tait *v.* Central Lunatic Asylum, 84 Va. 271, 4 S. E. 697; Plecker *v.* Rhodes, 30 Gratt. 795.

Washington.— Samish River Boom Co. *v.* Union Boom Co., 32 Wash. 586, 73 Pac. 670.

West Virginia.— Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812.

Wisconsin.— Smith *v.* Gould, 59 Wis. 631, 18 N. W. 457; Smeaton *v.* Martin, 57 Wis. 364, 15 N. W. 403; Ford *v.* Chicago, etc., R. Co., 14 Wis. 609, 80 Am. Dec. 791.

United States.— Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170; U. S. *v.* Jones, 119 U. S. 477, 7 S. Ct. 283, 30 L. ed. 440; Mississippi, etc., Boom Co. *v.* Patterson, 98 U. S. 403, 25 L. ed. 206; Horton *v.* Squankum, etc., Marl Co., 11 Fed. Cas. No. 6,710.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 166, 169.

Judicial function exhausted on determining character of use.— The courts have power to determine whether the use for which private property authorized by the legislature to be taken is in fact a public use, but if this question is decided in the affirmative the judicial function is exhausted; the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made. St. Louis County Ct. *v.* Griswold, 58 Mo. 175.

Indicating the determination.— The decision of the legislature that a railroad is required by a public necessity is conclusively shown by the grant of a charter for it (State *v.* Noyes, 47 Me. 189); and where the legislature grants the right of eminent domain for the building of railroads to any persons who will undertake to construct them, leaving it to such persons to select routes for themselves, this is a determination by the legislature that such roads are necessary and essential for the public, without any express declaration to that effect (New Jersey Cent. R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475); if a railroad corporation resolves that the taking of certain land is necessary, the courts will presume it to be necessary, no abuse being shown; and the fact that the company had already condemned a strip does not show that there was no necessity to take other land to widen the strip (Cincinnati Southern R. Co. *v.* O'Meara, 7 Ohio Dec. (Reprint) 346, 2 Cinc. L. Bul. 142).

99. *Florida.*— Moody *v.* Jacksonville, etc., R. Co., 20 Fla. 597.

Kansas.— Lake Koen Nav., etc., Co. *v.* Klein, 63 Kan. 484, 65 Pac. 684.

Maine.— Riche *v.* Bar Harbor Water Co., 75 Me. 91; Cushman *v.* Smith, 34 Me. 247.

Minnesota.— Fairchild *v.* St. Paul, 46 Minn. 540, 49 N. W. 325; Weir *v.* St. Paul, etc., R. Co., 18 Minn. 155; Langford *v.* Ramsey County Com'rs, 16 Minn. 375; Wilkin *v.* First Div. St. Paul, etc., R. Co., 16 Minn. 271.

Pennsylvania.— *In re* East Walnut St., 10 Lanc. Bar 209.

United States.— Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170; Secombe *v.* Milwaukee, etc., R. Co., 23 Wall. 108, 23 L. ed. 67.

1. Fairchild *v.* St. Paul, 46 Minn. 540, 49 N. W. 325; Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. St. Rep. 70 [*reversing* 3 Lans. 429].

2. Lecoul *v.* St. James Parish Police Jury, 20 La. Ann. 308; Marquette, etc., R. Co. *v.* Probate Judge, 53 Mich. 217, 18 N. W. 788; Paul *v.* Detroit, 32 Mich. 108; Horton *v.* Grand Haven, 24 Mich. 465; Stearns *v.* Barre, 73 Vt. 281, 50 Atl. 1086, 87 Am. St. Rep. 721, 58 L. R. A. 240; Foster *v.* Stafford Nat.

cise of the power of eminent domain,[3] it may unless prohibited by the constitution delegate this power to public officers or to private corporations established to carry on enterprises in which the public are interested, and their determination that a necessity for the exercise of the power exists is conclusive.[4] There is no restraint upon the power except that requiring compensation to be made. And when the power has been so delegated it is a subject of legislative discretion to determine what prudential regulations shall be established to secure a discreet and judicious exercise of the authority.[5] It has been held that in the absence of any statutory provision submitting the matter to a court or jury the decision of the

Bank, 57 Vt. 128. And see Detroit *v.* Brennan, 93 Mich. 338, 53 N. W. 525.

3. People *v.* Smith, 21 N. Y. 595; Ford *v.* Chicago, etc., R. Co., 14 Wis. 609, 80 Am. Dec. 791. And see the preceding section.

4. *California.*— Santa Ana *v.* Harlin, 99 Cal. 538, 34 Pac. 224; Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604; Butte County *v.* Boydstun, (1886) 11 Pac. 781.

Colorado.— Warner *v.* Gunnison, 2 Colo. App. 430, 31 Pac. 238.

Connecticut.— New York, etc., R. Co. *v.* Long, 69 Conn. 424, 37 Atl. 1070.

Indiana.—Farneman *v.* Mt. Pleasant Cemetery Assoc., 135 Ind. 344, 35 N. E. 271.

Iowa.— Bennett *v.* Marion, 106 Iowa 628, 78 N. W. 747; Barrett *v.* Kemp, 91 Iowa 296, 59 N. W. 76; Cherokee *v.* Sioux City, etc., Town Lot, etc., Co., 52 Iowa 279, 3 N. W. 42.

Massachusetts.— Lynch *v.* Forbes, 161 Mass. 302, 37 N. E. 437, 42 Am. St. Rep. 402; Eastern R. Co. *v.* Boston R. Co., 111 Mass. 125, 15 Am. Rep. 13.

Minnesota.— Knoblauch *v.* Minneapolis, 56 Minn. 321, 57 N. W. 928; State *v.* Rapp, 39 Minn. 65, 38 N. W. 926.

Missouri.— Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453; Cape Girardeau *v.* Houck, 129 Mo. 607, 31 S. W. 933; Simpson *v.* Kansas City, 111 Mo. 237, 20 S. W. 38; State *v.* Engelmann, 106 Mo. 628, 17 S. W. 759; Kansas City *v.* Baird, 98 Mo. 215, 11 S. W. 243, 562.

New York.— *In re* Fowler, 53 N. Y. 60; People *v.* Smith, 21 N. Y. 595.

North Carolina.— Stratford *v.* Greensboro, 124 N. C. 127, 32 S. E. 394.

Texas.— Palmer *v.* Harris County, 29 Tex. Civ. App. 340, 69 S. W. 229.

West Virginia.— Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812.

Wisconsin.— Smith *v.* Gould, 59 Wis. 631, 18 N. W. 457.

United States.— Mississippi, etc., Boom Co. *v.* Patterson, 98 U. S. 403, 25 L. ed. 206.

See 18 Cent. Dig. tit. "Eminent Domain," § 169.

Submission to court or jury unnecessary.— There is no constitutional right on the part of landowners to have the question of the necessity or expediency of the taking of land for a public use in any particular instance submitted to a court or jury. Lynch *v.* Forbes, 161 Mass. 302, 37 N. E. 437, 42 Am. St. Rep. 402; People *v.* Smith, 21 N. Y. 595.

Statutes conferring power.— A statute giving township trustees power to condemn land for cemetery purposes, "when it shall be deemed necessary," makes the trustees exclusive judges of the necessity. Barrett *v.* Kemp, 91 Iowa 296, 59 N. W. 76.

Instances.— It may be delegated to a municipality (Santa Ana *v.* Harlin, 99 Cal. 538, 34 Pac. 224; Lynch *v.* Forbes, 161 Mass. 302, 37 N. E. 437, 42 Am. St. Rep. 402; Joplin Consol. Min. Co. *v.* Joplin, 124 Mo. 129, 27 S. W. 406; Simpson *v.* Kansas City, 111 Mo. 237, 20 S. W. 38; Stratford *v.* Greensboro, 124 N. C. 127, 32 S. E. 394); to a public board (*In re* Fowler, 53 N. Y. 60); to township trustees (Barrett *v.* Kemp, 91 Iowa 296, 59 N. W. 76), to town supervisors or road overseers (Smith *v.* Gould, 59 Wis. 631, 18 N. W. 457; Smeaton *v.* Martin, 57 Wis. 364, 15 N. W. 403); to trustees of a cemetery association (Farneman *v.* Mt. Pleasant Cemetery Assoc., 135 Ind. 344, 35 N. E. 271); to bridge commissioners (Philadelphia *v.* Ward, 174 Pa. St. 45, 34 Atl. 458); to railroad companies (Chicago, etc., R. Co. *v.* Lake, 71 Ill. 333), or to a boom company (Cotton *v.* Mississippi, etc., Boom Co., 22 Minn. 372). A decision made in good faith by the county commissioners as to the necessity of enlarging a burial-ground by taking a parcel of adjoining land is not objectionable on the ground that the land so taken was to be left open as part of a passageway giving access to the burial-ground from a public street. Balch *v.* Essex County, 103 Mass. 106.

The determination, how shown.— When a railroad company acquires land by condemnation proceedings the necessity for taking the land is settled and determined by the order appointing commissioners to ascertain the damages. Hopkins *v.* Chicago, etc., R. Co., 76 Minn. 70, 78 N. W. 969. In Connecticut the approval of the railroad commissioners is the essential fact to show necessity, and it is immaterial that the expression of the corporate will, which receives the approval of the railroad commissioners, was formulated outside the state. New York, etc., R. Co. *v.* Long, 69 Conn. 424, 37 Atl. 1070. The above case decides further that where the company applies for the appointment of appraisers to estimate damages for the taking of land the fact of necessity is shown by an authenticated copy of the vote of the applicant to take, and the ordering of the taking of the land, with a like copy of the doings of the railroad commissioners thereunder.

5. People *v.* Smith, 21 N. Y. 595; Long *v.* Pennsylvania R. Co., 9 Lanc. Bar (Pa.) 98.

question of necessity lies with the body of individuals to whom the state has delegated the authority to take,[6] and the legislature may by express provision confer this power on a corporation to whom the power of eminent domain is delegated unless prohibited by the constitution.[7] It is of course competent for the legislature to declare that the question shall be a judicial one, in which case the court and not the corporation determines the question of necessity.[8]

IX. NECESSITY AND EXTENT OF APPROPRIATION.

A. In General. The extent to which property shall be taken for public use rests wholly in the legislative discretion, subject to the limitation that due compensation be made.[9] The legislature may determine the amount of land necessary to be taken[10] and the location.[11] It may designate the particular property to be condemned, and its determination in this respect cannot be reviewed by the courts.[12]

B. On Delegation of Power — 1. IN GENERAL. To authorize the condemnation of any particular land by a company to which the power has been delegated, a necessity must exist for the taking thereof for the uses and purposes of the party instituting the proceedings, and this must be made to appear.[13] And it is never

6. Lynch *v.* Forbes, 161 Mass. 302, 37 N. E. 437, 42 Am. St. Rep. 402; *In re* Fowler, 53 N. Y. 60. And see O'Hare *v.* Chicago, etc., R. Co., 139 Ill. 151, 28 N. E. 923; State *v.* Rapp, 39 Minn. 65, 38 N. W. 926. *Compare* Easton, etc., R. Co. *v.* Greenwich Tp., 25 N. J. Eq. 565, holding that under a clause contained in the charter of a railroad company that if it shall find it necessary to change the location of any portion of any turnpike or other road they are authorized and empowered so to do and to occupy such portions of the turnpike or road as they may deem necessary or expedient, etc., the company are not the sole judges of the necessity or expediency of changing the location, etc. They have not the power to change the location whenever they shall decide that it is necessary or expedient, but only when the necessity in point of fact exists.

7. Warner *v.* Gunnison, 2 Colo. App. 430, 31 Pac. 238; Moseley *v.* York Shore Water Co., 94 Me. 83, 46 Atl. 809. And see Chaplin *v.* Wheatland, 129 Ill. 651, 22 N. E. 484.

8. *In re* New York Cent. R. Co., 66 N. Y. 407; Rensselaer, etc., R. Co. *v.* Davis, 43 N. Y. 137; New York Cent., etc., R. Co. *v.* Metropolitan Gas-Light Co., 5 Hun (N. Y.) 201; Bigelow *v.* Draper, 6 N. D. 152, 69 N. W. 570; Hays *v.* Risher, 32 Pa. St. 169.

Statutes making question a judicial one.— A statute which provides that on presenting the petition to the court with proof of service any of the persons whose estates or interests are to be affected by the proceedings may show cause against granting the prayer of the petition and may disprove any of the facts alleged in it, and that the court shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petitioner it shall make an order for the appointment of commissioners of appraisal, makes the determination of necessity a judicial question. *In re* New York Cent. R. Co., 66 N. Y. 407.

9. Lake Koen Nav., etc., Irr. Co. *v.* Cline, 63 Kan. 484, 65 Pac. 684; Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170.

10. Fairchild *v.* St. Paul, 46 Minn. 540, 45 N. W. 325; St. Louis County Ct. *v.* Griswold, 58 Mo. 175; Wisconsin Cent. R. Co. *v.* Cornell University, 52 Wis. 537, 8 N. W. 491.

11. Bennett *v.* Marion, 106 Iowa 628, 76 N. W. 844; Lynch *v.* Forbes, 161 Mass. 302, 37 N. E. 437, 42 Am. St. Rep. 402.

12. *Missouri.*— Southern Illinois, etc., Bridge Co. *v.* Stone, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301.

New York.— *In re* Brooklyn Union Ferry Co., 98 N. Y. 139.

Ohio.— Giesy *v.* Cincinnati, etc., R. Co., 4 Ohio St. 308.

West Virginia.— Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812.

United States.— Mississippi, etc., Boom Co. *v.* Patterson, 98 U. S. 403, 25 L. ed. 206.

13. *California.*— Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604; Spring Valley Water Works *v.* San Mateo Water Works, 64 Cal. 123, 28 Pac. 447.

Georgia.— Butler *v.* Thomasville, 74 Ga. 570.

Illinois.— Dewey *v.* Chicago, etc., R. Co., 184 Ill. 426, 56 N. E. 804.

Maryland.—New Cent. Coal Co. *v.* George's Creek Coal, etc., Co., 37 Md. 537.

Minnesota.—*In re* Minneapolis R. Terminal Co., 38 Minn. 157, 36 N. W. 105.

Nevada.— Dayton Gold, etc., Min. Co. *v.* Seawell, 11 Nev. 394.

New York.— New York, etc., R. Co. *v.* Franz, 8 N. Y. Suppl. 727.

Pennsylvania.— Shick *v.* Pennsylvania R. Co., 1 Pearson 259.

Vermont.— Farnsworth *v.* Goodhue, 48 Vt. 209.

United States.— Highland Boy Gold Min. Co. *v.* Strickley, 116 Fed. 852, 54 C. C. A. 186.

See 18 Cent. Dig. tit. "Eminent Domain," § 147 *et seq.*

permissible for a company or individual to appropriate more land than is necessary for its use.[14] There is of course a prohibition against excessive appropriation, or the taking of any land not within the scope of the purpose required.[15] The moment the appropriation goes beyond the necessity of the case it ceases to be justified on the principles which underlie the right of eminent domain.[16] Nevertheless necessity, within the meaning of this rule, does not mean an absolute but only a reasonable necessity,[17] such as would combine the greatest benefit.

Reason for rule.— The party claiming the right to the exercise of the power should be required to show at least a reasonable degree of necessity for the exercise. Any rule less strict than this, with the large and almost indiscriminate delegation of the right to corporations, would likely lead to oppression and the sacrifice of the private right to corporate power. Indeed in the delegation of the power is implied the condition that it shall only be exercised when and to the extent actually found necessary. New Cent. Coal Co. *v.* George's Creek Coal, etc., Co., 37 Md. 537.

Under N. Y. Consol. Act, § 715, empowering the city to extinguish private ownership in all wharf property and acquiring a title in itself by the exercise of the power of eminent domain, property of this nature may be condemned, although it is not necessary for the purpose of building a pier or dock. *In re* New York, 135 N. Y. 253, 31 N. E. 1043, 31 Am. St. Rep. 825.

A Colorado statute providing that no land shall be subjected to the burden of two or more irrigating ditches when the same object can feasibly and practically be obtained by one ditch applies only to the owners of land and cannot be invoked by a corporation which has already constructed a ditch through the lands sought to be taken. San Luis Land, etc., Co. *v.* Kenilworth Canal Co., 3 Colo. App. 244, 32 Pac. 860.

14. *California.*— Mahoney *v.* Spring Valley Water Co., 52 Cal. 159.

Indiana.— Swinney *v.* Ft. Wayne, etc., R. Co., 59 Ind. 205.

Louisiana.— Kansas City, etc., R. Co. *v.* Vicksburg, etc., R. Co., 49 La. Ann. 29, 21 So. 144; New Orleans, etc., R. Co. *v.* Gay, 32 La. Ann. 471.

New York.— Sixth Ave. R. Co. *v.* Kerr, 72 N. Y. 330; Gravesend *v.* Curtiss, 34 How. Pr. 261.

Ohio.— Platt *v.* Pennsylvania Co., 43 Ohio St. 228, 1 N. E. 420; Giesy *v.* Cincinnati, etc., R. Co., 4 Ohio St. 308; Cooper *v.* Williams, 5 Ohio 391, 24 Am. Dec. 299.

West Virginia.— Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 17 W. Va. 812.

See 18 Cent. Dig. tit. "Eminent Domain," § 153.

"The surplus beyond the amount required by the public is not properly taken, not being needed for the public use, and the owners are entitled to such surplus." Mills Em. Dom. § 23.

Appropriation of lands for other companies. — One company has no power to appropriate lands for use of another company. Swinney *v.* Ft. Wayne, etc., R. Co., 59 Ind. 205. And see Mahoney *v.* Spring Valley Water Works, 52 Cal. 159.

15. Kansas City, etc., R. Co. *v.* Vicksburg, etc., R. Co., 49 La. Ann. 29, 21 So. 144; Cooley Const. Lim. (7th ed.) 779.

16. Cooley Const. Lim. (7th ed.) 779.

17. *California.*— Rialto Irr. Dist. *v.* Brandon, 103 Cal. 384, 37 Pac. 484.

Illinois.— Aurora, etc., R. Co. *v.* Harvey, 178 Ill. 477, 53 N. E. 331.

Louisiana.— Kansas City, etc., R. Co. *v.* Vicksburg, etc., R. Co., 49 La. Ann. 29, 21 So. 144.

Maryland.— New Cent. Coal Co. *v.* George's Creek Coal, etc., Co., 37 Md. 537.

Massachusetts.— Pettingill *v.* Porter, 8 Allen 1, 85 Am. Dec. 671.

Michigan.— Detroit, etc., Com'rs *v.* Moesta, 91 Mich. 149, 51 N. W. 903.

Nevada.— Overman Silver Min. Co. *v.* Corcoran, 15 Nev. 147.

New Jersey.— Olmsted *v.* Morris Aqueduct, 47 N. J. L. 311.

New York.— *In re* New York Cent., etc., R. Co., 59 Hun 7, 5 Silv. Supreme 353, 8 N. Y. Suppl. 290; New York Cent., etc., R. Co. *v.* Metropolitan Gas-Light Co., 5 Hun 201 (holding that in case of a railroad company it is not a question of possibility but of strict practicability); Coates *v.* New York, 7 Cow. 585.

Ohio.— Platt *v.* Pennsylvania Co., 43 Ohio 228, 1 N. E. 420; Cooper *v.* Williams, 5 Ohio 391, 24 Am. Dec. 299 [*affirming* 4 Ohio 253, 22 Am. Dec. 745].

Pennsylvania.— Shick *v.* Pennsylvania R. Co., 1 Pearson 259; Farmers' Market Co. *v.* Philadelphia, etc., Terminal Co., 10 Pa. Co. Ct. 25; Hays *v.* Briggs, 3 Pittsb. 504.

Washington.— Samish River Boom Co. *v.* Union Boom Co., 32 Wash. 586, 73 Pac. 670.

See 18 Cent. Dig. tit. "Eminent Domain," § 147 *et seq.*

A legal necessity arises for condemning particular property where it is needed by a railroad company to increase the safety of its road-bed at a certain point (Bigelow *v.* Draper, 6 N. D. 152, 69 N. W. 570); or for the more convenient removal of gravel from certain pits which comprise the most of the gravel which the railway owns (Saginaw, etc., R. Co. *v.* Bordner, 108 Mich. 236, 66 N. W. 62); or where it is needed by a street railway to avoid the ascent and descent of a hill and the danger of a grade crossing (Aurora, etc., R. Co. *v.* Harvey, 178 Ill. 477, 53 N. E. 331); or where a part of the right of way of a railroad company is needed by a telegraph company for the erection and maintenance of its telegraph lines; and it is not

to the public with the least inconvenience and expense to the condemning party and property-owner consistent with such benefit,[18] although it does not include the taking of land which may merely render the employment of the improvement more convenient or less expensive,[19] or for a necessity which is merely colorable.[20]

2. SELECTION AND LOCATION. Under a power conferred by the legislature the selection by the condemning company of land required for the construction of a railroad, or the location of its depot and other buildings,[21] or the location of its

essential that the telegraph company should affirmatively show that it is necessary for it to condemn the proposed right of way or that it is necessary for it to use the particular portion which it proposes to condemn (Savannah, etc., R. Co. *v.* Postal Tel. Cable Co., 112 Ga. 941, 38 S. E. 353; Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705).

The term "necessary" is not to be held equivalent to "indispensable," but should be held to cover what is appropriate and convenient to carry into effect the power conferred. Detroit Park, etc., Com'rs *v.* Moesta, 91 Mich. 149, 51 N. W. 903; New Jersey R., etc., Co. *v.* Hancock, 35 N. J. L. 537. But see Detroit, etc., Plank-Road Co. *v.* Detroit, 81 Mich. 562, 46 N. W. 12, which seems to hold that, under Howell Annot. St. § 3581, in order for a turnpike company to condemn land outside of its right of way for a toll-house and keeper's residence, there must be an absolute necessity therefor.

Necessity for the condemnation of certain land or water-rights by a water company, for the purpose of supplying a city with water, exists where the present supply is insufficient during the summer time, or to meet the wants of an increasing population (Santa Cruz *v.* Enright, 95 Cal. 105, 30 Pac. 197; Olmsted *v.* Morris Aqueduct, 47 N. J. L. 311; Keller *v.* Riverton Water Co., 161 Pa. St. 422, 29 Atl. 82); but not where its present sources are amply sufficient if utilized (Spring Valley Water Works *v.* San Mateo Water Works, 64 Cal. 123, 28 Pac. 447).

In Missouri it has been held that land is not "necessary" for public use if it can be dispensed with without abandoning the original project for which it was intended to be used. Leisse *v.* St. Louis, etc., R. Co., 2 Mo. App. 105.

18. *Arkansas.*— St. Louis, etc., R. Co. *v.* Petty, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434.

Michigan.— Detroit *v.* Brennan, 93 Mich. 338, 53 N. W. 525.

Nevada.— Overman Silver Min. Co. *v.* Corcoran, 15 Nev. 147.

New Hampshire.— Crowell *v.* Londonderry, 63 N. H. 42.

United States.— Colorado Eastern R. Co. *v.* Union Pac. R. Co., 41 Fed. 293.

See 18 Cent. Dig. tit. "Eminent Domain," § 147 *et seq.*

It should appear that the advantages to the public of taking the private property would be sufficiently great to overbalance the private injury which it would impose. Matter of Field, 61 N. Y. App. Div. 618, 70 N. Y. Suppl. 677; McWhirter *v.* Cockrell, 2 Head (Tenn.) 9.

A corporation will not be prevented from taking certain land because it appears that the same object might be accomplished in another way without taking the land. Lamb *v.* North London R. Co., L. R. 4 Ch. 522, 21 L. T. Rep. N. S. 98, 17 Wkly. Rep. 746.

An owner is not bound to give up a part of his land for the construction of a levee, which was not originally required to protect his own land, but which was rendered necessary by closing a bayou in order to reclaim swamp lands belonging to the state and to other individuals. Cash *v.* Whitworth, 13 La. Ann. 401, 71 Am. Dec. 515.

19. Spring Valley Water Works *v.* San Mateo Water Works, 64 Cal. 123, 28 Pac. 447; Creston Waterworks Co. *v.* McGrath, 89 Iowa 502, 56 N. W. 680; Detroit *v.* Brennan, 93 Mich. 338, 53 N. W. 525; Memphis Freight Co. *v.* Memphis, 4 Coldw. (Tenn.) 419.

Land cannot be condemned for the purpose of draining an adjacent tract through it, where it appears that the owner of the land sought to be drained can construct the drains through his own land with but little less convenience, and at but little more expense than through the land sought to be condemned (*In re* Rochester, etc., R. Co., 12 N. Y. Suppl. 566); but in proceedings to condemn land for a pipe-line for irrigation purposes, it is not necessary to show that the water could be brought by no other way (Rialto Irrigating Dist. *v.* Brandon, 103 Cal. 384, 37 Pac. 484).

20. Lynch *v.* London Sewer Com'rs, 32 Ch. D. 72, 50 J. P. 548, 55 L. J. Ch. 409, 54 L. T. Rep. N. S. 699, holding that an injunction will lie to restrain the taking in such a case.

21. St. Louis, etc., R. Co. *v.* Petty, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434; California Cent. R. Co. *v.* Hooper, 76 Cal. 404, 18 Pac. 599; Kansas, etc., Coal R. Co. *v.* Northwestern Coal, etc., Co., 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L. R. A. 936; St. Louis, etc., R. Co. *v.* Hannibal Union Depot Co., 125 Mo. 82, 28 S. W. 483; Harlem River, etc., R. Co. *v.* Arnow, 21 N. Y. App. Div. 636, 47 N. Y. Suppl. 438.

Statute conferring power to select.— A statute requiring, if a boom company file with the secretary of state within ninety days after filing articles of incorporation, a plat of so much of the shore lines or waters of the state and lands contiguous thereto as are proposed to be appropriated for its corporate purposes by necessary implication grants the privilege of selecting in good faith the location designated in the plat. Samish River

route between certain fixed termini,[22] cannot be controlled by the courts, if such selection is made in good faith,[23] and is not capricious or wantonly injurious, or in some respect beyond the privilege conferred by the charter or statute;[24] but the grant of the power is never to be extended by unnecessary implication.[25] These rules apply to cases where power is conferred upon a railroad company to lay its tracks along a street or highway;[26] and also to the laying of water-pipes,[27] to the construction of sewers[28] or ditches,[29] the laying off and location of streets,[30] to the condemnation of a right of way for a tunnel[31] or a telegraph line,[32] to the

Boom Co. *v.* Union Boom Co., 32 Wash. 586, 73 Pac. 670.

Under the English Lands Clauses Act (8 & 9 Vict. c. 18) it is not necessary, in order to entitle a railway company to take lands, that the particular works for which the lands are to be used should appear on the deposited plans, if such lands fall within the limits of deviation delineated on the plans, although the whole of a lot is taken, only a part of which is within the line of deviation (Doe *v.* North Staffordshire R. Co., 16 Q. B. 526, 15 Jur. 944, 20 L. J. Q. B. 249, 71 E. C. L. 526; Weld *v.* South Western R. Co., 32 Beav. 340, 9 Jur. N. S. 510, 33 L. J. Ch. 142, 8 L. T. Rep. N. S. 13, 1 New Rep. 415, 11 Wkly. Rep. 448; Crawford *v.* Chester, etc., R. Co., 11 Jur. 917. See also *In re* Huddersfield, L. R. 10 Ch. 92, 44 L. J. Ch. 96, 31 L. T. Rep. N. S. 466, 23 Wkly. Rep. 100; Wrigley *v.* Lancashire, etc., R. Co., 4 Giff. 352, 9 Jur. N. S. 710, 8 L. T. Rep. N. S. 267); but if a company seeks to acquire a portion of a large piece of land which is not divided into lots, the plans must be so framed as to show how much of such land it is proposed to take (Dowling *v.* Pontypool, etc., R. Co., L. R. 18 Eq. 714, 43 L. J. Ch. 761).

22. Piedmont, etc., R. Co. *v.* Speelman, 67 Md. 260, 10 Atl. 77, 293; Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen (Mass.) 221; New York Cent., etc., R. Co. *v.* Metropolitan Gas-Light Co., 5 Hun (N. Y.) 201; Cleveland, etc., R. Co. *v.* Speer, 56 Pa. St. 325, 94 Am. Dec. 84.

In Pennsylvania the only restriction upon the right to locate and construct the road where the company sees fit is that its line shall not pass through a burying-ground or place of public worship, or a dwelling-house occupied by its owner. Anspach *v.* Mahanoy, etc., R. Co., 5 Phila. 491.

Where the statute limits the width of a railroad right of way it is not necessary that the track should be located in the middle of the strip condemned. Stark *v.* Sioux City, etc., R. Co., 43 Iowa 501.

Under Ill. Rev. St. c. 24, art. 5, § 1, which gives the city council power "to provide for and change the location, grade and crossing of any railroad" within the city, a railroad which has accepted the city ordinance locating the line of its road through the city cannot condemn land not included within such location. Tudor *v.* Chicago, etc., Rapid Transit R. Co., (Ill. 1891) 27 N. E. 915.

23. Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen (Mass.) 221; Harlem River, etc., R. Co. *v.* Arnow, 21 N. Y. App. Div. 636, 47 N. Y. Suppl. 438; Anspach *v.* Mahanoy, etc., R. Co., 5 Phila. (Pa.) 491.

Bad faith is not shown by the mere fact that a boom company extended its works further down the river than they were at first, the company having discretion in the matter of selecting the location of its business. Samish River Boom Co. *v.* Union Boom Co., 32 Wash. 586, 73 Pac. 670.

24. Anspach *v.* Mahanoy, etc., R. Co., 5 Phila. (Pa.) 491.

25. Tudor *v.* Chicago, etc., Rapid Transit R. Co., 154 Ill. 129, 39 N. E. 136; Akers *v.* United New Jersey R., etc., Co., 43 N. J. L. 110.

26. Campbell *v.* Metropolitan St. R. Co., 82 Ga. 320, 9 S. E. 1078; Struthers *v.* Dunkirk, etc., R. Co., 87 Pa. St. 282; Philadelphia, etc., R. Co.'s Appeal, 2 Walk. (Pa.) 291.

If the company has the consent of the city as well as of the legislature it may lay its track wherever it is for its best interest; and the fact that it was the intention of the company to lay a portion of its track as close as possible to the premises of an abutting owner is no objection. Campbell *v.* Metropolitan St. R. Co., 82 Ga. 320, 9 S. E. 1078.

27. Dallas *v.* Hallock, (Oreg. 1904) 75 Pac. 204; Biddle *v.* Wayne Waterworks Co., 190 Pa. St. 94, 42 Atl. 380.

If the company has once exercised its right, and has located its pipe-lines, it cannot lay out over the same lands an entirely new and additional route, no matter how convenient or necessary the latter might be. McKay *v.* Pennsylvania Water Co., 6 Pa. Dist. 364.

28. Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604; Joplin Consol. Min. Co. *v.* Joplin, 124 Mo. 129, 27 S. W. 406.

The landowner cannot object on the ground that another system of sewerage would have been better and should have been adopted. *In re* Long, 12 N. Y. Suppl. 230.

29. Sample *v.* Carroll, 132 Ind. 496, 32 N. E. 220.

30. Chicago, etc., R. Co. *v.* Morrison, 195 Ill. 271, 63 N. E. 96; Little Miami, etc., R. Co. *v.* Dayton, 23 Ohio St. 510.

31. Douglass *v.* Byrnes, 59 Fed. 29.

32. Union Pac. R. Co. *v.* Colorado Postal Tel. Cable Co., 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106; Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

acquiring of land for a wharf,[33] and to the selection of sites for schools[34] and public buildings.[35]

3. AMOUNT, WIDTH, ETC.— a. In General. Under a like power from the legislature the amount or width of land which a condemning corporation or body may take for its purposes is within reasonable limits within the discretion of such corporation or body,[36] to be exercised in good faith,[37] unless the amount or width is expressly limited by charter or statutory provision,[38] in which case no amount in excess of the limit can be taken,[39] unless the statute also provides for the taking

33. Gregory *v.* Jersey City, 34 N. J. L. 390, holding that the statutory power of the aldermen of Jersey City to acquire lands for the purpose of erecting wharves is restricted to lands lying at the terminus of a street.

34. Rittenhouse *v.* Creasy, 12 Luz. Leg. Reg. (Pa.) 14.

35. Darlington *v.* U. S., 82 Pa. St. 382, 22 Am. Rep. 766; Culpeper County *v.* Gorrell, 20 Gratt. (Va.) 484.

36. *Illinois.*— Chicago, etc., R. Co. *v.* Pontiac, 169 Ill. 155, 48 N. E. 485; O'Hare *v.* Chicago, etc., R. Co., 139 Ill. 151, 28 N. E. 923; Chicago, etc., R. Co. *v.* Wiltse, 116 Ill. 449, 6 N. E. 49; Lockie *v.* Mutual Union Tel. Co., 103 Ill. 401.

Indiana.— Sample *v.* Carroll, 132 Ind. 496, 32 N. E. 220.

Iowa.— Bennett *v.* Marion, 106 Iowa 628, 76 N. W. 844.

Louisiana.— Thibodeaux *v.* Maggioli, 4 La. Ann. 73.

Mississippi.— Ewing *v.* Alabama, etc., R. Co., 68 Miss. 551, 9 So. 295.

Nebraska.— Dietrichs *v.* Lincoln, etc., R. Co., 13 Nebr. 361, 13 N. W. 624.

Ohio.— Iron R. Co. *v.* Ironton, 19 Ohio St. 299; Ohio Southern R. Co. *v.* Hinkle, 1 Ohio S. & C. Pl. Dec. 682, 1 Ohio N. P. 63.

Pennsylvania.— Philadelphia *v.* Ward, 174 Pa. St. 45, 34 Atl. 458; Lodge *v.* Philadelphia, etc., R. Co., 8 Phila. 345.

Vermont.— Eldridge *v.* Smith, 34 Vt. 484. But see Stearns *v.* Barre, 73 Vt. 281, 50 Atl. 1086, 87 Am. St. Rep. 721, 58 L. R. A. 240, holding that under the constitution of that state the question of necessity is ultimately a judicial one, and that a statute leaving the extent of the taking to the final determination of a municipality is void.

Virginia.— Zircle *v.* Southern R. Co., 102 Va. 17, 45 S. E. 802.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 153, 154.

Amount of land to be taken a question for the court.— In some jurisdictions the amount of land that may be taken is a question for the court.

Kentucky.— Reed *v.* Louisville Bridge Co., 8 Bush 69.

Minnesota.— *In re* St. Paul, etc., R. Co., 34 Minn. 227, 25 N. W. 345.

New York.— *In re* New York Cent. R. Co., 66 N. Y. 407; New York Cent., etc., R. Co. *v.* Metropolitan Gaslight Co., 63 N. Y. 326; Rensselaer, etc., R. Co. *v.* Davis, 43 N. Y. 137.

South Carolina.— South Carolina R. Co. *v.* Blake, 9 Rich. 228 [*explaining Ex p.* South Carolina R. Co., 2 Rich. 434].

West Virginia.— Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812.

Estoppel.— A railroad company is not estopped by its petition as to the width of the right of way, unless with knowledge of the width adopted in the commissioner's report it has acquiesced in the same. Peoria, etc., R. Co. *v.* Bryant, 57 Ill. 473.

37. Lodge *v.* Philadelphia, etc., R. Co., 8 Phila. (Pa.) 345. But see Lake Shore, etc., R. Co. *v.* New York, etc., R. Co., 8 Fed. 858, 859, holding that whether or not more than is necessary for the purposes of the condemning company has been taken is a proper subject of judicial investigation, where the controversy before the court arises from an alleged encroachment by another corporation. McKenna, C. J., saying: "I do not agree with the argument that the extent of such acquisition is conclusively determinable by the directors of the corporation, and that the exercise of their power in this connection is questionable only on the ground of bad faith, as the equivalent of fraud."

38. Garbutt Lumber Co. *v.* Georgia, etc., R. Co., 111 Ga. 714, 36 S. E. 942; Winklemans *v.* Des Moines North Western R. Co., 62 Iowa 11, 17 N. W. 82; Pittsburgh Nat. Bank of Commerce *v.* Shoenberger, 111 Pa. St. 95, 2 Atl. 190; Duck River Valley Narrow Gauge R. Co. *v.* Cochrane, 3 Lea (Tenn.) 478.

A Nevada statute providing that state lands along the line of a railroad, taken for railroad station purposes, shall not exceed two acres in extent, does not apply to the land of individuals. Virginia, etc., R. Co. *v.* Elliott, 5 Nev. 358.

Whether lands within the limits of a right of way provided for by statute is necessary to the proper use and operation of a railroad is a matter to be determined by the company (McKennon *v.* St. Louis, etc., R. Co., 69 Ark. 104, 61 S. W. 383); land within such limits will be conclusively presumed to be necessary (Stark *v.* Sioux City, etc., R. Co., 43 Iowa 501. See also North Missouri R. Co. *v.* Gott, 25 Mo. 540).

39. *Illinois.*— Tudor *v.* Chicago, etc., R. Co., (1891) 27 N. E. 915.

Minnesota.— Ramsey County *v.* Stees, 28 Minn. 326, 9 N. W. 879.

New Jersey.— Middlesex, etc., Traction Co. *v.* Metlar, (Sup. 1903) 56 Atl. 142; New Jersey Cent. R. Co. *v.* Hudson Terminal R. Co., 46 N. J. L. 289.

New York.— Matter of Central Park, 35 How. Pr. 255.

Ohio.— Kemper *v.* Cincinnati, etc., Turnpike Co., 11 Ohio 392.

Pennsylvania.— Pittsburgh Nat. Bank of

of such excess under circumstances therein prescribed,[40] or unless the quantity and value thereof are exceedingly small.[41] This rule, however, cannot be extended so as to allow the taking of land which is clearly unnecessary,[42] and if the statute authorizes the taking of more land than is necessary for the intended use it will be unconstitutional and void.[43] But the statutory limit does not prevent the subsequent condemnation, under another statute, of land in excess of such limit, if the additional land becomes necessary to the proper operation of the improvement.[44] The presumption is that the amount or width appropriated is to the full limit allowed by statute;[45] and under some statutes an amount less than the statutory limit cannot be taken.[46]

b. Prospective Needs. A condemning corporation may condemn lands sufficient to provide for not only its present but also its prospective necessities,[47] as in the case of a railroad company,[48] if it is not more than may in good faith be pre

Commerce *v.* Shoenberger, 111 Pa. St. 95, 2 Atl. 190; Cumberland Valley R. Co. *v.* McLanahan, 59 Pa. St. 23.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 153, 154.

That the company owns land adjacent to the strip which it seeks to condemn will not restrict its right of condemnation to less than that fixed by the statute. Stark *v.* Sioux City, etc., R. Co., 43 Iowa 501; Middlesex, etc., Traction Co. *v.* Metlar, (N. J. Sup. 1903) 56 Atl. 142.

Restraining abuse of power.— If a company abuses the discretion vested in it by statute to acquire as much land for stations and terminal facilities as may be necessary for that purpose equity may restrain it and keep it within the limits of its charter. Atlantic, etc., R. Co. *v.* Penny, 119 Ga. 479, 46 S. E. 665.

40. Atlantic, etc., R. Co. *v.* Penny, 119 Ga. 479, 46 S. E. 665; Wilder *v.* Boston, etc., R. Co., 161 Mass. 387, 37 N. E. 380 (holding that such excess cannot be taken for the purpose of improving the alignment of a railroad against the owner's consent, without first obtaining authority from the commissioners); Stringham *v.* Oshkosh, etc., R. Co., 33 Wis. 471 (holding that where the charter of a railroad company authorizes land in excess of a certain width to be taken, under a resolution adopted by the directors, such resolution must be adopted at a meeting of directors at which a quorum is present).

Under statutes limiting the general width of a railroad and further providing that the width might be extended for the purpose of cuttings, embankments, and the like, the amount needed for such cuttings and embankments is within the discretion of the condemning company. Bowman *v.* Venice, etc., R. Co., 102 Ill. 459: Booker *v.* Venice, etc., R. Co., 101 Ill. 333; North Missouri R. Co. *v.* Gott, 25 Mo. 540; New Jersey Cent. R. Co. *v.* Hudson Terminal R. Co.. 46 N. J. L. 289.

41. Dowling *v.* Pontypool, etc., R. Co., L. R. 18 Eq. 714, 43 L. J. Ch. 761.

42. *Illinois.*— Schuster *v.* Chicago Sanitary Dist., 177 Ill. 626, 52 N. E. 855.

Iowa.— Bennett *v.* Marion, 106 Iowa 628, 76 N. W. 844.

Kentucky.— Long *v.* Louisville, 98 Ky. 67, 32 S. W. 271, 17 Ky. L. Rep. 253.

Minnesota.— Ramsey County *v.* Stees, 28 Minn. 326, 9 N. W. 879.

New York.— Gravesend *v.* Curtiss, 34 How. Pr. 261.

Pennsylvania.— Jones *v.* Tatham, 20 Pa. St. 398.

Vermont.— Eldridge *v.* Smith, 34 Vt. 484.

United States.— Lake Shore, etc., R. Co. *v.* New York, etc., R. Co., 8 Fed. 858.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 152, 153.

But see Quinton *v.* Bristol, L. R. 17 Eq. 524, 43 L. J. Ch. 733, 30 L. T. Rep. N. S. 112, 22 Wkly. Rep. 434; Galloway *v.* London, L. R. 1 H. L. 34, 12 Jur. N. S. 747, 35 L. J. Ch. 477, 14 L. T. Rep. N. S. 865.

43. Embury *v.* Conner, 3 N. Y. 511, 53 Am. Dec. 325 [*reversing* 2 Sandf. 98]; *In re* Albany St., 11 Wend. (N. Y.) 149, 25 Am. Dec. 618; Dunn *v.* Charleston, Harp. (S. C.) 189.

44. Eaton *v.* European, etc., R. Co., 59 Me. 520, 8 Am. Rep. 430; Childs *v.* New Jersey Cent. R. Co., 33 N. J. L. 323; *In re* New York Cent., etc., R. Co., 67 Barb. (N. Y.) 426.

45. Jones *v.* Erie, etc., R. Co., 144 Pa. St. 629, 23 Atl. 251; Blakely *v.* Delaware, etc., Canal Co., 2 Lack. Leg. N. (Pa.) 59.

This presumption will prevail, although a railroad, entitled to a strip not exceeding sixty feet in width, is located in a street less than sixty feet wide. Jones *v.* Erie, etc., R. Co., 144 Pa. St. 629, 23 Atl. 251.

46. Cincinnati, etc., Turnpike Co. *v.* Cincinnati, 7 Ohio Dec. (Reprint) 337, 2 Cinc. L. Bul. 126, holding that a municipal corporation has no power, under the municipal code of Ohio, to condemn any less than the whole portion of the turnpike within its limits.

47. Kountz *v.* Morris Aqueduct, 58 N. J. L. 303, 33 Atl. 252, holding that, where a reservoir is part of the general plan for making use of waters already acquired by a water company, lands may be condemned for the reservoir, although not intended to be immediately used for that purpose.

48. Pennsylvania R. Co. *v.* National Docks, etc., Connecting R. Co., 57 N. J. L. 86, 30 Atl. 183; Erie R. Co. *v.* Steward, 61 N. Y. App. Div. 480, 70 N. Y. Suppl. 698; Harlem River, etc., R. Co. *v.* Arnow, 21 N. Y. App. Div. 636, 47 N. Y. Suppl. 438; *In re* New

sumed necessary for future traffic.[49] But this does not extend to providing for a future contingent right.[50]

4. ADJOINING LAND. Ordinarily a condemning corporation cannot condemn additional land that is not contiguous to land already acquired for its purposes;[51] but it may condemn such contiguous property as may be necessary to enable it to carry out its purposes.[52]

X. COMPENSATION.

A. Definition. Compensation, as the term is now used in the various constitutional provisions against taking private property for public use without making just compensation, means recompense or remuneration for the property which is taken or injured.[53]

York Cent., etc., R. Co., 67 Barb. (N. Y.) 426; Lodge *v.* Philadelphia, etc., R. Co., 8 Phila. (Pa.) 345; *In re* Yorkshire, etc., R. Co., 1 Jur. N. S. 975.

But it must be sufficiently shown that the lands will be required within a reasonable time. *In re* Staten Island Rapid Transit Co., 103 N. Y. 251, 8 N. E. 548. But see St. Louis, etc., R. Co. *v.* Foltz, 52 Fed. 627, holding that the fact that the extra amount of land is not used for a considerable time does not necessarily indicate an abandonment of it by the company.

49. St. Louis, etc., R. Co. *v.* Foltz, 52 Fed. 627.

A charter provision, empowering a railroad company to take more than sixty-six feet for its stations, sidings, and turnouts, vests it with a discretionary power in this respect; but it cannot take a right of way one hundred and forty feet wide through a farm without locating thereon any of the appurtenances mentioned above, under the expectation that the future necessities of the road may require it. Robinson *v.* Pennsylvania R. Co., 161 Pa. St. 561, 29 Atl. 268.

A railroad company locating its route along a city street need not occupy from the very beginning the entire space which it is empowered to take; as its business increases it is not only authorized, but is bound, to furnish increased accommodation by occupying all the allotted ground. Yost *v.* Philadelphia, etc., R. Co., 29 Leg. Int. (Pa.) 85.

50. Hibernia R. Co. *v.* De Camp, 47 N. J. L. 518, 4 Atl. 318, 54 Am. Rep. 197.

51. Akers *v.* United New Jersey R., etc., Co., 43 N. J. L. 110; Bird *v.* Wilmington, etc., R. Co., 8 Rich. Eq. (S. C.) 46, 64 Am. Dec. 739.

52. Piedmont, etc., R. Co. *v.* Speelman, 67 Md. 260, 10 Atl. 77, 293; Middlesex, etc., Traction Co. *v.* Metlar, (N. J. Sup. 1903) 56 Atl. 142; Jersey Co. *v.* Jersey City, 8 N. J. Eq. 715; Sherman *v.* Kane, 86 N. Y. 57 [*affirming* 46 N. Y. Super. Ct. 310]; New York Cent., etc., R. Co. *v.* Metropolitan Gaslight Co., 63 N. Y. 326 [*affirming* 5 Hun 201]; *In re* Union El. R. Co., 4 N. Y. Suppl. 85; Ohio Southern R. Co. *v.* Hinkle, 1 Ohio S. & C. Pl. Dec. 682, 1 Ohio N. P. 63.

The intervention of a street does not prevent property from being contiguous within the meaning of this rule. Baltimore, etc., R. Co. *v.* Edmonds, 3 Mackey (D. C.) 526.

Land adjacent to a school site may be taken for necessary yard purposes. Williams *v.* Newfane School Dist. No. 6, 33 Vt. 271.

A boom company may be authorized to take land adjacent to the river at the point at which the boom is located. Plumer *v.* Wausau Boom Co., 49 Wis. 449, 5 N. W. 232.

But if a public road is established along a river bank on land condemned for the purpose, and such land is washed away in whole or in part by high water, there is no right to take so much other adjoining land of the owner as may suffice for the highway, without new condemnation proceedings. Com. *v.* Beeson, 3 Leigh (Va.) 821.

53. People *v.* Brooklyn, 9 Barb. (N. Y.) 535; Hays *v.* Briggs, 3 Pittsb. (Pa.) 504 [*reversed* on another point in 74 Pa. St. 373].

Just compensation for property taken under the pressure of public necessity means nothing less than the rendering of an equivalent in something which the taker has a right to bestow. People *v.* Brooklyn, 9 Barb. (N. Y.) 535. The word "just" is used to intensify the meaning of the word "compensation." Its purpose is "to convey the idea that the equivalent to be rendered for property taken shall be real, substantial, full, and ample; and no legislature can diminish by one jot the rotund expressions of the constitution." Virginia, etc., R. Co. *v.* Henry, 8 Nev. 165. It means full compensation (Spring Valley Waterworks *v.* San Francisco, 124 Fed. 574. See also *Ex p.* Martin, 13 Ark. 198, 58 Am. Dec. 321) or the fair cash value (Paducah, etc., R. Co. *v.* Stovall, 12 Heisk. (Tenn.) 1).

"Compensation" includes "damages" to the residue when only a part of a tract is taken.

Alabama.—Colbert County Com'rs *v.* Street, 116 Ala. 28, 22 So. 629 [*approving* Jones *v.* New Orleans, etc., R. Co., 70 Ala. 227; Hooper *v.* Savannah, etc., R. Co., 69 Ala. 529].

Minnesota.— Hursh *v.* First Div. St. Paul, etc., R. Co., 17 Minn. 439.

Nevada.— Virginia, etc., R. Co. *v.* Henry, 8 Nev. 165.

Ohio.— Kramer *v.* Cleveland, etc., R. Co., 1 Ohio Dec. (Reprint) 474, 10 West. L. J. 138.

Wisconsin.— Bigelow *v.* West Wisconsin R. Co., 27 Wis. 478.

"Damages" includes "compensation." Henry *v.* Dubuque, etc., R. Co., 2 Iowa 288;

B. Necessity For and Right to Compensation — 1. Constitutional Guaranty — a. In General. Just compensation, to be ascertained by an impartial tribunal, is a constitutional right of the owner of property taken under the power of eminent domain.[54]

b. Direct Taking by State or Municipality — (I) *In General.* Even when the power is exercised directly by the government itself due compensation must be made,[55] except in cases of extreme necessity, time of war, or immediately pending public danger.[56]

(II) *For Highway or Street.* It is the general doctrine that neither a county nor other municipality can take the land of a private citizen for the purpose of a highway or a street without making due compensation,[57] but there is

Grove *v.* Franklin County, 8 Ohio Cir. Ct. 166, 4 Ohio Cir. Dec. 382.

Damages distinguished.— While "compensation" and "damages" mean practically the same thing, as those terms are used in the law of eminent domain, yet there is a distinction. Damages is a relative term with reference to possible advantages to the landowner, while "compensation" is absolute and implies that the owner must be paid in money for what is taken from him. Hays *v.* Briggs, 3 Pittsb. (Pa.) 504 [*reversed* on another point in 74 Pa. St. 373]. And it has been held that "compensation" means the sum which will remunerate the owner for the land actually taken, while "damages" signifies the allowance made for injury to the residue. Ohio Southern R. Co. *v.* Rawlins, 4 Ohio S. & C. Pl. Dec. 483, 29 Cinc. L. Bul. 260. This last-mentioned distinction is not ordinarily observed, however, as an examination of the cases cited throughout this division will show.

Meaning of "damaged" within constitutional provision that property shall not be damaged without compensation see *supra*, X, D, 2, b.

54. *Ex p.* Martin, 13 Ark. 198, 58 Am. Dec. 321; Wagner *v.* Gage County, 3 Nebr. 237; People *v.* Adirondack R. Co., 160 N. Y. 225, 54 N. E. 689 [*affirmed* in 176 U. S. 335, 20 S. Ct. 460, 44 L. ed. 492]; People *v.* Calder, 89 N. Y. App. Div. 503, 85 N. Y. Suppl. 1015; Kelsey *v.* King, 1 Transcr. App. (N. Y.) 133, 33 How. Pr. (N. Y.) 39. See also cases cited *infra*, note 55 *et seq.*

The constitutional guaranty of just compensation is not a limitation of the power of taking private property, but only a condition of its exercise. Long Island Water-Supply Co. *v.* Brooklyn, 166 U. S. 685, 17 S. Ct. 718, 41 L. ed. 1165.

In England, where an act of parliament with compulsory powers incorporates the whole of the Lands Clauses Act (8 & 9 Vict. c. 18), a right to compensation is, without any other enactment, conferred upon the persons interested in lands injuriously affected by the exercise of such powers. Reg. *v.* St. Luke's Church, L. R. 7 Q. B. 148, 41 L. J. Q. B. 81, 25 L. T. Rep. N. S. 914, 20 Wkly. Rep. 209. See also Essex *v.* Acton Local Bd., 14 App. Cas. 153, 53 J. P. 756, 58 L. J. Q. B. 594, 61 L. T. Rep. N. S. 1, 38 Wkly. Rep. 209.

55. McCauley *v.* Weller, 12 Cal. 500; Dolan *v.* New York, etc., R. Co., 74 N. Y. App. Div. 434, 77 N. Y. Suppl. 815; Monongahela Nav. Co. *v.* U. S., 148 U. S. 312, 13 S. Ct. 622, 37 L. ed. 463; Meade *v.* U. S., 2 Ct. Cl. 224; Brady *v.* Atlantic Works, 3 Fed. Cas. No. 1,794, 4 Cliff. 408, 2 Ban. & A. 436 [*reversed* on another point in 107 U. S. 192, 2 S. Ct. 225, 7 L. ed. 438].

The constitution of Texas provides, however, that compensation shall be made for the taking of private property, except when the taking is "for the use of the state." Travis County *v.* Trogden, 88 Tex. 302, 31 S. W. 358 [*reversing* (Civ. App. 1895) 29 S. W. 46].

Drains cannot be constructed over private property for sanitary purposes without making compensation to the owners. Wabash R. Co. *v.* Coon Run Drainage, etc., Dist., 194 Ill. 310, 62 N. E. 679; Payson *v.* People, 175 Ill. 267, 51 N. E. 588; Matter of Chesebrough, 78 N. Y. 232; Matter of Church of Holy Supulchre, 61 How. Pr. (N. Y.) 315; Matter of Chesebrough, 56 How. Pr. (N. Y.) 460; Watson *v.* Pleasant Tp., 21 Ohio St. 667. See, however, Cummins *v.* Seymour, 79 Ind. 491, 41 Am. Rep. 618.

Levees.— The front proprietors on a navigable river in Louisiana must yield the property for levee purposes without compensation; but property which by reason of its situation away from a river owes no servitude for levees must be paid for when expropriated for that purpose. Pontchartrain R. Co. *v.* Orleans Levee Dist., 49 La. Ann. 570, 21 So. 765; Bass *v.* State, 34 La. Ann. 494; Mithoff *v.* Carrollton, 12 La. Ann. 185 (holding that buildings not originally erected in violation of law cannot be removed for the purpose of building a levee without compensating the owners); Hart *v.* Levee Com'rs, 54 Fed. 559.

Interference with property under police power and on the ground of overruling necessity see *supra*, IV, B.

56. Brady *v.* Atlantic Works, 3 Fed. Cas. No. 1,794, 2 Ban. & A. 436, 4 Cliff. 408. And see *supra*, IV, B.

57. *Alabama.*— Smith *v.* Inge, 80 Ala. 283.

California.— Colusa County *v.* Hudson, 85 Cal. 633, 24 Pac. 791; Scott *v.* Dyer, 54 Cal. 430.

Illinois.— Norton *v.* Studley, 17 Ill. 556.

Indiana.— Union R. Transfer, etc., Co. *v.* Moore, 80 Ind. 458.

Iowa.— Dinwiddie *v.* Roberts, 1 Greene 363.

authority to the contrary, resting in some states upon peculiar constitutional provisions.[58]

2. Statutory Provisions — a. For Making Compensation. A statute authorizing an exercise of the power of eminent domain is inoperative and will not support condemnation proceedings unless it provides for compensation to the owner of the property taken, or to the owner of property injured, if the constitution requires compensation for injuring or damaging property as well as for property taken,[59]

Louisiana.— Jefferson Police Jury *v.* D'Hemecourt, 7 Rob. 509.

Missouri.— Kansas City, etc., R. Co. *v.* Farrell, 76 Mo. 183.

Nebraska.—Zimmerman *v.* Kearney County, 33 Nebr. 620, 50 N. W. 1126; Chicago, etc., R. Co. *v.* Douglas County, (1901) 95 N. W. 339.

New Hampshire.— Abbott *v.* Stewartstown, 47 N. H. 228.

North Carolina.— Hitch *v.* Edgecombe County Com'rs, 132 N. C. 573, 44 S. E. 30.

Rhode Island.— Johnston *v.* Old Colony R. Co., 18 R. I. 642, 29 Atl. 594, 49 Am. St. Rep. 800.

Tennessee.— Frater *v.* Hannibal County, 90 Tenn. 661, 19 S. W. 233.

Texas.— Hamilton County *v.* Garrett, 62 Tex. 602; Watkins *v.* Walker County, 18 Tex. 585, 70 Am. Dec. 298.

See 18 Cent. Dig. tit. "Eminent Domain," § 172.

The fact that the claimant's interest is less than the whole does not affect his right to compensation for land taken or damaged for the construction of a street. Olson *v.* Seattle, 30 Wash. 687, 71 Pac. 201.

Private way.— Land cannot be taken for a private way without compensation to the owner. Brewer *v.* Bowman, 9 Ga. 37; Perrine *v.* Farr, 22 N. J. L. 356; Warren *v.* Bunnell, 11 Vt. 600.

58. Wagner *v.* Salzburg Tp., 132 Pa. St. 636, 19 Atl. 294; Feree *v.* Meily, 3 Yeates (Pa.) 153; State *v.* Dawson, 3 Hill (S. C.) 100; Patrick *v.* Charleston Neck Cross Roads Com'rs, 4 McCord (S. C.) 541; Livermore *v.* Jamaica, 23 Vt. 361. See also Hallowell *v.* Doylestown Road, 1 Am. L. J. (Pa.) 522, holding that the legislature is not bound to require a turnpike company to make compensation for lands taken for the use of the road.

In New Jersey, under a constitutional provision that "private property shall not be taken for public use without just compensation; but land may be taken for public highways as heretofore, until the legislature shall direct compensation to be made," the practice of the state not to lay out roads of a greater width than four rods, which had obtained from the year 1716 until after the adoption of the constitution in 1844, constitutes a limitation on the legislative power to take land for highways without compensation. Gautier *v.* Hudson County Bd. of Chosen Freeholders, 55 N. J. L. 88, 25 Atl. 322, 17 L. R. A. 785. The constitutional provision does not apply to lands taken for streets within municipalities, except to the extent that such compensation is required by their respective charters; and the compensation so prescribed is the measure of the landowners' legal right, whether it be just or unjust. Simmons *v.* Passaic, 42 N. J. L. 619. Under a charter providing that the owner of land taken for a street must be compensated before the city can proceed with the improvement, if the charter makes no provision as to the mode of ascertaining the amount of compensation, the city has no power to condemn the land. Mulligan *v.* Perth Amboy, 52 N. J. L. 132, 18 Atl. 670. By providing in the act of March 1, 1850, that when roads were laid out damages should be given to the owner of the lands taken, the legislative control of the subject was thereby exhausted, and it could not thereafter authorize such taking without compensation. Cherry *v.* Keyport, 52 N. J. L. 544, 20 Atl. 970.

59. *Alabama.*— Anniston, etc., R. Co. *v.* Jacksonville, etc., R. Co., 82 Ala. 297, 2 So. 710; Miller *v.* Mobile, 47 Ala. 163, 11 Am. Rep. 768; Aldridge *v.* Tuscumbia, etc., R. Co., 2 Stew. & P. 199, 23 Am. Dec. 307.

Arkansas.— *Ex p.* Martin, 13 Ark. 198, 58 Am. Dec. 321.

California.— Curran *v.* Shattuck, 24 Cal. 427; McCauley *v.* Weller, 12 Cal. 500; McCann *v.* Sierra County, 7 Cal. 121.

Florida.— Moody *v.* Jacksonville, etc., R. Co., 20 Fla. 597.

Georgia.— Garbutt Lumber Co. *v.* Georgia, etc., R. Co., 111 Ga. 714, 36 S. E. 942; Southwestern R. Co. *v.* Southern, etc., Tel. Co., 46 Ga. 43, 12 Am. Rep. 585; Loughbridge *v.* Harris, 42 Ga. 500; Powers *v.* Armstrong, 19 Ga. 427; Parham *v.* Decatur County Justices Inferior Ct., 9 Ga. 341.

Illinois.— Chicago *v.* Larned, 34 Ill. 203; Highway Com'rs *v.* Newby, 31 Ill. App. 378. See, however, Shute *v.* Chicago, etc., R. Co., 26 Ill. 436, holding that while, if provision is not made for paying the compensation allowed for the land, the party may be restrained from occupying by injunction until payment is made, yet the condemnation will not be invalid.

Indiana.— Evansville, etc., R. Co. *v.* Dick, 9 Ind. 433.

Kansas.— Hunt *v.* Smith, 9 Kan. 137; Chicago, etc., R. Co. *v.* Selders, 4 Kan. App. 497, 44 Pac. 1012.

Kentucky.— Hancock Stock, etc., Law Co. *v.* Adams, 87 Ky. 417, 9 S. W. 246, 10 Ky. L. Rep. 371; Henderson, etc., R. Co. *v.* Dickerson, 17 B. Mon. 173, 66 Am. Dec. 148; O'Hara *v.* Lexington, etc., R. Co., 1 Dana 232.

Louisiana.— Calder *v.* Police Jury, 44 La.

and this rule applies although the taking is by the state under a direct legislative

Ann. 173, 10 So. 726; Jefferson Police Jury *v.* D'Hemecourt, 7 Rob. 509.

Maine.— Cushman *v.* Smith, 34 Me. 247; Spring *v.* Russell, 7 Me. 273.

Maryland.— American Telephone, etc., Co., *v.* Smith, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200; Harness *v.* Chesapeake, etc., Canal Co., 1 Md. Ch. 248; Hamilton *v.* Annapolis, etc., Bridge R. Co., 1 Md. Ch. 107.

Massachusetts.— Brickett *v.* Haverhill Aqueduct Co., 142 Mass. 394, 8 N. E. 119; Connecticut River R. Co. *v.* Franklin County Com'rs, 127 Mass. 50, 34 Am. Rep. 338; Haverhill Bridge *v.* Essex County, 103 Mass. 120, 4 Am. Rep. 518; Morse *v.* Stocker, 1 Allen 150; Boston, etc., Corp. *v.* Salem, etc., R. Co., 2 Gray 1; Thacher *v.* Dartmouth Bridge Co., 18 Pick. 501; Perry *v.* Wilson, 7 Mass. 393.

Michigan.— People *v.* Detroit, etc., R. Co., 79 Mich. 471, 44 N. W. 934, 7 L. R. A. 717; Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308.

Minnesota.— State *v.* Chicago, etc., R. Co., 36 Minn. 402, 31 N. W. 365; U. S. *v.* Minnesota, etc., R. Co., 1 Minn. 127.

Mississippi.— Donnaher *v.* State, 8 Sm. & M. 649.

Missouri.— St. Louis *v.* Hill, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226; Webster *v.* Kansas City, etc., R. Co., 116 Mo. 114, 22 S. W. 474; Zoeller *v.* Kellogg, 4 Mo. App. 163.

Nebraska.—Zimmerman *v.* Kearney County, 33 Nebr. 620, 50 N. W. 1126.

New Hampshire.— Opinion of Justices, 66 N. H. 629, 33 Atl. 1076.

New Jersey.—Cherry *v.* Keyport, 52 N. J. L. 544, 20 Atl. 970; Ward *v.* Peck, 49 N. J. L. 42, 6 Atl. 805; Ten Eyck *v.* Delaware, etc., Canal, 18 N. J. L. 200, 37 Am. Dec. 233; Chamberlain *v.* Elizabethport Steam Cordage Co., 41 N. J. Eq. 43, 2 Atl. 775; Coster *v.* Tide Water Co., 18 N. J. Eq. 54; Carson *v.* Coleman, 11 N. J. Eq. 106.

New York.— *In re* Cheesebrough, 78 N. Y. 232 [*affirming* 17 Hun 561]; People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; Matter of Tuthill, 36 N. Y. App. Div. 492, 55 N. Y. Suppl. 657 [*reversing* 50 N. Y. Suppl. 410]; De Camp *v.* Thompson, 16 N. Y. App. Div. 528, 44 N. Y. Suppl. 1014; People *v.* Loew, 39 Hun 490; Robinson *v.* New York, etc., R. Co., 27 Barb. 512; People *v.* Westchester County, 4 Barb. 64; McMillian *v.* Lauer, 24 N. Y. Suppl. 951; Lyon *v.* Jerome, 26 Wend. 485, 37 Am. Dec. 271; Bloodgood *v.* Mohawk, etc., R. Co., 18 Wend. 9, 31 Am. Dec. 313 [*affirming* 14 Wend. 51]; *In re* Furman St., 17 Wend. 649; Bradshaw *v.* Rodgers, 20 Johns. 103; Gardner *v.* Newburgh, 2 Johns. Ch. 161, 7 Am. Dec. 526.

Ohio.— Symonds *v.* Cincinnati, 14 Ohio 147, 45 Am. Dec. 529; Cooper *v.* Williams, 4 Ohio 253, 22 Am. Dec. 745; Beck *v.* Medina County, 9 Ohio Dec. (Reprint) 108, 11 Cinc. L. Bul. 18; Smith *v.* McKee, 3 Ohio Dec. (Reprint) 578, 10 Cinc. L. Bul. 276.

Pennsylvania.— *In re* Burnish St., 140 Pa. St. 531, 21 Atl. 500 (*semble*); McMasters *v.* Com., 3 Watts 292 (*semble*); Pickering *v.* Rutty, 1 Serg. & R. 511. See also Long *v.* Pennsylvania R. Co., 9 Lanc. Bar 98; Maffatt *v.* Perry, 3 Pittsb. 8; Hecksher *v.* Shenandoah Citizens' Water, etc., Co., 2 Leg. Chron. 273. *Compare* Rees' Appeal, (1888) 12 Atl. 427, holding that the fact that an act conferring upon certain corporations the right of eminent domain fails to make provision for compensation for land taken under it or to designate a method of determining the damages suffered thereby does not render it unconstitutional, the owner of the land so taken having his remedy at common law under the constitution of 1874.

Tennessee.— Watauga Water Co. *v.* Scott, (Sup. 1903) 76 S. W. 888; East End St. R. Co. *v.* Doyle, 88 Tenn. 747, 13 S. W. 936, 17 Am. St. Rep. 933, 9 L. R. A. 100.

Texas.— Buffalo Bayou, etc., R. Co. *v.* Ferris, 26 Tex. 588.

Vermont.— Foster *v.* Stafford Nat. Bank, 57 Vt. 128.

Washington.— Lewis County *v.* Gordon, 20 Wash. 80, 54 Pac. 779.

Wisconsin.— Shepardson *v.* Milwaukee, etc., R. Co., 6 Wis. 605.

United States.— Sweet *v.* Rechel, 159 U. S. 380, 16 S. Ct. 43, 40 L. ed. 188; *In re* Manderson, 51 Fed. 501, 2 C. C. A. 490 [*affirming* 48 Fed. 896]; Hollingsworth *v.* Tensas Parish, 17 Fed. 109, 4 Woods 280; Bonaparte *v.* Camden, etc., R. Co., 3 Fed. Cas. No. 1,617, Baldw. 205; Van Horne *v.* Dorrance, 28 Fed. Cas. No. 16,857, 2 Dall. 304, 1 L. ed. 391.

See 18 Cent. Dig. tit. "Eminent Domain," § 171.

Where the constitution does not require compensation for injuring or damaging property, the statutes need not provide for compensation for consequential injuries such as are suffered by abutting owners by reason of the laying of railroad tracks through a street. Merchants' Union, etc., Co. *v.* Chicago, etc., R. Co., 70 Iowa 105, 28 N. W. 494, 69 Iowa 605, 29 N. W. 822; Mulholland *v.* Des Moines, etc., R. Co., 60 Iowa 740, 13 N. W. 726.

Compensation is sufficiently provided for by a statute providing that the selectmen of a town may lay out private roads when it shall be found necessary, so that no damage shall be done to persons through whose lands such roads shall be laid without due recompense (Warren *v.* Bunnell, 11 Vt. 600); also by a statute which provides for the payment of damages which have been awarded in a proceeding to take land for public use (*In re* State Reservation Com'rs, 37 Hun (N. Y.) 537). See also St. Louis *v.* Connecticut Mut. L. Ins. Co., 90 Mo. 135, 2 S. W. 211. So a statute declaring a river a public highway and providing only for the payment of damages to riparian owners and not to persons who own the bed of the stream and who are not riparian owners is not invalid, it not appearing that there was any one who had title

resolve.[60] The want of an express provision for compensation in a special statute[61] or an ordinance[62] is not necessarily fatal, if a general law is in existence which provides for compensation in the class of cases in question; and it has been held that a statute will be read with the constitution, so as to supply the want in the former of an express provision for compensation,[63] provided there is nothing in the statute which is repugnant to the constitution.[64]

b. For Determining Compensation. A statute authorizing the taking of private property for public use must not only provide for the payment of compensation but also make provision for a certain and adequate remedy by which the owner of the property may procure the compensation.[65] It has been held that a

to the bed of the stream distinct from that which was incidental to riparian ownership. Matter of Wilder, 90 N. Y. App. Div. 262, 85 N. Y. Suppl. 741.

Implied provision.— If the statute provides for the ascertainment of the compensation, but makes no express provision for its payment, it will be construed as requiring payment to be made. Woodruff *v.* Glendale, 26 Minn. 78, 1 N. W. 581.

Provision must exist at the time of the taking by which the owner can have his damages assessed by an impartial tribunal and on his own motion obtain the compensation allowed him; and where such provision is not made in the law which authorizes the municipal action, the owner may resist the initial attempt to divest him of his title. State *v.* Perth Amboy, 52 N. J. L. 132, 18 Atl. 670. Time of payment generally see *infra*, X, F, 1.

Right to file petition.— If a statute provides that a petition for compensation may be filed by a lot owner, it is not void because it does not give the same right to a lienholder. German Sav., etc., Soc. *v.* Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067.

Sufficiency of compensation.— A charter provision authorizing a city to condemn the fee for a public street is constitutional, where it contemplates paying not for an easement but for the fee. Fairchild *v.* St. Paul, 46 Minn. 540, 49 N. W. 325.

Power to provide for compensation.— The constitution does not prevent the legislature from providing compensation for the damaging of varieties of property not specified in the constitution; and hence a statute is not invalid because it provides compensation for the damaging of a form of property which might under the general power of eminent domain be subject to uncompensated damage. Earle *v.* Com., 180 Mass. 579, 63 N. E. 10, 91 Am. St. Rep. 326, 57 L. R. A. 292.

60. Comins *v.* Bradbury, 10 Me. 447.

61. *California.*— Jennings *v.* Le Roy, 63 Cal. 397.

Maryland.— Gregg *v.* Baltimore, 56 Md. 256.

New York.— *In re* New York El. R. Co., 70 N. Y. 327 [*affirming* 7 Hun 239]; Swikehard *v.* Michels, 81 Hun 325, 8 Misc. 568, 29 N. Y. Suppl. 777, 30 N. Y. Suppl. 1135.

Pennsylvania.— East Union Tp. *v.* Comrey, 100 Pa. St. 362; Smedley *v.* Irwin, 51 Pa. St. 445; *In re* Sharett's Road, 8 Pa. St. 89; Delaware, etc., R. Co. *v.* Wilkes-Barre, etc., R. Co., 11 Pa. Co. Ct. 165; Wister *v.* Philadelphia, 31 Leg. Int. 53.

Wisconsin.— State *v.* Hogue, 71 Wis. 384, 36 N. W. 860.

See 18 Cent. Dig. tit. "Eminent Domain," § 171.

See, however, Garbutt Lumber Co. *v.* Georgia, etc., R. Co., 111 Ga. 714, 36 S. E. 942, holding that a statute granting a private company the right to lay tracks across a railroad, which is inoperative by reason of its failure to provide for compensation to the railroad company, cannot be made valid by extending to it the provisions of another section which provides a method to be followed when private property is taken or damaged for public use.

62. Clarke *v.* Blackmar, 47 N. Y. 150, holding that where power is conferred on a city to authorize the laying of railroad tracks on its streets, subject to the same compensation to the owners of adjoining property which is allowed under the general railroad laws, it is not necessary that the ordinance authorizing the laying of the track should expressly provide for compensation.

63. Rees' Appeal, (Pa. 1888) 12 Atl. 427; *In re* Rugheimer, 36 Fed. 369. See also McArthur *v.* Kelly, 5 Ohio 139 (holding that if the statute makes no provision for compensation, the presumption is that there is no intention to authorize the taking of one's property without his consent); Harrisburg *v.* Crangle, 3 Watts & S. (Pa.) 460 (holding that a statute authorizing the taking of land for a public purpose must be construed in subordination to the constitutional provision as to making compensation).

Although the courts of Great Britain are not controlled by constitutional prohibitions on this subject, yet it is there held that it is a proper rule not to construe an act of parliament as interfering with or injuring persons' rights without compensation, unless no other construction is possible. Att'y-Gen. *v.* Horner, 14 Q. B. D. 257, 49 J. P. 326, 54 L. J. Q. B. 232, 33 Wkly. Rep. 93.

64. *In re* Sharett's Road, 8 Pa. St. 89.

65. *California.*— Curran *v.* Shattuck, 24 Cal. 427.

Connecticut.— Harding *v.* Stamford Water Co., 41 Conn. 87.

Georgia.— Southwestern R. Co. *v.* Southern, etc., Tel. Co., 46 Ga. 43, 12 Am. Rep. 585, holding that a statute which fails to

law is constitutional which compels the owner to institute proceedings to have

provide any compulsory process for enforcing payment of just compensation is unconstitutional.

Maine.— Cushman *v.* Smith, 34 Me. 247.

Massachusetts.—Old Colony R. Co. *v.* Framingham Water Co., 153 Mass. 561, 27 N. E. 662, 13 L. R. A. 332; Woodbury *v.* Marblehead Water Co., 145 Mass. 509, 15 N. E. 282; Callender *v.* Marsh, 1 Pick. 418.

Missouri.— Kansas City *v.* Bacon, 147 Mo. 209, 48 S. W. 860; Walther *v.* Warner, 25 Mo. 277.

New Hampshire.— Ash *v.* Cummings, 50 N. H. 591 (holding that the provision for compensation should be such as not only to secure to the landowner a seasonable assessment of his damages, but also their prompt payment); *In re* Mt. Washington R. Co., 35 N. H. 134; Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35; Bristol *v.* New Chester, 3 N. H. 524, all holding that it is not enough that the owner may obtain his compensation by an action for the wrong done.

New York.— *In re* Board of Rapid Transit R. Com'rs, 65 Hun 63, 19 N. Y. Suppl. 561; Wallace *v.* Karlenowefski, 19 Barb. 118; Lyon *v.* Jerome, 26 Wend. 485, 37 Am. Dec. 271; Bloodgood *v.* Mohawk, etc., R. Co., 18 Wend. 9, 31 Am. Dec. 313.

Ohio.— Smith *v.* Atlantic, etc., R. Co., 25 Ohio St. 91; Beck *v.* Medina County, 9 Ohio Dec. (Reprint) 108, 11 Cinc. L. Bul. 18; Kramer *v.* Cleveland, etc., R. Co., 1 Ohio Dec. (Reprint) 474, 1 West. L. J. 138.

Oklahoma.— Southern Kansas R. Co. *v.* Oklahoma City, 12 Okla. 82, 69 Pac. 1050.

Pennsylvania.— Com. *v.* Pittsburg, etc., R. Co., 58 Pa. St. 26; Pittsburgh *v.* Scott, 1 Pa. St. 309, *semble*. *Compare* Rees' Appeal, (Pa. 1888) 12 Atl. 427, holding that the fact that an act conferring upon certain corporations the right of eminent domain fails to make provision for compensation for land taken under it or to designate a method of determining the damages suffered thereby does not render it unconstitutional, the owner of the land so taken having his remedy at common law under the constitution of 1874.

South Carolina.— Fort *v.* Goodwin, 36 S. C. 445, 15 S. E. 723.

Virginia.—Tait *v.* Central Lunatic Asylum, 84 Va. 271, 4 S. E. 667.

United States.— Adirondack R. Co. *v.* New York, 176 U. S. 335, 20 S. Ct. 460, 44 L. ed. 492 [*affirming* 160 N. Y. 225, 54 N. E. 689].

See 18 Cent. Dig. tit. "Eminent Domain," § 171.

Even as respects the state itself certain and ample provision must be first made by law so that the owner can coerce payment through judicial tribunals or otherwise and without any unreasonable or unnecessary delay. Otherwise the law making the appropriation is void. People *v.* Hayden, 6 Hill (N. Y.) 359.

Assessment by commissioners.— An act granting to a railroad company a right of way through private lands, which provides for the appointment of commissioners to assess the compensation and gives the owners an appeal from their award to the courts, where the case may be tried *de novo*, and which provides that on such appeal the company shall pay into court, to abide its judgment, double the amount of the commissioners' award, makes adequate provision for compensation. Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 10 S. Ct. 965, 34 L. ed. 295 [*reversing* 33 Fed. 900]. See also State *v.* Graves, 19 Md. 351, 81 Am. Dec. 639; Black *v.* Delaware, etc., Canal Co., 24 N. J. Eq. 455.

Assessment by jury.— A statute furnishes ample means for determining damages where it provides that a county taking land for park purposes must pay such damages as are agreed on between the selectmen and the owner, and, if the parties cannot agree, a jury may be had to determine the same. Whitman *v.* Nantucket, 169 Mass. 147, 47 N. E. 611. So a provision in a railroad charter that the landowner shall file with the company his claim for damages, that the company shall appoint disinterested men to award damages, and that if either party is dissatisfied with the award he may appeal to a jury is constitutional, except so far as it affects non-residents and persons under disability. New Albany, etc., R. Co. *v.* Connelly, 7 Ind. 32. The fact that the statute authorizes a jury composed of citizens of the town which is appropriating the land does not render it invalid, since the interest of such jurors is too remote to disqualify them. Johnston *v.* Rankin, 70 N. C. 550.

Ex parte proceedings.— It is not sufficient that the statute provides an *ex parte* proceeding for the assessment of compensation. Langford *v.* Ramsey County Com'rs, 16 Minn. 375; St. Louis County Ct. *v.* Griswold, 58 Mo. 175; Kramer *v.* Cleveland, etc., R. Co., 1 Ohio Dec. (Reprint) 474, 10 West. L. J. 138. Thus a statute which provides that a railroad company before appropriating land shall offer to pay to the owner the sum which its agent and two disinterested freeholders of the county where the lands are situated shall in writing swear to be a just compensation is not a compliance with the constitutional requirement, since it is open to gross partiality and abuse, being *ex parte* and secret. Powers *v.* Bears, 12 Wis. 213, 78 Am. Dec. 733.

Construction of statutes.— A statute designed to furnish the means of ascertaining just compensation must be so construed as fully to satisfy the constitutional guaranty. Stolze *v.* Milwaukee, etc., R. Co., 113 Wis. 44, 88 N. W. 919, 90 Am. St. Rep. 833. Where the legislature provides by a special act for the opening of a highway without providing special means for determining compensation for property taken, the reasonable presumption is that it is to be ascertained and paid under the provisions of the general

his compensation assessed, or an action for damages,[66] and the legislature may limit the period within which the remedy shall be available, so that a failure to resort to it within the time prescribed shall work a forfeiture of the right to compensation.[67] Since the legislature may prescribe the manner in which compensation for the land appropriated shall be obtained, it may provide that a failure to seek the compensation in that manner shall be a waiver of all claim therefor.[68]

law on the subject. Warner *v.* Hennepin County Com'rs, 9 Minn. 139.

Reference to existing law.— A statute empowering an aqueduct company to take the waters of certain ponds and to lay and maintain aqueduct pipes, and providing that all damages shall be ascertained and recovered in the manner provided where land is taken for highways, makes adequate provision for the ascertainment and payment of the damages. Brickett *v.* Haverhill Aqueduct Co., 142 Mass. 394, 8 N. E. 119.

Power to fix amount of compensation.— While the legislature is judge of the expediency of the exercise of the right of eminent domain, it is not the judge of the amount of compensation to be paid for the property taken. Langford *v.* Ramsey County Com'rs, 16 Minn. 375; Monongahela Nav. Co. *v.* U. S., 148 U. S. 312, 13 S. Ct. 622, 37 L. ed. 463; Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170. However, the legislature is not bound to submit the question of compensation incident to the exercise of the right of eminent domain to a judicial tribunal. Provided it be an impartial tribunal, and the property-owner has an opportunity to be heard before it, the legislature may refer the matter for determination to a jury, a court, a commission, or any other body it may designate. State *v.* Rapp, 39 Minn. 65, 38 N. W. 926.

Power to prescribe mode of fixing compensation.— The legislature may ordinarily prescribe the method by which compensation shall be ascertained (Henderson, etc., R. Co. *v.* Dickerson, 17 B. Mon. (Ky.) 173, 36 Am. Dec. 148); but if the constitution requires that it be fixed by a jury or a board a statute which attempts to fix it otherwise is void (Tripp *v.* Overocker, 7 Colo. 72, 1 Pac. 695; Peterson *v.* Smith, 6 Wash. 163, 32 Pac. 1050).

Special method of fixing compensation.— Where a charter or statute provides a method for determining the compensation different from that prescribed by the general law governing eminent domain, it is none the less valid if the fundamental principles of just compensation and an opportunity to be heard are secured to the landowner. Kansas City *v.* Bacon, 147 Mo. 259, 48 S. W. 860.

66. State *v.* Messenger, 27 Minn. 119, 6 N. W. 457; Branson *v.* Gee, 25 Oreg. 462, 36 Pac. 527, 24 L. R. A. 355; Pittsburgh *v.* Scott, 1 Pa. St. 309; Bates *v.* Titusville, 3 Pittsb. (Pa.) 434. See also Kimberly, etc., Co. *v.* Hewitt, 79 Wis. 334, 48 N. W. 373, holding that an act of congress which gives a right of action in a state court against the United States to determine the amount of compensation due for injury to property by improvements which had been after their construction purchased by the United States confers adequate means for obtaining compensation. *Contra*, St. Louis *v.* Hill, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226; Snohomish County *v.* Hayward, 11 Wash. 429, 39 Pac. 652; Newell *v.* Smith, 15 Wis. 101, where an act authorizing proprietors of a mill-dam to flow lands of other persons, without any provision for compensation except that they should pay the landowners the value of the lands, to be ascertained by the verdict in an action of trespass, was held to be unconstitutional. See also Pearson *v.* Johnson, 54 Miss. 259 (holding that a law which merely gives a landowner a right of action, or even a judgment, for his damages is unconstitutional); Buffalo Bayou, etc., R. Co. *v.* Ferris, 26 Tex. 588 (holding that an execution on a judgment against a private corporation to be rendered at least two terms of court after the taking of the property is too uncertain to be an adequate compensation).

67. *California.*— Potter *v.* Ames, 43 Cal. 75; Harper *v.* Richardson, 22 Cal. 251.

Iowa.— Tharp *v.* Witham, 65 Iowa 566, 22 N. W. 677; Smiths *v.* Dubuque County, 1 Iowa 492.

Massachusetts.— Boston, etc., Mill-Dam Corp. *v.* Newman, 12 Pick. 467, 23 Am. Dec. 622.

Minnesota.—Banse *v.* Clark, 69 Minn. 53, 71 N. W. 819 (holding that the statute providing that the owner must apply within a given time to have his damages assessed is a remedial one, intended to provide the owner, where a highway has been already laid out and is in use as such by the public but by reason of some irregularity his damages have not been assessed or paid, with an opportunity to obtain compensation, and so construed, is not unconstitutional); State *v.* Messenger, 27 Minn. 119, 6 N. W. 457.

Nebraska.— Hodges *v.* Seward County, 49 Nebr. 666, 68 N. W. 1027.

Ohio.— Reckner *v.* Warner, 22 Ohio St. 275.

Tennessee.—Simms *v.* Memphis, etc., R. Co., 12 Heisk. 621.

United States.— Wabash R. Co. *v.* Defiance, 167 U. S. 88, 17 S. Ct. 748, 42 L. ed. 87; Sweet *v.* Rechel, 159 U. S. 380, 16 S. Ct. 43, 40 L. ed. 188; Kaukauna Water-Power Co. *v.* Green Bay, etc., Canal Co., 142 U. S. 254, 12 S. Ct. 173, 35 L. ed. 1004 [*affirming* 70 Wis 635, 35 N. W. 529, 36 N. W. 828].

See 18 Cent. Dig. tit. "Eminent Domain," § 206.

Contra.— Board of Levee Com'rs *v.* Dancy, 65 Miss. 335, 3 So. 568.

68. *Iowa.*— Abbott *v.* Scott County, 36 Iowa 354.

c. Designation of Fund For Compensation. A statute authorizing the taking of private property for public use must make provision, not only for an assessment and collection of compensation, but also for some definite and certain fund out of which it shall be paid.[69] It is sufficient if the payment is made a charge on the public treasury of the government, general or local, which exercises the power, or on the fund raised by it by general taxation;[70] but it has been held that a law which authorizes the taking of land without the pledge of the credit of the state or one of its political divisions for the payment of compensation, and which remits the owner for his sole remedy to a fund to be obtained by taxation, according to

Kansas.— Shearer *v.* Douglas County Com'rs, 13 Kan. 145, holding that sickness in the family, in consequence of which the owner failed to attend the meeting of the viewers or to present any claim for damages, is not an excuse.

New York.— Seeley *v.* Amsterdam, 54 N. Y. App. Div. 9, 66 N. Y. Suppl. 221.

Ohio.— Cupp *v.* Seneca County Com'rs, 19 Ohio St. 173.

Texas.— Llano County *v.* Scott, 2 Tex. Civ. App. 408, 21 S. W. 177.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 206, 207.

69. Ash *v.* Cummings, 50 N. H. 591, holding, however, that where the power is conferred upon a city, county, or town, it will be presumed that these bodies politic are responsible for the compensation. See also Bent *v.* Emery, 173 Mass. 495, 53 N. E. 910; Tuttle *v.* Knox County, 89 Tenn. 157, 14 S. W. 486, both holding that a statute is insufficient which, while providing for the assessment of the compensation, fails to declare who shall pay it, or to provide means for collecting it.

Payment out of railroad earnings.— A statute authorizing a railroad owned by the state to take land for a station for that and other roads, which provides no other mode of compensation to the landowner than that the land shall be paid for from the earnings of the road owned by the commonwealth, is unconstitutional, even though there is a probability that the earnings will be sufficient to meet all claims for damages. Connecticut River R. Co. *v.* Franklin County Com'rs, 127 Mass. 50, 34 Am. Rep. 338.

70. *Alabama.*—Lowndes County Com'rs Ct. *v.* Bowie, 34 Ala. 461.

California.— Gilmer *v.* Lime Point, 18 Cal. 229.

Indiana.— Jeffersonville, etc., R. Co. *v.* Daugherty, 40 Ind. 33.

Minnesota.— State *v.* Otis, 53 Minn. 318, 55 N. W. 143 (where the charter imposed upon the city the duty of paying the compensation); State *v.* Bruggerman, 31 Minn. 493, 18 N. W. 454.

New Jersey.— Loweree *v.* Newark, 38 N. J. L. 151.

New York.— *In re* New York, 99 N. Y. 569, 2 N. E. 642 [*affirming* 34 Hun 441]; Chapman *v.* Gates, 54 N. Y. 132; People *v.* Haverstraw, 80 Hun 385, 30 N. Y. Suppl. 325; Smith *v.* Helmer, 7 Barb. 416; New York *v.* Wright, 12 N. Y. Suppl. 20.

North Carolina.— State *v.* Lyle, 100 N. C. 497, 6 S. E. 379.

North Dakota.— Martin *v.* Tyler, 4 N. D. 278, 60 N. W. 392, 25 L. R. A. 838.

Ohio.— Zimmerman *v.* Canfield, 42 Ohio St. 463; McMicken *v.* Cincinnati, 4 Ohio St. 394.

Pennsylvania.— Long *v.* Fuller, 68 Pa. St. 170; *In re* Yost, 17 Pa. St. 524; Bromley *v.* Philadelphia, 8 Pa. Co. Ct. 600 (holding that payment of the compensation is amply secured by the power of taxation and the power of the courts to compel payment by mandamus); *In re* Spring Garden St., 7 Phila. 393; *Ex p.* United States, 24 Pittsb. Leg. J. 105; *In re* Valley Forge, 14 Montg. Co. Rep. 129.

Wisconsin.— State *v.* Superior, 81 Wis. 649, 51 N. W. 1014; Smeaton *v.* Martin, 57 Wis. 364, 15 N. W. 403; Kimberly, etc., Co. *v.* Hewitt, 79 Wis. 334, 48 N. W. 373; Green Bay, etc., Canal Co. *v.* Kaukauna Water-Power Co., 70 Wis. 635, 35 N. W. 529, 36 N. W. 828, in both of which last two cases the United States itself had assumed payment of the compensation.

United States.— Sweet *v.* Rechel, 159 U. S. 380, 16 S. Ct. 43, 40 L. ed. 188; Great Falls Mfg. Co. *v.* Garland, 25 Fed. 521.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 181, 182.

The property of the town or county upon which the assessment is to be made is an adequate fund. Bloodgood *v.* Mohawk, etc., R. Co., 18 Wend. (N. Y.) 9, 31 Am. Dec. 313.

A provision for the issue of bonds to pay for improvements, the bonds to be paid out of a general tax so far as benefit assessments should prove inadequate, is a sufficient provision for compensation. German Sav., etc., Soc. *v.* Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; Robert *v.* Sadler, 104 N. Y. 229, 10 N. E. 428, 58 Am. Rep. 498; Hubbard *v.* Sadler, 104 N. Y. 223, 10 N. E. 426; Kelley *v.* New York, 89 Hun (N. Y.) 246, 35 N. Y. Suppl. 1109 [*affirming* 6 Misc. 516, 27 N. Y. Suppl. 164]. See also Hansen *v.* Hammer, 15 Wash. 315, 46 Pac. 332.

Certificates of indebtedness.—Where a statute provides for a park fund to be created by the sale of city bonds, and that the park board shall determine how much of the cost, not exceeding forty per cent, shall be paid from such fund, and shall set apart such amount for payment of the compensation, which shall be applicable to no other purpose; that the park board shall require the board of public works to ascertain the amount of compensation, and to assess the amount, less the amount appropriated from the park fund, against the property benefited, and if the as-

benefits, of specified lands in a limited assessment district, is not such a sure and adequate provision for compensation as is required by the constitution.[71]

d. Curative Acts. Defects in a statute may be cured by a subsequent statute or by an amendment of the original,[72] but the subsequent act will not cover cases in which the land was taken prior to its passage.[73]

C. Property or Rights For Which Compensation Must Be Made — 1. Business or Profession. In the absence of statute a business or profession is not property which must be paid for if injured or destroyed in the exercise of the power of eminent domain.[74]

2. Easements. An easement is an interest in land for which the owner is entitled to compensation, as much so as if the land to which the easement is appurtenant were taken or injured.[75] Accordingly an abutting owner's easement

sessments are not paid that the land assessed shall be sold therefor; that if there are no purchasers the land shall be struck off to the city, and if the city is unable to sell the certificates of sale within thirty days, it shall forthwith issue certificates of indebtedness for the amount of such certificates of sale, which shall be absolute obligations of the city, and the landowners be allowed interest on the compensation awarded from the date of the award, it is an adequate provision for the payment of compensation. State *v.* Brill, 58 Minn. 152, 59 N. W. 989.

The general power to raise money to pay the ordinary expenses of the city or to carry into effect the charter powers granted the city is not a sufficient authority or direction to pay landowners for property condemned. Matter of South Market St., 67 Hun (N. Y.) 594, 22 N. Y. Suppl. 432.

71. Sage *v.* Brooklyn, 89 N. Y. 189. See also State *v.* Brill, 58 Minn. 152, 59 N. W. 989; *In re* Lincoln Park, 44 Minn. 299, 46 N. W. 355 (holding that where a statute provided that compensation should be paid out of the park fund, but did not make it a general charge upon the city treasury, or make the city liable at all events to pay it, the act did not provide an adequate method for compensation); Matter of South Market St., 67 Hun (N. Y.) 594, 22 N. Y. Suppl. 432; Mitchell *v.* White Plains, 62 Hun (N. Y.) 231, 16 N. Y. Suppl. 828; State *v.* Superior, 81 Wis. 649, 51 N. W. 1014. It has been held, however, that a street may be opened and widened before the compensation is paid, if the statute provides that it must be paid by the city at large, or by the property-owners benefited, according to the decision of council by ordinance (Bates *v.* Titusville, 3 Pittsb. (Pa.) 434); and that if the entire taxable property of the city is ultimately liable for the payment of the judgment, should the special assessment prove insufficient, provisions for the special assessment are not in violation of the constitutional provision (State *v.* Superior, *supra*. And see State *v.* Brill, *supra*). See also Hansen *v.* Hammer, 15 Wash. 315, 46 Pac. 332, holding that a law providing for the condemnation of rights of way is not unconstitutional as authorizing a taking of property without full compensation having been made in money, where provision is made for ascertaining the cost and collecting same by assessment or the issuance of bonds, as the presumption is that compensation would be provided in this manner before actual construction should begin.

72. Harding *v.* Stamford Water Co., 41 Conn. 87; Cherry *v.* Keyport, 52 N. J. L. 544, 20 Atl. 970; *In re* U. S. Commissioners, 96 N. Y. 227, 67 How. Pr. (N. Y.) 121 [*affirming* 66 How. Pr. 517]; Bonaparte *v.* Camden, etc., R. Co., 3 Fed. Cas. No. 1,617, Baldw. 205.

73. Henderson *v.* Minneapolis, 32 Minn. 319, 20 N. W. 322; Willey *v.* Epping, 16 N. H. 58. See, however, Lewis County *v.* Gordon, 20 Wash. 80, 54 Pac. 779.

74. See *infra*, X, E, 19, d.

75. *Illinois.*— Galena, etc., R. Co. *v.* Haslam, 73 Ill. 494; Chicago, etc., R. Co. *v.* Jefferson, 14 Ill. App. 615, railroad right of way.

Kansas.—Atchison, etc., R. Co. *v.* Davenport, 65 Kan. 206, 69 Pac. 195, private railroad crossing.

Maryland.— Baltimore *v.* Cowen, 88 Md. 447, 41 Atl. 900.

New York.— *In re* New York, 168 N. Y. 134, 61 N. E. 158, 56 L. R. A. 500; Bischoff *v.* New York El. R. Co., 138 N. Y. 257, 33 N. E. 1073; Sterry *v.* New York El. R. Co., 129 N. Y. 619, 29 N. E. 68; Mortimer *v.* Manhattan R. Co., 129 N. Y. 81, 29 N. E. 5 [*affirming* 57 N. Y. Super. Ct. 509, 8 N. Y. Suppl. 536, 59 N. Y. Super. Ct. 579, 14 N. Y. Suppl. 952]; Kernochan *v.* New York El. R. Co., 128 N. Y. 559, 29 N. E. 65 [*affirming* 59 N. Y. Super. Ct. 561, 13 N. Y. Suppl. 624]; Kane *v.* New York El. R. Co., 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640; Lahr *v.* Metropolitan El. R. Co., 104 N. Y. 268, 10 N. E. 528; Smith *v.* Rochester, 92 N. Y. 463, 44 Am. Rep. 393; People *v.* Calder, 89 N. Y. App. Div. 503, 85 N. Y. Suppl. 1015; Matter of Board of St. Opening, 27 N. Y. App. Div. 265, 50 N. Y. Suppl. 621 (holding that the proprietor of an easement in land is an "owner" entitled to compensation); Matter of Rochester, 24 N. Y. App. Div. 383, 48 N. Y. Suppl. 764 (right to maintain drains); Reilly *v.* Manhattan R. Co., 86 Hun 618, 33 N. Y. Suppl. 391; Kissam *v.* Brooklyn El. R. Co., 86 Hun 598, 33 N. Y. Suppl. 740; McCready *v.* Metropolitan El. R. Co., 76 Hun 531, 28 N. Y. Suppl. 94; Ode *v.* Manhattan R. Co., 56 Hun 199, 9 N. Y. Suppl. 338; People *v.* Eldridge, 6 Thomps. & C. 20 (mining right); Alger *v.* New York El. R.

in a highway must be paid for if lost through condemnation proceedings,[76] and this is so, although another owns the fee in the highway.[77]

8. FRANCHISES. Where the franchise granted to a corporation is taken for public use, the corporation is entitled to compensation.[78]

4. MATERIAL TAKEN FROM UNCONDEMNED LAND. Although no land is taken, yet

Co., 60 N. Y. Super. Ct. 1, 15 N. Y. Suppl. 960; Hughes *v.* Metropolitan El. R. Co., 57 N. Y. Super. Ct. 379, 8 N. Y. Suppl. 535; Phyfe *v.* Metropolitan El. R. Co., 11 Misc. 70, 31 N. Y. Suppl. 1018; Hine *v.* New York El. R. Co., 8 Misc. 18, 28 N. Y. Suppl. 66; Betjeman *v.* New York El. R. Co., 1 Misc. 138, 20 N. Y. Suppl. 628; Barrett *v.* Manhattan R. Co., 18 N. Y. Suppl. 71; Mortimer *v.* Metropolitan El. R. Co., 18 N. Y. Suppl. 2 [*affirmed* in 137 N. Y. 546, 33 N. E. 337]; Nooney *v.* New York El. R. Co., 17 N. Y. Suppl. 111; Kane *v.* Manhattan R. Co., 17 N. Y. Suppl. 109; Suarez *v.* Manhattan R. Co., 15 N. Y. Suppl. 222, 224; Korn *v.* New York El. R. Co., 15 N. Y. Suppl. 10; Johnston *v.* Manhattan R. Co., 14 N. Y. Suppl. 897; Korn *v.* New York El. R. Co., 13 N. Y. Suppl. 514; Cornell *v.* New York El. R. Co., 13 N. Y. Suppl. 511; Hine *v.* New York El. R. Co., 13 N. Y. Suppl. 510 [*affirmed* in 128 N. Y. 571, 29 N. E. 69]; Mulford *v.* Metropolitan El. R. Co., 12 N. Y. Suppl. 929; Conkling *v.* Manhattan R. Co., 12 N. Y. Suppl. 846; Williams *v.* New York, 12 N. Y. Suppl. 501.

Ohio.— Dodson *v.* Cincinnati, 34 Ohio St. 276.

Tennessee.— Hamilton County *v.* Rape, 101 Tenn. 222, 47 S. W. 416.

United States.— Central Trust Co. *v.* Hennen, 90 Fed. 593, 33 C. C. A. 189; Bowman *v.* Wathen, 3 Fed. Cas. No. 1,740, 2 McLean 376 [*affirmed* in 1 How. 189, 11 L. ed. 97].

England.— Buccleuch *v.* Metropolitan Bd. of Works, L. R. 5 H. L. 418, 41 L. J. Exch. 137, 27 L. T. Rep. N. S. 1; Eagle *v.* Charing Cross R. Co., L. R. 2 C. P. 638, 36 L. J. C. P. 297, 16 L. T. Rep. N. S. 593, 15 Wkly. Rep. 1016; Ford *v.* Metropolitan, etc., R. Co., 17 Q. B. D. 12, 50 J. P. 661, 55 L. J. Q. B. 296, 54 L. T. Rep. N. S. 718, 34 Wkly. Rep. 426.

See 18 Cent. Dig. tit. "Eminent Domain," § 221, *et seq.* See also *supra*, VII, E.

Compare Farwell *v.* Boston, 130 Mass. 433, 62 N. E. 751.

A private street or way cannot be taken for public use without compensation. Lowery *v.* Pekin, 186 Ill. 387, 57 N. E. 1062, 51 L. R. A. 301; De Lauder *v.* Baltimore County, 94 Md. 1, 50 Atl. 427; Speir *v.* Utrecht, 121 N. Y. 420, 24 N. E. 692; *In re* Eleventh Ave., 81 N. Y. 436; U. S. *v.* Jamestown, 112 Fed. 622. This rule has been applied to a way of necessity. Abbott *v.* Stewartstown, 47 N. H. 228. But it has been held that a way of necessity based on estoppel is not an interest in land which entitles its holder to compensation, where taken for a public street. Matter of East One Hundred and Forty-Second St., 83 N. Y. App. Div. 430, 82 N. Y. Suppl. 445.

Water-rights see *infra*, X, C, 6.

76. *California.*— Bigelow *v.* Ballerino, 111 Cal. 559, 44 Pac. 307.

Colorado.— Denver *v.* Bayer, 7 Colo. 113, 2 Pac. 6.

Massachusetts.— Onset St. R. Co. *v.* Plymouth County, 154 Mass. 395, 28 N. E. 286.

New York.— Matter of New York, 54 N. Y. App. Div. 479, 67 N. Y. Suppl. 57.

North Carolina.— Moose *v.* Carson, 104 N. C. 431, 10 S. E. 689, 17 Am. St. Rep. 681, 7 L. R. A. 548.

Ohio.— Cincinnati *v.* Dodson, 3 Ohio Dec. (Reprint) 504, 3 Cinc. L. Bul. 560.

Tennessee.—Anderson *v.* Turbeville, 6 Coldw. 150.

Utah.— Dooly Block *v.* Salt Lake Rapid Transit Co., 9 Utah 31, 33 Pac. 229, 24 L. R. A. 610.

See 18 Cent. Dig. tit. "Eminent Domain," § 222.

Unopened highway.— This is so although the highway has not been opened to the public, if it has been laid out or dedicated. Elizabethtown, etc., R. Co. *v.* Thompson, 1 Ky. L. Rep. 395; Camden M. E. Church *v.* Pennsylvania R. Co., 48 N. J. Eq. 452, 22 Atl. 183; *In re* Adams, 141 N. Y. 297, 36 N. E. 318 [*affirming* 73 Hun 581, 26 N. Y. Suppl. 422]; Olean *v.* Steyner, 135 N. Y. 341, 34 N. E. 9, 17 L. R. A. 640; Matter of Summit Ave., 35 Misc. (N. Y.) 59, 71 N. Y. Suppl. 207; U. S. *v.* Jamestown, 112 Fed. 622.

77. Mahady *v.* Bushwick R. Co., 91 N. Y. 148, 43 Am. Rep. 661 (holding that where a railway company unreasonably uses a street for storing and switching cars to the special injury of an abutting owner, he is entitled to compensation, although the fee of the street is in the city); Schaiole *v.* Lake Shore, etc., R. Co., 10 Ohio Cir. Ct. 334, 3 Ohio Cir. Dec. 505; Dooly Block *v.* Salt Lake Rapid Transit Co., 9 Utah 31, 33 Pac. 229, 24 L. R. A. 610 (as where the fee is in the city in trust for street uses). *Compare* Sixth Ave. R. Co. *v.* Gilbert El. R. Co., 43 N. Y. Super. Ct. 292 [*reversing* 41 N. Y. Super. Ct. 489].

Light and air.— This applies to easements of light, air, and access (Matter of Board of Education, 24 N. Y. App. Div. 117, 48 N. Y. Suppl. 1061. See also the New York cases cited *supra*, note 75), although it has been held that an owner of land adjoining a railroad has no easement of light, air, and view for which compensation must be made when the track is elevated so as to obstruct it (Osburn *v.* Chicago, 105 Ill. App. 217).

78. Kennebec Water Dist. *v.* Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856; State *v.* Noyes, 47 Me. 189; *In re* Flatbush Ave., 1 Barb. (N. Y.) 286 (turnpike franchise); Moore *v.* New Orleans Waterworks Co., 114 Fed. 380 (waterworks franchise); Monongahela Nav. Co. *v.* U. S., 148 U. S. 312, 13 S. Ct. 622, 37 L. ed. 463. See also *supra*, VII, F.

if earth or other material is taken from the land of an individual for the construction of a public improvement, the owner is entitled to compensation.[79]

5. RIGHT OF COMMON. A right of common is property which cannot be taken or injured in the exercise of the power of eminent domain without compensation.[80]

6. RIPARIAN RIGHTS. Water-rights are within the protection of the constitutional inhibition against taking or injuring private property without making just compensation to the owner. Consequently, if the waters of a lake or stream are polluted, diminished, or diverted, or otherwise taken, directly or indirectly, so as to infringe upon the rights of a riparian or littoral proprietor,[81] or if

The rule has been applied in the case of ferry franchises. Bowman *v.* Wathen, 3 Fed. Cas. No. 1,740, 2 McLean 376 [*affirmed* in 1 How. (U. S.) 189, 11 L. ed. 97]. Thus where a ferry is used for wagons and passengers, and land used in connection with it is condemned for a railroad right of way and for approaches to a railroad bridge which contains a roadway for wagons and foot-passengers, the owner of the ferry is entitled to compensation. Payne *v.* Kansas, etc., R. Co., 46 Fed. 546. And see Columbia Delaware Bridge Co. *v.* Geisse, 35 N. J. L. 558.

In England, under the Lands Clauses Act of 1845 (8 & 9 Vict. c. 18), the owner of an ancient ferry is a person interested in land, so that if the ferry is injuriously affected by the company's works he is entitled to compensation. Reg. *v.* Cambrian R. Co., L. R. 6 Q. B. 422, 40 L. J. Q. B. 169, 25 L. T. Rep. N. S. 84, 19 Wkly. Rep. 1138. *Compare* Hopkins *v.* Great Northern R. Co., 2 Q. B. D. 224, 46 L. J. Q. B. 265, 36 L. T. Rep. N. S. 898. And where privileges granted a railroad company by its charter are taken for public use, the owners must be compensated therefor (State *v.* Noyes, 47 Me. 189); so a turnpike company is entitled to damages for the extinguishment of its franchise by an appropriation of its right of way for a public highway (*In re* Flatbush Ave., 1 Barb. (N. Y.) 286).

Interference with conduits.—Statutes which allow private corporations to construct conduits in streets for the carrying of wires but which do not purport to convey private rights of property are merely provisions for the regulation of the different public rights in the street, and the rights of the corporations are subject to control or termination by the legislature at any time, without compensation. New England Telephone, etc., Co. *v.* Boston Terminal Co., 182 Mass. 397, 65 N. E. 835.

Reservation of right to repeal grant.— If the legislature, in its act of incorporation, reserves the right to repeal the grant if the company abuses its franchise, and the charter is subsequently rescinded for such abuse, the stock-holders are not entitled to compensation. Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287.

79. White Water Valley R. Co. *v.* McClure, 29 Ind. 536; Wheelock *v.* Young, 4 Wend. (N. Y.) 647; Hamilton County *v.* Garrett, 62 Tex. 602; Watkins *v.* Walker County, 18 Tex. 585, 70 Am. Dec. 298. See also *supra*, VII, C.

80. Thomas *v.* Marshfield, 10 Pick. (Mass.) 364, common of pasture.

Fishery.— It seems that a fishery is not thus protected. Cole *v.* Eastham, 133 Mass. 65; Tinicum Fishing Co. *v.* Carter, 90 Pa. St. 85, 35 Am. Rep. 632. See, however, Alexandria, etc., R. Co. *v.* Faunce, 31 Gratt. (Va.) 761.

81. *Iowa.*— McCord *v.* High, 24 Iowa 336.

Maine.— Stone *v.* Augusta, 46 Me. 127.

Massachusetts.— Boston Belting Co. *v.* Boston, 152 Mass. 307, 25 N. E. 613. See, however, Watuppa Reservoir Co. *v.* Fall River, 147 Mass. 548, 18 N. E. 465, 1 L. R. A. 466, holding that the colony ordinance of Massachusetts of 1641–1647 (Ancient Charters & Laws 148), providing that householders should have free fishing and fowling in any great ponds, bays, etc., within the precincts of the town, and might pass and repass on foot through any man's land, so that they trespass not on corn or meadow land, and that no town should appropriate any great pond to any particular person, established a rule of property throughout the state, vesting in the state both the *jus privatum* and the *jus publicum* in the great ponds, so that the legislature has power to appropriate their waters to public uses without making compensation to owners of land on natural streams flowing therefrom. But the ordinance did not become the law in Plymouth colony until its union with Massachusetts under the province charter in 1692; and therefore ponds therein which were subject to private ownership at that time cannot be appropriated to public uses without compensation to the owners. Watuppa Reservoir Co. *v.* Fall River, 154 Mass. 305, 28 N. E. 257, 13 L. R. A. 255.

Michigan.— Ryan *v.* Brown, 18 Mich. 196, 100 Am. Dec. 154.

Nebraska.— Crawford County *v.* Hathaway, (1903) 93 N. W. 781, 60 L. R. A. 889.

New Jersey.— State *v.* Jersey City, 34 N. J. L. 31, holding that a city has no power to pass an ordinance providing for the removal of all obstructions from docks erected by private persons on private property and for the opening of such docks to the public, without providing for compensation to the owners.

New York.— Cott *v.* Lewiston R. Co., 36 N. Y. 214; McMillan *v.* Lauer, 24 N. Y. Suppl. 951, holding that a charter providing that the council may cause any mill-race to be covered with bridges in the same manner that other public improvements are directed does not authorize the city to erect a bridge pier in a mill-race without the owner's consent and

lands lying under the waters of a lake or stream and owned by private individ-

without condemnation proceedings and compensation to him.

Ohio.— Mansfield *v.* Balliett, 65 Ohio St. 451, 63 N. E. 86, 58 L. R. A. 628; Cooper *v.* Williams, 5 Ohio 391, 24 Am. Dec. 391, 24 Am. Dec. 299 [*affirming* 4 Ohio 253, 22 Am. Dec. 745].

Pennsylvania.— Fleming's Appeal, 65 Pa. St. 444.

Wisconsin.— Janesville *v.* Carpenter, 77 Wis. 288, 46 N. W. 128, 20 Am. St. Rep. 123, 8 L. R. A. 808.

United States.— Chesapeake, etc., Canal Co. *v.* Union Bank, 5 Fed. Cas. No. 2,654, 5 Cranch C. C. 509.

See 18 Cent. Dig. tit. "Eminent Domain," § 227. See also *supra*, VII, G, H.

Grant from state.— Rights acquired by special grants from the state in non-navigable watercourses cannot be taken away by the government except upon compensation being made. Cornelius *v.* Glen, 52 N. C. 512; State *v.* Glen, 52 N. C. 321.

Prior use of water.— Where a stream is taken by a water-supply company, the owner is entitled to compensation notwithstanding that he made no use of the stream prior to its being taken. Trent-Stoughton *v.* Barbados Water Supply Co., [1893] A. C. 502, 62 L. J. P. C. 123, 69 L. T. Rep. N. S. 164, 1 Reports 403.

Easements.— The owner of an easement in a watercourse is protected against a taking without compensation. Watuppa Reservoir Co. *v.* Fall River, 134 Mass. 267; Lowndes *v.* U. S., 105 Fed. 838.

Drains and waterworks.— Where watercourses, ponds, springs, or wells are taken for public use, either directly, as for a water-supply, or indirectly, as by draining them or cutting off the water which supplies them or otherwise diverting it, the proprietors are entitled to compensation.

Alabama.— Burden *v.* Stein, 27 Ala. 104, 62 Am. Dec. 758; Stein *v.* Burden, 24 Ala. 130, 60 Am. Dec. 453.

Delaware.— Murphy *v.* Wilmington, 6 Houst. 108, 22 Am. St. Rep. 345.

Illinois.— Peoria, etc., R. Co. *v.* Bryant, 57 Ill. 473.

Iowa.— Winklemans *v.* Des Moines North Western R. Co., 62 Iowa 11, 17 N. W. 82.

Massachusetts.— Fosgate *v.* Hudson, 178 Mass. 225, 59 N. E. 809; Dwight Printing Co. *v.* Boston, 164 Mass. 247, 41 N. E. 285; Cowdrey *v.* Woburn, 136 Mass. 409; Watuppa Reservoir Co. *v.* Fall River, 134 Mass. 267; White *v.* South Shore R. Co., 6 Cush. 412; Parker *v.* Boston, etc., R. Co., 3 Cush. 107, 50 Am. Dec. 709.

Missouri.— Chicago, etc., R. Co. *v.* George, 145 Mo. 38, 47 S. W. 11.

New York.— Port Henry *v.* Kidder, 39 N. Y. App. Div. 640, 57 N. Y. Suppl. 102; Gilzinger *v.* Saugerties Water Co., 66 Hun 173, 21 N. Y. Suppl. 121; *In re* Boston, etc., R. Co., 31 Hun 461.

North Carolina.— Mullen *v.* Lake Drummond Canal, etc., Co., 130 N. C. 496, 41 S. E. 1027, 61 L. R. A. 833.

Oklahoma.— Guthrie, etc., R. Co. *v.* Faulkner, 12 Okla. 532, 73 Pac. 290.

Pennsylvania.—Shenandoah Citizens' Water, etc., Co.'s Appeal, 2 Wkly. Notes Cas. 46.

Vermont.— *In re* Barre Water Co., 72 Vt. 413, 48 Atl. 653.

United States.— U. S. *v.* Alexander, 148 U. S. 186, 13 S. Ct. 529, 37 L. ed. 415.

See 18 Cent. Dig. tit. "Eminent Domain," § 227.

In England, however, under the Lands Clauses Acts (8 & 9 Vict. c. 18) a company, in constructing its works in accordance with the authority granted by act of parliament, is not liable for cutting off or draining water and thus preventing it from reaching the well or spring of one whose land is not taken. New River Co. *v.* Johnson, 2 E. & E. 435, 6 Jur. N. S. 374, 29 L. J. M. C. 93, 1 L. T. Rep. N. S. 295, 8 Wkly. Rep. 179, 105 E. C. L. 435; Reg. *v.* Metropolitan Bd. of Works, 3 B. & S. 710, 9 Jur. N. S. 1008, 32 L. J. Q. B. 105, 8 L. T. Rep. N. S. 238, 11 Wkly. Rep. 492, 113 E. C. L. 710.

Water-power.— The owner of a water-power is entitled to compensation for injury to it caused by the construction of a public work. Galena, etc., R. Co. *v.* Haslam, 73 Ill. 494; Lake Superior, etc., R. Co. *v.* Greve, 17 Minn. 322; Arnold *v.* Hudson River R. Co., 55 N. Y. 661; Hall *v.* State, 72 N. Y. App. Div. 360, 77 N. Y. Suppl. 282. So the lessee of a water-power is entitled to compensation whether or not he is the owner or lessee of lands bordering on the stream. Doremus *v.* Paterson, 63 N. J. Eq. 605, 52 Atl. 1107.

Bridges.— If a railroad company erects a bridge across a non-navigable stream, it must compensate the riparian owner whose land is either taken therefor or damaged thereby. Chicago, etc., R. Co. *v.* Stein, 75 Ill. 41. However, the legislature may authorize the erection of a toll-bridge where a public highway crosses a stream without compensation to the riparian owners, even though they are operating a ferry at the crossing, the value of which will be impaired. Jones *v.* Keith, 37 Tex. 394, 14 Am. Rep. 382.

Dams.— Where one owning the bed of an unnavigable river has erected a dam across the stream under a grant from the state, the legislature has not the power to compel him to take away part of the dam at his own expense, so as to make an opening for the passage of fish. State *v.* Glen, 52 N. C. 321. See also Com. *v.* Pennsylvania Canal Co., 66 Pa. St. 41, 5 Am. Rep. 329. And an act directing a mill-owner, after his mill is established and his dam erected according to law, to make locks through his dam and keep them in repair is a taking for public use which entitles the mill-owner to compensation. Crenshaw *v.* Slate River Co., 6 Rand. (Va.) 245. But it has been held that a town may compel a mill-dam owner to allow the water

uals,[82] or improvements thereon[83] are taken wholly or in part, the owner is entitled to proper compensation. The rights of a proprietor of lands abutting on a navigable water will be protected, subject, however, to various limitations and qualifications which do not apply to an owner on non-navigable waters.[84] If a water

to flow unobstructed while the town repairs a bridge over the stream. East Montpelier *v.* Wheelock, 70 Vt. 391, 41 Atl. 432. Where a mill-owner has acquired a prescriptive right to maintain a dam, which in its usual operation would raise the water to a certain height, the fact that from the leaky condition of the dam, the rude construction of the mill machinery, or the lavish use of the water, the water has not been usually and constantly kept up to such height will not prevent him from repairing the dam without so changing it as to raise the water higher than it would have been raised had the old dam been tight, nor would it prevent the use of the water in a different manner, so as to keep it up to such height more constantly than before; for in neither case is there such a new use of the stream as would entitle the landowner to claim damages (Jackson *v.* Harrington, 2 Allen (Mass.) 242; Cowell *v.* Thayer, 5 Metc. (Mass.) 253, 38 Am. Dec. 400); but the mill-owner would be liable for any excess in the height of the water over the old limit (Jackson *v.* Harrington, 2 Allen (Mass.) 242).

82. Ballance *v.* Peoria, 180 Ill. 29, 54 N. E. 428 [*reversing* 70 Ill. App. 546]; *In re* New York, 168 N. Y. 134, 61 N. E. 158, 56 L. R. A. 500.

Lands under non-navigable water.— As the title of one owning land on a non-navigable stream extends to the center of the stream, land under the water to that extent cannot be taken or damaged without compensation to him.

Illinois.— Chicago, etc., R. Co. *v.* Stein, 75 Ill. 41.

New York.— De Camp *v.* Dix, 159 N. Y. 436, 54 N. E. 63 [*affirming* 33 N. Y. App. Div. 517, 53 N. Y. Suppl. 1035]; Smith *v.* Rochester, 92 N. Y. 463, 44 Am. Rep. 393.

Pennsylvania.— Hecksher *v.* Shenandoah Citizens' Water, etc., Co., 2 Leg. Chron. 273.

Tennessee.— Allison *v.* Davidson, (Ch. App. 1896) 39 S. W. 905.

United States.— Kaukauna Water-Power Co. *v.* Green Bay, etc., Canal Co., 142 U. S. 254, 12 S. Ct. 173, 35 L. ed. 1004 [*affirming* 70 Wis. 635, 35 N. W. 529, 36 N. W. 828].

See 18 Cent. Dig. tit. "Eminent Domain," § 227.

83. Meyers *v.* St. Louis, 8 Mo. App. 266; Canal Com'rs *v.* People, 5 Wend. (N. Y.) 423, both holding that the state cannot without making compensation destroy property on rivers above tide water in making them navigable, where they are not so by nature.

Dams.—A riparian owner may by constructing and for a long period maintaining a dam on a river acquire such a right of property that it cannot be taken from him without compensation. *In re* State Reservation, 16 Abb. N. Cas. (N. Y.) 159 [*affirmed* in 37 Hun 537, 16 Abb. N. Cas. 395]. And see Com. *v.* Pennsylvania Canal Co., 66 Pa. St. 41, 5 Am. Rep. 329.

Wharves and docks.— The right conferred upon private riparian owners to construct wharves, docks, and buildings on the bank of a navigable stream creates a right of property which cannot be invaded without compensation being made.

Iowa.— Grant *v.* Davenport, 18 Iowa 179.

Massachusetts.— Haskell *v.* New Bedford, 108 Mass. 208, holding that, where a city is authorized to lay out sewers through streets or private lands, it cannot so construct them as, by discharging into a private dock, to obstruct its use by the owner for receiving vessels. See, however, Thayer *v.* New Bedford R. Co., 125 Mass. 253, holding that a person cannot, by long use of a dock on navigable waters, gain such a right to the adjacent waters as entitles him to compensation for their obstruction by a railroad built across the water on piles without a draw, so as to prevent access to his dock by vessels. *Compare* Boston, etc., R. Corp. *v.* Old Colony R. Corp., 12 Cush. 605.

Minnesota.— Union Depot, etc., Co. *v.* Brunswick, 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789.

New York.— Kingsland *v.* New York, 110 N. Y. 569, 18 N. E. 435 [*affirming* 45 Hun 198]; Williams *v.* New York, 105 N. Y. 419, 11 N. E. 829; Langdon *v.* New York, 93 N. Y. 129; Murray *v.* Sharp, 1 Bosw. 539; Buffalo *v.* Delaware, etc., R. Co., 39 N. Y. Suppl. 4. See, however, Lansing *v.* Smith, 4 Wend. 9, 21 Am. Dec. 89, holding that where the commissioner of the land-office grants submerged land on a navigable stream for the erection of a wharf for the promotion of commerce, and a company afterward, under legislative authority, makes a great public improvement for the benefit of commerce, so as materially to impair the privileges granted to the private wharf owner, the latter is not entitled to compensation.

Oregon.— Lewis *v.* Portland, 25 Oreg. 133, 35 Pac. 256, 42 Am. St. Rep. 772, 22 L. R. A. 736.

Pennsylvania.— *In re* Walnut St. Bridge, 191 Pa. St. 153, 43 Atl. 88.

United States.— Yates *v.* Milwaukee, 10 Wall. 497, 19 L. ed. 984.

See 18 Cent. Dig. tit. "Eminent Domain," § 228.

84. Meyers *v.* St. Louis, 8 Mo. App. 266; Smith *v.* Rochester, 92 N. Y. 463, 44 Am. Rep. 393 (holding that the state has no right to divert the waters for any other purpose than for those of navigation, except under its power of eminent domain and upon making compensation); Canal Fund Com'rs *v.* Kempshall, 26 Wend. (N. Y.) 404 (holding that riparian proprietors owning to the center of a navigable stream are entitled to the usufruct of the waters as appurtenant to their

is naturally non-navigable it cannot be made navigable by legislative declaration,[85] or by physical improvement,[86] without compensation being made to the riparian owners for the consequent impairment of the rights. Artificial watercourses also are protected and if taken must be paid for.[87]

land, and are entitled to compensation for an interrupted enjoyment of these privileges in consequence of public improvements made by the state). See, however, Minneapolis Mill Co. *v.* St. Paul Water Com'rs, 56 Minn. 485, 58 N. W. 33 (holding that the public have the right to apply the waters of a navigable stream to public uses without making compensation to riparian owners); *In re* State Reservation, 16 Abb. N. Cas. (N. Y.) 159 (holding that if the state owns the bed of the stream a riparian owner is not entitled to compensation for being deprived by the state of the use of the waters); Hechsher *v.* Shenandoah Citizens' Water, etc., Co., 2 Leg. Chron. (Pa.) 273.

Public works.— The legislature may authorize the construction of a public work interfering with the enjoyment of the public right of navigation without providing for compensation for the injury. Matthiessen, etc., Sugar Refining Co. *v.* Jersey City, 26 N. J. Eq. 247. Thus where a bridge is erected over a navigable channel, part of the public domain, the owner is not entitled to compensation. Boston, etc., R. Corp. *v.* Old Colony R. Corp. 12 Cush. (Mass.) 605. *Contra*, Chapman *v.* Oshkosh, etc., R. Co., 33 Wis. 629.

Right of access.— One owning land on a navigable water has a right of access of which he cannot be deprived without compensation. Gawn *v.* Wilson, 9 Ohio S. & C. Pl. Dec. 683, 7 Ohio N. P. 33; Delaplaine *v.* Chicago, etc., R. Co., 42 Wis. 214, 24 Am. Rep. 386. Thus if by the construction by a city of a dike extending into a river sediment is caused to collect so as to destroy a private landing the owner is entitled to compensation. Myers *v.* St. Louis, 82 Mo. 367. *Contra*, Gibson *v.* U. S., 166 U. S. 269, 17 S. Ct. 578, 41 L. ed. 996. See also Scranton *v.* Wheeler, 179 U. S. 141, 21 S. Ct. 48, 45 L. ed. 126 [*approving* Gibson *v.* U. S., *supra*, and *distinguishing* Yates *v.* Milwaukee, 10 Wall. (U. S.) 497, 19 L. ed. 984, on the ground that it was a case in which a municipal corporation intended the actual destruction of tangible property belonging to a riparian owner and lawfully used by him in reaching navigable water and not a case of exercise in a proper manner of an admitted governmental power resulting indirectly or incidentally in the loss of the citizen's right of access to navigation]; Sage *v.* New York, 154 N. Y. 61, 47 N. E. 1096, 61 Am. St. Rep. 592, 38 L. R. A. 606; Rumsey *v.* New York, etc., R. Co., 133 N. Y. 79, 30 N. E. 654, 28 Am. St. Rep. 60. 16 L. R. A. 618; Gould *v.* Hudson River Co., 6 N. Y. 522.

Submerged lands.— In so far as a riparian owner's title extends to lands underneath a navigable water, he is entitled to compensation when they are taken without his consent. Union Depot, etc., Co. *v.* Brunswick, 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789; Brisbine *v.* St. Paul, etc., R. Co., 23 Minn. 114; Lewis *v.* Portland, 25 Oreg. 133, 35 Pac. 256, 42 Am. St. Rep. 772, 22 L. R. A. 736; Lehigh Valley R. Co. *v.* Trone, 28 Pa. St. 206, holding that a riparian owner is entitled to compensation for injury to a spring located between high and low water mark which is injured by the construction of a railroad over the land. See, however, Ravenswood *v.* Flemings, 22 W. Va. 52, 46 Am. Rep. 485 (holding that riparian owners along the Ohio river hold, as against the state, to ordinary high-water mark only, the bed, banks, and shores being held by the state in trust for the people; and that the legislature may authorize municipalities to build wharves within their limits between high and low water mark without compensation to the riparian owners); Stockton *v.* Baltimore, etc., R. Co., 32 Fed. 9.

Tide lands.— Lands or flats on tide water lying between high and low water mark cannot be taken, nor can they be included within harbor lines, without compensation to the owners. Gunter *v.* Geary, 1 Cal. 462; Farist Steel Co. *v.* Bridgeport, 60 Conn. 278, 22 Atl. 561, 13 L. R. A. 590. *Contra*, Gould *v.* Hudson River R. Co., 6 N. Y. 522 [*affirming* 12 Barb. 616]. *Compare* Davidson *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 91 (holding that the owner of a tide mill, who is the riparian owner of the flats from which the tide wholly ebbs between his mill and navigable water, has no right to have his flats kept open and unobstructed for the flow of the tide water, for the use of his mill or for navigation); Lansing *v.* Smith, 4 Wend. (N. Y.) 9, 21 Am. Dec. 89.

85. Clark *v.* Cambridge, etc., Irr., etc., Co., 45 Nebr. 798, 64 N. W. 239; Barclay R., etc., Co. *v.* Ingham, 36 Pa. St. 194.

Floatage of logs.— An act authorizing the floating of logs down a non-navigable stream is void, unless it provides for compensation to the owners of the bed of the stream. De Camp *v.* Dix, 159 N. Y. 436, 54 N. E. 63 [*affirming* 33 N. Y. App. Div. 517, 53 N. Y. Suppl. 1035]; Allison *v.* Davidson, (Tenn. Ch. App. 1896) 39 S. W. 905.

86. Morgan *v.* King, 18 Barb. (N. Y.) 277; Canal Com'rs *v.* People, 5 Wend. (N. Y.) 423; Walker *v.* Board of Public Works, 16 Ohio 540.

A private corporation cannot for its own purposes make a non-navigable stream navigable without payment of compensation to the riparian owners who are damaged thereby. Thunder Bay River Booming Co. *v.* Speechly, 31 Mich. 336, 18 Am. Rep. 184; Thompson *v.* Androscoggin River Imp. Co., 54 N. H. 545.

87. Reading *v.* Althouse, 93 Pa. St. 400.

7. WILD LANDS. Uncultivated and uninclosed land, if owned by individuals, cannot be condemned without compensation.[88]

8. PERSONAL PROPERTY AND RIGHTS THEREIN. The rule requiring compensation has been held to apply to personal property, such as inventions secured by patents,[89] money collected upon an assessment for grading a public avenue in a city,[90] crops planted on the right of way of a railroad company after location and before bond given or notice by the railroad company of the time when actual possession will be required,[91] and a haypress taken by a quartermaster.[92]

D. Taking or Injuring Property as Ground For Compensation — 1. IN GENERAL. According to some of the authorities which construe the term "taking" in its strictest sense, in order to bring a case within the constitutional provision, there should be a taking altogether; a seizure, a direct appropriation and dispossession of the owner.[93] There should be such a taking as divests the owner of all title to and control over the property taken and is an unqualified appropriation of it to the public.[94] This strict construction is not, however, now generally sanctioned; and while the decisions are by no means harmonious, the general rule deducible from them seems to be that any destruction, restriction, or interruption of the common and necessary use and enjoyment of property in a lawful manner may constitute a taking.[95] It is not necessary that the owner be wholly

88. Orange Belt R. Co. *v.* Craver, 32 Fla. 28, 13 So. 444; Gould *v.* Glass, 19 Barb. (N. Y.) 179; Norton *v.* Peck, 3 Wis. 714.

Lands sold to the state for taxes, and as to which the statutory period of redemption has not expired, have not become vacant and unappropriated public domain, which a railroad company has a right to appropriate without compensation. International, etc., R. Co. *v.* Benitos, 59 Tex. 326.

Highways.— Statutes which authorize the opening of public highways over uninclosed lands without compensation are void. Parham *v.* Justices Decatur County Inferior Ct., 9 Ga. 341; Wallace *v.* Karlenowefski, 19 Barb. (N. Y.) 118. *Contra*, Meers *v.* State, (Tex. Civ. App. 1891) 16 S. W. 653, holding, however, that where posts have been erected and the rail for the fence is on the ground, the land is to be regarded as inclosed, if inclosure is necessary to prevent the opening of a highway without compensation.

89. Brady *v.* Atlantic Works, 3 Fed. Cas. No. 1,794, 2 Ban. & A. 436, 4 Cliff. 408.

Right to remove buildings.— Where by agreement between the lessor and lessee, buildings placed on the leased lands by the lessee are made personal property, the lessee is entitled on condemnation of the lands to remove the buildings but he is not entitled to compensation. Matter of Buffalo, 1 N. Y. St. 742.

90. People *v.* Brooklyn, 9 Barb. (N. Y.) 535.

91. Lafferty *v.* Schuylkill River East Side R. Co., 124 Pa. St. 297, 16 Atl. 869, 10 Am. St. Rep. 587, 3 L. R. A. 124.

92. Peck *v.* U. S., 14 Ct. Cl. 84.

93. Godley *v.* City, 7 Phila. (Pa.) 637. See also Hurt *v.* Atlanta, 100 Ga. 274, 28 S. E. 65.

94. Livermore *v.* Jamaica, 23 Vt. 361.

Deprivation of part of title.— "To take the real estate of an individual for public use, is to deprive him of his title to it, or of some part of his title, so that the entire dominion over it no longer remains with him. He can no longer convey the entire title and dominion." Cushman *v.* Smith, 34 Me. 247, 260.

95. *Alabama.*— Memphis, etc., R. Co. *v.* Birmingham, etc., R. Co., 96 Ala. 571, 11 So. 642, 18 L. R. A. 166.

Connecticut.— Hooker *v.* New Haven, etc., R. Co., 14 Conn. 146, 36 Am. Dec. 477.

Louisiana.— Pontchartrain R. Co. *v.* Orleans Levee Dist., 49 La. Ann. 570, 21 So. 765.

Maryland.— Cumberland *v.* Willison, 50 Md. 138, 33 Am. Rep. 304.

Massachusetts.— Brinton *v.* Com., 178 Mass. 199, 59 N. E. 634; Old Colony, etc., R. Co. *v.* Plymouth County, 14 Gray 155.

Michigan.— Pearsall *v.* Eaton County, 74 Mich. 558, 42 N. W. 77, 4 L. R. A. 193.

Missouri.— St. Louis *v.* Hill, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226.

Nebraska.— Martin *v.* Fillmore County, 44 Nebr. 719, 62 N. W. 863.

New Hampshire.— Eaton *v.* Boston, etc., R. Co., 51 N. H. 504, 12 Am. Rep. 147.

New York.— Forster *v.* Scott, 136 N. Y. 577, 32 N. E. 976, 18 L. R. A. 543; Story *v.* New York El. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; People *v.* Otis, 90 N. Y. 48; *In re* Rogers Ave., 22 N. Y. Suppl. 27, 29 Abb. N. Cas. 361.

Ohio.— Callen *v.* Columbus Edison Electric Light Co., 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782.

Vermont.— Foster *v.* Stafford Nat. Bank, 57 Vt. 128.

Wisconsin.— Janesville *v.* Carpenter, 77 Wis. 288, 46 N. W. 128, 20 Am. St. Rep. 123, 8 L. R. A. 808.

United States.— U. S. *v.* Lynah, 188 U. S. 445, 23 S. Ct. 349, 47 L. ed. 539; Pumpelly *v.* Green Bay, etc., Canal Co., 13 Wall. 166, 20 L. ed. 557.

Dangerous use.— Woodruff *v.* New York, etc., R. Co., 59 Conn. 63, 20 Atl. 17.

deprived of the use of his property.[96] The term "taking" should not be limited to the absolute conversion of property.[97] Nor is it material whether the property is removed from the possession of the owner, or in any respect changes hands.[98] It is not necessary that there should be an actual physical taking.[99] To constitute a taking the power of disposal need not be interfered with.[1] The entire or partial destruction of private property for public use is an appropriation of it within the meaning of the constitution.[2] To constitute an appropriation within the intent of the fifth amendment to the United States constitution, the taking must be of a kind from which some benefit is to be anticipated.[3]

2. CONSEQUENTIAL DAMAGES — a. In General. The general rule is that acts done in the proper exercise of governmental powers and not directly encroaching upon private property, although their consequences may impair its use do not constitute a taking and do not entitle the owner of such property to compensation in the absence of constitutional or statutory provision providing that compensation shall be made for damaging, injuring, or destroying property.[4] Thus it has been

Destruction of wharfage rights.— Langdon *v.* New York, 28 Hun (N. Y.) 158.

The fixing of an arbitrary dock line by a city under legislative authority, so as to pass across the natural banks of the rivers at certain points, is a taking of private property. Grand Rapids *v.* Powers, 89 Mich. 94, 50 N. W. 661, 28 Am. St. Rep. 276, 14 L. R. A. 498.

The building of a sewer through a private lot necessarily takes a portion of the property, for which the owner is entitled to compensation, even though the market value of his lot is not diminished. Smith *v.* Atlanta, 92 Ga. 119, 17 S. E. 981.

96. A partial but substantial restriction of the right of user may not annihilate all the owner's rights of property, but it is none the less true that a part of his property is taken. Eaton *v.* Boston, etc., R. Co., 51 N. H. 504, 12 Am. Rep. 147. See also Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. ed. 739.

97. Pearsall *v.* Eaton County, 74 Mich. 558, 42 N. W. 77, 4 L. R. A. 193.

98. Old Colony, etc., R. Co. *v.* Plymouth County, 14 Gray (Mass.) 155.

99. Forster *v.* Scott, 136 N. Y. 577, 32 N. E. 976, 18 L. R. A. 543. See also Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. ed. 739. The operation of a cremator by a municipality from which stenches escape whereby the enjoyment of residential property in the vicinity is affected, is an injury to such property and therefore it cannot be authorized by statute without compensation to the owners of the property affected. Kobbe *v.* New Brighton, 20 Misc. (N. Y.) 477, 45 N. Y. Suppl. 777. *Compare* Frazer *v.* Chicago, 186 Ill. 480, 57 N. E. 1055, 78 Am. St. Rep. 296, 51 L. R. A. 306.

Where access to property destroyed.—There may be such a direct physical obstruction or injury to private property as will amount to a taking, although the *corpus* of the property is not touched or disturbed, as for example when all access to the property is destroyed. Rochette *v.* Chicago, etc., R. Co., 32 Minn. 201, 20 N. W. 140.

1. St. Louis *v.* Hill, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226.

2. Trenton Water Power Co. *v.* Raff, 36 N. J. L. 335; American Print Works *v.* Lawrence, 23 N. J. L. 590, 57 Am. Dec. 420, 21 N. J. L. 248; Hale *v.* Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190; Glover *v.* Powell, 10 N. J. Eq. 211.

3. McIntyre *v.* U. S., 25 Ct. Cl. 200.

4. *Alabama.*— Montgomery *v.* Townsend, 80 Ala. 489, 2 So. 155, 60 Am. Rep. 112.

California.— Lamb *v.* Reclamation Dist. No. 108, 73 Cal. 125, 14 Pac. 625, 2 Am. St. Rep. 775; Green *v.* State, 73 Cal. 29, 11 Pac. 602, 14 Pac. 610; Moulton *v.* Parks, 64 Cal. 166, 30 Pac. 613.

Connecticut.— Holyoke Water Power Co. *v.* Connecticut River Co., 52 Conn. 570.

Maine.— Frost *v.* Washington County R. Co., 96 Me. 76, 51 Atl. 806; Sumner *v.* Richardson Lake Dam Co., 71 Me. 106; Boothby *v.* Androscoggin, etc., R. Co., 51 Me. 318.

Massachusetts.— Chelsea Dye House, etc., Co. *v.* Com., 164 Mass. 350, 41 N. E. 649; Fuller *v.* Chicopee Mfg. Co., 16 Gray 46; Eames *v.* New England Worsted Co., 11 Metc. 570.

Michigan.—Pontiac *v.* Carter, 32 Mich. 164.

Missouri.— Springfield *v.* Schmook, 68 Mo. 394.

New Hampshire.— Eaton *v.* Boston, etc., R. Co., 51 N. H. 504, 12 Am. Rep. 147.

New York.— Benner *v.* Atlantic Dredging Co., 134 N. Y. 156, 31 N. E. 328, 30 Am. St. Rep. 649, 17 L. R. A. 220; Radcliff *v.* Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; Birrell *v.* New York, etc., R. Co., 41 N. Y. App. Div. 506, 58 N. Y. Suppl. 650; Swett *v.* Troy, 62 Barb. 630; *In re* Union Village, etc., R. Co., 53 Barb. 457; Arnold *v.* Hudson River R. Co., 49 Barb. 108; Canandaigua, etc., R. Co. *v.* Poque, 16 Barb. 273; Albany Northern R. Co. *v.* Lansing, 16 Barb. 68; Lansing *v.* Smith, 4 Wend. 9, 21 Am. Dec. 89.

Ohio.— Cincinnati *v.* Penny, 21 Ohio St. 499, 8 Am. Rep. 73.

Pennsylvania.—Tinicum Fishing Co. *v.* Carter, 90 Pa. St. 85, 35 Am. Rep. 632; Snyder *v.* Pennsylvania R. Co., 55 Pa. St. 340; New York, etc., R. Co. *v.* Young, 33 Pa. St. 175;

held that where the property of an abutting owner is damaged or his easements interfered with in consequence of a work of improvement in a public street, done under lawful authority, either by the municipality itself or its agent, he is without right to compensation;[5] and the same rule has been applied in favor of quasi-public corporations which while engaged in the public service are yet at the same time engaged in business for the profit of their stock-holders.[6] If, however, in consequence of a work done by governmental agency, there is an actual invasion of property, so that its usefulness is effectually destroyed or impaired, although it is not actually appropriated, as where land is flooded, or earth and stones are thrown upon it, compensation must be made to the owner.[7] The injuries which

Reitenbaugh *v.* Chester Valley R. Co., 21 Pa. St. 100; Monongahela Nav. Co. *v.* Coons, 6 Watts & S. 101; Lafean *v.* York County, 20 Pa. Super. Ct. 573; Clark *v.* Washington, 11 Pa. Co. Ct. 433; Philadelphia *v.* Empire Pass. R. Co., 3 Brewst. (Pa.) 547; Pittsburg Southern R. Co. *v.* Reed, 44 Leg. Int. (Pa.) 92.

Vermont.— Stewart *v.* Rutland, 58 Vt. 12, 4 Atl. 420; Hatch *v.* Vermont Cent. R. Co., 28 Vt. 142.

Wisconsin.— Kuhl *v.* Chicago, etc., R. Co., 101 Wis. 42, 77 N. W. 155; Alexander *v.* Milwaukee, 16 Wis. 247.

United States.— Bedford *v.* U. S., 192 U. S. 217, 24 S. Ct. 238, 48 L. ed. 414; Scranton *v.* Wheeler, 179 U. S. 141, 21 S. Ct. 48, 45 L. ed. 126; Meyer *v.* Richmond, 172 U. S. 82, 19 S. Ct. 106, 43 L. ed. 374; Gibson *v.* U. S., 166 U. S. 269, 17 S. Ct. 578, 41 L. ed. 996; Northern Transp. Co. *v.* Chicago, 99 U. S. 635, 25 L. ed. 336; Salliotte *v.* King Bridge Co., 122 Fed. 378, 58 C. C. A. 466, 65 L. R. A. 620; U. S. *v.* Jamestown, 112 Fed. 622; High Bridge Lumber Co. *v.* U. S., 69 Fed. 320, 16 C. C. A. 460; Mills *v.* U. S., 46 Fed. 738, 12 L. R. A. 673; McIntyre *v.* U. S., 25 Ct. Cl. 200. See also *infra*, X, D, 13.

An implied statutory exemption of a railroad company from liability for consequential damages to property not taken is not in violation of the constitutional provision that the owner of the property taken for public use should receive just compensation therefor, the constitution not containing any provision that compensation shall be made for property damaged. Hatch *v.* Vermont Cent. R. Co., 25 Vt. 49.

5. Selden *v.* Jacksonville, 28 Fla. 558, 10 So. 457, 29 Am. St. Rep. 278, 14 L. R. A. 370; Hurt *v.* Atlanta, 100 Ga. 274, 28 S. E. 65; Cummins *v.* Seymour, 79 Ind. 491, 41 Am. Rep. 618; Weis *v.* Madison, 75 Ind. 241, 39 Am. Rep. 135; Lafayette *v.* Bush, 19 Ind. 326; Macy *v.* Indianapolis, 17 Ind. 267; Radcliff *v.* Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; Sauer *v.* New York, 40 Misc. (N. Y.) 585, 83 N. Y. Suppl. 27.

6. *Illinois.*— Rigney *v.* Chicago, 102 Ill. 64.

Maine.— Rogers *v.* Kennebec, etc., R. Co., 35 Me. 319.

Maryland.— Poole *v.* Falls Road Electric R. Co., 88 Md. 533, 41 Atl. 1069; Garrett *v.* Lake Roland El. R. Co., 79 Md. 277, 29 Atl. 830, 24 L. R. A. 396.

Minnesota.— Rochette *v.* Chicago, etc., R. Co., 32 Minn. 201, 20 N. W. 140.

Missouri.— Payne *v.* Kansas City, etc., R. Co., 112 Mo. 6, 20 S. W. 322, 17 L. R. A. 628; Rude *v.* St. Louis, 93 Mo. 408, 6 S. W. 257.

New York.— Corey *v.* Buffalo, etc., R. Co., 23 Barb. 482.

Wisconsin.— Oshkosh First Cong. Church, etc. *v.* Milwaukee, etc., R. Co., 77 Wis. 158, 45 N. W. 1086; Heiss *v.* Milwaukee, etc., R. Co., 69 Wis. 555, 34 N. W. 916.

7. *California.*— Conniff *v.* San Francisco, 67 Cal. 45, 7 Pac. 41.

Colorado.— G. B. & L. R. Co. *v.* Eagles, 9 Colo. 544, 13 Pac. 696.

New Hampshire.— Eaton *v.* Boston, etc., R. Co., 51 N. H. 504, 12 Am. Rep. 147.

New Jersey.— Costigan *v.* Pennsylvania R. Co., 54 N. J. L. 233, 23 Atl. 810.

Oregon.— Mosier *v.* Oregon Nav. Co., 39 Oreg. 256, 64 Pac. 453, 87 Am. St. Rep. 652.

Wisconsin.— Arimond *v.* Green Bay, etc., Canal Co., 31 Wis. 316 [*distinguishing* Alexander *v.* Milwaukee, 16 Wis. 247]; Pettigrew *v.* Evansville, 25 Wis. 223, 3 Am. Rep. 50.

United States.— U. S. *v.* Lynah, 188 U. S. 445, 23 S. Ct. 349, 47 L. ed. 539 [*distinguishing* Gibson *v.* U. S., 166 U. S. 269, 17 S. Ct. 578, 41 L. ed. 996; Mills *v.* U. S., 46 Fed. 738, 12 L. R. A. 673]; Pumpelly *v.* Green Bay, etc., Canal Co., 13 Wall. 166, 20 L. ed. 557; Central Trust Co. *v.* Hennen, 90 Fed. 593, 33 C. C. A. 189. See *infra*, X, D, 10.

New Jersey rule.— "The injuries to which immunity from responsibility attaches, are such only as arise, incidentally, from acts done under a valid act of the legislature, in the execution of a public trust for the public benefit, by persons acting with due skill and caution within the scope of their authority. If the injury be direct, or the work be done for the benefit of an individual or corporation, with private capital and for private emolument, the principle which absolves the parties from liability to action at the suit of persons injured, does not apply, even though the public be incidentally benefited by the improvement." Trenton Water Power Co. *v.* Raff, 36 N. J. L. 335, 340; Quinn *v.* Paterson, 27 N. J. L. 35; Tinsman *v.* Belvidere Delaware R. Co., 26 N. J. L. 148, 69 Am. Dec. 565; Delaware, etc., Canal Co. *v.* Lee, 22 N. J. L. 243; Ten Eyck *v.* Delaware, etc., Canal Co., 18 N. J. L. 200, 37 Am. Dec. 233; Sinnickson *v.* Johnson, 17 N. J. L. 129, 34 Am. Dec. 184.

Private covenant as to liability.— The rule that merely incidental injury to property arising from the occupation and use of it by

are to be considered are such as specially affect the owner and not the community at large.[8]

b. Under Constitutional or Statutory Provisions Requiring Compensation For Property Damaged or Injured. If the constitutional or statutory provisions provide for compensation where property has been "damaged," "injured," or "destroyed" by the exercise of eminent domain, consequential damages are recoverable.[9] Under these provisions an injury to private property caused by the exercise of the power of eminent domain entitles the owner to compensation whether or not there be an actual taking of any part of it.[10] These provisions are intended to give a right of recovery which did not previously exist and not to restrict or limit any previously existing remedy,[11] and are to be liberally con-

the state or by the United States for public purposes does not constitute a taking of such property cannot be avoided by private covenants, so as to impose an additional burden upon the public in the exercise of the right of eminent domain. U. S. *v.* Jamestown, 112 Fed. 622, *semble*.

8. Central Branch Union Pac. R. Co. *v.* Andrews, 41 Kan. 370, 21 Pac. 276; Winnetka *v.* Clifford, 201 Ill. 475, 66 N. E. 384. For specific applications of this doctrine see X, E, 9, b, (I); X, E, 13, (A); X, E, 19, d, (I).

Unless given by express provision of the statute, there is no right to recover for injuries suffered in common with the community generally. Boston, etc., R. Corp. *v.* Old Colony R. Corp., 12 Cush. (Mass.) 605.

9. *Alabama.*— Niehaus *v.* Cook, 134 Ala. 223, 32 So. 728.

Connecticut.— Bradley *v.* New York, etc., R. Co., 21 Conn. 294.

Florida.— Orange Belt R. Co. *v.* Craver, 32 Fla. 28, 13 So. 444.

Illinois.— Schroeder *v.* Joliet, 189 Ill. 48, 59 N. E. 550, 52 L. R. A. 634; Metropolitan West Side El. R. Co. *v.* Goll, 100 Ill. App. 323.

Missouri.— St. Louis *v.* Brown, 155 Mo. 545, 56 S. W. 298; Hannibal Bridge Co. *v.* Schaubacher, 57 Mo. 582.

Nebraska.— Omaha, etc., R. Co. *v.* Brown, 22 Nebr. 355, 35 N. W. 188; Omaha, etc., R. Co. *v.* Standen, 22 Nebr. 343, 35 N. W. 183.

Pennsylvania.— Philadelphia's Appeal, 191 Pa. St. 153, 43 Atl. 88; Hartman *v.* Pittsburgh Incline Co., 159 Pa. St. 442, 28 Atl. 145; Pennsylvania, etc., R. Co. *v.* Sterner, 116 Pa. St. 472, 9 Atl. 871; Edmundson *v.* Pittsburgh, etc., R. Co., 111 Pa. St. 316, 2 Atl. 404; Hoffer *v.* Pennsylvania Canal Co., 87 Pa. St. 221; Delaware Div. Canal Co. *v.* McKeen, 52 Pa. St. 117; Watson *v.* Pittsburgh, etc., R. Co., 37 Pa. St. 469; Mononghela Nav. Co. *v.* Coons, 6 Watts & S. 101; Lloyd *v.* Philadelphia, 17 Phila. 202; Barlew *v.* Electric Illuminating Co., 1 Pa. Co. Ct. 651; Ritchie *v.* Pittsburgh, etc., R. Co., 31 Pittsb. Leg. J. 424; Chester Rolling Mills *v.* Grannan, 1 Del. Co. 379.

South Carolina.— Charleston, etc., R. Co. *v.* Blake, 12 Rich. 634.

Tennessee.— Colcough *v.* Nashville, etc., R. Co., 2 Head 171.

It is within the power of the legislature to subject corporations to liability for consequential damages. Lycoming Gas, etc., Co. *v.* Moyer, 99 Pa. St. 615.

It is immaterial that the land is wild land without improvements. Orange Belt R. *v.* Craver, 32 Fla. 28, 13 So. 444.

10. *Florida.*— Orange Belt R. Co. *v.* Craver, 32 Fla. 28, 13 So. 444.

Illinois.— Schroeder *v.* Joliet, 189 Ill. 48, 59 N. E. 550, 52 L. R. A. 634.

Kentucky.— Bramlette *v.* Louisville, etc., R. Co., 68 S. W. 145, 24 Ky. L. Rep. 180.

Maryland.— Lake Roland El. R. Co. *v.* Hibernian Soc., 83 Md. 420, 34 Atl. 1017.

New Jersey.— Doughty *v.* Somerville, etc., R. Co., 22 N. J. L. 495.

Pennsylvania.—Casper *v.* Scranton City, 21 Pa. Super. Ct. 17.

Texas.— Ft. Worth, etc., R. Co. *v.* Downie, 82 Tex. 382, 17 S. W. 620; Gainesville, etc., R. Co. *v.* Hall, 78 Tex. 169, 14 S. W. 259, 22 Am. St. Rep. 42, 9 L. R. A. 398.

Damages contemplated by the constitution where property is merely damaged and not taken are such as are actual, real, and present. Eberhart *v.* Chicago, etc., R. Co., 70 Ill. 347.

Unless the market value of land is lessened land not taken is not damaged. Metropolitan West Side El. R. Co. *v.* Clancy, 153 Ill. 270, 38 N. E. 557; Metropolitan West Side El. R. Co. *v.* Stickney, 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773.

Under constitutional provisions authorizing compensation for injuring or damaging property, the right of an owner of property abutting on a street to compensation for injuries caused by a change of grade of street must be adjusted in proceedings before viewers and not by an action of trespass, provided the injuries are not caused by negligence. Curran *v.* East Pittsburg Borough, 20 Pa. Super. Ct. 590.

11. Omaha, etc., R. Co. *v.* Brown, 22 Nebr. 355, 35 N. W. 188; Omaha, etc., R. Co. *v.* Standen, 22 Nebr. 343, 35 N. W. 183.

General effect of provisions.— A constitutional provision that corporations shall make just compensation for property taken, injured, or destroyed by the construction, etc., of their works, abolishes the distinction between actual and consequential damages, and such corporations are liable for consequential damages to the extent that they would be liable at common law if they had not been created with special legislative privileges.

strued.[12] The words "damaged" and "injured" have broader meaning than the word "taken,"[13] and are designed to impose a liability for consequential injuries for which no liability would otherwise exist.[14] They include all damages or injuries arising from the exercise of the right of eminent domain which cause a diminution in the value of private property, whether this results directly to the property or is but an interference with the right which the owner has to the legal and proper use of the same.[15] It is generally held, however, that such clause does not change the substantive law of damages, that it does not require compen-

Metropolitan West Side El. R. Co. v. Goll, 100 Ill. App. 323; Ritchie v. Pittsburgh, etc., R. Co., 31 Pittsb. Leg. J. (Pa.) 424.

12. Montgomery v. Townsend, 80 Ala. 489, 2 So. 155, 60 Am. Rep. 112.

13. St. Louis, etc., R. Co. v. Knapp, etc., Co., 160 Mo. 396, 61 S. W. 300; Philadelphia's Appeal, 191 Pa. St. 153, 42 Atl. 88; Brown v. Seattle, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161.

14. Edmondson v. Pittsburg, etc., R. Co., 111 Pa. St. 316, 2 Atl. 404.

15. *Georgia.*— Pause v. Atlanta, 98 Ga. 92, 26 S. E. 489, 58 Am. St. Rep. 290; Peel v. Atlanta, 85 Ga. 138, 11 S. E. 582, 8 L. R. A. 787; Campbell v. Metropolitan St. R. Co., 82 Ga. 320, 9 S. E. 1078.

Illinois.— Lake Erie, etc., R. Co. v. Scott, 132 Ill. 429, 24 N. E. 78, 8 L. R. A. 330; Chicago, etc., R. Co. v. Ayres, 106 Ill. 511; Rigney v. Chicago, 102 Ill. 64.

Louisiana.— Griffin v. Shreveport, etc., R. Co., 41 La. Ann. 808, 6 So. 624.

Missouri.— St. Louis, etc., R. Co. v. Knapp, etc., Co., 160 Mo. 396, 61 S. W. 300.

Nebraska.— Omaha v. Kramer, 25 Nebr. 489, 41 N. W. 295, 13 Am. St. Rep. 504.

Ohio.— See Columbus, etc., R. Co. v. Gardner, 45 Ohio St. 309, 13 N. E. 69.

Texas.— Gainesville, etc., R. Co. v. Hall, 78 Tex. 169, 14 S. W. 259, 22 Am. St. Rep. 42, 9 L. R. A. 298. And see Ft. Worth, etc., R. Co. v. Jennings, 76 Tex. 373, 13 S. W. 270, 8 L. R. A. 180; Texas, etc., R. Co. v. Meadows, 73 Tex. 32, 11 S. W. 145, 3 L. R. A. 565.

United States.— Chicago v. Taylor, 125 U. S. 161, 8 S. Ct. 820, 31 L. ed. 638; Omaha Horse R. Co. v. Cable Tramway Co., 32 Fed. 727.

Under this constitutional provision a statute which provides only for compensation for the property actually taken, leaving the owner without compensation for the injury done to his remaining and adjacent lands, is unconstitutional. Kramer v. Cleveland, etc., R. Co., 1 Ohio Dec. (Reprint) 474, 10 West. L. J. 138.

Property is "damaged" or "injured" under such provision, where the injury is caused by the construction of a sewer (Thoman v. Covington, 62 S. W. 721, 23 Ky. L. Rep. 117), or approach to a bridge (Chester County v. Brower, 117 Pa. St. 647, 12 Atl. 577, 2 Am. St. Rep. 713; Chicago v. Taylor, 125 U. S. 161, 8 S. Ct. 820, 31 L. ed. 638. And see Pundman v. St. Charles County, 110 Mo. 594, 19 S. W. 733); or by draining or collecting surface water in such a manner as to injure adjoining property (Rudel v. Los Angeles County, 118 Cal. 281, 50 Pac. 400; Rainey v. Hinds County, 78 Miss. 308, 28 So. 875; Fredericks v. Pennsylvania Canal Co., 148 Pa. St. 317, 23 Atl. 1067. But see Freeland v. Pennsylvania R. Co., 66 Pa. St. 91); or by materially interfering with the drainage of property whereby it is injured (Louisville, etc., R. Co. v. Brinton, 109 Ky. 180, 58 S. W. 604, 22 Ky. L. Rep. 664; Stith v. Louisville, etc., R. Co., 109 Ky. 168, 58 S. W. 600, 22 Ky. L. Rep. 653; *In re* Chatham St., 191 Pa. St. 604, 43 Atl. 365).

The construction and operation of a railroad so as to substantially interfere with the right to and the use of neighboring property "damages" is within the meaning of constitutional provision against damaging property without payment of compensation (Campbell v. Metropolitan St. R. Co., 82 Ga. 320, 9 S. E. 1078; Rigney v. Chicago, 102 Ill. 64; Chicago, etc., R. Co. v. McGinnis, 79 Ill. 269; Chicago, etc., R. Co. v. Hazels, 26 Nebr. 364, 42 N. W. 93; Syracuse Solar Salt Co. v. Rome, etc., R. Co., 43 N. Y. App. Div. 203, 60 N. Y. Suppl. 40; Pittsburgh Junction R. Co. v. McCutcheon, (Pa. 1886) 7 Atl. 146; Omaha Horse R. Co. v. Cable Tramway Co., 32 Fed. 727; Frankle v. Jackson, 30 Fed. 398. But see Osborne v. Missouri Pac. R. Co., 147 U. S. 248, 13 S. Ct. 299, 37 L. R. A. 155); but thereby causing mere inconvenience or discomfort does not (Austin v. Augusta Terminal R. Co., 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755; Campbell v. Metropolitan St. R. Co., 82 Ga. 320, 9 S. E. 1078; Peoria, etc., R. Co. v. Schertz, 84 Ill. 135; Hammersmith, etc., R. Co. v. Brand, L. R. 4 H. L. 171, 38 L. J. Q. B. 265, 21 L. T. Rep. N. S. 238, 18 Wkly. Rep. 12; Hutton v. London, etc., R. Co., 7 Hare 259, 13 Jur. 486, 18 L. J. Ch. 345, 27 Eng. Ch. 259. And see Lister v. Lobley, 7 A. & E. 124, 2 H. & W. 122, 6 L. J. K. B. 200, 34 E. C. L. 86).

The provisions mentioned in the text apply not only to corporations which have been created subsequent to its adoption, but also to those which were in existence at the time of its adoption, unless the latter were entitled to some exemption from constitutional legislation. Pennsylvania R. Co. v. Magee, (Pa. 1888) 13 Atl. 839; Chester County v. Brower, 117 Pa. St. 647, 12 Atl. 577, 2 Am. St. Rep. 713; Philadelphia, etc., R. Co. v. Patent, (Pa. 1886) 5 Atl. 747; Pennsylvania R. Co. v. Duncan, 111 Pa. St. 352, 5 Atl. 742; Pennsylvania R. Co. v. Miller, 132 U. S. 75, 10 S. Ct. 34, 33 L. ed. 267; McElroy v. Kansas City, 21 Fed. 257.

sation for depreciation in value caused by any lawful act, but that there must be some physical interference with property or with a right or use appurtenant thereto.[16]

3. Temporary Occupation — a. In General. A temporary occupation of or injury to property may amount to such a taking as to entitle the owner to compensation.[17] An exclusive appropriation to a specific public use of the property of an individual for a distinct period of time, depriving the owner of its actual possession and enjoyment and exposing it to necessary and essential damage, is a taking.[18]

b. Entering For Preliminary Survey and Like Purposes. The right of examination and survey, being incident to that of appropriation, and necessary to its proper exercise, the mere entering upon land for the purpose of examination and survey, and even its exclusive temporary occupancy as an initiatory proceeding to the acquisition of title to it, or of an easement in it, no unnecessary damage being done, do not amount to such a taking of the land as entitles the owner to compen-

16. *Georgia.*— Austin *v.* Augusta Terminal R. Co., 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755.

Illinois.— Aldrich *v.* Metropolitan West Side El. R. Co., 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237; Chicago *v.* Union Bldg. Assoc., 102 Ill. 379, 40 Am. Rep. 598; Rigney *v.* Chicago, 102 Ill. 64; Chicago *v.* McShane, 102 Ill. App. 239. And see Wylie *v.* Elwood, 134 Ill. 281, 25 N. E. 570, 23 Am. St. Rep. 673, 9 L. R. A. 726.

Kentucky.— Henderson *v.* McClain, 102 Ky. 402, 43 S. W. 700, 19 Ky. L. Rep. 1450, 39 L. R. A. 349.

Massachusetts.— Presbrey *v.* Old Colony, etc., R. Co., 103 Mass. 1.

Minnesota.— Rochette *v.* Chicago, etc., R. Co., 32 Minn. 201, 20 N. W. 140.

Missouri.— Rude *v.* St. Louis, 93 Mo. 408, 6 S. W. 257.

New Jersey.— Columbia Delaware Bridge Co. *v.* Geisse, 35 N. J. L. 558.

Pennsylvania.—Pennsylvania R. Co. *v.* Marchant, 119 Pa. St. 541, 13 Atl. 690, 4 Am. St. Rep. 659 [*affirmed* in 153 U. S. 380, 14 S. Ct. 894, 38 L. ed. 751]; Ritchie *v.* Pittsburgh, etc., R. Co., 31 Pittsb. Leg. J. 424.

West Virginia.— Jordan *v.* Benwood, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L. R. A. 519.

United States.— Chicago *v.* Taylor, 125 U. S. 161, 8 S. Ct. 820, 31 L. ed. 638.

Under English Lands Clauses Act.— Where an owner of land which is not actually taken claims compensation for injury, under section 68 of the English Lands Clauses Act of 1845 (8 & 9 Vict. c. 18) he must show that some injury has been incurred which would have been the subject of an action at law independent of the statute; he can make no claim for damages for which he would have had no action if the act had not been passed. Hopkins *v.* Great Northern R. Co., 2 Q. B. D. 224, 46 L. J. Q. B. 265, 36 L. T. Rep. N. S. 898; Beckett *v.* Midland R. Co., L. R. 3 C. P. 82, 37 L. J. C. P. 11, 17 L. T. Rep. N. S. 499, 16 Wkly. Rep. 221; Metropolitan Bd. of Works *v.* McCarthy, L. R. 7 H. L. 243, 43 L. J. C. P. 385, 31 L. T. Rep. N. S. 182, 23 Wkly. Rep. 115; Glasgow Union R. Co. *v.* Hunter, L. R. 2 H. L. Sc. 78; Reg. *v.* Metropolitan Bd. of Works, L. R. 4 Q. B. 358, 10 B. & S. 391, 38 L. J. Q. B. 201, 17 Wkly. Rep. 1094; Caledonian R. Co. *v.* Walker, 7 App. Cas. 259, 46 J. P. 676, 46 L. T. Rep. N. S. 826, 30 Wkly. Rep. 569; Wood *v.* Stourbridge R. Co., 16 C. B. N. S. 222, 111 E. C. L. 222; Rhodes *v.* Airedale Drainage Com'rs, 1 C. P. D. 402, 45 L. J. C. P. 861, 35 L. T. Rep. N. S. 46, 24 Wkly. Rep. 1053; Broadbent *v.* Imperial Gas Co., 7 De G. M. & G. 436, 3 Jur. N. S. 221, 26 L. J. Ch. 276, 5 Wkly. Rep. 272, 56 Eng. Ch. 337 [*affirmed* in 7 H. L. Cas. 600, 5 Jur. N. S. 1319, 29 L. J. Ch. 377, 11 Eng. Reprint 239]; New River Co. *v.* Johnson, 2 E. & E. 435, 6 Jur. N. S. 374, 29 L. J. M. C. 93, 1 L. T. Rep. N. S. 295, 8 Wkly. Rep. 179, 105 E. C. L. 435.

17. Indiana Stone R. Co. *v.* Srain, 27 Ind. App. 694, 62 N. E. 63; Cushman *v.* Smith, 34 Me. 247; Penney *v.* Com., 173 Mass. 507, 53 N. E. 865, 73 Am. St. Rep. 312; Bate *v.* Philadelphia, etc., R. Co., 1 Montg. Co. Rep. (Pa.) 47. See also Trowbridge *v.* Brookline, 144 Mass. 139, 10 N. E. 796.

Applications of rule.— The rule applies to the temporary occupation of a street in front of the property (McKeon *v.* New York, etc., R. Co., 75 Conn. 656, 53 Atl. 656; Illinois Cent. R. Co. *v.* Wolf, 95 Ill. App. 74; Bailey *v.* Boston, etc., R. Corp., 182 Mass. 537, 66 N. E. 203; Putnam *v.* Boston, etc., R. Corp., 182 Mass. 351, 65 N. E. 790); as for instance by a railroad while changing its grade (Knapp, etc., Mfg. Co. *v.* New York, etc., R. Co., 76 Conn. 311, 56 Atl. 512). See, however, Shepherd *v.* Baltimore, etc., O. R. Co., 130 U. S. 426, 9 S. Ct. 598, 32 L. ed. 970, holding that no damage is recoverable for temporary obstruction of a street, unless it is unreasonably prolonged. It has also been held that when an owner of land on both sides of a highway was entitled to maintain certain crossings over the same, which were destroyed or injured by the construction of a street railroad along the highway, such owner was entitled to recover damages between the time the crossings were injured and the time they were restored. Georgetown, etc., Traction Co. *v.* Mulholland, 76 S. W. 148, 25 Ky. L. Rep. 578.

18. Brigham *v.* Edmands, 7 Gray (Mass.) 359.

sation;[19] but such occupation becomes unlawful unless the title or an easement is acquired within a reasonable time.[20] Such a preliminary survey without further action does not constitute a sufficient location and appropriation as against another person or corporation seeking to condemn the land thus surveyed.[21]

4. Locating, Filing Maps, Etc. The mere locating or laying out of streets, highways, or other public works by the city, county, or township authorities does not constitute a taking; it is only after streets or highways have been opened by the duly constituted authorities that they can be regarded as taken for public use.[22] Nor is the making and filing of a description or map of a street[23] or of a proposed public reservoir[24] a taking unless made so by statute.[25] An appropriation of land for a canal takes place as soon as the state has surveyed and settled upon the route, and entered upon and taken exclusive possession of the land, although the work has not been completed.[26] The taking of land by a railroad corporation consists of a series of acts, commencing with the entry for the purpose of location and terminating in the act of payment.[27] When the description of the location of

19. *California.*— Robinson *v.* Southern California R. Co., 129 Cal. 8, 61 Pac. 947; Fox *v.* Western Pac. R. Co., 31 Cal. 538.

Maine.— Nichols *v.* Somerset, etc., R. Co., 43 Me. 356; Cushman *v.* Smith, 34 Me. 247.

Maryland.— Steuart *v.* Baltimore, 7 Md. 500.

Massachusetts.— Winslow *v.* Gifford, 6 Cush. 327.

New York.— Geneva, etc., R. Co. *v.* New York Cent., etc., R. Co., 90 Hun 9, 35 N. Y. Suppl. 339; Buffalo, etc., R. Co. *v.* New York, etc., R. Co., 72 Hun 587, 25 N. Y. Suppl. 155; Polly *v.* Saratoga, etc., R. Co., 9 Barb. 449; Bloodgood *v.* Mohawk, etc., R. Co., 18 Wend. 9, 31 Am. Dec. 313 [*reversing* 14 Wend. 51].

Ohio.— Ward *v.* Toledo, etc., R. Co., 1 Ohio Dec. (Reprint) 553, 10 West. L. J. 365.

Pennsylvania.— Wilkesbarre, etc., R. Co. *v.* Danville, etc., R. Co., 29 Leg. Int. 373.

United States.— Roberts *v.* Germantown R. Co., 11 Pittsb. Leg. J. 278; Bonaparte *v.* Camden, etc., R. Co., 3 Fed. Cas. No. 1,617, Baldw. 205.

England.—Standish *v.* Liverpool, 1 Drew. 1, 15 Eng. L. & Eq. 255; Fooks *v.* Wilts, etc., R. Co., 5 Hare 199, 4 R. & Can. Cas. 210, 26 Eng. Ch. 199. See also Simpson *v.* South Staffordshire Waterworks Co., 4 De G. J. & S. 679, 11 Jur. N. S. 453, 34 L. J. Ch. 380, 12 L. T. Rep. N. S. 360, 13 Wkly. Rep. 729, 908, 69 Eng. Ch. 519; Standish *v.* Liverpool, 1 Drew. 1, 15 Eng. L. & Eq. 255.

See 18 Cent. Dig. tit. "Eminent Domain," § 163.

A statute authorizing the inspection of a mining claim in the possession of another person is not unconstitutional as being in conflict with the provision against taking private property. Montana Co. *v.* St. Louis Min., etc., Co., 152 U. S. 160, 14 S. Ct. 506, 38 L. ed. 398.

Temporary appropriation of water.— Gloucester Water-Supply Co. *v.* Gloucester, 179 Mass. 365, 60 N. E. 977.

Sinking a shaft not an exploration.— Morris, etc., R. Co. *v.* Hudson Tunnel R. Co., 25 N. J. Eq. 384.

20. Nichols *v.* Somerset, etc., R. Co., 43 Me. 356.

21. New Brighton, etc., R. Co. *v.* Pittsburg, etc., R. Co., 105 Pa. St. 13; Denver, etc., R. Co. *v.* Alling, 99 U. S. 463, 25 L. ed. 438.

When a railroad company has made and filed a map and survey of the line of route it intends to adopt for the construction of its road and has given the required notice to all persons affected by such construction and no change of route is made as a result of any proceeding instituted by any landowner or occupant, it acquires the right to construct and operate a railroad upon such line exclusive in that respect as to all other railroad corporations and free from the interference of any party. Rochester, etc., R. Co. *v.* New York, etc., R. Co., 110 N. Y. 128, 17 N. E. 680.

22. District of Columbia *v.* Armes, 8 App. Cas. (D. C.) 393; *In re* Volkmar St., 124 Pa. St. 320, 16 Atl. 867; *In re* Pittsburgh, 2 Watts & S. (Pa.) 320; State *v.* James, 4 Wis. 408.

23. District of Columbia *v.* Armes, 8 App. Cas. (D. C.) 393; Singer *v.* New York, 47 N. Y. App. Div. 42, 62 N. Y. Suppl. 347 [*affirmed* in 165 N. Y. 658, 59 N. E. 1130]; Forster *v.* Scott, 60 N. Y. Super. Ct. 313, 17 N. Y. Suppl. 479; *In re* Furman St., 17 Wend. (N. Y.) 649; Bush *v.* McKeesport, 166 Pa. St. 57, 30 Atl. 1023. Where a railroad company condemns a portion of a tract, the fact that the owner, after the proceedings are instituted, but before a judgment has been rendered confirming the award, files a map designating such portion or a part of it as a public street will not affect the title or rights of the railroad company. Niagara Falls *v.* New York Cent., etc., R. Co., 41 N. Y. App. Div. 93, 58 N. Y. Suppl. 619.

24. New York Cent., etc., R. Co. *v.* State, 37 N. Y. App. Div. 57, 55 N. Y. Suppl. 685.

Filing description required by statute.— Wamesit Power Co. *v.* Allen, 120 Mass. 352.

25. Chandler *v.* Jamaica Pond Aqueduct Corp., 114 Mass. 575.

26. People *v.* Hayden, 6 Hill (N. Y.) 359.

27. Fox *v.* Western Pac. R. Co., 31 Cal. 538; Arthur *v.* Pennsylvania R. Co., 27 Leg. Int. (Pa.) 237; Bate *v.* Philadelphia, etc., R. Co., 1 Montg. Co. Rep. (Pa.) 47. The taking

a railroad is filed, the land over which it passes may then be *prima facie* considered as taking.[28]

5. **Commencement of Proceedings.** The institution of condemnation proceedings does not constitute a taking, if such proceedings are afterward discontinued;[29] damages being paid for actual losses and expense incident to such proceedings.[30] The institution and pendency of such proceedings does not deprive the owner of the right of alienation; he may sell and convey his entire estate wholly unrestrained thereby.[31] Judicial proceedings to determine whether the property can be taken for the desired use and how much must be paid for it are not in violation of the inhibition against taking private property without compensation and the owner is not disturbed in his possession thereby.[32]

6. **Passage of Statute or Ordinance.** The legislature has the power to appropriate property directly by statute.[33] But the taking of property directly by the act of the legislature is the exception to the general policy of such legislation, and to have this effect it should distinctly appear by the terms of the law and the circumstances under which the alleged appropriation was made that the purpose of the law was to appropriate and take by force of the statute.[34] The passage of an ordinance by a municipality authorized by statute to condemn land for public purposes, stating its election to appropriate certain property amounts to a present taking of such property and entitles the landowner to institute proceedings to recover compensation therefor.[35]

7. **Constructing Drains, Etc.** The occupancy and use of the land of an individual for the purpose of constructing and maintaining ditches or drains is such an interference with the proprietary interests of the individual as to constitute a taking of his property.[36] The construction of a public ditch across the right of way of a railroad company, although the ditch be constructed by tiling under the surface, is an appropriation of the company's property.[37] The construction by a city of a canal in a street for the purpose of drainage is, if the effect is to destroy the street and deprive abutting owners of access to their property, a taking of the

possession and grading of the right of way by a railroad company, so as to make a continuous road-bed nearly one hundred miles in length, is an appropriation of the land forming a part of such right of way. Harshbarger *v.* Mdland R. Co., 131 Ind. 177, 27 N. E. 352, 30 N. E. 1083.

28. Davidson *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 91.

29. Morris *v.* Wisconsin Midland R. Co., 82 Wis. 541, 52 N. W. 758.

30. *In re* Franklin St., 14 Pa. Super. Ct. 403.

31. Duluth Transfer R. Co. *v.* Northern Pac. R. Co., 51 Minn. 218, 53 N. W. 366.

32. Kansas City *v.* Ward, 134 Mo. 172, 35 S. W. 600. See also U. S. *v.* Oregon R., etc., Co., 16 Fed. 524, 9 Sawy. 61.

33. People *v.* Collis, 20 N. Y. App. Div. 341, 46 N. Y. Suppl. 727; Smedley *v.* Erwin, 51 Pa. St. 445. See also *In re* Chestnut St., 118 Pa. St. 593, 12 Atl. 585; Philadelphia *v.* Lennard, 97 Pa. St. 242; Smith *v.* U. S., 32 Ct. Cl. 295.

34. New York Cent., etc., R. Co. *v.* State, 37 N. Y. App. Div. 57, 55 N. Y. Suppl. 685; Sixth Ave. R. Co. *v.* Gilbert El. R. Co., 3 Abb. N. Cas. (N. Y.) 372; Garwin *v.* Columbus, 5 Ohio S. & C. Pl. Dec. 333, 5 Ohio N. P. 236; Brower *v.* Philadelphia, 142 Pa. St. 350, 21 Atl. 828 [*distinguishing* Smedley *v.* Erwin, 51 Pa. St. 445]; Lebanon School-Dist. *v.* Lebanon Female Seminary, (Pa. 1888) 12 Atl. 857; Smith *v.* U. S., 32 Ct. Cl. 295.

35. *In re* Delafield, 109 Fed. 577. See also McMicken *v.* Cincinnati, 4 Ohio St. 394.

The vote of a corporation that "the directors be authorized to build the Brown Island boom this season" is not a taking of land for that purpose within Me. Spec. Laws (1859), c. 352, § 1, by which said corporation is empowered to take and use shores, flats and lands adjacent to and necessary for the erection and occupation of its boom, under certain terms and conditions specified in said act. Lancaster *v.* Kennebec Log Driving Co., 62 Me. 272.

36. *New Jersey.*—Ward *v.* Peck, 49 N. J. L. 42, 6 Atl. 805.

New York.—People *v.* Haines, 49 N. Y. 587; People *v.* Nearing, 27 N. Y. 306.

North Carolina.—State *v.* New, 130 N. C. 731, 41 S. E. 1033.

Pennsylvania.—Strasburg *v.* Backman, 21 Wkly. Notes Cas. 462.

Wisconsin.—Smith *v.* Gould, 61 Wis. 31, 20 N. W. 369.

Arching over a natural watercourse which has been used as a drain, so as to make of it a closed sewer instead of an open one, does not subject the land to a new easement. Jeanette *v.* Eschallier, 7 Pa. Dist. 268.

37. Lake Erie, etc., R. Co. *v.* Hancock County, 63 Ohio St. 23, 57 N. E. 1009.

property of such abutting owners.[38] A municipality has power to use a public way lying outside its boundaries for the purpose of drainage without compensation to adjacent property holders for the consequential injuries.[39]

8. **Discharge of Sewage.** The discharge of sewage on the property of an individual is a taking of property within the meaning of the constitution,[40] as is also its discharge into a stream, where the effect is to destroy the value of the stream itself or of private property situated on it.[41]

9. **Diversion of Water.** The diversion of water, whether in a stream or in a well or spring, or percolating through the soil, is a taking of it for which compensation must be made.[42]

38. Houston *v.* Kleinecke, (Tex. Civ. App. 1894) 26 S. W. 250.

39. Cummins *v.* Seymour, 79 Ind. 491, 41 Am. Rep. 618.

40. New York Cent., etc., R. Co. *v.* Rochester, 127 N. Y. 591, 28 N. E. 416; Chapman *v.* Rochester, 110 N. Y. 273, 18 N. E. 88, 6 Am. St. Rep. 366, 1 L. R. A. 296; Moody *v.* Saratoga Springs, 17 N. Y. App. Div. 207, 45 N. Y. Suppl. 365 [*affirmed* in 163 N. Y. 581, 57 N. E. 1118]; Sammons *v.* Gloversville, 34 Misc. (N. Y.) 459, 70 N. Y. Suppl. 284; Clark *v.* Peckham, 9 R. I. 455; Winn *v.* Rutland, 52 Vt. 481.

Discharge upon an oyster-bed.— Huffmire *v.* Brooklyn, 162 N. Y. 584, 57 N. E. 176, 48 L. R. A. 421.

41. *California.*— Peterson *v.* Santa Rosa, 119 Cal. 387, 51 Pac. 557.

Connecticut.—Waterbury *v.* Platt, 76 Conn. 435, 56 Atl. 856; Platt *v.* Waterbury, 72 Conn. 531, 45 Atl. 154, 77 Am. St. Rep. 335, 48 L. R. A. 691; Nolan *v.* New Britain, 69 Conn. 668, 38 Atl. 703; Kellogg *v.* New Britain, 62 Conn. 232, 24 Atl. 996.

Illinois.— Robb *v.* La Grange, 158 Ill. 21, 42 N. E. 77; Dwight *v.* Hayes, 150 Ill. 273, 37 N. E. 218, 41 Am. St. Rep. 367; Bloomington *v.* Costello, 65 Ill. App. 407.

Massachusetts.— Washburn, etc., Mfg. Co. *v.* Worcester, 153 Mass. 494, 27 N. E. 664; Worcester Gaslight Co. *v.* Worcester County, 138 Mass. 289.

Minnesota.— O'Brien *v.* St. Paul, 18 Minn. 176.

Missouri.— Smith *v.* Sedalia, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711; Joplin Consol. Min. Co. *v.* Joplin, 124 Mo. 129, 27 S. W. 406.

New Jersey.— Doremus *v.* Paterson, (Err. & App. 1903) 55 Atl. 304; Simmons *v.* Paterson, 60 N. J. Eq. 385, 45 Atl. 995, 83 Am. St. Rep. 642, 48 L. R. A. 717.

New York.— Chapman *v.* Rochester, 110 N. Y. 273, 18 N. E. 88, 6 Am. St. Rep. 366, 1 L. R. A. 296; Moody *v.* Saratoga Springs, 17 N. Y. App. Div. 207, 45 N. Y. Suppl. 365 [*affirmed* in 163 N. Y. 581, 57 N. E. 1118]; Bolton *v.* New Rochelle, 84 Hun 281, 32 N. Y. Suppl. 442; Schriver *v.* Johnston, 71 Hun 232, 24 N. Y. Suppl. 1083; Hooker *v.* Rochester, 12 N. Y. Suppl. 671.

Ohio.— Mansfield *v.* Hunt, 19 Ohio Cir. Ct. 488, 10 Ohio Cir. Dec. 567.

Pennsylvania.— Good *v.* Altoona City, 162 Pa. St. 493, 29 Atl. 741, 42 Am. St. Rep. 840.

England.— See Cator *v.* Lewisham Dist. Bd. of Works, 5 B. & S. 115, 11 Jur. N. S. 340, 34 L. J. Q. B. 74, 13 L. T. Rep. N. S. 212, 13 Wkly. Rep. 254, 117 E. C. L. 115; Atty.-Gen. *v.* Birmingham, 4 Kay & J. 528, 6 Wkly. Rep. 811; Lillywhite *v.* Trimmer, 36 L. J. Ch. 525, 16 L. T. Rep. N. S. 318, 15 Wkly. Rep. 763.

Public necessity not a defense.— Platt *v.* Waterbury, 72 Conn. 531, 45 Atl. 154, 77 Am. St. Rep. 335, 48 L. R. A. 691. But see Valparaiso *v.* Moffitt, 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. Rep. 522.

Rule inapplicable to public waters.— Sayre *v.* Newark, 60 N. J. Eq. 361, 45 Atl. 985, 83 Am. St. Rep. 629, 48 L. R. A. 722. See also Attwood *v.* Bangor, 83 Me. 582, 22 Atl. 466. *Compare* Haskell *v.* New Bedford, 108 Mass. 208.

Taking away a riparian owner's prescriptive right to pollute the waters of a stream is a taking of his property for a public use. Sprague *v.* Dorr, 185 Mass. 10, 69 N. E. 344.

42. *Alabama.*— Burden *v.* Stein, 27 Ala. 104, 62 Am. Dec. 758; Stein *v.* Berden, 24 Ala. 130, 6 Am. Dec. 453.

Connecticut.— Harding *v.* Stamford Water Co., 41 Conn. 87; Wadsworth *v.* Tillotson, 15 Conn. 366, 39 Am. Dec. 391; Hooker *v.* New Haven, etc., R. Co., 14 Conn. 146, 36 Am. Dec. 477.

Kentucky.— Maysville, etc., R. Co. *v.* Ingram, 30 S. W. 8, 16 Ky. L. Rep. 853.

Massachusetts.— Gloucester Water Supply Co. *v.* Gloucester, 179 Mass. 365, 60 N. E. 977; Washburn, etc., Mfg. Co. *v.* Worcester, 153 Mass. 497, 27 N. E. 664; Boston Belting Co. *v.* Boston, 153 Mass. 307, 25 N. E. 613; Worcester Gaslight Co. *v.* Worcester County, 138 Mass. 289; Brookline *v.* Mackintosh, 133 Mass. 215; Ætna Mills *v.* Brookline, 127 Mass. 59; Ætna Mills *v.* Waltham, 126 Mass. 422; Bailey *v.* Woburn, 126 Mass. 416.

Nebraska.— Crawford County *v.* Hathaway, (1903) 93 N. W. 781, 60 L. R. A. 889.

New Jersey.— Trenton Water Power Co. *v.* Reff, 36 N. J. L. 335.

Ohio.— Cooper *v.* Williams, 5 Ohio 391, 24 Am. Rep. 299, 4 Ohio 253, 22 Am. Dec. 745.

Pennsylvania.— Leiby *v.* Clear Spring Water Co., 205 Pa. St. 634, 55 Atl. 782; Union Canal Co. *v.* Stump, 81 Pa. St. 255; Heilman *v.* Union Canal Co., 50 Pa. St. 268.

Utah.— Fisher *v.* Bountiful City, 21 Utah 29, 59 Pac. 520.

United States.— Avery *v.* Fox, 2 Fed. Cas. No. 674, 1 Abb. 246.

England.— Ferrand *v.* Bradford, 21 Beav. 412, 2 Jur. N. S. 175.

10. Flooding Land. When land is injured by flooding caused by the obstruction of the flow of water or its diversion from its natural channel there is such a taking as entitles the owner to compensation.[43] This rule is subject to the general limitation that when the injury is remote and consequential the owner is not entitled to compensation.[44]

See 18 Cent. Dig. tit. "Eminent Domain," § 252.

But see De Baker *v.* Southern California R. Co., 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237; Todhunter *v.* State, (Cal. 1886) 11 Pac. 604; Green *v.* State, 73 Cal. 29, 11 Pac. 602, 14 Pac. 610.

Where a well became permanently dry on account of the construction of a water channel by the United States government at a considerable depth below the water level of the well, whereby the water percolated from the well into the channel, but the channel occupied no part of the premises in which the well was situated, this did not constitute a taking. Alexander *v.* U. S., 25 Ct. Cl. 87. But under a statute providing that in estimating damages regard shall be had to all the damage done to the party, whether by taking his property or by injuring it in any manner, if a town lawfully takes land and constructs a sewer therein, whereby a well upon land which is neither taken, nor adjoining that which is taken, is made dry, the well being fed by water percolating through the soil, such town is liable. Trowbridge *v.* Brookline, 144 Mass. 139, 10 N. E. 796.

The permanent destruction of a waterfall by the construction of public works is an appropriation of such waterfall. Canal Com'rs *v.* People, 5 Wend. (N. Y.) 423.

43. *Arkansas.*— Springfield, etc., R. Co. *v.* Rhea, 44 Ark. 258.

California.— Rudel *v.* Los Angeles County, 118 Cal. 281, 50 Pac. 400.

Illinois.— Toledo, etc., R. Co. *v.* Morrison, 71 Ill. 616.

Indiana.—North Vernon *v.* Voegler, 89 Ind. 77; Indianapolis, etc., R. Co. *v.* Smith, 52 Ind. 428.

Iowa.— Ellis *v.* Iowa City, 29 Iowa 229.

Kentucky.— Louisville, etc., R. Co. *v.* Brinton, 109 Ky. 180, 58 S. W. 604, 22 Ky. L. Rep. 664; Stith *v.* Louisville, etc., R. Co., 109 Ky. 168, 58 S. W. 600, 22 Ky. L. Rep. 653; Kemper *v.* Louisville, 13 Bush 87; Maysville, etc., R. Co. *v.* Ingram, 30 S. W. 8, 16 Ky. L. Rep. 853.

Louisiana.— Mabire *v.* Canal Bank, 11 La. 83, 30 Am. Dec. 710.

Maryland.—Cumberland *v.* Willison, 50 Md. 138, 33 Am. Rep. 304.

Massachusetts.— Haskell *v.* New Bedford, 108 Mass. 208; Gile *v.* Stevens, 13 Gray 146.

Michigan.— Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308.

Minnesota.— Carlson *v.* St. Louis River Dam, etc., Co., 73 Minn. 128, 75 N. W. 1044, 72 Am. St. Rep. 610, 41 L. R. A. 371; *In re* Minnetonpa Lake Imp. Co., 56 Minn. 513, 58 N. W. 295, 45 Am. St. Rep. 494; Weaver *v.* Mississippi, etc., R., etc., Co., 28 Minn. 534, 11 N. W. 114.

Mississippi.— Rainey *v.* Hinds County, 78 Miss. 308, 28 So. 875.

Missouri.— Rose *v.* St. Charles, 59 Mo. 509.

New Hampshire.— Eaton *v.* Boston, etc., R. Co., 51 N. H. 504, 12 Am. Rep. 147.

New Jersey.— Trenton Water Power Co. *v.* Raff, 36 N. J. L. 335.

North Carolina.— Beach *v.* Wilmington, etc., R. Co., 120 N. C. 498, 26 S. E. 703.

Oregon.— Oregon, etc., R. Co. *v.* Barlow, 3 Oreg. 311.

Pennsylvania.— Goulden *v.* Franklin, 3 Lanc. L. Rev. 340.

Washington.— Wendel *v.* Spokane County, 27 Wash. 121, 67 Pac. 576, 91 Am. St. Rep. 825.

Wisconsin.— Smith *v.* Gould, 61 Wis. 31, 20 N. W. 369; Arimond *v.* Green Bay, etc., Canal Co., 31 Wis. 316; Pettigrew *v.* Evansville, 25 Wis. 223, 3 Am. Rep. 50.

United States.— U. S. *v.* Lynch, 188 U. S. 445, 23 S. Ct. 349, 47 L. ed. 539; Pumpelly *v.* Green Bay, etc., Canal Co., 13 Wall. 166, 20 L. ed. 557; King *v.* U. S., 59 Fed. 9.

See 18 Cent. Dig. tit. "Eminent Domain," § 253 *et seq.*

Although the flooding of the land is only occasional, it is still within the provisions of the English Lands Clauses Act. Ware *v.* Regent's Canal Co., 3 De G. & J. 212, 5 Jur. N. S. 25, 28 L. J. Ch. 153, 7 Wkly. Rep. 67, 60 Eng. Ch. 165.

A city is liable for the permanent submersion of property by the construction of a dam for the purposes of water-supply, although such dam is authorized by the legislature. Albany *v.* Sikes, 94 Ga. 30, 20 S. E. 257, 47 Am. St. Rep. 132, 26 L. R. A. 653; Baltimore *v.* Merryman, 86 Md. 584, 39 Atl. 98.

Channel made through the land.— When a city discharges all the surface water carried to a particular point in such a manner that the water by its own force makes a channel through the land of an individual, this is a taking of such land for public use. Miller *v.* Morristown, 47 N. J. Eq. 62, 20 Atl. 61 [*affirmed* in 48 N. J. Eq. 645, 25 Atl. 20].

Subsequent rebuilding of dam.— Where a mill-dam, which was erected under a law in force at the time, was carried away after the act was repealed, its subsequent rebuilding and the renewed flowing of lands caused thereby, constituted a fresh and unauthorized taking of private property. Pratt *v.* Brown, 3 Wis. 603.

44. Green *v.* State, 73 Cal. 29, 11 Pac. 602, 14 Pac. 610; Payne *v.* Kansas City, etc., R. Co., 112 Mo. 6, 20 S. W. 322, 17 L. R. A. 628; Norris *v.* Vermont Cent. R. Co., 28 Vt. 99; McIntyre *v.* U. S., 25 Ct. Cl. 200; Salliotte *v.* King Bridge Co., 122 Fed. 378, 58 C. C. A. 466, 65 L. R. A. 620; Holyoke

11. Removal of Lateral Support. An owner of land, being entitled to the lateral support of the adjoining land, must be compensated for an injury occasioned by the removal of such lateral support by a municipality,[45] a railroad,[46] or a plank-road company.[47]

12. Obstructing Street or Highway. An abutting owner on a street or highway has a right to the common and unobstructed use thereof, so far as is necessary to afford him incidental easements of which he cannot be deprived by legislative action without his consent or just compensation.[48]

13. Change of Grade of Street or Highway — a. By Municipality. The general rule is that an injury caused by a change of grade in a street made by a municipality under the authority of law and with due care does not entitle an abutting owner to compensation in the absence of a constitutional or statutory provision to that effect.[49] Under the statutes and constitutional provisions of some states as to damaging or injuring property, municipalities must make com-

Water-Power Co. *v.* Connecticut River Co., 20 Fed. 71.

Illustrations.— Where a levee built on one side of the Sacramento river caused an overflow of lands two miles below, seven years after the erection of the levee, this was held not to be a taking of the overflowed land. Lamb *v.* Reclamation Dist. No. 108, 73 Cal. 125, 14 Pac. 625, 2 Am. St. Rep. 775. So damages cannot be recovered for injuries to land which is not itself overflowed, but is rendered less valuable by reason of the noxious and offensive smells which proceed from the land which is overflowed. Fuller *v.* Chicopee Mfg. Co., 16 Gray (Mass.) 46; Eames *v.* New England Worsted Co., 11 Metc. (Mass.) 570.

45. Cabot *v.* Kingman, 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45; McCollough *v.* St. Paul, etc., R. Co., 52 Minn. 12, 53 N. W. 802; Nichols *v.* Duluth, 40 Minn. 389, 42 N. W. 84, 12 Am. St. Rep. 743; Dyer *v.* St. Paul, 27 Minn. 457, 8 N. W. 217.

46. Baltimore, etc., R. Co. *v.* Reaney, 42 Md. 117; Costigan *v.* Pennsylvania R. Co., 54 N. J. L. 233, 23 Atl. 810; Mosier *v.* Oregon Nav. Co., 39 Oreg. 256, 64 Pac. 453, 87 Am. St. Rep. 652; Richardson *v.* Vermont Cent. R. Co., 25 Vt. 465, 60 Am. Dec. 283. But see Hortsman *v.* Covington, etc., R. Co., 18 B. Mon. (Ky.) 218; Boothby *v.* Androscoggin, etc., R. Co., 51 Me. 318.

47. Williams *v.* National Bridge Plank Road Co., 21 Mo. 580.

48. *Connecticut.*— Bradley *v.* New York, etc., R. Co., 21 Conn. 294.

Illinois.— Chicago, etc., R. Co. *v.* Ayres, 106 Ill. 511.

Iowa.— Dairy *v.* Iowa Cent. R. Co., 113 Iowa 716, 84 N. W. 688; Cadle *v.* Muscatine Western R. Co., 44 Iowa 11.

Kansas.— Ottawa, etc., R. Co. *v.* Peterson, 51 Kan. 604, 33 Pac. 606; Chicago, etc., R. Co. *v.* Union Invest. Co., 51 Kan. 600, 33 Pac. 378.

Kentucky.—Transylvania University *v.* Lexington, 3 B. Mon. 25, 38 Am. Dec. 173; Louisville Southern R. Co. *v.* Hooe, 35 S. W. 266, 18 Ky. L. Rep. 521; Maysville, etc., R. Co. *v.* Lynch, 14 Ky. L. Rep. 671; Henderson Belt R. Co. *v.* Stapp, 14 Ky. L. Rep. 111.

Missouri.— Smith *v.* Kansas City, etc., R. Co., 98 Mo. 20, 11 S. W. 259.

New York.— Corey *v.* Buffalo, etc., R. Co., 23 Barb. 482.

United States.—Shepherd *v.* Baltimore, etc., R. Co., 130 U. S. 426, 9 S. Ct. 598, 32 L. ed. 970.

Application of rule.— The rule has been applied in case of construction of streets by embankments (Atchison, etc., R. Co. *v* Pratt, 53 Ill. App. 263; Indianapolis, etc., R. Co. *v.* Smith, 52 Ind. 428; Park *v.* Chicago, etc., R. Co., 43 Iowa 636; Fletcher *v.* Auburn, etc., R. Co., 25 Wend. 462; Cumberland Valley R. Co. *v.* Rhoadarmer, 107 Pa. St. 214); or by bridges or viaducts (Rigney *v.* Chicago, 102 Ill. 64; Willamette Iron Works *v.* Oregon R., etc., Co., 26 Oreg. 224, 37 Pac. 1016, 46 Am St. Rep. 620, 29 L. R. A. 88; Gibson *v.* Fifth Ave., etc., Bridge Co., 192 Pa. St. 55, 43 Atl. 339, 73 Am. St. Rep. 795; Jones *v.* Erie, etc., R. Co., 151 Pa. St. 30, 25 Atl. 134, 31 Am. St. Rep. 722, 17 L. R. A. 758; Frater *v.* Hamilton County, 90 Tenn. 661, 19 S. W. 233; Seattle Transfer Co. *v.* Seattle, 27 Wash. 520, 68 Pac. 90). But when a bridge is so constructed as to form a part of the highway, abutting owners are not entitled to compensation. Willets Mfg. Co. *v.* Mercer County, 62 N. J. L. 95, 40 Atl. 782; Jones *v.* Keith, 37 Tex. 394, 14 Am. Rep. 382. See also Hurt *v.* Atlanta, 100 Ga. 274, 28 S. E. 65.

Private ways.— It has been held that the landowner is entitled to compensation for obstruction of a private way for railroad tracks. Union R. Transfer, etc., Co. *v.* Moore, 80 Ind. 458; Kansas City, etc., R. Co. *v.* Farrell, 76 Mo. 183. So the owner of a private right of way is entitled to compensation where its use is destroyed by a culvert constructed by the municipality. De Lauder *v.* Baltimore County Com'rs, 94 Md. 1, 50 Atl. 427.

49. *Arkansas.*— Simmons *v.* Camden, 26 Ark. 276, 7 Am. Rep. 620.

Colorado.— Aicher *v.* Denver, 10 Colo. App. 413, 52 Pac. 86.

Connecticut.— Gilpin *v.* Ansonia, 68 Conn. 72, 35 Atl. 777.

Florida.— Selden *v.* Jacksonville, 28 Fla. 558, 10 So. 457, 29 Am. St. Rep. 278, 14 L. R. A. 370.

Indiana.— Princeton *v.* Geisler, 93 Ind. 102; Weis *v.* Madison, 75 Ind. 241, 39 Am. Rep. 135; Macy *v.* Indianapolis, 17 Ind. 267.

pensation for injuries so caused.[50] It seems, however, that, apart from any statutory or constitutional provision when in the course of grading or improving streets real estate is actually invaded by superinduced additions of earth, sand, or other material or is otherwise so physically injured that its usefulness is effectually

Kentucky.— Newport Bridge Co. *v.* Foote, 9 Bush 264. This case was decided in 1873. It will be noticed that the Kentucky constitution of 1891 does contain the words "taken, injured, or destroyed." Wolfe *v.* Covington, etc., R. Co., 15 B. Mon. 404; Keasy *v.* Louisville, 4 Dana 154, 29 Am. Dec. 395.

Maryland.— Green *v.* City, etc., R. Co., 78 Md. 294, 28 Atl. 626, 44 Am. St. Rep. 288.

New York.—Smith *v.* White Plains, 67 Hun 81, 22 N. Y. Suppl. 450; Wilson *v.* New York Cent., etc., R. Co., 2 N. Y. Suppl. 65.

Oregon.— Brand *v.* Multnomah County, 38 Oreg. 79, 60 Pac. 390, 62 Pac. 209, 84 Am. St. Rep. 772, 50 L. R. A. 389.

South Carolina.— Garraux *v.* Greenville, 53 S. C. 575, 31 S. E. 597; Cherry *v.* Rock Hill, 48 S. C. 553, 26 S. E. 798.

Virginia.— Roanoke Gas Co. *v.* Roanoke, 88 Va. 810, 14 S. E. 665.

Wisconsin.— Walish *v.* Milwaukee, 95 Wis. 16, 69 N. W. 818; Colcough *v.* Milwaukee, 92 Wis. 182, 65 N. W. 1039; Drummond *v.* Eau Claire, 85 Wis. 556, 55 N. W. 1028; Smith *v.* Eau Claire, 78 Wis. 457, 47 N. W. 830.

See 18 Cent. Dig. tit. "Eminent Domain," § 269.

In England the lessee of a house which is injuriously affected by the raising of the grade of a street is entitled to compensation, although the special act contains no provision allowing it. Reg. *v.* St. Luke's Church, L. R. 7 Q. B. 148, 41 L. J. Q. B. 81, 25 L. T. Rep. N. S. 914, 20 Wkly. Rep. 209. See also Furness R. Co. *v.* Cumberland Co-operative Bldg. Soc., 49 J. P. 292, 52 L. T. Rep. N. S. 144.

What constitutes a change.— The extension of the level of a street by filling in its sides as far as the front line of the abutting lots, without raising the level of the street above the established grade, does not constitute a change of grade. Bissell *v.* Larchmont, 57 N. Y. App. Div. 61, 67 N. Y. Suppl. 962. The construction of a viaduct along a street is held by the New York courts not to be a mere change of grade. Manhattan R. Co. *v.* New York, 89 Hun (N. Y.) 429, 35 N. Y. Suppl. 505. But in Wisconsin it is held that the occupation of the entire street for the approach to a viaduct, where the approach is supported by columns resting on the surface of the street, is merely a change of grade. Walish *v.* Milwaukee, 95 Wis. 16, 69 N. W. 818.

Bridge approach.— An approach to a wagon bridge which gradually ascends from the natural level of the street to the level of the bridge does not impose any additional servitude on the street so as to render the city liable to an abutting owner. Willis *v.* Winona, 59 Minn. 27, 60 N. W. 814, 26 L. R. A. 142. Where the legislature granted a franchise to a company to build a bridge, providing that one of its approaches should conform to the grade of a certain street, it in fact merely established the grade of that part of the street, and hence an abutting owner was entitled to no compensation. Brand *v.* Multnomah County, 38 Oreg. 79, 60 Pac. 390, 62 Pac. 209, 84 Am. St. Rep. 772, 50 L. R. A. 389. Raising the grade of a street by building approaches for a street bridge, for the purpose of abolishing grade railway crossings, is not such a taking of the property of abutting owners as to entitle them to damages. Talbot *v.* New York, etc., R. Co., 151 N. Y. 155, 45 N. E. 382.

Cannot authorize railroad to change.— A city has no power to authorize a railroad to so change the grade of a street as to cause injury to one abutting owner not common to other owners of adjacent lands, unless such owner is compensated. Belt Line St. R. Co. *v.* Crabtree, 2 Tex. App. Civ. Cas. § 662.

No compensation to non-abutting owner.— *In re* Grade Crossing Com'rs, 46 N. Y. App. Div. 473, 61 N. Y. Suppl. 748 [*affirmed* in 166 N. Y. 69, 59 N. E. 706].

50. *Alabama.*— Montgomery *v.* Townsend, 80 Ala. 489, 2 So. 155, 60 Am. Rep. 112.

California.— Eachus *v.* Los Angeles, 130 Cal. 492, 62 Pac. 829, 80 Am. St. Rep. 147; Reardon *v.* San Francisco, 66 Cal. 492, 6 Pac. 317, 56 Am. Rep. 109.

Colorado.— Denver *v.* Bonesteel, 30 Colo. 107, 69 Pac. 595.

Georgia.— Peel *v.* Atlanta, 85 Ga. 138, 11 S. E. 582, 8 L. R. A. 787; Moore *v.* Atlanta, 70 Ga. 611; Atlanta *v.* Green, 67 Ga. 386.

Illinois.— Winnetka *v.* Clifford, 201 Ill. 475, 66 N. E. 384; Chicago *v.* Lonergan, 196 Ill. 518, 63 N. E. 1018; Chicago *v.* Jackson, 196 Ill. 496, 63 N. E. 1013, 1135; Schroeder *v.* Joliet, 189 Ill. 48, 59 N. E. 550, 52 L. R. A. 634; Bloomington *v.* Pollock, 141 Ill. 346, 31 N. E. 146; Elgin *v.* Eaton, 83 Ill. 535, 25 Am. Rep. 412; Chicago *v.* McShane, 102 Ill. App. 239.

Kentucky.—Layman *v.* Beeler, 113 Ky. 221, 67 S. W. 995, 24 Ky. L. Rep. 174; Ludlow *v.* Detweller, 47 S. W. 881, 20 Ky. L. Rep. 894.

Massachusetts.— See Putnam *v.* Boston, etc., R. Corp., 182 Mass. 351, 65 N. E. 790.

Minnesota.—Dickerman *v.* Duluth, 88 Minn. 288, 92 N. W. 1119.

Missouri.— St. Louis, etc., R. Co. *v.* Knapp, 160 Mo. 346, 61 S. W. 300; Hickman *v.* Kansas City, 120 Mo. 110, 25 S. W. 225, 41 Am. St. Rep. 684, 23 L. R. A. 658; Van de Vere *v.* Kansas City, 107 Mo. 83, 17 S. W. 695, 28 Am. St. Rep. 396; Sheehy *v.* Kansas City Cable Co., 94 Mo. 574, 7 S. W. 579, 48 Am. St. Rep. 396; Johnson *v.* Boonville, 85 Mo. App. 199. *Compare* Taylor *v.* St. Louis, 14 Mo. 20, 55 Am. Dec. 89, decided before the words "or damaged" were inserted in the constitution.

Montana.— Less *v.* Butte, 28 Mont. 27, 72 Pac. 140, 98 Am. St. Rep. 545, 61 L. R. A. 601.

destroyed or impaired, it is a taking entitling the owner to compensation.[51] Where the city has given permission to a private corporation to use its streets, either on the surface or below it, such permission is subject to the right of the municipality to change the grade of any street as public convenience may require, and it is not liable for any injury caused thereby to the corporation so using the street.[52]

b. By Railroad. As a general rule the owners of property abutting on a street are entitled to compensation or damages resulting from a change in the grade of the street is changed for the construction and operation of either a commercial[53]

Nebraska.— Harmon *v.* Omaha, 17 Nebr. 548, 23 N. W. 503, 52 Am. Rep. 420.

Ohio.— Grant *v.* Hyde Park, 67 Ohio St. 166, 65 N. E. 891.

Pennsylvania.— *In re* Chatham St., 191 Pa. St. 604, 43 Atl. 365; New Brighton *v.* Peirsol, 107 Pa. St. 280; Lloyd *v.* Philadelphia, 17 Phila. 202; Billinfelt *v.* Adamstown, 5 Lanc. L. Rev. 107.

South Dakota.—Whittaker *v.* Deadwood, 12 S. D. 608, 82 N. W. 202.

Tennessee.— Hamilton County *v.* Rape, 101 Tenn. 222, 47 S. W. 416.

Texas.— San Antonio *v.* Mullaly, 11 Tex. Civ. App. 596, 33 S. W. 256; Texarkana *v.* Talbot, 7 Tex. Civ. App. 202, 26 S. W. 451.

United States.—McElroy *v.* Kansas City, 21 Fed. 257, construing Missouri constitution.

See 18 Cent. Dig. tit. "Eminent Domain," § 269.

Drainage affected.— *In re* Chatham St., 191 Pa. St. 604, 43 Atl. 365.

In Illinois it has been decided that any change in the grade of a street by which egress and ingress are obstructed to the private property of an owner is damaging private property for public use. Chicago *v.* Jackson, 196 Ill. 496, 63 N. E. 1013, 1135 [*affirming* 88 Ill. App. 130]; Joliet *v.* Blower, 155 Ill. 414, 40 N. E. 619; Bloomington *v.* Polleck, 141 Ill. 346, 31 N. E. 146; Rigney *v.* Chicago, 102 Ill. 104.

51. Nevins *v.* Peoria, 41 Ill. 502, 89 Am. Dec. 392; Tinker *v.* Rockford, 36 Ill. App. 460; Hendershott *v.* Ottumwa, 46 Iowa 658, 26 Am. Rep. 182; Vanderlip *v.* Grand Rapids, 73 Mich. 522, 41 N. W. 677, 16 Am. St. Rep. 597, 3 L. R. A. 247; Stearns *v.* Richmond, 88 Va. 992, 14 S. E. 847, 29 Am. St. Rep. 758. See also Broadwell *v.* Kansas, 75 Mo. 213, 42 Am. Rep. 406; Pumpelly *v.* Green Bay, etc., Canal Co., 13 Wall. (U. S.) 166, 20 L. ed. 557.

In Ohio it seems that, apart from a special statute or constitutional provision, the owner of an improved lot abutting on a street must be compensated for injuries caused by a change in grade, when he made his improvements in good faith in accordance with a grade already established, or if in the exercise of ordinary discretion and judgment he made his improvements having reference to probable future improvements in the municipality and with reference also to the right possessed by the municipality to make a reasonable and proper grade for such street. Lotze *v.* Cincinnati, 61 Ohio St. 272, 55 N. E. 828; Akron *v.* Chamberlain, 34 Ohio St. 328, 32 Am. Rep. 367; Cincinnati *v.* Penny, 21 Ohio St. 499, 8 Am. Rep. 73; Jackson *v.* Jackson, 16 Ohio St. 163; Crawford *v.* Delaware, 7 Ohio St. 459; McCombs *v.* Akron, 15 Ohio 474. But see Hickox *v.* Cleveland, 8 Ohio 543, 32 Am. Dec. 730; Scovil *v.* Geddings, 7 Ohio, Pt. II, 211. No compensation is to be made for an injury caused by change of grade in front of an unimproved lot. Leonard *v.* Cassidy, 8 Ohio Cir. Ct. 529, 4 Ohio Cir. Dec. 480.

52. The rule is applied to a gas company in Roanoke Gas Co. *v.* Roanoke, 88 Va. 810, 14 S. E. 665, and to a water company in National Water Works Co. *v.* Kansas City, 20 Mo. App. 237. But where the easement of a railroad company in a city street is dominant to the estate of the city therein, and the city orders the construction of a sewer in such street under the railroad tracks, the city must compensate the company for the cost of alterations necessitated thereby. Baltimore *v.* Cowen, 88 Md. 447, 41 Atl. 900.

53. *Connecticut.*— Nicholson *v.* New York, etc., R. Co., 22 Conn. 74, 56 Am. Dec. 390.

Illinois.— Chicago, etc., R. Co. *v.* Ayres, 106 Ill. 511; Indianapolis, etc., R. Co. *v.* Hartley, 67 Ill. 439, 16 Am. Rep. 624.

Kentucky.— Louisville, etc., R. Co. *v.* Cumnock, 77 S. W. 933, 25 Ky. L. Rep. 1330.

Massachusetts.— Springfield *v.* Connecticut River R. Co., 4 Cush. 63.

New Jersey.—Clark *v.* Elizabeth, 61 N. J. L. 565, 40 Atl. 616, 737; Jersey City *v.* New Jersey Cent. R. Co., 40 N. J. Eq. 417, 2 Atl. 262.

Pennsylvania.— See Ryan *v.* Pennsylvania Schuylkill Valley R. Co., 1 Pa. Co. Ct. 650.

Wisconsin.— Shealy *v.* Chicago, etc., R. Co., 72 Wis. 471, 40 N. W. 145.

See 18 Cent. Dig. tit. "Eminent Domain," § 270.

Where a change of grade at a railroad crossing cuts off one entrance to an alley, which affords one of the means of egress and access from and to lots abutting on the alley, which results in a material diminution in the value of the lots, the right of the owner to compensation cannot be defeated on the ground that his injury is not different from that suffered by the public generally. Pennsylvania Co. *v.* Stanley, 10 Ind. App. 421, 37 N. E. 288, 38 N. E. 421.

Elevation of tracks on right of way creates no liability to adjoining owners. Chicago *v.* Webb, 102 Ill. App. 232.

Change by turnpike company.— A turnpike company which has the right under its charter

or a street railway.[54] But where a railroad which has acquired a right of way in a street acting under the direction of lawful authority, and in order to benefit the public, changes the grade of such street, or in some manner improves it, the abutting owners are not entitled to compensation.[55]

14. Vacation or Change of Highway or Street. While the owner of a lot abutting on a public street has the same right to the use of the street that rests in the public he at the same time has other rights which are special and peculiar to him and the right of ingress and egress is one of them. The right of access is appurtenant to his lot and is private property. To destroy that right is to damage his property, and when this is done for the public good just compensation must be made therefor. When therefore a person owns a lot which abuts upon a portion of a street which is vacated, so that access to the lot is shut off, it is clear that the lot owner is directly injured and that he is entitled to compensation. The closing up of access to the lot is the direct result of the vacating of the street and he by the loss of access to his lot suffers an injury which is not common to the public;[56] and this is true, although the owner still has access to

to change the grade of its road is not liable to an abutting owner for injuries caused by such change of grade. Green *v.* City, etc., R. Co., 78 Md. 294, 28 Atl. 626, 44 Am. St. Rep. 288.

54. *Michigan.*— Nichols *v.* Ann Arbor, etc., St. R. Co., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371. See also Detroit City R. Co. *v.* Mills, 85 Mich. 634, 48 N. W. 1007. But see Austin *v.* Detroit, etc., R. Co., (1903) 96 N. W. 35.

Minnesota.— Newell *v.* Minneapolis, etc., R. Co., 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303.

Missouri.— Placke *v.* Union Depot R. Co., 140 Mo. 634, 41 S. W. 915; Farrar *v.* Midland Electric R. Co., 101 Mo. App. 140, 74 S. W. 500.

Pennsylvania.— Quinn *v.* Lancaster, etc., Narrow-Gauge R. Co., 7 Lanc. Bar 197.

Wisconsin.— See La Crosse City R. Co. *v.* Higbee, 107 Wis. 389, 83 N. W. 701, 51 L. R. A. 923; Hobart *v.* Milwaukee City R. Co., 27 Wis. 194, 9 Am. Rep. 461.

See 18 Cent. Dig. tit. "Eminent Domain," § 270.

Elevated road affected by change of grade. — The rule as to change of grade is not applicable when an elevated railroad company is forced to make extensive changes in its structure by reason of the erection of a viaduct in a street by the city. Manhattan R. Co. *v.* New York, 89 Hun (N. Y.) 429, 35 N. Y. Suppl. 505.

55. Muhlker *v.* New York, etc., R. Co., 173 N. Y. 549, 66 N. E. 558; Fries *v.* New York, etc., R. Co., 169 N. Y. 270, 62 N. E. 358; Lewis *v.* New York, etc., R. Co., 162 N. Y. 202, 56 N. E. 540 [*affirming* 40 N. Y. App. Div. 343, 57 N. Y. Suppl. 1053]; Rauenstein *v.* New York, etc., R. Co., 136 N. Y. 528, 32 N. E. 1047, 18 L. R. A. 768, 120 N. Y. 661, 24 N. E. 1020 [*distinguishing* Reining *v.* New York, etc., R. Co., 128 N. Y. 157, 28 N. E. 640, 14 L. R. A. 133; Story *v.* New York El. R. Co., 90 N. Y. 122, 43 Am. Rep. 146]; Ottenot *v.* New York, etc., R. Co., 119 N. Y. 603, 23 N. E. 169. See also Wolfe *v.* Covington, etc., R. Co., 15 B. Mon. (Ky.) 404; Welde *v.* New York, etc., R. Co., 168 N. Y. 597, 61 N. E. 554 [*reversing* 66 N. Y. Suppl. 1147 (*affirming* 29 Misc. 13, 60 N. Y. Suppl. 319)]; Conklin *v.* New York, etc., R. Co., 102 N. Y. 107, 6 N. E. 663; Uline *v.* New York Cent., etc., R. Co., 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661; Welde *v.* New York, etc., R. Co., 28 N. Y. App. Div. 379, 51 N. Y. Suppl. 290; Iron Mountain R. Co. *v.* Bingham, 87 Tenn. 522, 11 S. W. 705, 4 L. R. A. 622. But see Salazer *v.* New York, etc., R. Co., 49 N. Y. Suppl. 1065, where it was held that abutting owners were entitled to compensation from a railroad company which in consequence of certain river improvements was compelled by statute to elevate its railroad structure, change the grade of its road, and construct a new railroad bridge at an increased elevation.

56. *Connecticut.*—Cullen *v.* New York, etc., R. Co., 66 Conn. 211, 33 Atl. 910.

Illinois.— Chicago *v.* Burcky, 158 Ill. 103, 42 N. E. 178, 49 Am. St. Rep. 142, 29 L. R. A. 568.

Kansas.— Heller *v.* Atchison, etc., R. Co., 28 Kan. 625.

Kentucky.— Bannon *v.* Rohmeiser, 90 Ky. 48, 13 S. W. 444, 11 Ky. L. Rep. 987, 29 Am. St. Rep. 355; Transylvania University *v.* Lexington, 3 B. Mon. 25, 38 Am. Dec. 173.

Maryland.—Van Witsen *v.* Gutman, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403.

Massachusetts.—See Webster *v.* Lowell, 142 Mass. 324, 8 N. E. 54.

Michigan.— Pearsall *v.* Eaton County, 74 Mich. 558, 42 N. W. 77, 4 L. R. A. 193.

Missouri.— Heinrich *v.* St. Louis, 125 Mo. 424, 28 S. W. 626, 46 Am. St. Rep. 490. *Compare* Glasgow *v.* St. Louis, 107 Mo. 198, 17 S. W. 743.

Nebraska.— Lindsay *v.* Omaha, 30 Nebr. 512, 46 N. E. 621, 27 Am. St. Rep. 415.

New York.— See Halloway *v.* Delano, 64 Hun 34, 18 N. Y. Suppl. 704.

North Carolina.—Moose *v.* Carson, 104 N. C. 431, 10 S. E. 689, 17 Am. St. Rep. 681, 7 L. R. A. 548.

Tennessee.—Anderson *v.* Turbeville, 6 Coldw. 150.

United States.— Chicago *v.* Baker, 98 Fed. 830, 39 C. C. A. 318.

his property by another street.[57] A lot owner is not entitled to compensation for the vacation of a portion of a public street not bordering upon his lot and not necessary to afford him access thereto.[58] Even a non-abutting owner has a right to compensation if his right of access is entirely cut off,[59] or is impaired to a substantial degree.[60] Narrowing a street on which a lot abuts is not such an injury as entitles the owner of the lot to compensation if the means of ingress and egress and the supply of light and air are not impaired.[61] An abutting owner is

See 18 Cent. Dig. tit. "Eminent Domain," § 267.

Contra.—Levee Dist. No. 9 *v.* Farmer, 101 Cal. 178, 35 Pac. 569, 23 L. R. A. 388; Barr *v.* Oskaloosa, 45 Iowa 275; Brady *v.* Shinkle, 40 Iowa 576; Ellsworth *v.* Chickasaw County, 40 Iowa 571; State *v.* Deer Lodge County, 19 Mont. 582, 49 Pac. 147; McGee's Appeal, 114 Pa. St. 470, 8 Atl. 237; Godley *v.* Philadelphia, 7 Phila. (Pa.) 637; Bauer *v.* Andrews, 7 Phila. (Pa.) 359.

New highway established.— Huff *v.* Donehoo, 109 Ga. 638, 34 S. E. 1035.

Vacating alley.— Horton *v.* Williams, 99 Mich. 423, 58 N. W. 369.

Vacated by construction of railroad.— If a highway is discontinued by reason of the construction of a railroad in it, an abutting owner may recover any special damages sustained. Louisville, etc., R. Co. *v.* Lanter, 47 Ill. App. 339; Ft. Scott, etc., R. Co. *v.* Fox, 42 Kan. 490, 22 Pac. 583; Johnston *v.* Old Colony R. Co., 18 R. I. 642, 29 Atl. 594, 49 Am. St. Rep. 800. The authority contained in the general railroad laws of Pennsylvania to a railroad company occupying a public road to supply it by another road, made at their expense, does not divest the right of the abutting owner to compensation for the occupation of the road by the railroad. Phillips *v.* Dunkirk, etc., R. Co., 78 Pa. St. 177.

No compensation for diversion of traffic.— Damages cannot be recovered for injury to property by discontinuing a portion of the street on which it is situated, so that traffic is diverted from it, trade diminished, and its value lessened, if access to it still exists, although by a longer route. Stanwood *v.* Malden, 157 Mass. 17, 31 N. E. 702, 16 L. R. A. 591; Cram *v.* Laconia, 71 N. H. 41, 51 Atl. 635, 57 L. R. A. 282. See also Dennis *v.* Mobile, etc., R. Co., 137 Ala. 649, 35 So. 30, 97 Am. St. Rep. 69; Huff *v.* Donehoo, 109 Ga. 638, 34 S. E. 1035.

Statutory provisions as to compensation for vacation.— Brown *v.* Robertson, 123 Ill. 631, 15 N. E. 30; Fesser *v.* Achenbach, 29 Ill. App. 373; Cook *v.* Quick, 127 Ind. 477, 26 N. E. 1007; Cram *v.* Laconia, 71 N. H. 41, 51 Atl. 635, 57 L. R. A. 282; People *v.* New York, 59 Hun (N. Y.) 407, 13 N. Y. Suppl. 404.

57. Ft. Scott, etc., R. Co. *v.* Fox, 42 Kan. 490, 22 Pac. 583 [*distinguishing* Kansas, etc., R. Co. *v.* Cuykendall, 42 Kan. 234, 21 Pac. 1051, 16 Am. St. Rep. 479]; Heinrich *v.* St. Louis, 125 Mo. 424, 28 S. W. 626, 46 Am. St. Rep. 490. *Contra, In re* Buffalo Grade Crossing Com'rs, 166 N. Y. 69, 59 N. E. 706; Egerer *v.* New York Cent., etc., R. Co., 130 N. Y. 108, 29 N. E. 95, 14 L. R. A. 381; Fearing *v.* Irwin, 55 N. Y. 486 [*affirming* 4 Daly 385]; Coster *v.* Albany, 43 N. Y. 399; Radcliff *v.* Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357.

58. *Illinois.*— East St. Louis *v.* O'Flynn, 119 Ill. 200, 10 N. E. 395, 59 Am. Rep. 795.

Massachusetts.— Stanwood *v.* Malden, 157 Mass. 17, 31 N. E. 702, 16 L. R. A. 591; Smith *v.* Boston, 7 Cush. 254.

Missouri.— Glascow *v.* St. Louis, 107 Mo. 198, 17 S. W. 743.

New Hampshire.— Cram *v.* Laconia, 71 N. H. 41, 31 Atl. 635, 57 L. R. A. 282.

New Jersey.—Kean *v.* Elizabeth, 54 N. J. L. 462, 24 Atl. 495.

New York.— Kings County F. Ins. Co. *v.* Stevens, 101 N. Y. 411, 5 N. E. 353.

See 18 Cent. Dig. tit. "Eminent Domain," § 267.

Compare Gargan *v.* Louisville, etc., R. Co., 89 Ky. 212, 12 S. W. 259, 11 Ky. L. Rep. 489, 6 L. R. A. 340. See also *In re* Melon St., 182 Pa. St. 397, 38 Atl. 482, 38 L. R. A. 275.

Altering the course of a street is not taking private property for public use, as contemplated in the constitution. A citizen of a city who resides on a street whose course has been changed by the authorities, and is thereby compelled to use a more circuitous route to and from his place of business, does not suffer such special and peculiar damage as will enable him to maintain an action against the city for damages or injunction. Cherry *v.* Rock Hill, 48 S. C. 553, 26 S. E. 798.

59. Brakken *v.* Minnesota, etc., R. Co., 29 Minn. 41, 11 N. W. 124. See also Davis *v.* Hampshire County Com'rs, 153 Mass. 218, 26 N. E. 848, 11 L. R. A. 750; Smith *v.* Boston, 7 Cush. (Mass.) 254.

Property near street vacated.— There may be a special injury to property in the vicinity of a street by the vacation thereof, for which the owner might recover damages, as by the shutting off of property or egress from it, or possibly in some other way. Doppas *v.* Cincinnati, etc., R. Co., 19 Ohio Cir. Ct. 582. Where a street by obstruction by a steam railroad is cut off near enough to property abutting on such street to materially affect its value, then the property-owner has a right to compensation, and it makes no difference whether the fee of the street is in the municipality or in the property-owner. Madden *v.* Pennsylvania R. Co., 21 Ohio Cir. Ct. 73.

60. Dantzer *v.* Indianapolis Union R. Co., 141 Ind. 604, 39 N. E. 223, 50 Am. St. Rep. 343, 34 L. R. A. 769.

61. Brown *v.* San Francisco, 124 Cal. 274, 57 Pac. 82. *Compare* Rensselaer *v.* Leopold, 106 Ind. 29, 5 N. E. 761.

entitled to compensation for land taken for widening a highway.[62] The conversion of a county road into a city street does not impose an additional servitude on the land occupied by the road requiring additional compensation to be made to the owner of the fee thereof, even though adjacent property becomes liable to assessment for maintaining and improving the street.[63] The designation of a city street as a public driveway for pleasure driving only, when duly authorized by statute, is not a taking of private property for public use for which compensation must be made.[64] In Texas, where the public highways are classified, the change of a road from a third-class one to a second-class one, without compensation to the owners of abutting lands, is unconstitutional.[65]

15. DISCONTINUANCE OF PARK. The owners of land around a public park, the fee of which is in the city, have no such right or interest therein as will entitle them to compensation when the city discontinues it under legislative sanction.[66]

16. GRANTING SIMILAR FRANCHISES. Where the grant is not by its terms exclusive, the legislature is not precluded from granting a similar franchise or authorizing the construction of a rival way or structure which may greatly impair or even totally destroy the value of the former grant and such damage is not a taking of the former franchise which entitles its owner to compensation.[67] But if such structure is erected in such a manner as to invade the rights of the first grantee and to inflict material physical injury to his property, there is a taking of private property.[68]

17. ASSESSMENT AND TAXATION OF BENEFITS. The fact that adjacent property is made liable to assessment for the purpose of paying for street improvements does not constitute a taking of such property for public use,[69] unless the assessment is grossly disproportionate to the benefit which may be reasonably supposed to accrue to the land assessed.[70]

62. *Georgia.*— Fulton County *v.* Amorous, 89 Ga. 614, 16 S. E. 201.

Massachusetts.— White *v.* Foxborough, 151 Mass. 28, 23 N. E. 652; Edmands *v.* Boston, 108 Mass. 535.

New York.— Matter of New York, 74 N. Y. App. Div. 197, 77 N. Y. Suppl. 737.

North Carolina.— Mullen *v.* Lake Drummond Canal, etc., Co., 130 N. C. 496, 41 S. E. 1027, 61 L. R. A. 833.

Pennsylvania.— *In re* Barbadoes St., 8 Phila. 498; *In re* Girard Ave., 44 Leg. Int. 166.

Instances.— Where a public highway was originally laid out six rods in width, but was fenced only four rods wide and used with that width for thirty years, and there was no evidence that the public had suffered any injury from the fences, the commissioners of highways have no right to enter upon the premises of those through whose land the road was originally laid out and remove the fences, so as to make the road six rods wide, without ascertaining and paying the damages to such owners. Peckham *v.* Henderson, 27 Barb. (N. Y.) 207.

63. Huddleston *v.* Eugene, 34 Oreg. 343, 55 Pac. 868, 43 L. R. A. 444.

64. Cicero Lumber Co. *v.* Cicero, 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L. R. A. 696. *Compare In re* Euclid Ave., 8 Ohio S. & C. Pl. Dec. 86, 6 Ohio N. P. 160.

65. Bounds *v.* Kirven, 63 Tex. 159.

Reason for rule.— Wooldridge *v.* Eastland County, 70 Tex. 680, 8 S. W. 503; Bradley *v.* State, 22 Tex. App. 330, 2 S. W. 828; Thompson *v.* State, 22 Tex. App. 328, 3 S. W. 232.

Change from second to first class.— The long use of a second-class road by a county would not give it the right to change it to a first-class road, sixty feet in width, without compensation. Llano County *v.* Scott, 2 Tex. Civ. App. 408, 21 S. W. 177.

66. Clark *v.* Providence, 16 R. I. 337, 15 Atl. 763, 1 L. R. A. 725.

67. Dyer *v.* Tuskaloosa Bridge Co., 2 Port. (Ala.) 296, 27 Am. Dec. 655; Charles River Bridge *v.* Warren Bridge, 7 Pick. (Mass.) 344; Rensselaer, etc., R. Co. *v.* Davis, 43 N. Y. 137; Ft. Plains Bridge Co. *v.* Smith, 30 N. Y. 44; Auburn, etc., Plank Road Co. *v.* Douglass, 9 N. Y. 444; *In re* Hamilton Ave., 14 Barb. (N. Y.) 405; Charleston, etc., Turnpike Co. *v.* Montgomery County, 100 Tenn. 417, 45 S. W. 345, 58 L. R. A. 155; Hyde Ferry Turnpike Co. *v.* Davidson County, 91 Tenn. 291, 18 S. W. 626.

Parallel railroad.— Sixth Ave. R. Co. *v.* Gilbert El. R. Co., 43 N. Y. Super. Ct. 292 [*reversing* 41 N. Y. Super. Ct. 489].

Exclusive grant.— Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716.

68. Western Union Tel. Co. *v.* Champion Electric Light Co., 9 Ohio Dec. (Reprint) 540, 14 Cinc. L. Bul. 527.

69. Roberts *v.* Smith, 115 Mich. 5, 72 N. W. 1091; Huddleston *v.* Eugene, 34 Oreg. 343, 55 Pac. 868, 43 L. R. A. 444.

70. Bloomington *v.* Latham, 142 Ill. 462, 32 N. E. 506, 18 L. R. A. 487; Weed *v.* Boston,

18. When Property Previously Devoted to Public Use — a. Compensation to Municipal Corporations. Over property which a municipality has acquired and holds exclusively for purposes deemed strictly public, that is, which the municipality holds merely as an agency of the state government for the performance of the strictly public duties devolved upon it and which has been already appropriated to one public use, the legislature may exercise a control to the extent of requiring the municipality, without receiving compensation therefor, to allow the use of such property for another public purpose.[71] Thus where the fee of the streets in a city is vested in the corporation in trust for the public, the legislature may authorize them to be used by a railroad company in the construction of its road without the consent of the city and without compensation to the city.[72] A telephone line may be erected in the streets of a city, which holds the title to its streets, without compensation to the city for such use, but where it is charged with the duty of keeping the streets under its control in repair, the city may be allowed compensation to an amount sufficient to make the repairs rendered necessary by such additional use.[73] This legislative power of control, however, is not universal and does not extend to property acquired by a municipality for special purposes not deemed strictly and exclusively public and political, but in respect to which a municipality is deemed rather to have a right of private ownership, of which it cannot be deprived against its will, save by the right of eminent domain with payment of compensation.[74] The transfer of property held by a municipality for strictly public purposes from one agency of the government to another, to be used for similar purposes, is not such a taking as necessitates compensation to the municipality.[75]

b. Compensation to Quasi-Public Corporations — (i) *In General.* One corporation cannot take property which has already been taken by another under the right of eminent domain, except upon payment to the latter of just compensation.[76]

172 Mass. 28, 51 N. E. 204, 42 L. R. A. 642; Rhoades *v.* Toledo, 6 Ohio Cir. Ct. 9, 3 Ohio Cir. Dec. 325; Hutcheson *v.* Storrie, 92 Tex. 685, 51 S. W. 848, 71 Am. St. Rep. 884, 45 L. R. A. 289. See also Zoeller *v.* Kellogg, 4 Mo. App. 163; King *v.* Portland, 28 Oreg. 402, 63 Pac. 2, 52 L. R. A. 812.

71. People *v.* Rochester, 50 N. Y. 525. See also Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; Mt. Hope Cemetery *v.* Boston, 158 Mass. 509, 33 N. E. 695, 35 Am. St. Rep. 515; *In re* Lawrence, 119 Fed. 453.

A bridge belonging to a county may be taken, under legislative authority, by a turnpike company for a part of its road without making compensation to the county. Monmouth County *v.* Red Bank, etc., Turnpike, 18 N. J. Eq. 91.

72. Clinton *v.* Cedar Rapids, etc., R. Co., 24 Iowa 455 (in this case Cole, J., was of opinion that a city has such an interest in its streets as to be entitled to compensation for any damages resulting from their use by a railroad); *In re* Milbridge, etc., Electric R. Co., 96 Me. 110, 51 Atl. 818; Portland, etc., R. Co. *v.* Portland, 14 Oreg. 188, 12 Pac. 265, 58 Am. Rep. 299 (public levee used for constructing railroad). *Contra*, Donnaher *v.* State, 8 Sm. & M. (Miss.) 649.

Rule applies to street railways.—Savannah, etc., R. Co. *v.* Savannah, 45 Ga. 602; Kellinger *v.* Forty-second St., etc., R. Co., 50 N. Y. 206; People *v.* Kerr, 27 N. Y. 188, 25 How. Pr. (N. Y.) 258 [*affirming* 37 Barb. 357]. See also People *v.* Kerr, 38 Barb. (N. Y.) 369.

In England the rule is that the vesting of a street in a municipal authority vests no property in such authority beyond the surface of the street and such portion as may be absolutely necessary to its repairs and management, but does not vest the soil or land in such municipality as owner. Where therefore part of a street is converted into a tramway, there is no taking of property, and no compensation is payable to the municipal authority. Sydney Municipal Council *v.* Young, [1898] A. C. 457, 67 L. J. P. C. 40, 78 L. T. Rep. N. S. 365, 46 Wkly. Rep. 561.

County's right to damages.— St. Paul, etc., R. Co. *v.* Grayson County, 31 Tex. Civ. App. 611, 73 S. W. 64.

73. Zanesville *v.* Zanesville Tel., etc., Co., 64 Ohio St. 67, 59 N. E. 781, 83 Am. St. Rep. 725, 51 L. R. A. 150 [*reversing* on rehearing 63 Ohio St. 442, 59 N. E. 109].

74. See Mt. Hope Cemetery *v.* Boston, 158 Mass. 509, 33 N. E. 695, 35 Am. St. Rep. 515. See also Browne *v.* Turner, 176 Mass. 9, 56 N. E. 969.

Cannot be taken for state armory.— Daniel *v.* Columbus, 8 Ohio Cir. Ct. 642, 4 Ohio Cir. Dec. 293.

Land held for park purposes.— *In re* Ninth Ave., etc., 45 N. Y. 729.

75. Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572; Rawson *v.* Spencer, 113 Mass. 40.

76. Indianapolis, etc., Gravel Road Co. *v.* Belt R. Co., 110 Ind. 5, 10 N. E. 923. See

(II) *Street or Highway on Railroad.* A railroad company is entitled to compensation for the location of a public highway over or across its right of way.[77]

(III) *Highway or Railroad on Turnpike.* When a highway,[78] a commercial railroad,[79] or a street railroad is laid out over a turnpike which has been constructed by a duly authorized turnpike company compensation must be made to such company.[80]

(IV) *Railroad on Right of Way of Another Railroad.* One railroad or street railway company has no right to appropriate without compensation the right of way or other property of another, for the construction and operation of its road.[81] The crossing or intersecting of one railroad by another is such a tak-

also Denver Power, etc., Co. *v.* Denver, etc., R. Co., 30 Colo. 204, 69 Pac. 568, 60 L. R. A. 383.

Right of street railway in street.— Third Ave. R. Co. *v.* New York El. R. Co., 19 Abb. N. Cas. (N. Y.) 261.

77. *Illinois.*— Illinois Cent. R. Co. *v.* Mattoon Highway Com'rs, 161 Ill. 247, 43 N. E. 1100; Illinois Cent. R. Co. *v.* Bloomington, 76 Ill. 447. See also Chicago, etc., R. Co. *v.* Cicero, 154 Ill. 656, 39 N. E. 574.

Kansas.— Chicago, etc., R. Co. *v.* Chautauqua County, 49 Kan. 763, 31 Pac. 736.

Massachusetts.— New York, etc., R. Co. *v.* Blackstone, (1904) 69 N. E. 315; Old Colony, etc., R. Co. *v.* Plymouth, 14 Gray 155.

New Jersey.— Paterson, etc., R. Co. *v.* Newark, 61 N. J. L. 80, 38 Atl. 689; New York, etc., R. Co. *v.* Capner, 49 N. J. L. 555, 9 Atl. 781; *In re* Morris, etc., R. Co., 9 N. J. L. J. 75.

Ohio.— Toledo, etc., R. Co. *v.* Fostoria, 7 Ohio Cir. Ct. 293, 4 Ohio Cir. Dec. 602.

Pennsylvania.— Keim *v.* Philadelphia, 2 Pa. Co. Ct. 149.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 224, 316.

Compare Baltimore, etc., R. Co. *v.* State, 159 Ind. 510, 65 N. E. 508.

Street under railroad.— Where a street is extended under railroad tracks, the company is entitled to be reimbursed the cost of a bridge necessary to carry its trains over the street. Cincinnati, etc., R. Co. *v.* Troy, 68 Ohio St. 510, 67 N. E. 1051.

Cost of constructing and maintaining crossings.— Railroads cannot be compelled to erect and maintain crossings at their own expense. The imposition of such a burden would be the taking of private property for public use without just compensation. Illinois Cent. R. Co. *v.* Bloomington, 76 Ill. 447. See also People *v.* Detroit, etc., R. Co., 79 Mich. 471, 44 N. W. 934, 7 L. R. A. 717. But see Albany Northern R. Co. *v.* Brownell, 24 N. Y. 345.

In New York it is provided by statute that a highway may be laid across a railroad track without compensation and this statute has been held to be constitutional. Albany Northern R. Co. *v.* Brownell, 24 N. Y. 345; Boston, etc., R. Co. *v.* Greenbush, 5 Lans. 461. And there is nothing unlawful in compelling the railroad company to make such excavations or embankments as may be necessary for taking the highway across its road. Albany Northern R. Co. *v.* Brownell, 24 N. Y. 345 [*overruling* Miller *v.* New York, etc., R. Co., 21 Barb. 513]. This statute does not authorize the laying out of a highway across a railroad without compensation, if the effect is to take or interfere with a station lawfully constructed by the company, unless compensation is made. Manhattan R. Co. *v.* New York, 89 Hun 429, 35 N. Y. Suppl. 505. The term "tracks" is held to include only such tracks as are used for traffic, turnouts, and switches; the statute does not authorize the construction without compensation of streets across land on which tracks are laid for the purpose of storing cars and making up trains. Boston, etc., R. Co. *v.* Greenbush, 52 N. Y. 510.

78. Barber *v.* Andover, 8 N. H. 398; *In re* Kensington Third Div., 2 Rawle (Pa.) 445; Armington *v.* Barnet, 15 Vt. 745, 40 Am. Dec. 705.

Under the California statute, a plank-road, turnpike, or other toll road becomes, after the expiration of the period during which it is authorized to collect tolls, a free public highway, and the owners thereof are not entitled to compensation for its use as such. McMullin *v.* Leitch, 83 Cal. 239, 23 Pac. 294; People *v.* O'Keefe, 79 Cal. 171, 21 Pac. 539; People *v.* Davidson, 79 Cal. 166, 21 Pac. 538.

79. Ellicottville, etc., Plank Road Co. *v.* Buffalo, etc., R. Co., 20 Barb. (N. Y.) 644.

80. New York, etc., R. Co. *v.* Fair Haven, etc., R. Co., 70 Conn. 610, 40 Atl. 607, 41 Atl. 169; Hinnershitz *v.* United Traction Co., 206 Pa. St. 91, 55 Atl. 841. See also Perkiomen, etc., Turnpike Road Co. *v.* Berks County, 196 Pa. St. 21, 46 Atl. 98; Heilamer *v.* Lebanon, etc., R. Co., 145 Pa. St. 23, 23 Atl. 389.

81. *Illinois.*— Suburban R. Co. *v.* Metropolitan West Side El. R. Co., 193 Ill. 217, 61 N. E. 1090.

Michigan.— Grand Rapids, etc., R. Co. *v.* Grand Rapids, etc., R. Co., 35 Mich. 265, 24 Am. Rep. 545.

Minnesota.— State *v.* Chicago, etc., R. Co., 36 Minn. 402, 31 N. W. 365.

New York.— Sixth Ave. R. Co. *v.* Kerr, 72 N. Y. 330.

United States.— Fidelity Trust, etc., Co. *v.* Mobile St. R. Co., 53 Fed. 687.

No right to use rails of another company.— Philadelphia *v.* Continental Pass. R. Co., 2 Wkly. Notes Cas. (Pa.) 283.

A horse railroad company may exclude from its tracks the cars of another horse railroad company, although the latter is given authority by the legislature to use such tracks, un-

ing of property as requires compensation to be made.[82] In a number of cases, however, it has been held that a street railway company may lay its tracks across a railroad, without making compensation.[83]

(v) *Telegraph or Telephone on Railroad.* A telegraph or telephone company cannot establish its lines over the right of way of a railroad company without making compensation to the railroad company therefor.[84]

c. Compensation to Individuals — (i) *In General.* Where the land of an individual is taken under legislative authority for a public use, and a full compensation is paid to the owner for a perpetual easement in it, the owner is not entitled to further compensation when the same land is afterward appropriated by legislative authority to another public use of a like kind.[85]

(ii) *For New Use of Street or Highway* — (a) *In General.* It is well settled that where the public have only an easement in the street, and the fee of the soil of the street is retained in the abutting owner, any new use of the street except a street use proper constitutes an additional servitude for which the abutting owner must be compensated.[86] Where this fee is taken by legislative author-

less compensation is required to be made. Citizens' Coach Co. *v.* Camden Horse R. Co., 33 N. J. Eq. 267, 36 Am. Rep. 542.

Use of common right of way.— Boston, etc., R. Corp. *v.* Old Colony R. Corp., 12 Cush. (Mass.) 605.

Constructing road over sidings of another company.— Philadelphia, etc., R. Co. *v.* Berks County R. Co., 2 Woodw. (Pa.) 361.

82. *Alabama.*—Birmingham Traction Co. *v.* Birmingham R., etc., Co., 119 Ala. 129, 24 So. 368; Memphis, etc., R. Co. *v.* Birmingham, etc., R. Co., 96 Ala. 571, 11 So. 642, 18 L. R. A. 166.

Georgia.— Georgia Midland, etc., R. Co. *v.* Columbus Southern R. Co., 89 Ga. 205, 18 S. E. 305.

Illinois.— Chicago, etc., R. Co. *v.* Springfield, etc., R. Co., 67 Ill. 142; Chicago, etc., R. Co. *v.* Englewood Connecting R. Co., 17 Ill. App. 141; Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 15 Ill. App. 587.

Massachusetts.— Grand Junction R., etc., Co. *v.* Middlesex County Com'rs, 14 Gray 553.

New Jersey.— See National Docks, etc., Connecting R. Co. *v.* State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. Rep. 421. *Compare* Lehigh Valley R. Co. *v.* Dover, etc., R. Co., 43 N. J. L. 528.

Ohio.— Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604.

United States.—See Missouri, etc., R. Co. *v.* Texas, etc., R. Co., 10 Fed. 497, 4 Woods 360.

See 18 Cent. Dig. tit. "Eminent Domain," § 226.

Contra.— Kansas City, etc., R. Co. *v.* St. Joseph Terminal R. Co., 97 Mo. 457, 10 S. W. 826, 3 L. R. A. 240.

83. *Connecticut.*— New York, etc., R. Co. *v.* Fair Haven, etc., R. Co., 70 Conn. 610, 40 Atl. 607, 41 Atl. 169; New York, etc., R. Co. *v.* Bridgeport Traction Co., 65 Conn. 410, 32 Atl. 953, 29 L. R. A. 367.

Indiana.— Chicago, etc., Terminal R. Co. *v.* Whiting, etc., R. Co., 139 Ind. 297, 38 N. E. 604, 47 Am. St. Rep. 264, 26 L. R. A. 337.

Kentucky.—Elizabethtown, etc., Co. *v.* Ashland, etc., Co., 96 Ky. 347, 26 S. W. 181, 16 Ky. L. Rep. 42.

Nebraska.— Chicago, etc., R. Co. *v.* Steel, 47 Nebr. 741, 66 N. W. 830.

Pennsylvania.— Delaware, etc., R. Co. *v.* Wilkes-Barre, etc., R. Co., 11 Pa. Co. Ct. 165.

See 18 Cent. Dig. tit. "Eminent Domain," § 318.

But see Birmingham Traction Co. *v.* Birmingham R., etc., Co., 119 Ala. 129, 24 So. 268; Central Pass. R. Co. *v.* Philadelphia, etc., R. Co., 95 Md. 428, 52 Atl. 752.

84. Southwestern R. Co. *v.* Southern, etc., Tel. Co., 46 Ga. 43, 12 Am. Rep. 585. American Tel., etc., Co. *v.* Pearce, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200; Phillips *v.* Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022; 89 Am. St. Rep. 866; Montana Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 114 Fed. 787; Atlantic, etc., Tel. Co. *v.* Chicago, etc., R. Co., 2 Fed. Cas. No. 632, 6 Biss. 158. See also Western Union Tel. Co. *v.* American Union Tel. Co., 29 Fed. Cas. No. 17,444, 9 Biss. 72.

85. Chase *v.* Sutton Mfg. Co., 4 Cush. (Mass.) 152; *In re* Wellington, 16 Pick. (Mass.) 87, 26 Am. Dec. 631; Peirce *v.* Sumersworth, 10 N. H. 369.

Side-tracks constructed on land deeded to a railroad for a right of way are not an additional burden entitling the grantor to compensation. San Antonio, etc., R. Co. *v.* Faires, (Tex. Civ. App. 1893) 26 S. W. 82.

Change of railroad grade.— Where, however, a change is made in the grade of a railroad after damages have once been assessed, and such change results in injury to the property over which it runs, additional damages may be recovered. Chicago, etc., R. Co. *v.* Cogswell, 44 Ill. App. 388.

Part of land previously taken.— Where village trustees lay out a road, and a part of the land taken was previously used as a highway, the landowner is entitled to pay for such part of his land only as is taken under the order laying out the new road. People *v.* Haverstraw, 20 N. Y. Suppl. 7.

86. *Alabama.*— Western R. Co. *v.* Alabama Great Trunk R. Co., 96 Ala. 272, 14 So. 483, 17 L. R. A. 474.

ity, the abutting owners are entitled to substantial compensation.[87] In a number of well settled cases distinctions based upon the legal ownership of the fee have been disregarded and the doctrine announced by them is, that whether the fee in the street is in the abutter, subject to the rights of the public, that is, to the paramount rights of the public for street uses proper, or whether the fee is in the public for street uses proper, in either case the abutter is entitled to the benefit of the street for all uses except street uses proper, subject of course to legislative and municipal regulations; and that such rights are property or property rights in the abutter which can only be taken away by the legislature on the condition of making compensation. And the abutting owner's rights in the street are not affected by the source from which he derives his title. If the abutter owns the fee of the street his rights may be said to be legal in their nature. If he does not own the fee those rights are in the nature of equitable easements in fee, the soil of the street being the servient, the abutting owner's lot being the dominant, tenement.[88] It has been held that, even where the fee of the street is in the abutting owners, an abutting owner on one side of the street, owning as he does the fee of only the half of the street next to him,[89] is not entitled to compensation for the taking of the other half of the street for another public use.[90] According to some authorities there is an essential distinction between the right to use city streets and suburban highways; a city street being subject to a greater servitude in favor of the public than is a road in the open country.[91]

California.—Porter *v.* Pacific Coast R. Co., (1888) 18 Pac. 428.

Connecticut.— McKeon *v.* New York, etc., R. Co., 75 Conn. 656, 53 Atl. 653, 61 L. R. A. 730.

Illinois.— Stetson *v.* Chicago, etc., R. Co., 75 Ill. 74; Indianapolis, etc., R. Co. *v.* Hartley, 67 Ill. 439, 16 Am. Rep. 624.

Iowa.— Kucheman *v.* C. C. & D. R. Co., 46 Iowa 366.

Louisiana.— See Bruning *v.* New Orleans Canal, etc., R. Co., 12 La. Ann. 541.

Massachusetts.— Springfield *v.* Connecticut River, etc., R. Co., 4 Cush. 63.

New Jersey.— Starr *v.* Camden, etc., R. Co., 24 N. J. L. 592; Chamberlane *v.* Elizabethport Steam Cordage Co., 41 N. J. Eq. 43, 2 Atl. 775; Higbie *v.* Camden, etc., R. Co., 19 N. J. Eq. 276.

New York.— Williams *v.* New York Cent. R. Co., 16 N. Y. 97, 69 Am. Dec. 651; Fanning *v.* Osborne, 34 Hun 121; Kelsey *v.* King, 33 How. Pr. 39, 1 Transcr. App. 133.

South Dakota.— Kirby *v.* Citizens' Telephone Co., (1903) 97 N. W. 3.

Tennessee.— East End, etc., R. Co. *v.* Doyle, 88 Tenn. 747, 13 S. W. 936, 17 Am. St. Rep. 933, 9 L. R. A. 100.

Wisconsin.— La Crosse City R. Co. *v.* Higbie, 107 Wis. 389, 83 N. W. 701, 51 L. R. A. 923; Sherman *v.* Milwaukee, etc., R. Co., 40 Wis. 645.

See 18 Cent. Dig. tit. "Eminent Domain," § 218.

87. Matter of Buffalo, 131 N. Y. 293, 30 N. E. 233, 27 Am. St. Rep. 592, 15 L. R. A. 413 [*affirming* 15 N. Y. Suppl. 775, and *distinguishing In re* Twenty-Ninth St., 1 Hill (N. Y.) 189; *In re* Twenty-Second St., 19 Wend. (N. Y.) 128; Champlin *v.* Laytin, 18 Wend. (N. Y.) 407, 31 Am. Dec. 382; Livingston *v.* New York, 8 Wend. (N. Y.) 85, 22 Am. Dec. 622; *In re* New York, 2 Wend. (N. Y.) 472; Matter of New York, 1 Wend. (N. Y.) 262]. See also Matter of Central Park Extension, 16 Abb. Pr. (N. Y.) 56.

88. *Colorado.*— Denver Circle R. Co. *v.* Nestor, 10 Colo. 403, 15 Pac. 714.

Minnesota.— Lamm *v.* Chicago, etc., R. Co., 45 Minn. 71, 47 N. W. 453, 10 L. R. A. 268.

Mississippi.— Theobold *v.* Louisville, etc., R. Co., 66 Miss. 279, 6 So. 230, 14 Am. St. Rep. 564, 4 L. R. A. 735.

Missouri.— Lakeland *v.* North Missouri R. Co., 31 Mo. 180.

New York.— Wagner *v.* Metropolitan El. R. Co., 104 N. Y. 665, 10 N. E. 535; Lahr *v.* Metropolitan El. R. Co., 104 N. Y. 268, 10 N. E. 528.

North Carolina.— White *v.* Northwestern North Carolina R. Co., 113 N. C. 610, 18 S. E. 330, 37 Am. St. Rep. 639, 22 L. R. A. 627.

Ohio.— Schaaf *v.* Cleveland, etc., R. Co., 66 Ohio St. 215, 64 N. E. 145; Callen *v.* Columbus Edison Electric Light Co., 66 Ohio St. 166, 64 N. E. 141.

Oregon.— Willamette Iron Works Co. *v.* Oregon R., etc., Co., 26 Oreg. 224, 37 Pac. 1016, 46 Am. St. Rep. 620, 29 L. R. A. 88.

89. Florida Southern R. Co. *v.* Brown, 23 Fla. 104, 1 So. 512; Harrington *v.* St. Paul, etc., R. Co., 17 Minn. 215; McQuaid *v.* Portland, etc., R. Co., 18 Oreg. 237, 22 Pac. 899.

90. Haslett *v.* New Albany Belt, etc., R. Co., 7 Ind. App. 603, 34 N. E. 845; Sinnott *v.* Chicago, etc., R. Co., 81 Wis. 95, 50 N. W. 1097; Oshkosh First Cong. Church, etc. *v.* Milwaukee, etc., R. Co., 77 Wis. 158, 45 N. W. 1086; Heiss *v.* Milwaukee, etc., R. Co., 69 Wis. 555, 34 N. E. 916. *Contra*, Madden *v.* Pennsylvania R. Co., 21 Ohio Cir. Ct. 73, 11 Ohio Cir. Dec. 571. And see Lake Erie, etc., R. Co. *v.* Scott, 132 Ill. 429, 24 N. E. 78, 8 L. R. A. 330.

91. Kincaid *v.* Indianapolis Natural Gas Co., 124 Ind. 577, 24 N. E. 1066, 19 Am. St.

(B) *What Constitutes a New Use* — (1) IN GENERAL. There is much conflict of authority as to what constitutes a new use and no exact rule can be laid down. On this subject it has been said that when property is appropriated to street uses, the public acquires an easement of passing and repassing with all such incidents as properly belong thereto, and that any use not incident to such right of passage is a new use — an additional servitude to which the street cannot be subjected without first making proper compensation to the owner of the bed of the street.[92]

(2) PLANK-ROADS OR TURNPIKES. A plank-road or turnpike constructed upon a public highway is not such an additional servitude as entitles abutting owners to compensation, if such plank-road or turnpike remains a public highway subject to the same uses as before.[93] And abutting owners have no claim for further compensation, when a highway is laid over a turnpike road and the easement or franchise of the corporation is taken.[94]

(3) COMMERCIAL RAILROADS. According to many authorities when the fee of the street is in the abutting owners, the construction of a commercial railroad upon it is such a taking as entitles such owners to compensation or damages.[95]

Rep. 113, 8 L. R. A. 602; Pennsylvania R. Co. *v.* Montgomery County Pass. R. Co., 167 Pa. St. 62, 31 Atl. 468, 46 Am. St. Rep. 659, 27 L. R. A. 766; McDevitt *v.* People's Nat. Gas Co., 160 Pa. St. 367, 28 Atl. 948; Lockhart *v.* Craig St. R. Co., 139 Pa. St. 419, 21 Atl. 26; Sterling's Appeal, 111 Pa. St. 35, 2 Atl. 105, 56 Am. Rep. 246. See also Palmer *v.* Larchmont Electric Light Co., 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672 [*reversing* 6 N. Y. App. Div. 12, 39 N. Y. Suppl. 522]; Eels *v.* American Telephone, etc., Co., 143 N. Y. 133, 28 N. E. 202, 25 L. R. A. 640; Van Brunt *v.* Flatbush, 128 N. Y. 50, 27 N. E. 973; Bloomfield, etc., Natural Gaslight Co. *v.* Calkins, 62 N. Y. 386; Castle *v.* Bell Telephone Co., 49 N. Y. App. Div. 437, 63 N. Y. Suppl. 482 [*affirming* 30 Misc. 38, 61 N. Y. Suppl. 743]. *Contra*, Lonaconing, etc., R. Co. *v.* Consolidation Coal Co., 95 Md. 630, 53 Atl. 420; Lincoln *v.* Com., 164 Mass. 1, 41 N. E. 112; Callen *v.* Columbus Edison Electric Light Co., 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782; Ranken *v.* St. Louis, etc., Suburban R. Co., 98 Fed. 479. See *infra*, X, D, 18, c, (II), (B), (9).

92. Poole *v.* Falls Road Electric R. Co., 88 Md. 533, 41 Atl. 1069; Nicoll *v.* New York, etc., Telephone R. Co., 62 N. J. L. 733, 42 Atl. 583, 72 Am. St. Rep. 666; Eels *v.* American Telephone, etc., Co., 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640; Haverford Electric Light Co. *v.* Hart, 13 Pa. Co. Ct. 369. See also Chesapeake, etc., Telephone Co. *v.* McKenzie, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219.

Illustrations.— The erection of a water-tank and the operation in connection therewith of a steam-engine used to supply the city with water (Morrison *v.* Hinkson, 87 Ill. 587, 29 Am. Rep. 77); the erection of a platform or depot for passengers (Higbie *v.* Camden, etc., R. Co., 19 N. J. Eq. 276); holding a public market (State *v.* Laverack, 34 N. J. L. 201); the construction of an elevated approach to a private toll-bridge (Willamette Iron Works *v.* Oregon R., etc., Co., 26 Oreg. 224, 27 Pac. 1016, 46 Am. St. Rep. 620, 29 L. R. A. 88); the erection by a railroad of a coal house and hoisting apparatus (Chicago, etc., R. Co. *v.* O'Connor, 42 Nebr. 90, 60 S. W. 326); or the erection and maintenance of a fire-alarm system (Callen *v.* Columbus Edison Electric Light Co., 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782), in a street, entitles abutting owners to compensation. But it was decided that the extension of the foot-way of the New York and Brooklyn bridge over a street, fifteen feet above the level of the street, with a railing five feet high and uncovered, leaving an open space at least one hundred feet between it and an abutting building, did not entitle the owner of such building to compensation (Ottendorfer *v.* Agnew, 13 Daly (N. Y.) 16).

Transmission of information.— Pierce *v.* Drew, 136 Mass. 75, 49 Am. Rep. 7.

93. Douglass *v.* Boonsborough Turnpike R. Co., 22 Md. 219, 85 Am. Dec. 647; Chagrin Falls, etc., Plank Road Co. *v.* Cane, 2 Ohio St. 419.

Liability for additional damage.— Williams *v.* Natural Bridge Plank Road Co., 21 Mo. 580.

94. Peirce *v.* Somersworth, 10 N. H. 369. See also Heath *v.* Barman, 49 Barb. (N. Y.) 496.

95. *Alabama.*— Western R. Co. *v.* Alabama Grand Trunk R. Co., 96 Ala. 272, 11 So. 483, 17 L. R. A. 474. See also Columbus R. Co. *v.* Witherow, 82 Ala. 190, 3 So. 23.

Connecticut.— McKeon *v.* New York, etc., R. Co., 75 Conn. 343, 53 Atl. 656, 61 L. R. A. 730; Canastota Knife Co. *v.* Newington Tramway Co., 69 Conn. 146, 36 Atl. 1107; Imlay *v.* Union Branch R. Co., 26 Conn. 249, 68 Am. Dec. 392; Nicholson *v.* New York, etc., R. Co., 22 Conn. 74, 56 Am. Dec. 390.

Florida.— Florida Southern R. Co. *v.* Brown, 23 Fla. 104, 1 So. 512.

Illinois.— Bond *v.* Pennsylvania Co., 171 Ill. 508, 49 N. E. 545; Stetson *v.* Chicago, etc., R. Co., 75 Ill. 74; Stone *v.* Fairbury, etc., R. Co., 68 Ill. 394, 18 Am. Rep. 556; Indianapolis, etc., R. Co. *v.* Hartley, 67 Ill.

In several well considered cases it has been decided that owners of property abutting on a street are entitled to compensation for such use of the street, even though the fee of the street is not in them but in the municipality,[96]

439, 16 Am. Rep. 624; Moses *v.* Pittsburgh, etc., R. Co., 21 Ill. 516.

Indiana.— Cox *v.* Louisville, etc., R. Co., 48 Ind. 178; Protzman *v.* Indianapolis, etc., R. Co., 9 Ind. 467, 68 Am. Dec. 650.

Maryland.— Phipps *v.* Western Maryland R. Co., 66 Md. 319, 7 Atl. 556.

Massachusetts.— Bullard *v.* New York, etc., R. Co., 178 Mass. 570, 60 N. E. 380; Springfield *v.* Connecticut River R. Co., 4 Cush. 63.

Michigan.— Grand Rapids, etc., R. Co. *v.* Heisel, 47 Mich. 393, 11 N. W. 212, 38 Mich. 62, 31 Am. Rep. 306.

Nebraska.— Hastings, etc., R. Co. *v.* Ingalls, 15 Nebr. 123, 16 N. W. 762. See also Chicago, etc., R. Co. *v.* Sturey, 55 Nebr. 137, 75 N. W. 557.

New Jersey.— Chamberlain *v.* Elizabethport Steam Cordage Co., 41 N. J. Eq. 43, 2 Atl. 775.

New York.— Wager *v.* Troy Union R. Co., 25 N. Y. 526; Williams *v.* New York Cent. R. Co., 16 N. Y. 97, 69 Am. Dec. 651 [*reversing* 18 Barb. 222]; Syracuse Solar Salt Co. *v.* Rome, etc., R. Co., 67 Hun 153, 22 N. Y. Suppl. 321; Burt *v.* Lima, etc., R. Co., 21 N. Y. Suppl. 482. See also *In re* Prospect Park, etc., R. Co., 16 Hun 261.

Pennsylvania.— Jones *v.* Erie, etc., R. Co., 151 Pa. St. 30, 25 Atl. 134, 31 Am. St. Rep. 122, 17 L. R. A. 758, 144 Pa. St. 629, 23 Atl. 251. See also Fidelity Ins., etc., Co. *v.* Philadelphia, etc., Pass. R. Co., 6 Pa. Dist. 737.

Tennessee.— East End St. R. Co. *v.* Doyle, 88 Tenn. 747, 13 S. W. 936, 17 Am. St. Rep. 933, 9 L. R. A. 100.

Texas.— Jones *v.* Keith, 37 Tex. 394, 14 Am. Rep. 382.

Vermont.— Wead *v.* St. Johnsbury, etc., R. Co., 64 Vt. 52, 24 Atl. 361. *Quære* in Richardson *v.* Vermont Cent. R. Co., 25 Vt. 465, 60 Am. Dec. 283.

Wisconsin.—Carl *v.* Sheboygan, etc., R. Co., 46 Wis. 625, 1 N. W. 295; Sherman *v.* Milwaukee, etc., R. Co., 40 Wis. 645; Ford *v.* Chicago, etc., R. Co., 14 Wis. 609, 80 Am. Dec. 791.

See 18 Cent. Dig. tit. "Eminent Domain," § 310.

Abutting owners of fee entitled to compensation when railroad constructed on turnpike.— Mahon *v.* New York Cent. R. Co., 24 N. Y. 658. See also Mifflin *v.* Harrisburg, etc., R. Co., 16 Pa. St. 182; Mumma *v.* Harrisburg, etc., R. Co., 1 Pearson (Pa.) 24. But see Brainard *v.* Missisquoi R. Co., 48 Vt. 107.

Dependent upon time of acquiring right to construct.— Pape *v.* New York, etc., R. Co., 74 N. Y. App. Div. 175, 77 N. Y. Suppl. 725.

Reservation of right to lay private road.— Riedinger *v.* Marquette, etc., R. Co., 62 Mich. 29, 28 N. W. 775.

Subsequent change of grade.— Louisville, etc., R. Co. *v.* Cumnock, 77 S. W. 933, 25 Ky. L. Rep. 1330.

96. *Colorado.*— Denver Circle R. Co. *v.* Bigler, 10 Colo. 428, 15 Pac. 726; Denver Circle R. Co. *v.* Clark, 10 Colo. 427, 15 Pac. 726; Denver Circle R. Co. *v.* Nestor, 10 Colo. 403, 15 Pac. 714; Denver *v.* Bayer, 7 Colo. 113, 2 Pac. 6.

Georgia.— South Carolina R. Co. *v.* Steiner, 44 Ga. 546.

Mississippi.— Alabama, etc., R. Co. *v.* Bloom, 71 Miss. 247, 15 So. 72; Theobold *v.* Louisville, etc., R. Co., 66 Miss. 279, 6 So. 230, 14 Am. St. Rep. 564, 4 L. R. A. 735.

North Carolina.— White *v.* Northwestern North Carolina R. Co., 113 N. C. 610, 18 S. E. 330, 37 Am. St. Rep. 639, 22 L. R. A. 627.

United States.—Frankle *v.* Jackson, 30 Fed. 398; Mollandin *v.* Union Pac. R. Co., 14 Fed. 394, 4 McCrary 290, both cases construing Colorado constitution.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 257, 310.

In Minnesota the rule laid down in the later cases is as follows: "That the owner of a lot abutting on a public street has, independent of the fee in the street, as appurtenant to his lot, an easement in the street in front of his lot to the full width of the street, for admission of light and air to his lot, which easement is subordinate only to the public right. That depriving him of or interfering with his enjoyment of the easement for any public use not a proper street use is a taking of his property within the meaning of the constitution. That appropriating a public street to the construction and operation of an ordinary commercial railroad upon it is not a proper street use. That where, without his consent and without compensation to him, such a railroad is laid and operated along the portion of the street in front of his lot, so as upon that part of the street to cause smoke, dust, cinders, etc., which darken or pollute the air coming from that part of the street upon his lot, he may recover whatever damages to his lot are caused by so laying and operating such railroad on that part of the street." Lamm *v.* Chicago, etc., R. Co., 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268; Adams *v.* Chicago, etc., R. Co., 39 Minn. 286, 295, 39 N. W. 629, 12 Am. St. Rep. 544, 1 L. R. A. 493. In the earlier cases the distinction between the rights of abutting owners having the fee of the street and of such owners when not having the fee seems to have been recognized. Adams *v.* Hastings, etc., R. Co., 18 Minn. 260; Harrington *v.* St. Paul, etc., R. Co., 17 Minn. 215; Molitor *v.* First Div. St. Paul, etc., R. Co., 14 Minn. 285; Gray *v.* First Div. St. Paul, etc., R. Co., 13 Minn. 315. See also Schurmeier *v.* St. Paul, etc., R. Co., 10 Minn. 82, 88 Am. Dec. 59.

In Ohio it has been decided that an abutting owner, whether the fee of the street is in him or in the public, has an easement in the street which is as much property as the lot

although this is denied in other decisions.[97] In some cases it has been held that the test of the right to compensation is the manner of the construction and operation of the railroad. That on the one hand the construction of a railroad along a street is not *per se* such an encroachment on the individual right of an abutting owner as entitles him to compensation, even though he owns the fee; and that on the other hand, without regard to whether the fee is in the adjoining owner or not, he can recover compensation when his right of ingress and egress or his right to light and air is destroyed or interfered with unreasonably; but that if he is merely inconvenienced by such use or suffers some remote consequential injury he cannot recover.[98] Under constitutional provisions against damaging as well as taking private property without compensation, abutting owners may recover when they are deprived of their easement in the street and their property rendered less valuable by the construction of a railroad thereon without regard to the ownership of the fee.[99] The right to compensation exists

itself, and if the construction of a railroad upon the street will materially interfere with this easement he is entitled to compensation. Cincinnati, etc., R. Co. *v.* Cumminsville, 14 Ohio St. 523; Cleveland Burial Case Co. *v.* Erie R. Co., 24 Ohio Cir. Ct. 107.

97. *Indiana.*— Indianapolis, etc., R. Co. *v.* Rayl, 69 Ind. 424; New Albany, etc., R. Co. *v.* O'Daily, 13 Ind. 353, 12 Ind. 551.

Kansas.— Ottawa, etc., R. Co. *v.* Peterson, 40 Kan. 310, 19 Pac. 666; Ottawa, etc., R. Co. *v.* Larson, 40 Kan. 301, 19 Pac. 661, 2 L. R. A. 59.

Maryland.— Garrett *v.* Lake Roland El. R. Co., 79 Md. 277, 29 Atl. 830, 24 L. R. A. 896; O'Brien *v.* Baltimore Belt R. Co., 74 Md. 363, 22 Atl. 141, 13 L. R. A. 126.

New York.— Fobes *v.* Rome, etc., R. Co., 121 N. Y. 505, 24 N. E. 919, 8 L. R. A. 453; Drake *v.* Hudson River R. Co., 7 Barb. 508. But see Falker *v.* New York, etc., R. Co., 17 Abb. N. Cas. (N. Y.) 279.

Tennessee.— Brumit *v.* Virginia, etc., R. Co., 106 Tenn. 124, 60 S. W. 505; Iron Mountain R. Co. *v.* Bingham, 87 Tenn. 522, 11 S. W. 705, 4 L. R. A. 622.

Wisconsin.— Hanlin *v.* Chicago, etc., R. Co., 61 Wis. 515, 21 N. W. 623.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 257, 310.

For permanent obstruction and deprivation of access compensation may be recovered, even though the fee of the street is in the public. Burlington, etc., R. Co. *v.* Reinhackle, 15 Nebr. 279, 18 N. W. 69, 48 Am. Rep. 342; Reining *v.* New York, etc., R. Co., 128 N. Y. 157, 28 N. E. 640, 14 L. R. A. 133.

98. Montgomery *v.* Santa Ana Westminster R. Co., 104 Cal. 186, 37 Pac. 786, 43 Am. St. Rep. 89, 25 L. R. A. 654; Fulton *v.* Short Route R. Transfer Co., 85 Ky. 640, 4 S. W. 332, 9 Ky. L. Rep. 291, 7 Am. St. Rep. 619; Cosby *v.* Owensboro, etc., R. Co., 10 Bush 288; Louisville, etc., R. Co. *v.* Brown, 17 B. Mon. 763; Lexington, etc., R. Co. *v.* Applegate, 8 Dana 289, 33 Am. Dec. 497; Maysville, etc., R. Co. *v.* Ingram, 30 S. W. 8, 16 Ky. L. Rep. 853; Holmes *v.* Louisville, etc., R. Co., 16 Ky. L. Rep. 318; Elizabethtown, etc., R. Co. *v.* Tierney, 11 Ky. L. Rep. 526; Elizabethtown, etc., R. Co. *v.* Dillon, 7 Ky. L. Rep. 607; Kentucky Cent. R. Co. *v.* Clark, 5 Ky. L. Rep. 184; Elizabethtown, etc., R. Co. *v.* Thompson, 1 Ky. L. Rep. 395. See also *quære* in O'Connor *v.* Southern Pac. R. Co., 122 Cal. 681, 55 Pac. 688; Louisville, etc., R. Co. *v.* Orr, 91 Ky. 109, 15 S. W. 8, 12 Ky. L. Rep. 756; Kentucky, etc., Bridge Co. *v.* Gregory, 13 Ky. L. Rep. 878; McQuaid *v.* Portland, etc., R. Co., 18 Oreg. 237, 22 Pac. 899. *Compare* Porter *v.* Pacific Coast R. Co., (Cal. 1888) 18 Pac. 428; Weyl *v.* Sonoma Valley R. Co., 69 Cal. 202, 10 Pac. 510; Carson *v.* Central R. Co., 35 Cal. 325, making the ownership of the fee the test.

In Missouri the rule is that laying a track on the established grade and operating a steam railroad thereon in the transaction of commercial business along a street is not subjecting the street to an additional servitude for which abutting owners are entitled to compensation; but that if such railroad is constructed and operated in such a way as to destroy the usefulness of the street as a public thoroughfare, or destroy or unreasonably interfere with the right of abutting owners to access to and from their property, compensation must be made. Knapp *v.* St. Louis Transfer R. Co., 126 Mo. 26, 28 S. W. 627; Gaus, etc., Mfg. Co. *v.* St. Louis, etc., R. Co., 113 Mo. 308, 20 S. W. 658, 35 Am. St. Rep. 706, 18 L. R. A. 339; Lackland *v.* North Missouri R. Co., 34 Mo. 259, 31 Mo. 180; Porter *v.* North Missouri R. Co., 33 Mo. 128; Osborne *v.* Missouri Pac. R. Co., 147 U. S. 248, 13 S. Ct. 299, 37 L. ed. 155.

99. *Arkansas.*— Hot Springs R. Co. *v.* Williamson, 45 Ark. 429.

Illinois.— Chicago, etc., R. Co. *v.* Berg, 10 Ill. App. 607.

Nebraska.— Chicago, etc., R. Co. *v.* O'Neill, 58 Nebr. 239, 78 N. W. 521.

Texas.— Ft. Worth, etc., R. Co. *v.* Downie, 82 Tex. 383, 17 S. W. 620; Rosenthal *v.* Taylor, etc., R. Co., 79 Tex. 325, 15 S. W. 268; Gainesville, etc., R. Co. *v.* Hall, 78 Tex. 169, 14 S. W. 259, 22 Am. St. Rep. 42, 9 L. R. A. 298; Gulf, etc., R. Co. *v.* Fuller, 63 Tex. 467. See also Gulf, etc., R. Co. *v.* Graves, 1 Tex. App. Civ. Cas. § 579; Williams *v.* Gulf, etc., R. Co., 1 Tex. App. Civ. Cas. § 312. But see Houston, etc., R. Co. *v.* Odum, 53 Tex. 343,

where, for the benefit of the public, private property has been specially even though lawfully damaged.[1] In some jurisdictions the right to compensation when railroads are constructed upon streets and highways has been made the subject of legislative enactments.[2] The fact that the track of one railroad company has

decided under a constitutional provision limiting damages to cases of "taking."

Washington.— Kaufman *v.* Tacoma, etc., R. Co., 11 Wash. 632, 40 Pac. 137.

In Pennsylvania liability exists for taking, injuring, or destroying. Pennsylvania Schuylkill Valley R. Co. *v.* Walsh, 124 Pa. St. 544, 17 Atl. 186, 10 Am. St. Rep. 611. Where a railroad is constructed, not on the street, but on property owned by the railroad company which abuts on the street, it is not liable under the constitutional provision against taking, injuring, or destroying private property for a public use, for any depreciation in the value of property fronting on the opposite side of the street. Pennsylvania R. Co. *v.* Lippincott, 116 Pa. St. 472, 9 Atl. 871, 2 Am. St. Rep. 618. See *supra*, X, D, 2.

1. *Kansas.*— Central Branch Union Pac. R. Co. *v.* Andrews, 41 Kan. 370, 21 Pac. 276.

Minnesota.— Brakken *v.* Minneapolis, etc., R. Co., 29 Minn. 41, 11 N. W. 124.

Missouri.— Rude *v.* St. Louis, 93 Mo. 408, 6 S. W. 257.

Nebraska.— Omaha, etc., R. Co. *v.* Janecek, 30 Nebr. 276, 46 N. W. 478, 27 Am. St. Rep. 399; Omaha, etc., R. Co. *v.* Rogers, 16 Nebr. 117, 19 N. W. 603; Burlington, etc., R. Co. *v.* Reinhackle, 15 Nebr. 279, 18 N. W. 69, 48 Am. Rep. 342.

Ohio.— See Robert Mitchell Furniture Co. *v.* Cleveland, etc., R. Co., 10 Ohio S. & C. Pl. Dec. 218, 7 Ohio N. P. 639.

Texas.— Texas, etc., R. Co. *v.* Goldberg, 68 Tex. 685, 5 S. W. 824; Gulf, etc., R. Co. *v.* Eddins, 60 Tex. 656.

Washington.— Patton *v.* Olympia Door, etc., Co., 15 Wash. 210, 46 Pac. 237; Hatch *v.* Tacoma, etc., R. Co., 6 Wash. 1, 32 Pac. 1063.

West Virginia.— Guinn *v.* Ohio River R. Co., 46 W. Va. 151, 33 S. E. 87, 76 Am. St. Rep. 806; Stewart *v.* Ohio River R. Co., 38 W. Va. 438, 18 S. E. 604. See also Yates *v.* West Grafton, 34 W. Va. 783, 12 S. E. 1075; Spencer *v.* Point Pleasant, etc., R. Co., 23 W. Va. 406.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 257, 310.

"Special damage" is defined in Rigney *v.* Chicago, 102 Ill. 64; Metropolitan West Side El. R. Co. *v.* Goll, 100 Ill. App. 323.

2. In Iowa it is provided by statute that no railway track can be located and laid down upon a street, alley, or other public place until after the injury to the property abutting upon such street or public place has been ascertained and compensated. Fowler *v.* Des Moines, etc., R. Co., 91 Iowa 533, 60 N. W. 116; Nick *v.* Chicago, etc., R. Co., 84 Iowa 27, 50 N. W. 222; Cook *v.* Chicago, etc., R. Co., 83 Iowa 278, 49 N. W. 92; Gates *v.* Chicago, etc., R. Co., 82 Iowa 518, 48 N. W. 1040; Harbach *v.* Des Moines, etc., R. Co., 80 Iowa 593, 44 N. W. 348, 11 L. R. A. 113; Enos *v.* Chicago, etc., R. Co., 78 Iowa 28, 42 N. W. 575; Strough *v.* Chicago, etc., R. Co., 71 Iowa 641, 33 N. W. 149; Merchants' Union Barb Wire Co. *v.* Chicago, etc., R. Co., 70 Iowa 105, 28 N. W. 494; Wilson *v.* Des Moines, etc., R. Co., 67 Iowa 509, 25 N. W. 754; Mulholland *v.* Des Moines, etc., R. Co., 60 Iowa 740, 13 N. W. 726. It has been held that if the tracks were laid at a time when there was no law in force requiring compensation to the abutting owners, such owners cannot, on a subsequent change of the law, claim damages. Merchants' Union Barb Wire Co. *v.* Chicago, etc., R. Co., 70 Iowa 105, 28 N. W. 494, 29 N. W. 822. But that if the railroad company had simply appropriated the street for its track, but had not actually laid it down, prior to the adoption of the code, it did not thereby acquire a vested right which would preclude the abutters from claiming compensation in accordance with the provision of section 464 of the code, which provides that no railway track can be "located and laid down" until after the injury has been ascertained and compensated; and it is immaterial that, before the adoption of the code, no compensation could have been demanded. Mulholland *v.* Des Moines, etc., R. Co., 60 Iowa 740, 13 N. W. 726. The rule in Iowa before the passage of the statute is discussed in the following cases: Davis *v.* Chicago, etc., R. Co., 46 Iowa 389; Kucheman *v.* C. C. & D. R. Co., 46 Iowa 366; Cadle *v.* Muscatine Western R. Co., 44 Iowa 11; Park *v.* Chicago, etc., R. Co., 43 Iowa 636; Ingram *v.* Chicago, etc., R. Co., 38 Iowa 669; Clinton *v.* Clinton, etc., Horse R. Co., 37 Iowa 61; Cook *v.* Burlington, 36 Iowa 357; Chicago, etc., R. Co. *v.* Newton, 36 Iowa 299; Tomlin *v.* Dubuque, etc., R. Co., 32 Iowa 106, 7 Am. Rep. 176; Clinton *v.* Cedar Rapids, etc., R. Co., 24 Iowa 455; Milburn *v.* Cedar Rapids, 12 Iowa 246; Barney *v.* Keokuk, 94 U. S. 324, 24 L. ed. 224.

In Michigan it is provided by statute that no railway shall be constructed on any street unless compensation shall be made to owners of property adjoining the street, and opposite where such railroad is to be constructed. It was held that an abutting owner is entitled to damages where the railroad right of way lies on the opposite side of the street. The owner of a lot of land containing a residence situated three hundred feet from the street is not entitled to damages owing to the construction of a railroad thereon. Marquette, etc., R. Co. *v.* Longyear, (1903) 94 N. W. 670.

In Ohio it is provided by statute that every company which lays a railroad track upon

been laid through a street and the property-owners have received compensation therefor does not warrant the location of another railroad in the same street without compensation to the owners.[3] The laying of additional tracks by the same railroad in a street, the fee of which is in the abutting owner, is an additional servitude for which such owner is entitled to compensation.[4] No compensation is due owners whose lots do not abut upon the street[5] or that particular part of the street upon which a railroad is constructed,[6] unless thereby all access to his lot is cut off.[7] Where a street has been laid out but not opened, a railroad company cannot build its track on it without compensation to the owner.[8]

(4) STREET RAILWAYS. According to the great weight of authority the use of a street, when duly authorized,[9] for the construction and operation of a street railway does not impose an additional servitude on the fee, and an abutting owner cannot recover compensation or damages for such use,[10] unless he shows that he has

any street, alley, road, or ground shall be responsible for injury done thereby to private or public property lying upon or near to said ground. Zanesville *v.* Fannan, 53 Ohio St. 605, 42 N. E. 703, 53 Am. St. Rep. 664; Dillenbach *v.* Xenia, 41 Ohio St. 207. This statute is intended merely to provide compensation for consequential injuries not covered by the compensation provided for the appropriation of property. Robert Mitchell Furniture Co. *v.* Cleveland, etc., R. Co., 10 Ohio S. & C. Pl. Dec. 218, 7 Ohio N. P. 639. Property is "near to" the street, so as to entitle the owner to avail himself of the remedy given by this statute, if the injury to it is the direct and necessary result of the occupancy of the street by the track or other structure of a railroad company. Fliehman *v.* Cleveland, etc., R. Co., 11 Ohio Dec. (Reprint) 543, 27 Cinc. L. Bul. 302.

In Wisconsin by statute the construction of a railroad in a street by the consent of an abutting owner gives such owner an immediate right of action for the damages caused to his land abutting on the street without reference to the side on which the railroad track may be placed. Kuhl *v.* Chicago, etc., R. Co., 101 Wis. 42, 77 N. W. 155.

3. Southern Pac. R. Co. *v.* Reed, 41 Cal. 256.

4. Rock Island, etc., R. Co. *v.* Johnson, 204 Ill. 488, 68 N. E. 549. See also Bond *v.* Pennsylvania Co., 171 Ill. 508, 49 N. E. 545; Pittsburg, etc., R. Co. *v.* Reich, 101 Ill. 157; Gulf, etc., R. Co. *v.* Necco, (Tex. Sup. 1892) 18 S. W. 564. *Compare* Com. *v.* Hartford, etc., R. Co., 14 Gray (Mass.) 379.

5. Pennsylvania L. Ins., etc., Co. *v.* Pennsylvania Schuylkill Valley R. Co., 151 Pa. St. 334, 25 Atl. 107, 31 Am. St. Rep. 762; Richmond Traction Co. *v.* Murphy, 98 Va. 104, 34 S. E. 982.

6. *Iowa.*— Morgan *v.* Des Moines, etc., R. Co., 64 Iowa 589, 21 N. W. 96, 52 Am. Rep. 462.

Massachusetts.— Merrimack River Locks, etc. *v.* Nashua, etc., R. Corp., 10 Cush. (Mass.) 385.

Minnesota.— Rochette *v.* Chicago, etc., R. Co., 32 Minn. 201, 20 N. W. 140.

New York.— *In re* Buffalo Grade Crossing Com'rs, 166 N. Y. 69, 59 N. E. 706.

Wisconsin.— Oshkosh First Cong. Church, etc. *v.* Milwaukee, etc., R. Co., 77 Wis. 158, 45 N. W. 1086.

Obstructing street not in front of lot.— Union Pac. R. Co. *v.* Benson, 19 Colo. 285, 35 Pac. 544; Union Pac. R. Co. *v.* Foley, 19 Colo. 280, 35 Pac. 542.

Vacation of portion of street not adjoining lot does not entitle to compensation. East St. Louis *v.* O'Flynn, 119 Ill. 100, 10 N. E. 395, 59 Am. Rep. 795.

7. Rochette *v.* Chicago, etc., R. Co., 32 Minn. 201, 20 N. W. 140.

8. Beidler's Appeal, (1889) 17 Atl. 244; Quigley *v.* Pennsylvania Schuylkill Valley R. Co., 121 Pa. St. 35, 15 Atl. 478, 1 L. R. A. 503.

9. Paterson, etc., R. Co. *v.* Paterson, 24 N. J. Eq. 158; Rafferty *v.* Central Traction Co., 147 Pa. St. 579, 23 Atl. 884, 30 Am. St. Rep. 763.

10. *Iowa.*— Sears *v.* Marshalltown St. R. Co., 65 Iowa 742, 23 N. W. 150.

Kentucky.—Ashland, etc., St. R. Co. *v.* Faulkner, 106 Ky. 332, 45 S. W. 235, 51 S. W. 806, 21 Ky. L. Rep. 151, 43 L. R. A. 554; Fulton *v.* Short Route R. Transfer Co., 85 Ky. 640, 4 S. W. 332, 9 Ky. L. Rep. 291, 7 Am. St. Rep. 619.

Maine.— Taylor *v.* Portsmouth, etc., R. Co., 91 Me. 193, 39 Atl. 560, 64 Am. St. Rep. 216.

Maryland.— Poole *v.* Falls Road Electric R. Co., 88 Md. 533, 41 Atl. 1069.

Massachusetts.— Eustis *v.* Milton St. R. Co., 183 Mass. 586, 66 N. E. 663.

Michigan.— Grand Rapids, etc., R. Co. *v.* Heisel, 47 Mich. 393, 11 N. W. 212.

New Jersey.— Jersey City, etc., Belt Co. *v.* Jersey City, etc., R. Co., 20 N. J. Eq. 61.

Ohio.— Parrish *v.* Hamilton, etc., Traction Co., 23 Ohio Cir. Ct. 527.

Pennsylvania.— *In re* Philadelphia, etc., R. Co., 6 Whart. 25, 36 Am. Dec. 202; Conshohocken R. Co. *v.* Pennsylvania R. Co., 15 Pa. Co. Ct. 445; Maris *v.* Union Pass. R. Co., 10 Phila. 41; Faust *v.* Passenger R. Co., 3 Phila. 164.

Tennessee.— Smith *v.* East End St. R. Co., 87 Tenn. 626, 11 S. W. 709; Iron Mountain R. Co. *v.* Bingham, 87 Tenn. 522, 11 S. W. 705.

Wisconsin.— Younkin *v.* Milwaukee Light, etc., Traction Co., (1904) 98 N. W. 215; Chicago, etc., R. Co. *v.* Milwaukee R., etc., Elec-

been specially damaged thereby.[11] It is immaterial whether or not the fee of the street is in the abutting owner.[12] Nor does it matter what motive power is

tric R. Co., 95 Wis. 561, 70 N. W. 678, 60 Am. St. Rep. 136, 37 L. R. A. 856; Hobart *v.* Milwaukee City R. Co., 27 Wis. 194, 9 Am. Rep. 461.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 259, 305 *et seq.*

The construction of a subway and tunnel in a street does not impose an additional servitude. Sears *v.* Crocker, 184 Mass. 586, 69 N. E. 327.

The construction of a street railroad in a street together with a trestle as a viaduct to cross an intersecting thoroughfare is not an additional servitude. Winnetka *v.* Chicago, etc., Electric R. Co., 107 Ill. App. 117 [*affirmed* in 204 Ill. 297, 68 N. E. 407].

The ordinary use of the street must not be interfered with by the construction of such road. Morris, etc., R. Co. *v.* Newark, 10 N. J. Eq. 325. See also Nichols *v.* Ann Arbor, etc., R. Co., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371. And so it has been held that an injunction will be granted to prevent the construction of a street railway upon a street already burdened with commercial railroad tracks (Lange *v.* La Crosse, etc., R. Co., 118 Wis. 558, 95 N. W. 952), or when there are already two street-car lines and various poles and wires on the street (Dooly Block *v.* Salt Lake Rapid Transit Co., 9 Utah 31, 33 Pac. 229, 24 L. R. A. 610). It has been held, however, that the laying by a street railway company of a double track along a street so narrow that there would not be room for vehicles between the track and the curb did not create an additional servitude (Poole *v.* Falls Road Electric R. Co., 88 Md. 833, 41 Atl. 1069), and it has been held that no compensation will be allowed abutting owners, although after the construction of such a road vehicles cannot stand between the track and the curb (Rafferty *v.* Central Traction Co., 147 Pa. St. 579, 23 Atl. 884, 30 Am. St. Rep. 763). See also Ashland, etc., R. Co. *v.* Faulkner, 106 Ky. 332, 45 S. W. 235, 51 S. W. 806, 21 Ky. L. Rep. 151, 43 L. R. A. 554.

No compensation for removing or destroying trees.— Miller *v.* Detroit, etc., R. Co., 125 Mich. 171, 84 N. W. 49, 84 Am. St. Rep. 569, 51 L. R. A. 955; Akron, etc., R. Co. *v.* Keck, 23 Ohio Cir. Ct. 57.

Street railway on toll-bridge.— Pittsburg, etc., R. Co. *v.* Point Bridge Co., 165 Pa. St. 37, 30 Atl. 511, 26 L. R. A. 323.

Street railway trestle.— Winnetka *v.* Chicago, etc., Electric R. Co., 107 Ill. App. 117 [*affirmed* in 204 Ill. 297, 68 N. E. 407].

11. *Florida.*— Florida Southern R. Co. *v.* Brown, 23 Fla. 104, 1 So. 512.

Georgia.— Campbell *v.* Metropolitan St. R. Co., 82 Ga. 320, 9 S. E. 1078.

Illinois.— Doane *v.* Chicago City R. Co., 51 Ill. App. 353.

Missouri.— Ruckert *v.* Grand Ave. R. Co., 163 Mo. 260, 63 S. W. 814; Spencer *v.* Metropolitan St. R. Co., 120 Mo. 154, 23 S. W. 126, 22 L. R. A. 668, access obstructed by a viaduct.

New Mexico.— New Mexico R. Co. *v.* Hendricks, 6 N. M. 611, 30 Pac. 901.

New York.— Mahady *v.* Bushwick R. Co., 91 N. Y. 148, 43 Am. Rep. 661.

Texas.— Belt Line St. R. Co. *v.* Crabtree. 2 Tex. App. Civ. Cas. § 662.

See 18 Cent. Dig. tit. "Eminent Domain," § 305 *et seq.*

12. *Alabama.*— Birmingham Traction Co. *v.* Birmingham R., etc., Co., 119 Ala. 137, 24 So. 502, 43 L. R. A. 233.

California.— Finch *v.* Riverside, etc., R. Co., 87 Cal. 597, 25 Pac. 765 [*distinguishing* Weyl *v.* Sonoma Valley R. Co., 69 Cal. 203, 10 Pac. 510].

Connecticut.— Canastota Knife Co. *v.* Newington Tramway Co., 69 Conn. 146, 36 Atl. 1107.

Delaware.— Philadelphia, etc., R. Co. *v.* Wilmington City R. Co., (1897) 38 Atl. 1067.

Florida.— Randall *v.* Jacksonville St. R. Co., 19 Fla. 409.

Georgia.— Southern R. Co. *v.* Atlantic R., etc., Co., 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125.

Illinois.— Chicago, etc., R. Co. *v.* General Electric R. Co., 79 Ill. App. 569.

Indiana.— Decker *v.* Evansville, etc., R. Co., 133 Ind. 493, 32 N. E. 349.

Kentucky.— Ashland, etc., R. Co. *v.* Faulkner, 106 Ky. 332, 45 S. W. 235, 51 S. W. 806, 21 Ky. L. Rep. 151, 43 L. R. A. 554.

Louisiana.— Brown *v.* Duplessis, 14 La. Ann. 842.

Maine.— *In re* Milbridge, etc., Electric R. Co., 96 Me. 110, 51 Atl. 818; Taylor *v.* Portsmouth, etc., R. Co., 91 Me. 193, 39 Atl. 560, 64 Am. St. Rep. 216.

Maryland.— Poole *v.* Falls Road Electric R. Co., 88 Md. 533, 41 Atl. 1069.

Michigan.— People *v.* Ft. Wayne, etc., R. Co., 92 Mich. 522, 52 N. W. 1010, 16 L. R. A. 752.

Minnesota.— Elfelt *v.* Stillwater St. R. Co., 53 Minn. 68, 55 N. W. 116.

Missouri.— Ransom *v.* Citizens' R. Co., 104 Mo. 375, 16 S. W. 416.

New Jersey.— Ehret *v.* Camden, etc., R. Co., 61 N. J. Eq. 171, 47 Atl. 562.

North Carolina.— Merrick *v.* Intramontaine R. Co., 118 N. C. 1081, 24 S. E. 667.

Ohio.— Akron, etc., R. Co. *v.* Keck, 23 Ohio Cir. Ct. 57.

Pennsylvania.— Rafferty *v.* Central Traction Co., 147 Pa. St. 579, 23 Atl. 884, 30 Am. St. Rep. 763; Pennsylvania R. Co. *v.* Conshohocken R. Co., 15 Pa. Co. Ct. 454; Pennsylvania R. Co. *v.* Montgomery County Pass. R. Co., 3 Pa. Dist. 58, 14 Pa. Co. Ct. 88; Patterson *v.* Pittston, 8 Kulp 530.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 259, 305 *et seq.*

In New York an abutting owner in whom is the fee of the street may recover compensa-

employed,[13] whether horsepower,[14] steam,[15] cable,[16] or electricity.[17] Such a road,

tion for its use by a street railway. Peck *v.* Schenectady R. Co., 170 N. Y. 298, 63 N. E. 357 [*affirming* 67 N. Y. App. Div. 359, 73 N. Y. Suppl. 794]; Adee *v.* Nassau Electric R. Co., 65 N. Y. App. Div. 529, 72 N. Y. Suppl. 992; Matter of Southern Boulevard R. Co., 58 Hun 497, 12 N. Y. Suppl. 466; Craig *v.* Rochester, etc., R. Co., 39 Barb. 494; Spofford *v.* Southern Boulevard R. Co., 15 Daly 162, 4 N. Y. Suppl. 388; McCruden *v.* Rochester R. Co., 28 N. Y. Suppl. 1135 [*affirming* 5 Misc. 59, 25 N. Y. Suppl. 114]. But when the fee is in a municipality an abutting owner is not entitled to compensation. Mahady *v.* Bushwick R. Co., 91 N. Y. 148, 43 Am. Rep. 661; Kellinger *v.* Forty-Second St., etc., R. Co., 50 N. Y. 206; People *v.* Kerr, 38 Barb. 369, 37 Barb. 357; Park *v.* Rochester City R. Co., 2 N. Y. Suppl. 563. See also Brooklyn City, etc., R. Co. *v.* Coney Island, etc., R. Co., 35 Barb. 364; People *v.* Law, 34 Barb. 494; Brooklyn Cent., etc., R. Co. *v.* Brooklyn City R. Co., 33 Barb. 420.

13. Briggs *v.* Lewiston, etc., R. Co., 79 Me. 363, 10 Atl. 47, 1 Am. St. Rep. 316; People *v.* Ft. Wayne, etc., R. Co., 92 Mich. 522, 52 N. W. 1010, 16 L. R. A. 752; Akron, etc., R. Co. *v.* Keck, 23 Ohio Cir. Ct. 57. Whether the use made of a street is an additional burden upon the easement does not depend upon the motive power which moves the vehicles employed in such use, but depends upon whether the vehicle and appliances used in and necessary to effectuate the purpose permanently and exclusively occupy a portion of the street to the continued exclusion of the rest of the public therefrom. Jaynes *v.* Omaha St. R. Co., 53 Nebr. 631, 74 N. W. 67, 39 L. R. A. 751.

Option as to motive power.— Fox *v.* Catharine, etc., St. R. Co., 12 Pa. Co. Ct. 180; Southern R. Co. *v.* Atlanta R., etc., Co., 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125.

A change in motive power from horse-power to electricity or cable does not constitute a new burden, so as to entitle the abutting owners to compensation. Roebling *v.* Trenton Pass. R. Co., 58 N. J. L. 666, 34 Atl. 1090, 33 L. R. A. 129; Mt. Adams, etc., Inclined R. Co. *v.* Winslow, 3 Ohio Cir. Ct. 425, 2 Ohio Cir. Dec. 240; Pelton *v.* East Cleveland R. Co., 10 Ohio Dec. (Reprint) 545, 22 Cinc. L. Bul. 67; Clement *v.* Cincinnati, 9 Ohio Dec. (Reprint) 688, 16 Cinc. L. Bul. 355; Tagart *v.* Newport St. R. Co., 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205; Reid *v.* Norfolk City R. Co., 94 Va. 117, 26 S. E. 428, 64 Am. St. Rep. 708, 36 L. R. A. 274.

14. *Connecticut.*— Elliott *v.* Fair Haven, etc., R. Co., 32 Conn. 579.

Florida.— State *v.* Jacksonville St. R. Co., 29 Fla. 590, 10 So. 590.

Georgia.— Savannah, etc., R. Co. *v.* Savannah, 45 Ga. 602.

Illinois.— Chicago, etc., R. Co. *v.* West Chicago St. R. Co., 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485 [*affirming* 54 Ill. App. 273].

Indiana.— Eichels *v.* Evansville St. R. Co., 78 Ind. 261, 41 Am. Rep. 561.

Maryland.— Hodges *v.* Baltimore Union Pass. R. Co., 58 Md. 603; Hiss *v.* Baltimore, etc., Pass. R. Co., 52 Md. 242, 36 Am. Rep. 371.

Massachusetts.— White *v.* Blanchard Bros. Granite Co., 178 Mass. 363, 59 N. E. 1025; Atty.-Gen. *v.* Metropolitan R. Co., 125 Mass. 515, 28 Am. Rep. 264.

New Jersey.— West Jersey R. Co. *v.* Cape May, etc., R. Co., 34 N. J. Eq. 164; Citizens Coach Co. *v.* Camden R. Co., 33 N. J. Eq. 267, 36 Am. Rep. 542; Jersey City, etc., R. Co. *v.* Jersey City, etc., R. Co., 20 N. J. Eq. 61; Hinchman *v.* Paterson Horse R. Co., 17 N. J. Eq. 75, 86 Am. Dec. 252.

Ohio.— Sells *v.* Columbus St. R. Co., 11 Ohio Dec. (Reprint) 643, 28 Cinc. L. Bul. 172.

Pennsylvania.— Patterson *v.* Pittston, 8 Kulp 530.

Texas.— Texas, etc., R. Co. *v.* Rosendale St. R. Co., 64 Tex. 80, 53 Am. Rep. 739.

Wisconsin.— Hobart *v.* Milwaukee City R. Co., 27 Wis. 194, 9 Am. Rep. 461.

See 18 Cent. Dig. tit. "Eminent Domain," § 306.

15. Briggs *v.* Lewiston, etc., R. Co., 79 Me. 363, 10 Atl. 47, 1 Am. St. Rep. 316; Nichols *v.* Ann Arbor, etc., R. Co., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; Newell *v.* Minnesota, etc., R. Co., 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303; Paquet *v.* Mt. Tabor St. R. Co., 18 Oreg. 233, 22 Pac. 906; Williams *v.* City Electric St. R. Co., 41 Fed. 556. See also Montgomery *v.* Santa Ana Westminster R. Co., 104 Cal. 186, 37 Pac. 786, 43 Am. St. Rep. 89, 25 L. R. A. 654; Fobes *v.* Rome, etc., R. Co., 121 N. Y. 505, 24 N. E. 919, 8 L. R. A. 453. But see East End R. Co. *v.* Doyle, 88 Tenn. 747, 13 S. W. 936, 17 Am. St. Rep. 933, 9 L. R. A. 100.

16. Tuebner *v.* California St. R. Co., 66 Cal. 171, 7 Pac. 1162; Harrison *v.* Mt. Auburn Cable Co., 9 Ohio Dec. (Reprint) 805, 17 Cinc. L. Bul. 265; Rafferty *v.* Central Traction Co., 147 Pa. St. 579, 23 Atl. 884, 30 Am. St. Rep. 763.

17. *Alabama.*— Baker *v.* Selma St., etc., R. Co., 130 Ala. 474, 30 So. 464; Birmingham Traction Co. *v.* Birmingham R. Electric Co., 119 Ala. 137, 24 So. 502, 43 L. R. A. 233.

Connecticut.— Canastota Knife Co. *v.* Newington Tramway Co., 69 Conn. 146, 36 Atl. 1107.

Georgia.— Southern R. Co. *v.* Atlanta Rapid-Transit Co., 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125.

Illinois.—Chicago, etc., R. Co. *v.* West Chicago, etc., R. Co., 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485 [*affirming* 54 Ill. App. 273]; Chicago, etc., R. Co. *v.* General Electric R. Co., 79 Ill. App. 569.

Iowa.— Snyder *v.* Ft. Madison St. R. Co., 105 Iowa 284, 75 N. W. 179, 41 L. R. A. 345.

Kentucky.— Georgetown, etc., Traction Co.

although operated by the overhead trolley system, does not entitle an abutting owner to compensation,[18] unless he is deprived of his right of access by the poles and wires.[19] A street railroad which carries freight only, or freight as well as passengers, constitutes an additional servitude, for then it is not to be distinguished from a commercial road.[20] According to some of the decisions a railway, although in all respects like a street railway, when constructed upon a country highway constitutes an additional servitude,[21] while this is denied by others.[22]

(5) ELEVATED ROADS. In New York where a large majority of the cases

v. Mulholland, 76 S. W. 148, 25 Ky. L. Rep. 578.

Maryland.— Green *v.* City, etc., R. Co., 78 Md. 294, 28 Atl. 626, 44 Am. St. Rep. 288; Koch *v.* North Ave. R. Co., 75 Md. 222, 23 Atl. 463, 15 L. R. A. 377.

Massachusetts.— Howe *v.* West End St. R. Co., 167 Mass. 46, 44 N. E. 386.

Michigan.— Dean *v.* Ann Arbor St. R. Co., 93 Mich. 330, 53 N. W. 396; People *v.* Ft. Wayne, etc., R. Co., 92 Mich. 522, 52 N. W. 1010, 16 L. R. A. 752; Detroit City R. Co. *v.* Mills, 85 Mich. 634, 48 N. W. 1007.

New Jersey.— Kennelly *v.* Jersey City, 57 N. J. L. 293, 30 Atl. 531, 26 L. R. A. 281; Ehret *v.* Camden, etc., R. Co., 61 N. J. Eq. 171, 47 Atl. 562; West Jersey R. Co. *v.* Camden, etc., R. Co., 52 N. J. Eq. 31, 29 Atl. 423; Halsey *v.* Rapid Transit St. R. Co., 47 N. J. Eq. 380, 20 Atl. 859. See also Paterson R. Co. *v.* Grundy, 51 N. J. Eq. 213, 26 Atl. 788.

Ohio.— Simmons *v.* Toledo, 8 Ohio Cir. Ct. 535, 4 Ohio Cir. Dec. 69; Sells *v.* Columbus St. R. Co., 11 Ohio Dec. (Reprint) 643, 28 Cinc. L. Bul. 172.

Pennsylvania.— Lockhart *v.* Craig St. R. Co., 139 Pa. St. 419, 21 Atl. 26; Com. *v.* West Chester, 9 Pa. Co. Ct. 542; Patterson *v.* Pittston, 8 Kulp 530.

Tennessee.— Cumberland Tel., etc., Co. *v.* United Electric R. Co., 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236.

Texas.— San Antonio Rapid Transit St. R. Co. *v.* Limburger, 88 Tex. 79, 30 S. W. 533, 53 Am. St. Rep. 730.

Virginia.— Reid *v.* Norfolk City R. Co., 94 Va. 117, 26 S. E. 428, 64 Am. St. Rep. 708, 36 L. R. A. 274.

Wisconsin.— Linden Land Co. *v.* Milwaukee Electric R., etc., Co., 107 Wis. 493, 83 N. W. 851; La Crosse City R. Co. *v.* Higbee, 107 Wis. 389, 83 N. W. 701, 51 L. R. A. 923.

See 18 Cent. Dig. tit. "Eminent Domain," § 307.

Limitation of rule.— An electric street railway operating passenger-cars from one city to the streets of another city and to a point beyond is an additional burden on the lands of abutting owners on the streets of the second city through which the line passes. Younkin *v.* Milwaukee Light, etc., Co., (Wis. 1904) 98 N. W. 215.

18. See cases cited *supra*, note 17.

19. *Michigan.*—Detroit City R. Co. *v.* Mills, 85 Mich. 634, 48 N. W. 1007.

Nebraska.— Jaynes *v.* Omaha St. R. Co., 53 Nebr. 631, 74 N. W. 67, 39 L. R. A. 751.

New Jersey.— West Jersey R. Co. *v.* Camden, etc., R. Co., 52 N. J. Eq. 31, 29 Atl. 423.

Ohio.— Mt. Adams, etc., Inclined R. Co. *v.* Winslow, 10 Ohio Dec. (Reprint) 358, 20 Cinc. L. Bul. 420.

Wisconsin.— La Crosse City R. Co. *v.* Higbee, 107 Wis. 389, 83 N. W. 701, 51 L. R. A. 923; Linden Land Co. *v.* Milwaukee Electric R., etc., Co., 107 Wis. 493, 83 N. W. 851.

See 18 Cent. Dig. tit. "Eminent Domain," § 305 *et seq.*

20. Carli *v.* Stillwater St. R., etc., Co., 28 Minn. 373, 10 N. W. 205, 41 Am. Rep. 290; Rische *v.* Texas Transp. Co., 27 Tex. Civ. App. 33, 66 S. W. 324; Chicago, etc., R. Co. *v.* Milwaukee, etc., Electric R. Co., 95 Wis. 561, 70 N. W. 678, 60 Am. St. Rep. 136, 37 L. R. A. 856. See also Goddard *v.* Chicago, etc., R. Co., 104 Ill. App. 533. But see Montgomery *v.* Santa Ana Westminster R. Co., 104 Cal. 186, 37 Pac. 786, 43 Am. St. Rep. 73, 25 L. R. A. 654; White *v.* Blanchard Bros. Granite Co., 178 Mass. 363, 59 N. E. 1025.

21. Pennsylvania R. Co. *v.* Montgomery County Pass. R. Co., 167 Pa. St. 62, 31 Atl. 468, 46 Am. St. Rep. 659, 27 L. R. A. 766; Zehren *v.* Milwaukee Electric R., etc., Co., 99 Wis. 83, 74 N. W. 538, 67 Am. St. Rep. 844, 41 L. R. A. 575. *Compare* Heilman *v.* Lebanon, etc., St. R. Co., 145 Pa. St. 23, 23 Atl. 389 [*affirming* 10 Pa. Co. Ct. 241].

Use of rails like those on commercial railroads.— Nichols *v.* Ann Arbor, etc., R. Co., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371.

When a railroad on a country highway is operated by the overhead trolley system and the poles and wires are used for supplying heat, light, and power to private consumers as well as for furnishing power for the road an additional servitude is imposed. Goddard *v.* Chicago, etc., R. Co., 104 Ill. App. 533; Schaaf *v.* Cleveland, etc., R. Co., 66 Ohio St. 215, 64 N. E. 145.

22. *Kentucky.*— See Ashland, etc., R. Co. *v.* Faulkner, 106 Ky. 332, 45 S. W. 235, 51 S. W. 806, 21 Ky. L. Rep. 151, 43 L. R. A. 554.

Maryland.— Lonaconing Midland, etc., R. Co. *v.* Consolidated Coal Co., 95 Md. 630, 53 Atl. 420; Hiss *v.* Baltimore, etc., Pass. R. Co., 52 Md. 242, 36 Am. Rep. 371; Peddicord *v.* Baltimore, etc., Pass. R. Co., 34 Md. 463.

New Jersey.—Ehret *v.* Camden, etc., R. Co., 61 N. J. Eq. 171, 47 Atl. 562; Ehret *v.* Camden, etc., R. Co., 60 N. J. Eq. 246, 46 Atl. 578. See also Borden *v.* Atlantic Highlands, etc., Electric R. Co., (Ch. 1895) 33 Atl. 276.

Ohio.— See Cincinnati, etc., R. Co. *v.* Cumminsville, 14 Ohio St. 523.

United States.— Ranken *v.* St. Louis, etc., R. Co., 98 Fed. 479.

relating to elevated roads have arisen, it has been decided that even though the fee of the street is owned by the municipality the owner of a lot abutting thereon has incorporeal private rights therein, such as the right to have it kept open so that from it access may be had to the lot and light and air furnished across the open way, and the right to be undisturbed by the unreasonable use of the neighboring property. These rights are property. The erection of an elevated road, in so far as it is incompatible with and destructive of these rights, is a taking of private property for public use for which compensation must be made.[23] In

23. Hine *v.* New York El. R. Co., 149 N. Y. 154, 43 N. E. 414; Malcolm *v.* New York El. R. Co., 147 N. Y. 308, 41 N. E. 790; Steubing *v.* New York El. R. Co., 138 N. Y. 658, 34 N. E. 369; Bischoff *v.* New York El. R. Co., 138 N. Y. 257, 33 N. E. 1073; Sloane *v.* New York El. R. Co., 137 N. Y. 595, 33 N. E. 335; Bookman *v.* New York El. R. Co., 137 N. Y. 302, 33 N. E. 333; Sperb *v.* Metropolitan El. R. Co., 137 N. Y. 155, 32 N. E. 1050, 20 L. R. A. 752; Storck *v.* Metropolitan El. R. Co., 131 N. Y. 514, 30 N. E. 497 [*affirming* 59 N. Y. Super. Ct. 588, 14 N. Y. Suppl. 311]; Hughes *v.* Metropolitan El. R. Co., 130 N. Y. 14, 28 N. E. 765 [*affirming* 57 N. Y. Super. Ct. 379, 8 N. Y. Suppl. 535]; American Bank Note Co. *v.* New York El. R. Co., 129 N. Y. 252, 29 N. E. 302; Lawrence *v.* Metropolitan El. R. Co., 126 N. Y. 483, 27 N. E. 765, 13 L. R. A. 102 [*affirming* 16 Daly 501, 12 N. Y. Suppl. 545]; Williams *v.* Brooklyn El. R. Co., 126 N. Y. 96, 26 N. E. 1048 [*reversing* 10 N. Y. Suppl. 929]; Duyckinck *v.* New York El. R. Co., 125 N. Y. 710, 26 N. E. 755; Kane *v.* New York El. R. Co., 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640 [*affirming* 15 Daly 294, 6 N. Y. Suppl. 526]; Abendroth *v.* Manhattan R. Co., 122 N. Y. 1, 25 N. E. 496, 19 Am. St. Rep. 461, 11 L. R. A. 634 [*affirming* 54 N. Y. Super. Ct. 417]; Powers *v.* Manhattan R. Co., 120 N. Y. 178, 24 N. E. 295; Wagner *v.* Metropolitan El. R. Co., 104 N. Y. 665, 10 N. E. 535; Lahr *v.* Metropolitan El. R. Co., 104 N. Y. 268, 10 N. E. 528; Story *v.* New York El. R. Co., 90 N. Y. 122, 11 Abb. N. Cas. (N. Y.) 236, 43 Am. Rep. 146; Mahon *v.* New York Cent. R. Co., 24 N. Y. 658; Manhattan R. Co. *v.* O'Sullivan, 6 N. Y. App. Div. 571, 40 N. Y. Suppl. 326; McElroy *v.* Manhattan R. Co., 6 N. Y. App. Div. 367, 39 N. Y. Suppl. 497; Lazarus *v.* Metropolitan El. R. Co., 5 N. Y. App. Div. 398, 39 N. Y. Suppl. 294; Otten *v.* Manhattan R. Co., 2 N. Y. App. Div. 396, 37 N. Y. Suppl. 982; Boetzkes *v.* Manhattan R. Co., 1 N. Y. App. Div. 526, 37 N. Y. Suppl. 461; Porter *v.* Seaside, etc., El. R. Co., 91 Hun (N. Y.) 201, 39 N. Y. Suppl. 333; Ryder *v.* Brooklyn El. R. Co., 89 Hun (N. Y.) 29, 35 N. Y. Suppl. 42; Market *v.* Manhattan R. Co., 87 Hun (N. Y.) 213, 33 N. Y. Suppl. 842; Reilly *v.* Manhattan R. Co., 86 Hun (N. Y.) 618, 33 N. Y. Suppl. 391; Kissam *v.* Brooklyn El. R. Co., 86 Hun (N. Y.) 598, 33 N. Y. Suppl. 740; Elias *v.* Manhattan R. Co., 85 Hun (N. Y.) 383, 32 N. Y. Suppl. 1053; Matter of Seaside, etc., El. R. Co., 83 Hun (N. Y.) 143, 31 N. Y. Suppl. 630; Wagner *v.* New York El. R. Co., 79 Hun (N. Y.) 445, 29 N. Y. Suppl. 990; Wright *v.* New York El. R. Co., 78 Hun (N. Y.) 450, 29 N. Y. Suppl. 223; McCready *v.* Metropolitan El. R. Co., 76 Hun (N. Y.) 531, 28 N. Y. Suppl. 94; Flood *v.* Brooklyn El. R. Co., 75 Hun (N. Y.) 601, 27 N. Y. Suppl. 662, 1111; Ode *v.* Manhattan R. Co., 56 Hun (N. Y.) 199, 9 N. Y. Suppl. 338; American Primitive Methodist Soc. *v.* Brooklyn El. R. Co., 46 Hun (N. Y.) 530; *In re* Gilbert El. R. Co., 38 Hun (N. Y.) 438; *In re* East River Bridge, etc., Steam Transit Co., 26 Hun (N. Y.) 490, 10 Abb. N. Cas. (N. Y.) 245; Seebach *v.* Metropolitan El. R. Co., 60 N. Y. Super. Ct. 501, 18 N. Y. Suppl. 208; Johnston *v.* Manhattan R. Co., 60 N. Y. Super. Ct. 494, 17 N. Y. Suppl. 953; Alger *v.* New York El. R. Co., 60 N. Y. Super. Ct. 1, 15 N. Y. Suppl. 960; Benson *v.* Manhattan R. Co., 59 N. Y. Super. Ct. 578, 13 N. Y. Suppl. 957; Cunningham *v.* Manhattan R. Co., 59 N. Y. Super. Ct. 577, 13 N. Y. Suppl. 622; Kearney *v.* Metropolitan El. R. Co., 59 N. Y. Super. Ct. 563, 13 N. Y. Suppl. 608; Jones *v.* Metropolitan El. R. Co., 59 N. Y. Super. Ct. 437, 14 N. Y. Suppl. 632; Stevens *v.* New York El. R. Co., 57 N. Y. Super. Ct. 416, 8 N. Y. Suppl. 313; Mortimer *v.* New York El. R. Co., 57 N. Y. Super. Ct. 244, 6 N. Y. Suppl. 898; Taylor *v.* Metropolitan El. R. Co., 55 N. Y. Super. Ct. 555, 14 N. Y. St. 850; Ireland *v.* Metropolitan El. R. Co., 52 N. Y. Super. Ct. 450; Rich *v.* New York El. R. Co., 16 Daly (N. Y.) 518, 14 N. Y. Suppl. 167; Peyser *v.* Metropolitan El. R. Co., 12 Daly (N. Y.) 70; Kopetsky *v.* Metropolitan El. R. Co., 14 Misc. (N. Y.) 311, 35 N. Y. Suppl. 766; Steinert *v.* Metropolitan El. R. Co., 12 Misc. (N. Y.) 370, 33 N. Y. Suppl. 560; Phyfe *v.* Metropolitan El. R. Co., 11 Misc. (N. Y.) 70, 31 N. Y. Suppl. 1018; Diehl *v.* Metropolitan El. R. Co., 11 Misc. (N. Y.) 14, 31 N. Y. Suppl. 839; Johnson *v.* New York El. R. Co., 10 Misc. (N. Y.) 136, 30 N. Y. Suppl. 920; Skelly *v.* New York El. R. Co., 7 Misc. (N. Y.) 88, 27 N. Y. Suppl. 304; Lindheim *v.* New York El. R. Co., 5 Misc. (N. Y.) 585, 25 N. Y. Suppl. 85; Struthers *v.* New York El. R. Co., 5 Misc. (N. Y.) 239, 25 N. Y. Suppl. 81; Knapp *v.* New York El. R. Co., 4 Misc. (N. Y.) 408, 24 N. Y. Suppl. 324; Mooney *v.* New York El. R. Co., 3 Misc. (N. Y.) 612, 22 N. Y. Suppl. 795; Kahn *v.* New York El. R. Co., 3 Misc. (N. Y.) 611, 22 N. Y. Suppl. 793; Cook *v.* New York El. R. Co., 3 Misc. (N. Y.) 248, 22 N. Y. Suppl. 790; Purdy *v.* Manhattan R. Co., 3 Misc. (N. Y.) 50, 22 N. Y. Suppl. 943; Nette *v.* New York El. R. Co., 2 Misc. (N. Y.) 62, 20 N. Y. Suppl. 844; Hoffman *v.* Manhattan El.

Illinois the owner of a lot abutting upon a street upon which an elevated road is erected is entitled to compensation under the constitutional provision that private property shall not be damaged for public use without just compensation.[24] In Washington under a similar constitutional provision the same decision was made in a case involving the erection of a high trestle for a street railway.[25] In Iowa it has been decided that an elevated steam railroad operated in a street to carry passengers is a "railway" and not "a street railway," within the statute providing compensation to owners of lots abutting on streets in which a railway is laid.[26] In Maryland it has been decided that injuries occasioned by the erection of an abutment to serve as an approach for an elevated road do not constitute a taking.[27]

(6) TELEGRAPH AND TELEPHONE STRUCTURES. There is a sharp conflict in the decisions as to whether the use of a street for the poles and wires of a telegraph or telephone company is or is not such a use of the street as entitles the abutting owner to compensation. Some courts have adopted the view that such use of the street is one which was contemplated when the street was dedicated or the land for it condemned, and hence the abutting owner is not entitled to be compensated for the new use;[28] while other courts have taken the opposite view, holding that

R. Co., 1 Misc. (N. Y.) 155, 20 N. Y. Suppl. 625; Cunard *v.* Manhattan R. Co., 1 Misc. (N. Y.) 151, 20 N. Y. Suppl. 724; Golden *v.* Metropolitan El. R. Co., 1 Misc. (N. Y.) 142, 20 N. Y. Suppl. 630; Betjeman *v.* New York El. R. Co., 1 Misc. (N. Y.) 138, 20 N. Y. Suppl. 628; Jones *v.* New York El. R. Co., 18 N. Y. Suppl. 952; Steinmetz *v.* Metropolitan El. R. Co., 18 N. Y. Suppl. 209; Jones *v.* New York El. R. Co., 18 N. Y. Suppl. 134; Smith *v.* New York El. R. Co., 18 N. Y. Suppl. 132; Ottinger *v.* New York El. R. Co., 17 N. Y. Suppl. 912; Kiep *v.* Metropolitan El. R. Co., 17 N. Y. Suppl. 804; Brush *v.* Manhattan R. Co., 17 N. Y. Suppl. 540; Johnston *v.* Manhattan R. Co., 16 N. Y. Suppl. 434; Suarez *v.* Manhattan R. Co., 15 N. Y. Suppl. 222; Korn *v.* New York El. R. Co., 13 N. Y. Suppl. 514; *In re* New York El. R. Co., 12 N. Y. Suppl. 857; Mattlage *v.* New York El. R. Co., 11 N. Y. Suppl. 482; Jewett *v.* Union El. R. Co., 1 N. Y. Suppl. 123; Third Ave. R. Co. *v.* New York El. R. Co., 19 Abb. N. Cas. (N. Y.) 261; Sixth Ave. R. Co. *v.* Gilbert El. R. Co., 3 Abb. N. Cas. (N. Y.) 372.

Compensation for damages by smoke, steam, and cinders.—Abendroth *v.* Manhattan R. Co., 122 N. Y. 1, 25 N. E. 496, 19 Am. St. Rep. 461, 11 L. R. A. 634. See also Mattlage *v.* New York El. R. Co., 11 N. Y. Suppl. 482.

The owner of the fee of the street is entitled to compensation for interference with a vault remained under the street. *In re* New York El. R. Co., 12 N. Y. Suppl. 857.

Street opened after condemnation.— Birrell *v.* New York, etc., R. Co., 41 N. Y. App. Div. 506, 58 N. Y. Suppl. 650.

That injunction will lie to prevent the operation of an elevated railroad in a street in front of plaintiff's premises see Storm *v.* New York, etc., R. Co., 83 Hun (N. Y.) 86, 31 N. Y. Suppl. 370; Keller *v.* Metropolitan El. R. Co., 59 N. Y. Super. Ct. 589, 15 N. Y. Suppl. 88; Herold *v.* Manhattan R. Co., 59 N. Y. Super. Ct. 564, 13 N. Y. Suppl. 610; Schmidt *v.* Manhattan R. Co., 11 Misc. (N. Y.) 18, 31 N. Y. Suppl. 832; Betjeman *v.* New York El. R. Co., 1 Misc. (N. Y.) 138, 20 N. Y. Suppl. 628; Slater *v.* Manhattan R. Co., 18 N. Y. Suppl. 531; Korn *v.* New York El. R. Co., 13 N. Y. Suppl. 514; Giordano *v.* Manhattan R. Co., 9 N. Y. Suppl. 258; Woolsey *v.* New York El. R. Co., 9 N. Y. Suppl 133.

24. Aldis *v.* Union El. Co., 203 Ill. 567, 68 N. E. 95 [*distinguishing* Doane *v.* Lake St. El. R. Co., 165 Ill. 510, 46 N. E. 520, 56 Am. St. Rep. 265, 36 L. R. A. 97]. See also Metropolitan West Side El. R. Co. *v.* Goll, 100 Ill. App. 323.

25. State *v.* King County Super. Ct., 26 Wash. 278, 66 Pac. 385.

26. Freiday *v.* Sioux City Rapid Transit Co., 92 Iowa 191, 60 N. W. 656, 26 L. R. A. 246.

27. Garrett *v.* Lake Roland El. R. Co., 79 Md. 277, 29 Atl. 830, 24 L. R. A. 396 [*disapproving* Lahr *v.* Metropolitan El. R. Co., 104 N. Y. 268, 10 N. E. 528]; Story *v.* New York El. R. Co., 90 N. Y. 122, 43 Am. Rep. 146.

28. *Indiana.*— Magee *v.* Overshiner, 150 Ind. 127, 49 N. E. 951, 65 Am. St. Rep. 358, 40 L. R. A. 370.

Louisiana.— Irwin *v.* Great Southern Tel. Co., 37 La. Ann. 63.

Massachusetts.— Pierce *v.* Drew, 136 Mass. 75, 49 Am. Rep. 7.

Missouri.— Julia Bldg. Assoc. *v.* Bell Telephone Co., 88 Mo. 258, 57 Am. Rep. 398. See also State *v.* St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113.

Montana.— Hershfield *v.* Rocky Mountain Bell Tel. Co., 12 Mont. 102, 29 Pac. 883.

Ohio.—Auerbach *v.* Cuyahoga Telephone Co., 9 Ohio S. & C. Pl. Dec. 389, 7 Ohio N. P. 633; Western Union Tel. Co. *v.* Champion Electric Light Co., 9 Ohio Dec. (Reprint) 540, 14 Cinc. L. Bul. 327.

Pennsylvania.— York Telephone Co. *v.* Keesy, 5 Pa. Dist. 366.

South Dakota.— Kirby *v.* Citizens' Telephone Co., (1903) 97 N. W. 3.

such use of the street constitutes an additional servitude for which the owner should be compensated.[29] According to the decided weight of authority, the use of a country highway for the poles and wires of a telegraph or telephone company is not one of the ordinary and legitimate uses of such a highway, and if such use is made of it, the abutting owners must be compensated.[30]

(7) Light and Power Structures. When poles are erected and wires strung for the purpose of furnishing heat, light, or power to private persons, an additional servitude is imposed entitling abutting owners to compensation;[31] but when poles and wires are placed upon a street or highway to serve public interests, such as lighting the street or highway, no compensation need be made.[32]

West Virginia.— Maxwell *v.* Central Dist., etc., Tel. Co., 51 W. Va. 121, 41 S. E. 125.

See 18 Cent. Dig. tit. "Eminent Domain," § 312.

An ordinance of Baltimore, giving a telephone company the right to maintain its poles in the foot-way adjoining plaintiff's warehouse, does not enlarge the authority conferred upon the company by Md. Code, art. 23, §§ 224, 232, which provides that telephone companies may construct their lines upon any street, provided the poles and fixtures do not interfere with the convenience of any landowner more than is unavoidable, and providing further that the company shall be responsible for any resulting damage. Chesapeake, etc., Tel. Co. *v.* Mackenzie, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219.

29. *Illinois.*— Postal Tel. Cable Co. *v.* Eaton, 170 Ill. 513, 49 N. E. 365, 62 Am. St. Rep. 390, 39 L. R. A. 722; Union Electric Telephone, etc., Co. *v.* Applequist, 104 Ill. App. 517.

Maryland.— Chesapeake, etc., Tel. Co. *v.* Mackenzie, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219.

Mississippi.— Stowers *v.* Postal Tel. Cable Co., 68 Miss. 559, 9 So. 356, 24 Am. St. Rep. 290, 12 L. R. A. 864.

Nebraska.— Bronson *v.* Albion Telephone Co., (1903) 93 N. W. 201, 60 L. R. A. 426.

New Jersey.— Nicoll *v.* New York, etc., Telephone Co., 62 N. J. L. 156, 40 Atl. 627; Broome *v.* New York, etc., Telephone Co., 42 N. J. Eq. 141, 7 Atl. 851.

New York.— Metropolitan Telephone, etc., Co. *v.* Colwell Lead Co., 50 N. Y. Super. Ct. 488, 67 How. Pr. 365; Andrews *v.* Delhi, etc., Tel. Co., 73 N. Y. Suppl. 1129 [*affirming* 36 Misc. 23, 72 N. Y. Suppl. 50].

North Dakota.— Donovan *v.* Allert, (1902) 91 N. W. 441.

Washington.— Spokane *v.* Colby, 16 Wash. 610, 48 Pac. 248.

Wisconsin.— Krueger *v.* Wisconsin Telephone Co., 106 Wis. 96, 81 N. W. 1041, 50 L. R. A. 298.

See 18 Cent. Dig. tit. "Eminent Domain," § 312.

30. *Illinois.*— Board of Trade Tel. Co. *v.* Barnett, 107 Ill. 507, 47 Am. Rep. 453.

New York.— Blashfield *v.* Empire State Telephone, etc., Co., 147 N. Y. 520, 42 N. E. 2; Eels *v.* American Telephone Co., 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640 [*affirming* 65 Hun 516, 20 N. Y. Suppl. 600]; Gray *v.* New York State Telephone Co., 41 Misc. 108, 83 N. Y. Suppl. 920.

Ohio.— Smith *v.* Central Dist. Printing, etc., Co., 2 Ohio Cir. Ct. 259, 1 Ohio Cir. Dec. 475; Denver *v.* U. S. Telephone Co., 10 Ohio S. & C. Pl. Dec. 273.

Pennsylvania.— Lancaster, etc., Turnpike Road Co. *v.* Columbia Telephone Co., 18 Lanc. L. Rev. 161.

Virginia.— Western Union Tel. Co. *v.* Williams, 86 Va. 696, 11 S. E. 106, 19 Am. St. Rep. 908, 8 L. R. A. 429.

United States.— Kester *v.* Western Tel. Co., 108 Fed. 926; Pacific Postal Tel. Cable Co. *v.* Irvine, 49 Fed. 113.

See 18 Cent. Dig. tit. "Eminent Domain," § 312.

Contra.— People *v.* Eaton, 100 Mich. 208, 59 N. W. 145, 24 L. R. A. 721; Cater *v.* Northwestern Telephone Exch. Co., 60 Minn. 539, 63 N. W. 111, 51 Am. St. Rep. 543, 28 L. R. A. 310; Rugg *v.* Commercial Union Tel. Co., 66 Vt. 208, 28 Atl. 1036. See also Willis *v.* Erie Tel., etc., Co., 37 Minn. 347, 34 N. W. 237, where the court was equally divided.

31. *Illinois.*— Goddard *v.* Chicago, etc., R. Co., 104 Ill. App. 533; Goddard *v.* Chicago, etc., R. Co., 104 Ill. App. 526.

New Jersey.— See Andreas *v.* Bergen County Gas, etc., Co., (Ch. 1900) 47 Atl. 555.

New York.— Tuttle *v.* Brush Electric Illuminating Co., 50 N. Y. Super. Ct. 464.

Ohio.— Schaaf *v.* Cleveland, etc., R. Co., 66 Ohio St. 215, 64 N. E. 145; Callen *v.* Columbus Edison Electric Light Co., 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782; McLean *v.* Brush Electric Light Co., 8 Ohio Dec. (Reprint) 619, 9 Cinc. L. Bul. 65.

Pennsylvania.— Haverford Electric Light Co. *v.* Hart, 13 Pa. Co. Ct. 369.

See 18 Cent. Dig. tit. "Eminent Domain," § 312.

32. Gulf Coast Ice, etc., Co. *v.* Bowers, 80 Miss. 570, 32 So. 113; Loeher *v.* Butte Gen. Electric Co., 16 Mont. 1, 39 Pac. 912, 50 Am. St. Rep. 468; Palmer *v.* Larchmont Electric Co., 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672 [*reversing* 6 N. Y. App. Div. 12, 36 N. Y. Suppl. 522]; People *v.* Thompson, 65 How. Pr. (N. Y.) 407. See also Andreas *v.* Bergen County Gas, etc., Co., (N. J. Ch. 1900) 47 Atl. 555; Johnson *v.* Thompson-Houston Electric Co., 54 Hun (N. Y.) 469, 7 N. Y. Suppl. 315; Tuttle *v.* Brush Electric Illuminating Co., 50 N. Y. Super. Ct. 464.

(8) BICYCLE PATH. A bicycle path along a public road or street does not constitute an additional servitude.[33]

(9) USE OF STREET OR HIGHWAY BELOW SURFACE. The use of city streets for sewers,[34] water-pipes,[35] gas-pipes,[36] conduits for underground wires,[37] or tunnels does not constitute such an additional servitude as entitles abutting owners to compensation, if such use is for the public benefit.[38] It is said in the last two cases that the temporary inconvenience to which the adjoining proprietors are subject while the work of excavation and tunneling is in progress is not such an injury as will entitle the abutting owner to damages.[39] Not only the bed of city streets but sidewalks may be put to such uses.[40] It has been decided in a number of cases that gas-pipes cannot be laid in rural highways without compensating abutting owners.[41] The right to use rural highways for water-pipes and sewers without compensation to abutting owners has been both affirmed[42] and denied.[43]

(III) *RAILROAD ON CANAL.* The change of use of land appropriated for canal

33. Ryan *v.* Preston, 59 N. Y. App. Div. 97, 69 N. Y. Suppl. 100.

34. *Massachusetts.*— Lincoln *v.* Com., 164 Mass. 1, 41 N. E. 112. See also Cabot *v.* Kingman, 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45; Chelsea Dye House, etc., Co. *v.* Com., 164 Mass. 350, 41 N. E. 649.

Michigan.— Warren *v.* Grand Haven, 30 Mich. 24.

New Jersey.— Stoudinger *v.* Newark, 28 N. J. Eq. 446.

New York.— Van Brunt *v.* Flatbush, 128 N. Y. 50, 50 N. E. 973; *In re* Wells Ave., 4 N. Y. Suppl. 301.

Ohio.— Cincinnati, etc., Turnpike Co. *v.* Avendale, 9 Ohio Dec. (Reprint) 813. See also Malone *v.* Toledo, 28 Ohio St. 643.

Oregon.— See Huddleston *v.* Eugene, 34 Oreg. 343, 55 Pac. 868, 43 L. R. A. 444.

Pennsylvania.— See Lockhart *v.* Craig St. R. Co., 139 Pa. St. 419, 21 Atl. 26.

See 18 Cent. Dig. tit. "Eminent Domain," § 313.

Limitations of rule.— When a sewer was in no way for the benefit of the owners of the lands in a town through which it passed or for the benefit of the town itself, but belonged to a neighboring town and was exclusively for the benefit of the inhabitants of the latter, the principles justifying the use of city streets for sewers did not apply. Van Brunt *v.* Flatbush, 128 N. Y. 50, 27 N. E. 973 [*reversing* 59 Hun 192, 13 N. Y. Suppl. 545]. A village cannot give a private corporation permission to construct its water mains through a village street not worked or accepted by the village as a street, without compensation to the owner of the soil in the street. Jayne *v.* Cortland Water Works Co., 42 Misc. (N. Y.) 263, 86 N. Y. Suppl. 571.

35. Crooke *v.* Flatbush Water Works Co., 29 Hun (N. Y.) 245; Memphis *v.* Memphis Water Co., 5 Heisk. (Tenn.) 495. See also Citizens' Coach Co. *v.* Camden Horse R. Co., 33 N. J. Eq. 267, 36 Am. Rep. 542; Jersey City Water Com'rs *v.* Hudson, 13 N. J. Eq. 420.

As to the highways of an unincorporated village the same rule applies as to the streets of municipalities. Witcher *v.* Holland Water Works Co., 66 Hun (N. Y.) 619, 20 N. Y. Suppl. 560.

36. McDevitt *v.* People's Natural Gas Co., 160 Pa. St. 367, 28 Atl. 948. But see Webb *v.* Ohio Gas Fuel Co., 9 Ohio Dec. (Reprint) 662, 16 Cinc. L. Bul. 121 (holding that when gas-pipes are laid in a city street for furnishing fuel that abutting owners must be compensated); Mallory *v.* Bradford, 1 Pa. Dist. 670 (holding that an incorporated gas company, although duly authorized by the city, cannot make such a use of the streets without compensation, but intimating that the city itself might do so).

37. Coburn *v.* New Telephone Co., 156 Ind. 90, 39 N. E. 324, 52 L. R. A. 671; Castle *v.* Bell Telephone Co., 49 N. Y. App. Div. 437, 63 N. Y. Suppl. 482 [*affirming* 30 Misc. 38, 61 N. Y. Suppl. 743].

38. Sears *v.* Crocker, 184 Mass. 586, 69 N. E. 327; Souch *v.* East London R. Co., L. R. 16 Eq. 108, 42 L. J. Ch. 477, 21 Wkly. Rep. 590, 22 Wkly. Rep. 566. See also Adams *v.* Saratoga, etc., R. Co., 11 Barb. (N. Y.) 414; Plant *v.* Long Island R. Co., 10 Barb. (N. Y.) 26.

39. See cases cited *supra*, note 38.

40. Coburn *v.* New Telephone Co., 156 Ind. 90, 59 N. E. 346, 52 L. R. A. 671; McDevitt *v.* People's Natural Gas Co., 160 Pa. St. 367, 28 Atl. 948.

41. Kincaid *v.* Indianapolis Natural Gas Co., 124 Ind. 577, 24 N. E. 1066, 19 Am. St. Rep. 112, 8 L. R. A. 602; Consumers' Gas Trust Co. *v.* Huntsinger, 14 Ind. App. 156, 42 N. E. 640; Ward *v.* Triple-State Natural Gas, etc., Co., 74 S. W. 709, 25 Ky. L. Rep. 116; Bloomfield, etc., Natural Gas Light Co. *v.* Calkins, 62 N. Y. 386 [*affirming* 1 Thomps. & C. 541]; Sterling's Appeal, 111 Pa. St. 35, 2 Atl. 105, 56 Am. Rep. 246. See also McDevitt *v.* People's Natural Gas Co., 160 Pa. St. 367, 28 Atl. 948.

42. Water-pipes.— Bishop *v.* North Adams Fire Dist., 167 Mass. 364, 45 N. E. 925.

Sewers.— Lincoln *v.* Com., 164 Mass. 1, 41 N. E. 112. See also Huddleston *v.* Eugene, 34 Oreg. 343, 55 Pac. 868, 43 L. R. A. 444.

43. Water-pipes.— Biddle *v.* Wayne Water Works Co., 7 Del. Co. (Pa.) 373.

purposes to use as a railroad right of way entitles the owner of the land to compensation for the additional burden.[44]

(iv) *Railroad Over Park.* Where land has been appropriated by a city for park purposes, the owner of the fee is entitled to compensation for a subsequent railroad right of way across the land.[45]

(v) *Telegraph or Telephone on Railroad.* A telegraph or telephone line constructed for general commercial purposes along a railroad and on the right of way thereof is an additional burden upon the land for which abutting landowners are entitled to just compensation.[46] If, however, such a line is constructed over the right of way of a railroad company in good faith for the use and benefit of the latter in the operation of its road and to facilitate its business, or is reasonably necessary for that purpose, the landowners have no ground of complaint, because such use of their land is within the scope of the original easement for which they have already received compensation.[47]

(vi) *Second Railroad on Right of Way.* The construction of a second railroad by another railroad company on a right of way is an additional burden for which landowners are entitled to compensation.[48] One railroad may, however, let another company into the common use of its tracks, for terminal purposes, especially in cities and towns, and this does not impose an additional burden, entitling the owner of the land to further compensation.[49] And a railroad may enter into an arrangement with another by which the latter may jointly use a part of land condemned by it for depot purposes for the same purposes, with the necessary switches, side-tracks, and turnouts, and such use does not constitute a new servitude.[50]

(vii) *Effect of Abandonment.* When lands are taken for streets, highways, railroads, or other such purposes, and only such interest is acquired as is necessary for the public use, when this use ceases the lands revert to the owners of the fee, and an additional burden, such as a railroad, cannot be imposed upon them by law, without making further compensation to such owners.[51]

E. Measure and Elements of Damages — 1. In General. The measure and amount of the compensation for property taken by the exercise of the right of eminent domain should be ascertained under the laws in force at the time the pro-

Sewers.— Van Brunt *v.* Flatbush, 128 N. Y. 50, 27 N. E. 973.

44. Vought *v.* Columbus, etc., R. Co., 58 Ohio St. 123, 50 N. E. 442; Hatch *v.* Cincinnati, etc., R. Co., 18 Ohio St. 92.

If a railroad company occupies with its tracks the banks of a canal, this constitutes an additional easement to that of the canal bank, for which the owner of the fee is entitled to compensation. Lafayette, etc., R. Co. *v.* Murdock, 68 Ind. 137.

45. Newton *v.* Manufacturers' R. Co., 115 Fed. 781, 53 C. C. A. 599.

46. Prather *v.* Jeffersonville, etc., R. Co., 52 Ind. 16; American Tel., etc., Co. *v.* Pearce, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200; Hodges *v.* Western Union Tel. Co., 133 N. C. 225, 45 S. W. 572; Phillips *v.* Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868; Kansas, etc., R. Co. *v.* Le Flore, 49 Fed. 119, 1 C. C. A. 192 [*reversing* 46 Fed. 546]; Kansas, etc., R. Co. *v.* Payne, 49 Fed. 114, 1 C. C. A. 183.

Joint construction by railroad and third party.— Western Union Tel. Co. *v.* Rich, 19 Kan. 517, 27 Am. Rep. 159.

47. American Tel., etc., Co. *v.* Pearce, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200; Hodges *v.* Western Union Tel. Co., 133 N. C. 225, 45 S. E. 572. See also Western Union Tel. Co. *v.* Rich, 19 Kan. 517, 27 Am. Rep. 159.

48. Platt *v.* Pennsylvania Co., 43 Ohio St. 228, 1 N. E. 420; Ft. Worth, etc., R. Co. *v.* Jennings, 76 Tex. 373, 13 S. W. 270, 8 L. R. A. 108.

49. Miller *v.* Green Bay, etc., R. Co., 59 Minn. 169, 60 N. W. 1006, 26 L. R. A. 443.

50. Stevens *v.* St. Louis, etc., R. Co., 152 Mo. 212, 53 S. W. 1066.

51. Omaha Southern R. Co. *v.* Beeson, 36 Nebr. 361, 54 N. W. 557. See also Heard *v.* Brooklyn, 60 N. Y. 242; Heath *v.* Barmore, 50 N. Y. 302 [*affirming* 49 Barb. 496]; *In re* Central Park Com'rs, 54 How. Pr. (N. Y.) 313; Platt *v.* Pennsylvania Co., 43 Ohio St. 228, 1 N. E. 420. But see Northern R. Co. *v.* Earhardt, 167 Mo. 612, 67 S. W. 229. See also XIII, E, 1, b.

Under the Iowa statute, which provides that an abandoned right of way may be condemned by a new railroad company, but that an owner who has previously received compensation, which has not been refunded by him, cannot recover the second time, a grantee of the original owner to whom the compensation for the first right of way was paid has no greater rights than such first owner.

ceedings are begun,[52] and the elements of compensation depend largely upon the nature and extent of the right taken or the interest acquired as well as upon the resulting injury or benefit to the owner of the property affected.[53] An element of damage cannot be considered which is based on an unlawful use or condition of the premises.[54]

2. WHERE ENTIRE TRACT IS TAKEN. The measure of damages when the whole of any particular piece of property is taken for a public use under the power of eminent domain is the market value of it.[55] Market value means the fair value as

Dubuque, etc., R. Co. *v.* Diehl, 64 Iowa 635, 21 N. W. 117.

52. Emerson *v.* Western Union R. Co., 75 Ill. 176.

53. See *infra*, X, E, 2 *et seq.*

54. Burke *v.* Chicago Sanitary Dist., 152 Ill. 125, 38 N. E. 670 (holding that the possibility of the land being improved by diking the river flowing in front of it cannot be considered if the effect of the diking would be to wrongfully overflow the lands of others); McKinney *v.* Nashville, 102 Tenn. 131, 52 S. W. 781, 73 Am. St. Rep. 859 (holding that the fact that the premises have an increased value because of being used for an illegal purpose cannot be considered as enhancing the compensation). See also Matter of Daly, 45 N. Y. App. Div. 622, 61 N. Y. Suppl. 480, holding that the fact that a part of the property consisting of a mill-dam has been declared a nuisance may be taken into consideration in the assessment. However, damages may be recovered for the removal of an embankment on which a private railroad was placed leading to the owner's property, although the embankment was above the established grade of a street, where the street has not been opened. Quigley *v.* Pennsylvania Schuylkill Valley R. Co., 121 Pa. St. 35, 15 Atl. 478, 1 L. R. A. 503.

55. *Alabama.*— Jones *v.* New Orleans, etc., R. Co., 70 Ala. 227.

Arkansas.— Little Rock, etc., R. Co. *v.* McGehee, 41 Ark. 202.

California.— Kishlar *v.* Southern Pac. R. Co., 134 Cal. 636, 66 Pac. 848; Santa Ana *v.* Brunner, 132 Cal. 234, 64 Pac. 287.

Illinois.— Sexton *v.* Union Stock Yard, etc., Co., 200 Ill. 244, 65 N. E. 638; Chicago *v.* Jackson, 196 Ill. 496, 63 N. E. 1013, 1135; Calumet, etc., Canal, etc., Co. *v.* Morawetz, 195 Ill. 398, 63 N. E. 165; Phillips *v.* Scales Mound, 195 Ill. 353, 63 N. E. 180; Davis *v.* Northwestern El. R. Co., 170 Ill. 595, 48 N. E. 678; Dupuis *v.* Chicago, etc., R. Co., 166 Ill. 249, 46 N. E. 803. See also Wabash, etc., R. Co. *v.* McDougall, 118 Ill. 229, 8 N. E. 678; Dupuis *v.* Chicago, etc., R. Co., 115 Ill. 97, 3 N. E. 720.

Indiana.— Lafayette, etc., R. Co. *v.* Murdock, 68 Ind. 137; Pittsburgh, etc., R. Co. *v.* Swinney, 59 Ind. 100; Lake Erie, etc., Co. *v.* Shelley, (App. 1903) 67 N. E. 564.

Iowa.— Bennett *v.* Marion, 106 Iowa 628, 76 N. W. 844; Hollingsworth *v.* Des Moines, etc., R. Co., 63 Iowa 443, 19 N. W. 325; Cummins *v.* Des Moines, etc., R. Co., 63 Iowa 397, 19 N. W. 268.

Kansas.— Kansas City, etc., R. Co. *v.* Fisher, 49 Kan. 17, 30 Pac. 111; Kansas City, etc., R. Co. *v.* Ryan, 49 Kan. 1, 30 Pac. 108.

Kentucky.— Barrall *v.* Quick, 111 Ky. 22, 63 S. W. 33, 23 Ky. L. Rep. 421; Henderson, etc., R. Co. *v.* Dickerson, 17 B. Mon. 173, 66 Am. Dec. 148.

Maine.— Bangor, etc., R. Co. *v.* McComb, 60 Me. 290.

Massachusetts.— Beale *v.* Boston, 166 Mass. 53, 43 N. E. 1029; Old Colony R. Co. *v.* Miller, 125 Mass. 1, 28 Am. Rep. 194; Hampden Paint, etc., Co. *v.* Springfield, etc., R. Co., 124 Mass. 118; Edmands *v.* Boston, 108 Mass. 535; Whitman *v.* Boston, etc., R. Co., 7 Allen 313; Dickenson *v.* Fitchburg, 13 Gray 546; Parks *v.* Boston, 15 Pick. 198.

Michigan.— Detroit *v.* Beecher, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813.

Minnesota.— Robbins *v.* St. Paul, etc., R. Co., 22 Minn. 286.

Missouri.— Missouri Pac. R. Co. *v.* Porter, 112 Mo. 361, 20 S. W. 568.

Nebraska.— Fremont, etc., R. Co. *v.* Whalen, 11 Nebr. 585, 10 N. W. 491.

Nevada.— Virginia, etc., R. Co. *v.* Henry, 8 Nev. 165.

New Jersey.— Henderson *v.* Orange, 9 N. J. L. J. 71.

New York.— Matter of Armory Bd., 73 N. Y. App. Div. 152, 76 N. Y. Suppl. 766; Matter of Public Parks, 53 Hun 280, 6 N. Y. Suppl. 750; People *v.* Eldridge, 6 Thomps. & C. 20.

Ohio.— Giesy *v.* Cincinnati, etc., R. Co., 4 Ohio St. 308; Cincinnati *v.* Kemper, 7 Ohio Dec. (Reprint) 245, 2 Cinc. L. Bul. 5.

Pennsylvania.— Friday *v.* Pennsylvania R. Co., 204 Pa. St. 405, 54 Atl. 339; Reading, etc., R. Co. *v.* Balthasar, 126 Pa. St. 1, 17 Atl. 518; Delaware, etc., R. Co. *v.* Burson, 61 Pa. St. 369.

Rhode Island.— Howard *v.* Providence, 6 R. I. 514.

Tennessee.— Memphis *v.* Boltin, 9 Heisk. 508.

Texas.— Eastern Texas R. Co. *v.* Eddings, 30 Tex. Civ. App. 170, 70 S. W. 98; Gulf, etc., R. Co. *v.* Lyons, 2 Tex. App. Civ. Cas. § 139.

West Virginia.— Ward *v.* Ohio River R. Co., 35 W. Va. 481, 14 S. E. 142.

Wisconsin.— West *v.* Milwaukee, etc., R. Co., 56 Wis. 318, 14 N. W. 292.

United States.— Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170; Kerr *v.* South Park Com'rs, 117 U. S. 379, 6 S. Ct. 801, 29 L. ed. 924; U. S. *v.* Honolulu Plantation Co., 122 Fed. 581, 58 C. C. A. 279; U. S. *v.* Inlots, 26 Fed. Cas. No. 15,441.

between one who wants to purchase and one who wants to sell, not what could be obtained for it under peculiar circumstances when a greater than its fair price

See 18 Cent. Dig. tit. "Eminent Domain," § 352 *et seq.*

The object of the statutes on eminent domain is not to enable corporations to acquire property for a less sum than the owners would be able to secure in the open market. The object is that corporations, upon paying such sum as the owners might reasonably and fairly expect to receive in the open market, may be enabled to possess and enjoy such property as public policy requires to be devoted to their purposes. *In re* Staten Island R. Co., 10 N. Y. St. 393.

"Cash market value" and "fair cash market value" are substantially synonymous terms. Conness *v.* Indiana, etc., R. Co., 193 Ill. 464, 62 N. E. 221.

Fee or perpetual easement taken.— It is immaterial whether the condemnation proceedings pass the fee (Cincinnati *v.* Kemper, 7 Ohio Dec. (Reprint) 245, 2 Cinc. L. Bul. 5), or an easement which is practically perpetual (Robbins *v.* St. Paul, etc., R. Co., 22 Minn. 286).

In estimating the market value of the shares of a dissenting stock-holder which are taken under the power of eminent domain for the purpose of effectuating a lease of the corporate property, the decrease in their market price caused by the execution of a contract for the lease falls on the owner the same as if he were voluntarily selling them. Gregg *v.* Northern R. Co., 67 N. H. 452, 41 Atl. 271.

Land abutting on a street.— *In re* New State House, 19 R. I. 382, 33 Atl. 523.

In determining the value of lands appropriated for public purposes, the same considerations are to be regarded as in a sale between private persons, the inquiry in such cases being what are they worth in the market. Mississippi, etc., River Boom Co. *v.* Patterson, 98 U. S. 403, 25 L. ed. 206. See also Muller *v.* Southern Pac. R. Co., 83 Cal. 240, 23 Pac. 265; San Diego Land, etc., Co. *v.* Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83; Ligare *v.* Chicago, etc., R. Co., 166 Ill. 249, 46 N. E. 803; Low *v.* Concord R. Co., 63 N. H. 557, 3 Atl. 739; Reg. *v.* Brown, L. R. 2 Q. B. 630, 8 B. & S. 456, 36 L. J. Q. B. 322, 16 L. T. Rep. N. S. 827, 16 Wkly. Rep. 988. The owner should be allowed to prove every fact which he would naturally be disposed to adduce if he were attempting to effect a private sale; and opposing counsel should be allowed to make every inquiry which one about to buy the property would feel it to his interest to make. Little Rock Junction R. Co. *v.* Woodruff, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51. Everything which gives the land intrinsic value is to be taken into consideration. Shenango, etc., R. Co. *v.* Braham, 79 Pa. St. 447.

Value as affected by presence of minerals, etc.— Pittsburgh, etc., R. Co. *v.* Swinney, 59 Ind. 100; People *v.* Eldridge, 6 Thomps. & C. (N. Y.) 20; Reading, etc., R. Co. *v.* Balthaser, 126 Pa. St. 1, 17 Atl. 518. In Iowa it is held that where there is no evidence that the estate is of any value by reason of anything on or under the surface which can be removed without interfering with the railroad company's easement, damages are properly awarded on the basis of the market value of the land. Hollingsworth *v.* Des Moines, etc., R. Co., 63 Iowa 443, 19 N. W. 325. A mining prospect upon which shafts have been sunk — one forty-one feet, another twenty feet — but which has produced no return has a market value, and such value is to be ascertained, in proceedings for condemnation of the claim for railroad purposes, under the same rule as is the value of other property; and testimony as to the value is not necessarily based upon sales of the same and similar property. Montana R. Co. *v.* Warren, 6 Mont. 275, 12 Pac. 641.

Profits of a business carried on in a store on the land cannot be considered for the purpose of proving the market value. Matter of Gilroy, 26 N. Y. App. Div. 314, 49 N. Y. Suppl. 798. So in proceedings to assess damages for condemning certain ground, the value of a salt water well on the premises is to be determined not by the profits in operating the same, but from its selling value. Kossler *v.* Pittsburg, etc., R. Co., 208 Pa. St. 50, 57 Atl. 66.

The market value is not to be enhanced or affected by different or conflicting rights of parties having different estates or interests. The sovereign must pay for the property taken but once, and but one price for the whole, embracing all estates and claims. Matter of Buffalo, Sheld. (N. Y.) 408.

What the owner paid for the property is immaterial, since the market value at the time of the taking is the measure of compensation. Gulf, etc., R. Co. *v.* Lyons, 2 Tex. App. Civ. Cas. § 139.

What was offered for the land five years before is immaterial. Eastern Texas R. Co. *v.* Eddings, 30 Tex. Civ. App. 170, 70 S. W. 98.

Not a universal test.— While ordinarily the market value is the best test, yet it is not the universal test, and cases often arise where some other mode of ascertaining value must be resorted to. Beale *v.* Boston, 166 Mass. 53, 43 N. E. 1029. Thus in proceedings to take a private toll-bridge for public use, the principle of market value does not apply, since the property cannot be said to have a market value. Montgomery County *v.* Schuylkill Bridge Co., 110 Pa. St. 54, 20 Atl. 407.

Cost of marketing.— Lehigh Coal Co. *v.* Wilkesbarre, etc., R. Co., 187 Pa. St. 145, 41 Atl. 37.

Burden of proving value see *infra*, XI, M, 9, a.

Evidence and proof of market value of land see, generally, EVIDENCE.

could be obtained, nor its speculative value, nor a value obtained from the necessity of another;[56] its present value at a sale which a prudent owner would make if he had the power of election as to the time and terms;[57] its value in view of all the purposes to which it is adapted;[58] the amount for which it would actually sell at the time, not what it might bring or ought to bring at some future time;[59] such a sum as it is fairly worth in the market, not its value at a forced sale;[60] not merely the value to the owner or to the person seeking to condemn it.[61] Its fair market value is to be reached without any regard to the external causes which may have contributed to make up its value at the time of the assessment.[62]

3. WHERE PART OF TRACT IS TAKEN.[63] Where only a part of a tract is taken in the exercise of the power of eminent domain, the just compensation which the constitution guarantees to the owner includes not only the value of the part taken but also the damages accruing to the residue from the improvement.[64] The

56. Tedens *v.* Chicago Sanitary Dist., 149 Ill. 87, 36 N. E. 1033; Brown *v.* Calumet River R. Co., 125 Ill. 600, 18 N. E. 283; Calumet River R. Co. *v.* Moore, 124 Ill. 329, 15 N. E. 764; Kiernan *v.* Chicago, etc., R. Co., 123 Ill. 188, 14 N. E. 18; Kansas City, etc., R. Co. *v.* Fisher, 49 Kan. 17, 30 Pac. 111.

57. Doughty *v.* Somerville, etc., R. Co., 22 N. J. L. 495.

The market value has also been said to be: "Such a sum of money as the property was worth in the market to persons generally who would pay its just and full value." Esch *v.* Chicago, etc., R. Co., 72 Wis. 229, 231, 39 N. W. 129. "The price that he could obtain after a reasonable and ample time, such as would ordinarily be taken by an owner." Little Rock Junction R. Co. *v.* Woodruff, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51; Santa Ana *v.* Harlin, 99 Cal. 538, 542, 34 Pac. 224.

58. Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170; Kerr *v.* South Park Com'rs, 117 U. S. 379, 6 S. Ct. 801, 29 L. ed. 924. Accordingly if it is unoccupied, its value is to be fixed by the most valuable of such purposes. Cochrane *v.* Com., 175 Mass. 299, 56 N. E. 610, 78 Am. St. Rep. 491. The value is estimated upon a fair consideration of the location of the land, the extent and condition of its improvements, its quantity and productive qualities, and the uses to which it may reasonably be applied, taken in connection with the general selling price of lands in the neighborhood at the time (Cochran *v.* Missouri, etc., R. Co., 94 Mo. App. 469, 68 S. W. 367; Pittsburgh, etc., R. Co. *v.* Vance, 115 Pa. St. 325, 8 Atl. 764; Hewitt *v.* Pittsburgh, etc., R. Co., 19 Pa. Super. Ct. 304; Weyer *v.* Chicago, etc., R. Co., 68 Wis. 180, 31 N. W. 710), keeping in view all the facts which would naturally affect its value in the minds of purchasers generally (Spring Valley Waterworks *v.* Drinkhouse, 92 Cal. 528, 28 Pac. 681). See also *infra*, X, E, 19, a.

59. Tide Water Canal Co. *v.* Archer, 9 Gill & J. (Md.) 479; Yazoo-Mississippi Delta Levee Com'rs *v.* Hendricks, 77 Miss. 483, 27 So. 613; Friday *v.* Pennsylvania R. Co., 204 Pa. St. 405, 54 Atl. 339.

In determining the value of agricultural land, its worth at some future time is not to be considered, but the fair market value for any purpose for which it might reasonably be used in the immediate future may be considered; and if it could be platted into lots, the resulting increase in value is properly allowed. Alexian *v.* Oshkosh, 95 Wis. 221, 70 N. W. 162. See also X, E, 15, a.

If the condemnation takes place during a temporary depression due to a stringency in the money market, it seems the value may be estimated as of the period immediately preceding such depression. Kohl *v.* U. S., 91 U. S. 367, 23 L. ed. 449; U. S. *v.* Inlots, 24 Fed. Cas. No. 15,441*a*.

60. *Illinois.*— Tedens *v.* Chicago Sanitary Dist., 149 Ill. 87, 36 N. E. 1033.

Kansas.— Kansas City, etc., R. Co. *v.* Fisher, 49 Kan. 17, 30 Pac. 111.

Maine.— Kennebec Water Dist. *v.* Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

Missouri.— Kansas City *v.* Bacon, 157 Mo. 450, 57 S. W. 1045.

New York.— Matter of Collis, 76 N. Y. App. Div. 368, 78 N. Y. Suppl. 495; Matter of Buffalo, Sheld. 408.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Vance, 115 Pa. St. 325, 8 Atl. 764.

Washington.— Seattle, etc., R. Co. *v.* Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 880.

Wisconsin.— Esch *v.* Chicago, etc., R. Co., 72 Wis. 229, 39 N. W. 129.

United States.— Kohl *v.* U. S., 91 U. S. 367, 23 L. ed. 449; U. S. *v.* Inlots, 26 Fed. Cas. No. 15,441*a*.

See 18 Cent. Dig. tit. "Eminent Domain," § 353.

61. Santa Ana *v.* Harlin, 99 Cal. 538, 34 Pac. 224; San Diego Land, etc., Co. *v.* Neale, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604. See also *infra*, X, E, 19, a, k.

62. Sater *v.* Burlington, etc., Plank Road Co., 1 Iowa 386; Shreveport, etc., Valley R. Co. *v.* Hinds, 50 La. Ann. 781, 24 So. 287; Packard *v.* Bergen Neck R. Co., 54 N. J. L. 553, 25 Atl. 506; Giesy *v.* Cincinnati, etc., R. Co., 4 Ohio St. 308.

63. **What constitutes an entire tract** see *infra*, X, E, 19, c.

64. *Alabama.*— Southern R. Co. *v.* Cowan, 129 Ala. 577, 29 So. 985; Hooper *v.* Savannah, etc., R. Co., 69 Ala. 529.

District of Columbia.— District of Colum-

measure of damages is the injury done to the fair market value of the entire tract by the taking.[65] In other words in case of depreciation the owner is enti-

bia *v.* Prospect Hill Cemetery, 5 App. Cas. 497.

Illinois.— Chicago, etc., Electric R. Co. *v.* Mawman, 206 Ill. 182, 69 N. E. 66; Miller *v.* Sterling, 198 Ill. 523, 65 N. E. 132; Board of Trade Tel. Co. *v.* Blume, 176 Ill. 247, 52 N. E. 258; West Chicago St. R. Co. *v.* Chicago, 172 Ill. 198, 50 N. E. 185; Metropolitan West Side El. R. Co. *v.* Springer, 171 Ill. 170, 49 N. E. 416.

Indiana.— Fifer *v.* Ritter, 159 Ind. 8, 64 N. E. 463.

Iowa.— Haggard *v.* Algona Independent School Dist., 113 Iowa 486, 85 N. W. 777; Cummins *v.* Des Moines, etc., R. Co., 63 Iowa 397, 19 N. W. 268.

Kansas.—Reisner *v.* Atchison Union Depot, etc., Co., 27 Kan. 382.

Kentucky.— Pollock *v.* Maysville, etc., R. Co., 103 Ky. 84, 44 S. W. 359, 19 Ky. L. Rep. 1717.

Massachusetts.— Penney *v.* Com., 173 Mass. 507, 53 N. E. 865, 73 Am. St. Rep. 312; Lincoln *v.* Com., 164 Mass. 368, 41 N. E. 489.

Minnesota.— Winona, etc., R. Co. *v.* Denman, 10 Minn. 267.

Missouri.— Chicago, etc., R. Co. *v.* George, 145 Mo. 38, 47 S. W. 11; Doyle *v.* Kansas City, etc., R. Co., 113 Mo. 280, 20 S. W. 970.

Nebraska.— Chicago, etc., R. Co. *v.* Buel, 56 Nebr. 205, 76 N. W. 571; Howard *v.* Clay County, 54 Nebr. 443, 74 N. W. 953; Omaha Southern R. Co. *v.* Todd, 39 Nebr. 818, 58 N. W. 289; Fremont, etc., R. Co. *v.* Meeker, 28 Nebr. 94, 44 N. W. 79; Chicago, etc., R. Co. *v.* Wiebe, 25 Nebr. 542, 41 N. W. 297; Blakeley *v.* Chicago, etc., R. Co., 25 Nebr. 207, 40 N. W. 956; Fremont, etc., R. Co. *v.* Ward, 11 Nebr. 597, 10 N. W. 524; Fremont, etc., R. Co. *v.* Lamb, 11 Nebr. 592, 10 N. W. 493; Fremont, etc., R. Co. *v.* Whalen, 11 Nebr. 585, 10 N. W. 491; Wagner *v.* Gage County, 3 Nebr. 237.

Nevada.— Virginia, etc., R. Co. *v.* Henry, 8 Nev. 165.

New Jersey.— Gautier *v.* Hudson County, 55 N. J. L. 88, 25 Atl. 322, 17 L. R. A. 785.

New York.— South Buffalo R. Co. *v.* Kirkover, 176 N. Y. 301, 68 N. E. 366 [*affirming* 86 N. Y. App. Div. 55, 83 N. Y. Suppl. 613]; *In re* Poughkeepsie, etc., R. Co., 63 Barb. 151; Albany, etc., R. Co. *v.* Dayton, 10 Abb. Pr. N. S. 182; Rochester, etc., R. Co. *v.* Budlong, 6 How. Pr. 467.

North Carolina.— Liverman *v.* Roanoke, etc., R. Co., 114 N. C. 692, 19 S. E. 64.

Ohio.— Cincinnati, etc., R. Co. *v.* Longworth, 30 Ohio St. 108; Kramer *v.* Cleveland, etc., R. Co., 1 Ohio Dec. (Reprint) 474, 10 West. L. J. 138.

Oregon.— Willamet Falls Canal, etc., Co. *v.* Kelly, 3 Oreg. 99.

Pennsylvania.— Finn *v.* Providence, etc., R. Co., 99 Pa. St. 631.

Texas.— Dallas *v.* Taylor, (Civ. App. 1903) 69 S. W. 1005.

Virginia.— Mitchell *v.* Thornton, 21 Gratt. 164.

Washington.— Sultan Water, etc., Co. *v.* Weyerhauser Timber Co., 31 Wash. 558, 72 Pac. 114; Seattle, etc., R. Co. *v.* Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 880.

Wisconsin.— Parks *v.* Wisconsin Cent. R. Co., 33 Wis. 413; Driver *v.* Western Union R. Co., 32 Wis. 569, 14 Am. Rep. 726; Bigelow *v.* West Wisconsin R. Co., 27 Wis. 478.

United States.— Laflin *v.* Chicago, etc., R. Co., 33 Fed. 415.

Canada.— McQuade *v.* Rex, 7 Can. Exch. 318.

See 18 Cent. Dig. tit. "Eminent Domain," § 365.

Elements of compensation.— The elements of compensation are: (1) The abstract value of the land taken; (2) the value arising from the relative situation of the land taken in connection with the remaining land of the same owner; (3) the effect upon the value of the residue of the owner's land arising from the use for which the appropriation is to be made. Lorain St. R. Co. *v.* Sinning, 17 Ohio Cir. Ct. 649, 6 Ohio Cir. Dec. 753.

Value of residue.— Miller *v.* Weber, 1 Ohio Cir. Ct. 130, 1 Ohio Cir. Dec. 77.

Depreciation in value.— Where the market value of the adjoining land is depreciated by the construction of the improvement, it forms a proper element of damages.

Illinois.— Galesburg, etc., R. Co. *v.* Milroy, 181 Ill. 243, 54 N. E. 939; Chicago, etc., R. Co. *v.* Eaton, 136 Ill. 9, 26 N. E. 575 [*distinguishing* Jacksonville, etc., R. Co. *v.* Walsh, 106 Ill. 253].

Iowa.— Hoyt *v.* Chicago, etc., R. Co., 117 Iowa 296, 90 N. W. 724.

Missouri.— Missouri Pac. R. Co. *v.* Porter, 112 Mo. 361, 20 S. W. 568; Pacific R. Co. *v.* Chrystal, 25 Mo. 544.

New York.— Rome, etc., R. Co. *v.* Gleason, 42 N. Y. App. Div. 530, 59 N. Y. Suppl. 647.

Pennsylvania.— Shenango, etc., R. Co. *v.* Braham, 79 Pa. St. 447.

England.— Reg. *v.* Brown, L. R. 2 Q. B. 630, 8 B. & S. 456, 36 L. J. Q. B. 322, 16 L. T. Rep. N. S. 827, 15 Wkly. Rep. 988.

See 18 Cent. Dig. tit. "Eminent Domain," § 247.

Sale of residue pendente lite.— Little Rock, etc., R. Co. *v.* Allister, 68 Ark. 600, 60 S. W. 953.

65. *Alabama.*— Mobile, etc., R. Co. *v.* Riley, 119 Ala. 260, 24 So. 858.

Georgia.— Smith *v.* Floyd County, 85 Ga. 420, 11 S. E. 850.

Illinois.— Chicago *v.* Lonergan, 196 Ill. 518, 63 N. E. 1018; Illinois Cent. R. Co. *v.* Ferrell, 108 Ill. App. 659.

Massachusetts.— Cochrane *v.* Com., 175 Mass. 299, 56 N. E. 610, 78 Am. St. Rep. 491.

Minnesota.— Haynes *v.* Duluth, 47 Minn. 458, 50 N. W. 693.

tled to the difference in the value of the whole tract immediately before and immediately after the appropriation is made.[66] It is to be observed that the damages sustained by the owner are a unit, although composed of integral parts, viz.,

Missouri.— Jamison *v.* Springfield, 53 Mo. 224.

Nebraska.— Chicago, etc., R. Co. *v.* Buel, 56 Nebr. 205, 76 N. W. 571.

New York.— *In re* Utica, etc., R. Co., 56 Barb. 456; Rochester, etc., R. Co. *v.* Budlong, 12 N. Y. Leg. Obs. 46.

North Carolina.— Rice *v.* Norfolk, etc., R. Co., 130 N. C. 375, 41 S. E. 1031.

Ohio.— Cincinnati, etc., R. Co. *v.* Pfitzer, Ohio Prob. 248.

Wisconsin.— Esch *v.* Chicago, etc., R. Co., 72 Wis. 229, 39 N. W. 129.

See 18 Cent. Dig. tit. "Eminent Domain," § 363 *et seq.*

The question is for how much less lands taken for the public purpose would sell in the market by reason of the construction and operation of the improvement. Davis *v.* Northwestern El. R. Co., 170 Ill. 595, 48 N. E. 1058; Hornstein *v.* Atlantic, etc., R. Co., 51 Pa. St. 87; Shirk *v.* Pennsylvania R. Co., 9 Lanc. Bar (Pa.) 198.

The actual damage resulting from the invasion of the owner's rights of property is the measure of damages. Selma, etc., R. Co. *v.* Camp, 45 Ga. 180.

66. *Arkansas.*— St. Louis, etc., R. Co. *v.* Anderson, 39 Ark. 167.

California.— San Francisco, etc., R. Co. *v.* Caldwell, 31 Cal. 367.

Connecticut.— New Milford Water Co. *v.* Watson, 75 Conn. 237, 52 Atl. 947, 53 Atl. 57.

Illinois.— Illinois Cent. R. Co. *v.* Turner, 194 Ill. 575, 62 N. E. 798 [*affirming* 97 Ill. App. 219]; Davis *v.* Northwestern El. R. Co., 170 Ill. 595, 48 N. E. 1058; Allmon *v.* Chicago, etc., R. Co., 155 Ill. 17, 39 N. E. 569; Metropolitan West Side El. R. Co. *v.* Stickney, 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773; Chicago, etc., R. Co. *v.* Eaton, 136 Ill. 9, 26 N. E. 575; Wabash, etc., R. Co. *v.* McDougall, 118 Ill. 229, 8 N. E. 678; Dupuis *v.* Chicago, etc., R. Co., 115 Ill. 97, 3 N. E. 720; Green *v.* Chicago, 97 Ill. 370; Eberhart *v.* Chicago, etc., R. Co., 70 Ill. 347; Page *v.* Chicago, etc., R. Co., 70 Ill. 324; Chicago, etc., R. Co. *v.* Leah, 41 Ill. App. 584.

Indiana.— Chicago, etc., R. Co. *v.* Hunter, 128 Ind. 213, 27 N. E. 477; Evansville, etc., R. Co. *v.* Swift, 128 Ind. 34, 27 N. E. 420.

Iowa.— Lough *v.* Minneapolis, etc., R. Co., 116 Iowa 31, 89 N. W. 77; Bennett *v.* Marion, 106 Iowa 628, 76 N. W. 844; Ham *v.* Wisconsin, etc., R. Co., 61 Iowa 716, 17 N. W. 157; Henry *v.* Dubuque, etc., R. Co., 2 Iowa 288.

Kansas.— Chicago, etc., R. Co. *v.* Broquet, 47 Kan. 571, 28 Pac. 717; Wichita, etc., R. Co. *v.* Kuhn, 38 Kan. 104, 16 Pac. 75.

Kentucky.— West Virginia, etc., R. Co. *v.* Gibson, 94 Ky. 234, 21 S. W. 1055, 15 Ky. L. Rep. 7; Elizabethtown, etc., R. Co. *v.* Helm, 8 Bush 681; Louisville, etc., R. Co. *v.* Asher, 15 S. W. 517, 12 Ky. L. Rep. 815; Louisville, etc., R. Co. *v.* Ingram, 14 S. W. 534, 12 Ky. L. Rep. 456; Ohio Valley R. Co. *v.* Simpson, 11 Ky. L. Rep. 719.

Massachusetts.— Driscoll *v.* Taunton, 160 Mass. 486, 36 N. E. 495.

Minnesota.— Colvill *v.* St. Paul, etc., R. Co., 19 Minn. 283; Winona, etc., R. Co. *v.* Denman, 10 Minn. 267.

Missouri.— Kansas City Suburban Belt R. Co. *v.* Norcross, 137 Mo. 415, 38 S. W. 299.

Nebraska.— Atchison, etc., R. Co. *v.* Boerner, 45 Nebr. 453, 63 N. W. 787.

New Jersey.— Packard *v.* Bergen Neck R. Co., 54 N. J. L. 553, 25 Atl. 506; Henderson *v.* Orange, 9 N. J. L. 71.

New York.— Lenhart *v.* State, 75 N. Y. App. Div. 162, 77 N. Y. Suppl. 397; *In re* Prospect Park, etc., R. Co., 13 Hun 345; Black River, etc., R. Co. *v.* Barnard, 9 Hun 104; Troy, etc., R. Co. *v.* Lee, 13 Barb. 169; *In re* William, etc., Sts., 19 Wend. 678; *In re* Furman St., 17 Wend. 649.

Ohio.— Lorain St. R. Co. *v.* Sinning, 17 Ohio Cir. Ct. 649, 6 Ohio Cir. Dec. 753; Cincinnati, etc., R. Co. *v.* Pfeitzer, Ohio Prob. 248.

Pennsylvania.— Struthers *v.* Philadelphia, etc., R. Co., 174 Pa. St. 291, 34 Atl. 443; Walker *v.* South Chester R. Co., 174 Pa. St. 288, 34 Atl. 560; Hoffman *v.* Bloomsburg, etc., R. Co., 157 Pa. St. 174, 27 Atl. 564; Harris *v.* Schuylkill River East Side R. Co., 141 Pa. St. 242, 21 Atl. 590, 23 Am. St. Rep. 278; Geissinger *v.* Hellertown Borough, 133 Pa. St. 522, 19 Atl. 412; Baltimore, etc., R. Co. *v.* Springer, (1888) 13 Atl. 76; Cresson, etc., Short Route R. Co. *v.* Aunsman, (1887) 11 Atl. 561; Setzler *v.* Pennsylvania Schuylkill Valley R. Co., 112 Pa. St. 56, 4 Atl. 370; Cummings *v.* Williamsport, 84 Pa. St. 472; Hornstein *v.* Atlantic, etc., R. Co., 51 Pa. St. 87; Harvey *v.* Lackawanna, etc., R. Co., 47 Pa. St. 428; East Pennsylvania R. Co. *v.* Hottenstine, 47 Pa. St. 28; Brown *v.* Corey, 43 Pa. St. 495; Watson *v.* Pittsburgh, etc., R. Co., 37 Pa. St. 469; Pennsylvania R. Co. *v.* Heister, 8 Pa. St. 445; Marshall *v.* American Tel., etc., Co., 16 Pa. Super. Ct. 615 (holding that in a proceeding to assess damages against a telegraph company for cutting trees, the measure of damages is the difference in the value of the property before and after the cutting of the trees); *In re* Chatham St., 16 Pa. Super. Ct. 103; Hankey *v.* Philadelphia Co., 5 Pa. Super. Ct. 148; Galbraith *v.* Philadelphia Co., 2 Pa. Super. Ct. 359; *In re* Passyunk Ave., 2 Pa. Co. Ct. 269; Pennsylvania, etc., Canal, etc., Co. *v.* Bunnell, 2 Wkly. Notes Cas. 633; Danville, etc., R. Co. *v.* McKelvey, 1 Wkly. Notes Cas. 338; Danville, etc., R. Co. *v.* Gearhart, 1 Wkly. Notes Cas. 237; Pittsburgh, etc., R. Co. *v.* Robinson, 38 Leg. Int. 22; McFerren *v.* Mont Alto R. Co., 32 Leg. Int. 328; Lodge *v.* Frankford, etc., R. Co., 30 Leg. Int. 92; Pittsburg, etc., R. Co. *v.* Patterson, 32 Pittsb.

the value of the land taken and the injury to the remaining portion.[67] So the improvement is to be considered as a unit in determining the damages resulting from its construction.[68] In determining the amount of the damages, it is proper to consider the nature of the improvement and the manner in which it is made, the character and quality of the tract of which a part is taken, the situation of the part taken with reference to the residue, and the effect of the improvement and the severance of the tract generally.[69]

Leg. J. 257; Robinson *v.* Pittsburgh, etc., R. Co., 27 Pittsb. Leg. J. 137; Robinson *v.* South Chester, 3 Del. Co. 176; Griffin *v.* Pennsylvania Schuylkill Valley R. Co., 2 Del. Co. 425; Philadelphia, etc., R. Co. *v.* Rogers, 2 Walk. 275. See, however, Hays *v.* South Easton, 10 Pa. Super. Ct. 390, holding that where a city takes a private sewer for public use, the fact that the land may be worth as much after as before the taking is not conclusive against the owner as to the amount of his damages.

Texas.— Ft. Worth, etc., R. Co. *v.* Downie, 82 Tex. 383, 17 S. W. 620; St. Louis Southwestern R. Co. *v.* Hughes, (Civ. App. 1903) 73 S. W. 976; Denison, etc., Suburban R. Co. *v.* Smith, 19 Tex. Civ. App. 114, 47 S. W. 278; Giersa *v.* Dennison, etc., R. Co., (Civ. App. 1898) 45 S. W. 925; Denison, etc., R. Co. *v.* Scholz, (Civ. App. 1898) 44 S. W. 560; Worsham *v.* Gainesville, etc., R. Co., 3 Tex. App. Civ. Cas. § 425; Texas Trunk R. Co. *v.* Elam, 1 Tex. App. Civ. Cas. § 445.

See 18 Cent. Dig. tit. "Eminent Domain," § 363 *et seq.*

This test is inapplicable to ascertain the damages resulting from the construction of levees; but the value of the land deprived of levee protection as compared with its value when protected is a legitimate subject of inquiry. Richardson *v.* Board of Levee Com'rs, 68 Miss. 539, 9 So. 351. See also Yazoo-Mississippi Delta Levee Com'rs *v.* Harkleroads, 62 Miss. 807, holding that where land is taken for levee purposes, the owner is entitled to damages for the depreciation of his tillable land, so cut off by the levee as to be unfit for cultivation, and for the filling of his drains, but not for injury to that part of his land, unprotected by the levee, which might result from the raising of the flood line by the building of the levee.

67. Winona, etc., R. Co. *v.* Waldron, 11 Minn. 515, 83 Am. Dec. 100; Ragan *v.* Kansas City, etc., R. Co., 111 Mo. 456, 20 S. W. 234; McReynolds *v.* Kansas City, etc., R. Co., 110 Mo. 484, 19 S. W. 824; Quincy, etc., R. Co. *v.* Ridge, 57 Mo. 599; Chicago, etc., R. Co. *v.* Vivian, 33 Mo. App. 583; Hewitt *v.* Pittsburg, etc., R. Co., 19 Pa. Super. Ct. 304, holding that the owner's loss is measured by the difference in the market value of the property before and after the construction, including all the elements of depreciation and representing the whole loss, but that the separate items are to be considered not as distinct items of loss, but as they affect the market value.

The damages to the residue are also to be considered as a unit; and accordingly the fact that a portion of the residue is injured does not entitle the owner to recover, if on the whole the residue is not injured. See *infra*, X, E, 20, b.

68. Chicago, etc., R. Co. *v.* Van Cleave, 52 Kan. 665, 33 Pac. 472 (holding that in determining the damages of one a portion of whose land is appropriated for a right of way for a railroad, the railroad is to be regarded as one entire thing, and he is entitled to compensation for all damages directly resulting to the residue of his land from the location and construction of the road, whether the road-bed be actually placed on that portion of the right of way taken from his land or not); Blesch *v.* Chicago, etc., R. Co., 48 Wis. 168, 2 N. W. 113. See, however, Kucheman *v.* C. C. & D. R. Co., 46 Iowa 366.

69. *Kentucky.*— Louisville, etc., R. Co. *v.* Barrett, 91 Ky. 487, 16 S. W. 278, 13 Ky. L. Rep. 57, holding that in determining the damages the jury should consider what easements have been impaired or destroyed.

Maine.— Bangor, etc., R. Co. *v.* McComb, 60 Me. 290.

Massachusetts.— Walker *v.* Old Colony, etc., R. Co., 103 Mass. 10, 4 Am. Rep. 509, holding that the turning of surface water upon land by a railroad embankment is a proper element of damages.

Minnesota.— Ely *v.* Conan, (1903) 97 N. W. 737, holding in proceedings to condemn a piece of land appropriated from a larger tract by a city to extend its waterworks, that the rule of damages is the market value of the property taken, and the fact that a valuable spring thereon enhances such value is proper to be considered.

Missouri.— Ragan *v.* Kansas City, etc., R. Co., 144 Mo. 623, 46 S. W. 602, holding that the jury may consider the quality of the land as an element of damages.

New Jersey.— Gautier *v.* Hudson County Bd. of Chosen Freeholders, 55 N. J. L. 88, 25 Atl. 322, 17 L. R. A. 785.

New York.— Matter of New York, 39 N. Y. App. Div. 589, 57 N. Y. Suppl. 657, holding that the question whether or not a manufacturing plant on land of which a part is taken is to be treated as a going concern has a bearing on the amount of the damages.

Pennsylvania.— Searle *v.* Lackawanna, etc., R. Co., 33 Pa. St. 57 (holding that in estimating the damages caused by the construction of a railroad, the jury may allow all actual damages arising from the manner in which the road passes through the property and affects the improvements, but not the value of unopened mines); McFerren *v.* Mont Alto R. Co., 32 Leg. Int. 328.

4. Where Property Is Injured But No Part Is Taken. If property, no part of which is actually taken in the exercise of the right of eminent domain, is damaged by the construction of a public improvement near it, the measure of the owner's damages is the difference between the value of the property immediately before the construction of the improvement and its value afterward.[70] The compensa-

Texas.— Harrison *v.* Sulphur Springs, (Civ. App. 1899) 50 S. W. 1064.

Vermont.— Sabin *v.* Vermont Cent. R. Co., 25 Vt. 363, holding that all special damages to the land not taken, having reference not only to the operation of the road laid through the tract but to all special annoyances, are to be considered.

See 18 Cent. Dig. tit. "Eminent Domain," § 365.

If the value of one part is entirely destroyed by a railroad which divides the tract into two parts, while that of the other part is diminished, the owner is entitled to the value of the part actually taken, and the value of the part which is destroyed, together with compensation for the diminution in value of the other part. Mobile, etc., R. Co. *v.* Riley, 119 Ala. 260, 24 So. 858.

Improvements and expenses.— In assessing the damages the additional improvements necessary to the enjoyment of the residue should be considered. Russell *v.* St. Louis, etc., R. Co., 71 Ark. 451, 75 S. W. 725; Louisville, etc., R. Co. *v.* Barrett, 91 Ky. 487, 16 S. W. 278, 13 Ky. L. Rep. 57. So it is an element of damage that the improvement imposes expenses upon the landowner. Bloomfield, etc., Natural Gas-light Co. *v.* Calkins, 1 Thomps. & C. (N. Y.) 549; Seattle, etc., R. Co. *v.* Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864. See, however, Searle *v.* Lackawanna, etc., R. Co., 33 Pa. St. 57, holding that in making roads over unopened mines it is not a subject of damages that the owner of the property will be thereby put to expense and inconvenience when he begins to work his mines. See also *infra*, X, E, 19, d, (III).

The disfigurement of the residue by reason of the taking and of the use made of the land should be considered on the question of damages. Bangor, etc., R. Co. *v.* McComb, 60 Me. 290. See also Louisville, etc., R. Co. *v.* Barrett, 91 Ky. 487, 16 S. W. 278, 13 Ky. L. Rep. 57.

The distance of the owner's buildings from the improvement may be considered on the question of damages. Bangor, etc., R. Co. *v.* McComb, 60 Me. 290; Cedar Rapids, etc., R. Co. *v.* Raymond, 37 Minn. 204, 33 N. W. 704. However, in estimating the damages occasioned by taking land for a railroad, depreciation in value of the residue arising from the proximity of the road and running of the trains is to be considered so far, and only so far, as it is due to proximity which is caused by and would not have resulted but for such taking. Walker *v.* Old Colony, etc., R. Co., 103 Mass. 10, 4 Am. Rep. 509.

The uses to which the part taken is to be put are to be considered in connection with the effect of the taking of the part on the market value of the whole. Cincinnati Southern R. Co. *v.* Garrard, 8 Ohio Dec. (Reprint) 389, 7 Cinc. L. Bul. 272. Actual or probable use of the residue as an element of damage see *infra*, X, E, 19, a.

Taking for gas main.— Where an easement in a farm was appropriated for the laying of natural gas mains, the jury should consider the relation of the residue to the part condemned, the fact that the owner was deprived of the privilege of improving certain portions of his land, and the liability of the soil and crops to injury by leakage. Manufacturers' Natural Gas Co. *v.* Leslie, (Ind. Sup. 1898) 49 N. E. 946. In the absence of evidence that a natural gas main will prevent the future improvement of land, however, damages cannot be allowed based on such fact. Manufacturers' Natural Gas Co. *v.* Leslie, 29 Ind. App. 677, 51 N. E. 510.

Taking for public sewer.— For an appropriation of his property for a public sewer an action accrues to the owner, and the measure of his damages is the value of the land so appropriated. In estimating such value the fact that the owner could still apply the premises to any use not inconsistent with the servitude for sewer purposes may properly be considered. Atlanta *v.* Hunnicutt, 95 Ga. 138, 22 S. E. 130. If a municipality takes a private sewer for public use, the owner is entitled to compensation for the permanent and more onerous servitude imposed on the land, as well as for the value of the sewer which the municipality has taken. Wright *v.* Mt. Vernon, 44 N. Y. App. Div. 574, 60 N. Y. Suppl. 1017 [*affirmed* in 167 N. Y. 541, 60 N. E. 1123]; Hays *v.* South Easton, 10 Pa. Super. Ct. 390, in which case it is held that the measure of value of the sewer taken is the cost of an adequate sewer at the time of the taking, not exceeding the actual cost of the sewer taken.

Taking of vacant or wild lands.— The jury may estimate damages to the land not taken, although it be wild land (Orange Belt R. Co. *v.* Craver, 32 Fla. 28, 13 So. 444), the question being whether, for any and all purposes for which the property may be used or sold, its market value would be less with the proposed improvement than without it; but where the land is in use for a certain purpose, and it is especially adapted to that purpose, the question is whether its market value for that purpose is lessened (Snodgrass *v.* Chicago, 152 Ill. 600, 38 N. E. 790).

70. *Illinois.*— Osgood *v.* Chicago, 154 Ill. 194, 41 N. E. 40; Wabash, etc., R. Co. *v.* McDougall, 118 Ill. 229, 8 N. E. 678; Dupuis *v.* Chicago, etc., R. Co., 115 Ill. 97, 3 N. E. 720; Rockford *v.* Doughty, 103 Ill. App. 48; Illinois Cent. R. Co. *v.* Schmidgall, 91 Ill. App. 23.

tion should equal the depreciation in the actual market value of the property by reason of the improvement.[71]

5. Where Taking or Interference Is Temporary. If property is taken only temporarily, and possession is relinquished before an action is brought for damages, the measure of damages is not the full value of the property.[72] A mere temporary interference with a right of property during the time of constructing the work is not an element of damage, the constitutional or statutory provisions allowing damages for property injured by the construction of an improvement applying only to permanent injuries resulting from the completed work and its subsequent use.[73]

Iowa.— Richardson *v.* Webster City, 111 Iowa 427, 82 N. W. 920.

Kansas.— Harding *v.* Funk, 8 Kan. 315.

Kentucky.—Louisville, etc., R. Co. *v.* Cumnock, 77 S. W. 933, 25 Ky. L. Rep. 1330; Elizabethtown, etc., R. Co. *v.* Borders, 10 Ky. L. Rep. 725.

Missouri.— Chouteau *v.* St. Louis, 8 Mo. App. 48.

Nebraska.— Chicago, etc., R. Co. *v.* Sturey, 55 Nebr. 137, 75 N. W. 557; Plattsmouth *v.* Boeck, 32 Nebr. 297, 49 N. W. 167; Omaha Belt R. Co. *v.* McDermott, 25 Nebr. 714, 41 N. W. 648.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Getz, 113 Pa. St. 214, 6 Atl. 356; Woodward *v.* Webb, 65 Pa. St. 254; Schuylkill Nav. Co. *v.* Thoburn, 7 Serg. & R. 411; Hewitt *v.* Pittsburg, etc., R. Co., 19 Pa. Super. Ct. 304; Osborne *v.* Delaware County, etc., Electric R. Co., 9 Pa. Super. Ct. 632; Pittsburgh Junction R. Co. *v.* McCutcheon, 18 Wkly. Notes Cas. 527.

Texas.— Boyer *v.* St. Louis, etc., R. Co., (Civ. App. 1903) 72 S. W. 1038; Ft. Worth, etc., R. Co. *v.* Garvin, (Civ. App. 1894) 29 S. W. 794.

West Virginia.— Ward *v.* Ohio River R. Co., 35 W. Va. 481, 14 S. E. 142.

United States.— Lehigh Valley Coal Co. *v.* Chicago, 26 Fed. 415.

See 18 Cent. Dig. tit. "Eminent Domain," § 371 *et seq.*

This applies to the construction of a railroad in a street adjacent to plaintiff's property. Denison, etc., Suburban R. Co. *v.* Evans, (Tex. Civ. App. 1898) 47 S. W. 280.

Knowledge of projected improvement.— In an action by a property-owner against a railroad for damages resulting to his property from a change of the railroad's grade, the measure of damages is the difference between the market value of the property just before it was generally known that the work was to be done, and the market value after the completion of the work. Louisville, etc., R. Co. *v.* Cumnock, 77 S. W. 933, 25 Ky. L. Rep. 1330.

71. Galesburg, etc., R. Co. *v.* Milroy, 181 Ill. 243, 54 N. E. 939; Metropolitan, etc., R. Co. *v.* Springer, 171 Ill. 170, 49 N. E. 416; Metropolitan West Side El. R. Co. *v.* Goll, 100 Ill. App. 323; Elizabethtown, etc., R. Co. *v.* Combs, 10 Bush (Ky.) 382, 19 Am. Rep. 67; Paducah *v.* Allen, 63 S. W. 981, 23 Ky. L. Rep. 701; Bailey *v.* Boston, etc., R. Corp., 182 Mass. 537, 66 N. E. 203; Matter of New York, 89 N. Y. App. Div. 490, 85 N. Y. Suppl. 858.

72. Griswold *v.* St. Louis, etc., R. Co., 8 Mo. App. 582; Johnson *v.* U. S., 2 Ct. Cl. 391, holding that the measure of damages for the temporary occupation of land by the government is the value of such occupancy at the time of entry, regard being had to the nature of the occupancy, and treating it as a lease by the government for an indefinite time.

73. Springfield, etc., R. Co. *v.* Henry, 44 Ark. 360; St. Louis, etc., R. Co. *v.* Capps, 72 Ill. 188; *In re* Buffalo Grade Crossing Com'rs, 165 N. Y. 605, 58 N. E. 1088 [*affirming* 52 N. Y. App. Div. 27, 64 N. Y. Suppl. 769]; *In re* Squires, 125 N. Y. 131, 26 N. E. 142 [*affirming* 57 Hun 591, 10 N. Y. Suppl. 881]; Van Alstine *v.* Belden, 41 N. Y. App. Div. 123, 58 N. Y. Suppl. 521; Sabin *v.* Vermont Cent. R. Co., 25 Vt. 363. See, however, *In re* Chatham St., 16 Pa. Super Ct. 103.

Evidence of temporary taking.— Where a railroad company, while constructing its road, deposited boulders on adjacent land, the owner is not precluded from recovering as for a permanent injury by testimony on the part of the company that the boulders were deposited temporarily until the track should be laid. Colorado Midland R. Co. *v.* Brown, 15 Colo. 193, 25 Pac. 87.

Rule under English Lands Clauses Act.— An injury to business by reason of a temporary occupation of a highway or of lands not belonging to plaintiff is a subject of compensation. Ford *v.* Metropolitan, etc., R. Co., 17 Q. B. D. 12, 50 J. P. 661, 55 L. J. Q. B. 296, 54 L. T. Rep. N. S. 718, 34 Wkly. Rep. 426; East India, etc., R. Co. *v.* Gattke, 15 Jur. 261, 20 L. J. Ch. 217, 3 Macn. & G. 155, 6 R. & Can. Cas. 371, 49 Eng. Ch. 118, 42 Eng. Reprint 220. *Compare* Ricket *v.* Metropolitan R. Co., L. R. 2 H. L. 175, 36 L. J. Q. B. 205, 16 L. T. Rep. N. S. 542, 15 Wkly. Rep. 937; Herring *v.* Metropolitan Bd. of Works, 19 C. B. N. S. 510, 34 L. J. M. C. 224, 115 E. C. L. 510.

Excavations on right of way.— Where a railroad company has condemned its right of way, it has a right to make excavations thereon for the purpose of obtaining dirt for surfacing its road-bed, and is not liable to an adjacent property-owner by reason of the unsightliness of his plantation, or its supposed unhealthfulness from standing water, nor for the inconvenience of crossing

6. Where Claimant Owns Less Than Fee — a. In General. If land is taken from one who owns less than the fee, he can recover for the diminished value of whatever interest he has and for that only.[74]

caused by the pits made in excavating. New Orleans, etc., R. Co. *v.* Brown, 64 Miss. 479, 1 So. 637.

Injury by blasting, inflicted upon land adjoining the public work, is an element of damage, although the blasting is done in a proper manner. Whitehouse *v.* Androscoggin R. Co., 52 Me. 208; Dodge *v.* Essex County Com'rs, 3 Metc. (Mass.) 380; Matter of Thompson, 48 Hun (N. Y.) 618, 2 N. Y. Suppl. 34, 35; Booth *v.* Rome, etc., R. Co., 17 N. Y. Suppl. 336; Sabin *v.* Vermont Cent. R. Co., 25 Vt. 363. A railroad company is liable to an owner for failing to remove rock which has been thrown upon his land by blasting in building its road. Sabin *v.* Vermont Cent. R. Co., *supra*. *Contra*, Whitehouse *v.* Androscoggin R. Co., *supra*.

Loss of rent caused by obstruction of access to the property during the construction of the improvement is not an element of damage. Osgood *v.* Chicago, 154 Ill. 194, 41 N. E. 40 [*affirming* 44 Ill. App. 532]. *Contra*, Williams *v.* Brooklyn El. R. Co., 126 N. Y. 96, 26 N. E. 1048 [*reversing* 57 Hun 591, 10 N. Y. Suppl. 929].

Sewers.— One through whose land an easement has been taken for a sewer may recover damages for injury to adjoining land not taken, caused by the draining of wells thereon, although such injury was but temporary, and the wells filled again as soon as the sewer was complete. Penney *v.* Com., 173 Mass. 507, 53 N. E. 865, 73 Am. St. Rep. 312. So where a city, in constructing a sewer in a street, obstructed the natural drainage, in consequence of which water was turned into the cellars of the houses fronting thereon, it was an element of damage, although temporary. *In re* Chatham St., 16 Pa. Super. Ct. 103.

Street railroads and subways.— The temporary inconvenience to which abutting proprietors are subjected while the work of excavation and tunneling is going on in the construction of a railroad beneath the surface of the street is *damnum absque injuria*. Adams *v.* Saratoga, etc., R. Co., 11 Barb. (N. Y.) 414; Plant *v.* Long Island R. Co., 10 Barb. (N. Y.) 26. So a temporary interference with access to abutting property, which results from, and is necessarily incident to, the construction of a street railway, is not an element of damage. Glidden *v.* Cincinnati, 4 Ohio S. & C. Pl. Dec. 423, 30 Cinc. L. Bul. 213.

Temporary expenses.— Injury to crops from the destruction of fences occasioned by the building of a railroad, and the consequent expense of keeping animals from the crops, are not elements of damage; such matters being an independent tort. Springfield, etc., R. Co. *v.* Henry, 44 Ark. 360. But where, in the construction of an underground public ditch across the right of way of a railroad, it becomes necessary to make an excavation under the tracks, and the company is put to expense in supporting the tracks while the ditch is being constructed, the expense is properly taken into consideration. Lake Erie, etc., R. Co. *v.* Hancock County, 63 Ohio St. 23, 57 N. E. 1009.

Trespass in constructing work see *infra*, X, E, 19, b.

74. Chicago, etc., R. Co. *v.* Hurst, 41 Kan. 740, 21 Pac. 781 (holding that where a right of way is laid over a timber culture claim the title to which is still in the government, the occupant can recover only for the diminished value of his interest in the land, and not for the diminished value of the land itself); Ellisworth, etc., R. Co. *v.* Gates, 41 Kan. 574, 21 Pac. 632 (holding that where the occupant of land appropriated for a railroad right of way has only a homestead right, the measure of damages is not the same as if he owned the fee); Warren *v.* Spencer Water Co., 143 Mass. 155, 9 N. E. 527; Law of Burial, 4 Bradf. Surr. (N. Y.) 503 (holding that under a conveyance in fee of land "underneath the earth," with a passage for the purpose of burial, and also the right to cover the entries into the vault with a stone or stones even with the surface of the ground, or under a lease for nine hundred and ninety-nine years, with a restriction against the use of the land for any purpose other than for burial, if the land is taken for the widening of a street the owners of the vaults may recover the expense of providing suitable burial-places elsewhere, while the remainder of the compensation for the land should go to the grantor); Robbins *v.* Milwaukee, etc., R. Co., 6 Wis. 636.

A settler on public lands who has made a valid homestead entry and is in possession perfecting his title is entitled to full value for all injury done to his possession, where a part of the homestead is appropriated for a railroad right of way; and the measure of his damages differs only in degree from that sustained by one who has a perfect title. Ellisworth, etc., R. Co. *v.* Gates, 41 Kan. 574, 21 Pac. 632; Burlington, etc., R. Co. *v.* Johnson, 38 Kan. 142, 16 Pac. 125.

Base fee.— The fact that the owner has only a base fee in a part of the land is not admissible in reduction of the damages. Chandler *v.* Jamaica Pond Aqueduct Corp., 125 Mass. 544.

Easement.— The owner of a part of a building may recover for the loss of support and shelter caused by removing the part which he does not own. Marsden *v.* Cambridge, 114 Mass. 490.

Life-tenancy.— If the life-tenant puts fixtures into a building on the premises, and the land is taken under condemnation proceedings, the fixtures should be included in the damages awarded, and the life-tenant cannot recover therefor as for damages special

b. Rights of Lessee. Where a leasehold is taken, the measure of damages is the difference between the fair market value of the lessee's interest before and after the construction of the improvement.[75]

7. Where Franchise or Property of Corporation Is Taken.[76] Where the property of a corporation holding a franchise is condemned, the measure of damages is not merely the value of the physical structure, as the road or bridge, but its entire property rights, including the value of the franchise under and by virtue of which they are used and enjoyed.[77] This rule applies to the taking of the

to his separate estate. Williams *v.* Com., 168 Mass. 364, 47 N. E. 115.

Mining right.— Where one has an estate in land consisting in the right to remove gypsum, the measure of damages is the difference between the value of such estate before and after the improvement is made. People *v.* Eldridge, 6 Thomps. & C. (N. Y.) 20.

Temporary interest.— The jury may take into consideration the fact that the owner has only a temporary right or interest in the property, as where he holds by mere license. Chicago Sanitary Dist. *v.* Loughran, 160 Ill. 362, 43 N. E. 359; Matter of White Plains Water Com'rs, 71 N. Y. App. Div. 544, 76 N. Y. Suppl. 11.

Tenancy in common.— Where a railroad company has acquired the interest of one of two cotenants, and has laid its track across the land, and thereby depreciated its value, it cannot compel the other part owner to sell his interest at the value which such interest would then have in the market, but such cotenant is entitled to half the actual value of the entire land. Foote *v.* Lorain, etc., R. Co., 21 Ohio Cir. Ct. 319, 11 Ohio Cir. Dec. 685.

75. *California.*— Kishlar *v.* Southern Pac. R. Co., 134 Cal. 636, 66 Pac. 848.

Maryland.— Baltimore *v.* Rice, 73 Md. 307, 21 Atl. 181.

New York.— Tilson *v.* Manhattan R. Co., 24 N. Y. App. Div. 623, 48 N. Y. Suppl. 224; *In re* Armory Bd., 60 N. Y. Suppl. 882, 30 N. Y. Civ. Proc. 123.

Pennsylvania.— Shaaber *v.* Reading City, 150 Pa. St. 402, 24 Atl. 692; Lafferty *v.* Schuylkill River East Side R. Co., 124 Pa. St. 297, 16 Atl. 869, 10 Am. St. Rep. 587, 3 L. R. A. 124; Philadelphia, etc., R. Co. *v.* Getz, 113 Pa. St. 214, 6 Atl. 356; Pennsylvania R. Co. *v.* Eby, 107 Pa. St. 166; Pittsburgh, etc., R. Co. *v.* Bentley, 88 Pa. St. 178; Taylor *v.* Baltimore, etc., R. Co., 3 Del. Co. 545.

Washington.— Seattle, etc., R. Co. *v.* Scheike, 3 Wash. 625, 29 Pac. 217, 30 Pac. 503.

See 18 Cent. Dig. tit. "Eminent Domain," § 395.

The test of the value of the lessee's right lies in the excess of the sum for which such right will sell over the amount he has agreed to pay for it by way of rental. *In re* Morgan R., etc., Co., 32 La. Ann. 371; Matter of Buffalo, Sheld. (N. Y.) 408. The value must be over and above the rent reserved, but is subject to no arbitrary rule, and must depend very much on location, business facilities, and state of trade, all which elements must be taken into consideration. Matter of Central Park Com'rs, 54 How. Pr. (N. Y.) 313. Thus the fact that the lessees are under contract to remove all the tar from the lessor's gas-works adjoining the leasehold, and that to do so, after the taking of the land, it became necessary to erect temporary works for distilling it, and to convey the tar to the works by a specially constructed boat, is a proper element of damages. Ehret *v.* Schuylkill River East Side R. Co., 151 Pa. St. 158, 24 Atl. 1068.

Special value to lessee.— The value of the lease at the time of the injury is not its value to the lessee for a particular purpose but its fair market value. Kishlar *v.* Southern Pac. R. Co., 134 Cal. 636, 66 Pac. 848. See, however, Taylor *v.* Baltimore, etc., R. Co., 3 Del. Co. (Pa.) 545.

Covenant for renewal.— Where there is a covenant for renewal of the term, and such renewal at the rent reserved will add to the value of the tenant's interest, such value should be allowed in addition to the present value of the term. Baltimore *v.* Rice, 73 Md. 307, 21 Atl. 181; Stark *v.* Mansfield, 178 Mass. 76, 59 N. E. 643; *In re* William, etc., Sts., 19 Wend. (N. Y.) 678; North Pennsylvania R. Co. *v.* Davis, 26 Pa. St. 238; McGoldrick *v.* Rex, 8 Can. Exch. 169. So the lessee may show that a new lease had been made before the appropriation, which was to take effect on the expiration of the old lease, although the land was actually appropriated before the expiration of the original lease. Cobb *v.* Boston, 109 Mass. 438. See, however, Emery *v.* Boston Terminal Co., 178 Mass. 172, 59 N. E. 763, 86 Am. St. Rep. 473. Where the property was leased for a specified time, with a covenant of renewal on terms to be agreed on by the parties, and the lessee had erected a building on the premises, the fact that the rent for the renewed term was fixed with reference to the presence of an elevated railroad in front of the premises, which had been erected during the original term, would not preclude the lessee from recovering damages to the leasehold. Storms *v.* Manhattan R. Co., 77 N. Y. App. Div. 94, 79 N. Y. Suppl. 60.

Interference with business as element of damages see *infra*, X, E, 19, d, (IV).

Right to improvements see *infra*, X, E, 19, n, (II).

76. See also *infra*, X, E, 9, a.

77. Cincinnati, etc., Turnpike Co. *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 259, 6 Ohio

franchise or property of a corporation owning a bridge,[78] a ferry,[79] or a turnpike,[80]

N. P. 233; Montgomery County *v.* Schuylkill Bridge Co., 110 Pa. St. 54, 20 Atl. 407; *In re* Somerton Turnpike, 16 Pa. Super. Ct. 400.

The value of the property to the owner at the time it is taken is the measure of damages. Kennebec Water Dist. *v.* Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856; Allentown, etc., Turnpike Co. *v.* Lehigh Valley Traction Co., 174 Pa. St. 273, 34 Atl. 565; Clarion Turnpike, etc., Co. *v.* Clarion County, 172 Pa. St. 243, 33 Atl. 580; *In re* Chambersburg, etc., Turnpike Road, 20 Pa. Super. Ct. 173; *In re* Royersford Toll Bridge, 2 Montg. Co. Rep. (Pa.) 21.

Valuation of franchise.— Where a franchise is taken, the profits are to be considered, since the value of a franchise is its productive capacity. Kennebec Water Dist. *v.* Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856; Matter of White Plains Water Com'rs, 71 N. Y. App. Div. 544, 76 N. Y. Suppl. 11. If the franchise is not exclusive, but the business of the company is practically exclusive in that it has no competitor, such fact should be considered in fixing the value of the property as a going concern. The fact that the franchise is to be taken in no respect impairs its value for the purposes of appraisal; nor is the liability of the company to forfeit its franchise on account of past misbehavior to be considered. Kennebec Water Dist. *v.* Waterville, *supra*.

Partial and entire taking.— Compensation must be made for the injury to the whole franchise, if the whole be taken, or for the special injury, if the franchise is lowered in value. Union Pass. R. Co. *v.* Continental R. Co., 11 Phila. (Pa.) 321.

If its franchise and right to construct its works are not taken away, the company owning land which is taken for a public use is entitled to the value of the land only. Indiana Power Co. *v.* St. Joseph, etc., Power Co., 159 Ind. 42, 63 N. E. 304, 64 N. E. 468.

78. *In re* Sunderland Bridge, 122 Mass. 459 (holding that a bridge company is entitled to the damages resulting from the fact that it is deprived of its right to receive tolls to the end of the chartered term); Clarion Turnpike, etc., Co. *v.* Clarion County, 172 Pa. St. 243, 33 Atl. 580 (holding that the measure of damages is the value of the substructure, superstructure, and approaches, together with the franchise or right to take tolls); Montgomery County *v.* Schuylkill Bridge Co., 110 Pa. St. 54, 20 Atl. 407 (holding that the measure of damages is not alone the cost of a similar bridge, diminished by the wear and tear of the existing one, but the value of the franchise also is to be considered); *In re* Royersford Toll Bridge, 2 Montg. Co. Rep. (Pa.) 21 (holding that no bridge company authorized by its charter to take toll can be compelled to surrender its property for public use for a sum less than it is worth at a valuation legally made). Where, however, a bridge charter allowed a specified toll for seventy years, subject to be redeemed sooner, as the remuneration for the cost of building and maintaining the bridge, upon the taking of such bridge as a public way the owner was not entitled to receive as compensation the value of the bridge structure, but only the value of the right to take tolls. Central Bridge Corp. *v.* Lowell, 15 Gray (Mass.) 106.

79. Richmond, etc., Turnpike Road Co. *v.* Rogers, 1 Duv. (Ky.) 135; Moses *v.* Sanford, 11 Lea (Tenn.) 731; Jones *v.* Keith, 37 Tex. 394, 14 Am. Rep. 382, all holding that if land is taken for a highway and bridge the owner is entitled to the value of the land taken, and compensation for any collateral or incidental damage which such taking would produce to the residue of his land.

Danger and inconvenience.— Where part of a tract has been taken by a railroad company, the residue of which was used by the owner as a ferry, in estimating the injury done the property by reason of the proximity of the tracks, the increased inconvenience and danger to the public in reaching the ferry cannot be considered, unless it appears that the public are for this reason largely deterred from using the ferry. Missouri Pac. R. Co. *v.* Porter, 112 Mo. 361, 20 S. W. 568.

Profits.—Where the construction of a bridge or railroad will interpose no physical obstruction to the enjoyment of a ferry franchise, the owner of the ferry is not entitled to compensation for any incidental impairment of the profits of the ferry which results merely from the use by the public of the bridge or railroad instead of the ferry. Piatt *v.* Covington, etc., Bridge Co., 8 Bush (Ky.) 31; Richmond, etc., Turnpike Road Co. *v.* Rogers, 1 Duv. (Ky.) 135; Missouri Pac. R. Co. *v.* Porter, 112 Mo. 361, 20 S. W. 568; Hydes Ferry Turnpike Co. *v.* Davidson County, 91 Tenn. 291, 18 S. W. 626; Moses *v.* Sanford, 11 Lea (Tenn.) 731. See also Prosser *v.* Wapello County, 18 Iowa 327.

80. Stockton, etc., Gravel Road Co. *v.* Stockton, etc., R. Co., 53 Cal. 11 (holding that in trespass for disturbing the bed of a turnpike by building a railroad on it, the measure of damages is the injury actually sustained, not the entire value of the land composing the road-bed); Cincinnati, etc., Turnpike Co. *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 259, 6 Ohio N. P. 233 (holding that the capital invested in the property should be considered, as well as such percentage of the future earnings as the permanency of the investment may justify); Allentown, etc., Turnpike Co. *v.* Lehigh Valley Traction Co., 174 Pa. St. 273, 34 Atl. 565 (holding that the compensation which a railroad is required to pay for using a turnpike for its tracks is not measured by the mere additional expense of keeping the turnpike in repair, but by the depreciation in value of the property as a whole; but that there should not be included loss of tolls by reason of the improved facilities for travel furnished by the railroad); *In re* Chambersburg, etc.,

and it applies also where the franchise or property of a water-supply company is condemned for purchase.[81]

8. WHERE HIGHWAY OR RIGHT OF WAY IS BROADENED. Where a street or a right of way is widened, the measure of damages is the value of the additional land taken, the depreciation in value of the residue caused by the change in the way, and the expense necessarily caused by it.[82]

9. WHERE PROPERTY IS ALREADY DEVOTED TO PUBLIC USE — a. Taking of Railroad Right of Way[83] — (I) *FOR HIGHWAY OR STREET* — (A) *General Rule.* Where a railroad right of way is appropriated for a street or other highway, the measure of compensation to the railroad company is the diminution in value of the property for railroad uses,[84] and this has been held to be the true measure of

Turnpike Road, 20 Pa. Super. Ct. 173 (holding that the value of the property is to be determined from its physical condition, its substructure, superstructure, and the approaches to its bridges, together with the right of the company to collect tolls); *In re* Somerton Turnpike, 16 Pa. Super. Ct. 400 (holding that the measure of damages is not alone the mere value of the road itself, the mere structure or physical turnpike, its toll-house and gates, but its entire property rights and franchises).

81. Kennebec Water Dist. *v.* Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (holding that the property of a water company, both its plant and its franchises, is to be appraised, having in view the value as property in itself and the value as a source of income; that the value of the franchise depends upon its net earning power, present and prospective, developed and capable of development, at reasonable rates, and that such value is the value to the seller and not to the buyer; that consideration must be given to the fact that further investment may be necessary to develop the use, and that at any stage of the development the owner of the franchise will be entitled to charge only reasonable rates under the conditions then existing; that in fixing the structure value of the plant, while considering that the system is a going concern and subject to all proper legal duties governing such quasi-public corporations, the appraisers should also consider the present efficiency of the system, the length of time necessary to construct it *de novo*, the time and cost needed after construction to develop the system to the level of the present one in respect to business and income, and such added new income and profits as would reasonably accrue to a purchaser during the time required for such new construction and such development of business and income; and that the company is entitled to any appreciation in the value of its franchise due to natural causes); Matter of White Plains Water Com'rs, 71 N. Y. App. Div. 544, 76 N. Y. Suppl. 11 (holding that the fact that the contract of the condemning municipality with the water company stipulates for its termination at a fixed period and confers on the municipality the power to purchase the works at the expiration of that period, thus ending the company's franchise, must be considered).

82. White *v.* Foxborough, 151 Mass. 28, 23 N. E. 652 (holding that the jury may take into consideration the value of the land taken, the injury to the remaining land, the value of trees and a stone wall on the land taken, if they are used or destroyed in widening the way and no proper notice to remove them was given, and also the cost of fencing and grading the remaining land, if rendered necessary by the widening of the way); Edmands *v.* Boston, 108 Mass. 535; Zeibold *v.* Foster, 118 Mo. 349, 24 S. W. 155 (holding that where a highway is changed, and both the old and the new road are on the same person's land, the measure of damages is the value of the land taken, together with the expense of moving the fence and putting it on the new line); Mullen *v.* Lake Drummond Canal, etc., Co., 130 N. C. 496, 41 S. E. 1027, 61 L. R. A. 833 (holding that where a canal was broadened so as to exceed the limits of its original right of way, and there was an additional condemnation, all damages occasioned to the land should be included); St. Louis, etc., R. Co. *v.* Henderson, (Tex. Civ. App. 1893) 32 S. W. 143 (holding that if a railroad company, after paying the award assessed as for a certain route, constructs its road on a new alignment, the damages are the difference in value of the land before and after the construction of the road); Parker County *v.* Jackson, 5 Tex. Civ. App. 36, 23 S. W. 924. See, however, Brooks *v.* Boston, 19 Pick. (Mass.) 174 (holding that where the lessee of a store was prevented by the terms of the lease from making any alterations without the lessor's consent, and while the lease was in force, the street was widened, the city was not responsible to the lessee for any damage caused by a delay on the part of the lessor to give his consent to the alterations rendered necessary by the widening of the street); *In re* Girard Ave., 44 Leg. Int. (Pa.) 166; *In re* Barbadoes St., 8 Phila. (Pa.) 498 (both holding that upon the widening of a street the owner is not entitled to the cost of the curbing and paving).

Location of railroad see *infra*, X, E, 10.

Opening of street or highway see *infra*, X, E, 12.

83. See also *supra*, X, E, 7.

84. Illinois Cent. R. Co. *v.* Chicago, 169 Ill. 329, 48 N. E. 492; Chicago, etc., R. Co. *v.* Pontiac, 169 Ill. 155, 48 N. E. 485; Chicago,

damages without reference to such expenditures as the railroad company may be obliged to make in complying with police regulations in regard to street crossings.[85] In some jurisdictions, however, the rule is laid down that where a street or other highway is established to cross a railroad right of way, the company is entitled to compensation for the value of the land actually taken, the burden imposed on the company by the opening of the street, and the actual damage to the residue of the land by interference with its use, caused by the opening and operation of the street or highway;[86] and under this rule all expenses incurred in making the structural changes which are necessary to comply with the statutory regulations and which must necessarily continue in the future operation of the road should be included.[87] In some jurisdictions the fact that a railway company is the owner in fee of land condemned for a street makes no difference in the measure of compensation, since the railway company has no right to use any land for other than railroad purposes.[88]

(B) *Crossing Gates, Cattle-Guards, Etc.* In many jurisdictions it is held that damages should not include the expense of crossing gates, as they are not structural changes in the track and are not a necessary part of crossing construction.[89] In other jurisdictions, however, it is held that the expense of providing

etc., R. Co. *v.* Naperville, 166 Ill. 87, 47 N. E. 734; Illinois Cent. R. Co. *v.* Chicago, 156 Ill. 98, 41 N. E. 45; Lake Shore, etc., R. Co. *v.* Chicago, 151 Ill. 359, 37 N. E. 880; Chicago, etc., R. Co. *v.* Chicago, 149 Ill. 495, 36 N. E. 1006; Chicago, etc., R. Co. *v.* Chicago, 140 Ill. 309, 29 N. E. 1109; Chicago, etc., R. Co. *v.* Englewood Connecticut R. Co., 115 Ill. 375, 4 N. E. 246, 56 Am. Rep. 173; Boston, etc., R. Co. *v.* Cambridge, 159 Mass. 283, 34 N. E. 382; Detroit Park, etc., Com'rs *v.* Detroit, etc., R. Co., 91 Mich. 291, 51 N. W. 934; Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 L. ed. 979. See also Illinois Cent. R. Co. *v.* Normal, 175 Ill. 562, 51 N. E. 781, holding that the market value of the land for general purposes cannot enter into the estimate of compensation for taking it for a street crossing, since the company continues to own the property, and the public acquires only the right to use it jointly with the company and only as a crossing.

85. Chicago, etc., R. Co. *v.* Morrison, 195 Ill. 271, 63 N. E. 96; Lake Shore, etc., R. Co. *v.* Chicago, 152 Ill. 101, 37 N. E. 1029; Chicago, etc., R. Co. *v.* Chicago, 150 Ill. 597, 37 N. E. 1029; Chicago, etc., R. Co. *v.* Chicago, 149 Ill. 535, 37 N. E. 80; Chicago, etc., R. Co. *v.* Chicago, 149 Ill. 464, 37 N. E. 79; Chicago, etc., R. Co. *v.* Chicago, 149 Ill. 457, 37 N. E. 78; Lake Shore, etc., R. Co. *v.* Chicago, 148 Ill. 509, 37 N. E. 88; Chicago, etc., R. Co. *v.* Chicago, 140 Ill. 309, 29 N. E. 1109; Morris, etc., R. Co. *v.* Orange, 63 N. J. L. 252, 43 Atl. 730, 47 Atl. 363.

86. Boston, etc., R. Co. *v.* Cambridge, 159 Mass. 283, 34 N. E. 382; Massachusetts Cent. R. Co. *v.* Boston, etc., R. Co., 121 Mass. 124 (holding, however, that, where a highway is laid out across a railroad right of way and twenty feet above the grade, this does not entitle the company to damages for the interruption or inconvenience occasioned to its business); Old Colony, etc., R. Co. *v.* Plymouth County, 14 Gray (Mass.) 155; Matter of First St., 58 Mich. 641, 46 N. W. 159; Toledo, etc., Cent. R. Co. *v.* Fostoria, 7 Ohio Cir. Ct. 293, 4 Ohio Cir. Dec. 602; Chicago, etc., R. Co. *v.* Milwaukee, 97 Wis. 418, 72 N. W. 1118.

87. *Kansas.*— Southern Kansas R. Co. *v.* Johnson County, 52 Kan. 138, 34 Pac. 396; Atchison, etc., R. Co. *v.* Osage County, 48 Kan. 576, 29 Pac. 1084; Greenwood County *v.* Kansas City, etc., R. Co., 46 Kan. 104, 26 Pac. 397; Kansas City, etc., R. Co. *v.* Jackson County, 45 Kan. 716, 26 Pac. 394.

Massachusetts.— Old Colony, etc., R. Co. *v.* Plymouth County, 14 Gray 155.

Michigan.— Matter of First St., 66 Mich. 42, 33 N. W. 15; Chicago, etc., R. Co. *v.* Hough, 61 Mich. 507, 28 N. W. 532.

Missouri.— Kansas City *v.* Kansas City Belt R. Co., 102 Mo. 633, 14 S. W. 808, 10 L. R. A. 851.

New Jersey.— Morris, etc., R. Co. *v.* Orange, 63 N. J. L. 252, 43 Atl. 730, 47 Atl. 363 (holding that the expense incurred in the readjustment of a switch conformed to a grade of the street should be included); State *v.* Bayonne, 51 N. J. L. 428, 17 Atl. 971.

Oklahoma.— Southern Kansas R. Co. *v.* Oklahoma City, 12 Okla. 50, 69 Pac. 1050.

See 18 Cent. Dig. tit. "Eminent Domain," § 351.

See also *supra*, X, E, 19, d, (III).

88. Chicago, etc., R. Co. *v.* Chicago, 150 Ill. 597, 37 N. E. 1029; Chicago, etc., R. Co. *v.* Chicago, 149 Ill. 457, 37 N. E. 78; Lake Shore, etc., R. Co. *v.* Chicago, 148 Ill. 509, 37 N. E. 88; Grand Rapids *v.* Bennett, 106 Mich. 528, 64 N. W. 585.

89. Chicago, etc., R. Co. *v.* Morrison, 195 Ill. 271, 63 N. E. 96; Morris, etc., R. Co. *v.* Orange, 63 N. J. L. 252, 43 Atl. 730, 47 Atl. 363 [*overruling* Paterson, etc., R. Co. *v.* Newark, 61 N. J. L. 80, 38 Atl. 689]; State *v.* Bayonne, 51 N. J. L. 428, 17 Atl. 971; Morris, etc., R. Co.'s Case, 9 N. J. L. J. 75; Chicago, etc., R. Co. *v.* Milwaukee, 97 Wis. 418, 72 N. W. 1118.

crossing gates, cattle-guards, railroad signs, and other guards against accident, constitutes an element of damage to be considered in making the award;[90] likewise, the employment of flagmen.[91]

(c) *Increased Cost of Operation and Interruption of Traffic.* There is considerable conflict of authority as to whether the railroad company may recover for the interruption of traffic, or the increased cost of operation, caused by the establishment of a street or highway along its right of way, the rule being laid down in some jurisdictions that compensation should not include inconvenience to or interference with the traffic of the road;[92] while in other jurisdictions it is held that the company is entitled to recover for the interruption of its business, and for the increased cost of its transaction.[93] Under the former line of decisions, the increased risk in the physical operation of the railroad caused by the opening of the street or highway is not to be taken into consideration.[94]

(II) *Use by Another Railroad*—(A) *For Crossing.* Where one railroad company appropriates the right of way of another railroad, the measure of damages is the loss and inconvenience necessarily incidental to the reconstruction and keeping in repair of that part of the first road which is occupied by the second,[95] excluding the loss resulting from mere competition.[96] The first company is likewise entitled to damages for all actual or direct injuries resulting from a new and additional use to be made of its right of way.[97] However, the inconvenience to or interruption of a company's business, such as the stopping of trains at the crossing, is not an element to be considered in estimating damages;[98] nor is the increased liability to accident by reason of the crossing a proper element of dam-

90. Southern Kansas R. Co. *v.* Johnson County, 52 Kan. 138, 34 Pac. 396; Atchison, etc., R. Co. *v.* Osage County, 48 Kan. 576, 29 Pac. 1084; Greenwood County *v.* Kansas City, etc., R. Co., 46 Kan. 104, 26 Pac. 397; Kansas Cent. R. Co. *v.* Jackson County, 45 Kan. 716, 26 Pac. 394; Old Colony, etc., R. Co. *v.* Plymouth County, 14 Gray (Mass.) 155; Detroit Park, etc., Com'rs *v.* Detroit, etc., R. Co., 93 Mich. 58, 52 N. W. 1083; Detroit Park, etc., Com'rs *v.* Michigan Cent. R. Co., 90 Mich. 385, 51 N. W. 447; Chicago, etc., R. Co. *v.* Hough, 61 Mich. 507, 28 N. W. 532; Matter of First St., 58 Mich. 641, 26 N. W. 159.

91. Detroit *v.* Detroit, etc., R. Co., 112 Mich. 304, 70 N. W. 573; Grand Rapids *v.* Bennett, 106 Mich. 528, 64 N. W. 585; Detroit Park, etc., Com'rs *v.* Detroit, etc., R. Co., 91 Mich. 291, 51 N. W. 934.

92. Portland, etc., R. Co. *v.* Deering, 78 Me. 61, 2 Atl. 670, 57 Am. Rep. 784; Morris, etc., R. Co.'s Case, 9 N. J. L. J. 75.

93. Chicago, etc., R. Co. *v.* Naperville, 166 Ill. 87, 47 N. E. 734 [*overruling* in effect Chicago, etc., R. Co. *v.* Chicago, 140 Ill. 309, 29 N. E. 1109, and *distinguishing* Lake Shore, etc., R. Co. *v.* Chicago, 148 Ill. 509, 37 N. E. 88]; Lake Shore, etc., R. Co. *v.* Chicago, 151 Ill. 359, 37 N. E. 880. See also Chicago, etc., R. Co. *v.* Cicero, 154 Ill. 656, 39 N. E. 574.

94. Portland, etc., R. Co. *v.* Deering, 78 Me. 61, 2 Atl. 670, 57 Am. St. Rep. 784; Massachusetts Cent. R. Co. *v.* Boston, etc., R. Co., 121 Mass. 124; Boston, etc., R. Co. *v.* Middlesex County, 1 Allen (Mass.) 324; Old Colony, etc., R. Co. *v.* Plymouth County, 14 Gray (Mass.) 155; Morris, etc., R. Co.'s Case, 9 N. J. L. J. 75.

95. St. Louis, etc., R. Co. *v.* Springfield, etc., R. Co., 96 Ill. 274; Chicago, etc., R. Co. *v.* Springfield, etc., R. Co., 67 Ill. 142; Massachusetts Cent. R. Co. *v.* Boston, etc., R. Co., 121 Mass. 124.

96. Omaha Horse R. Co. *v.* Cable Tramway Co., 32 Fed. 727. See also Boston, etc., R. Corp. *v.* Old Colony R. Corp., 12 Cush. (Mass.) 605.

97. Grand Rapids *v.* Grand Rapids, etc., R. Co., 66 Mich. 42, 33 N. W. 15; Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 62 Mich. 564, 29 N. W. 500, 4 Am. St. Rep. 875; National Docks, etc., Junction Connecting R. Co. *v.* Pennsylvania R. Co., 57 N. J. L. 637, 32 Atl. 274; National Docks, etc., Junction Connecting R. Co. *v.* State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. Rep. 421 (holding that where the condemning company fails to define in its petition how it will cross the right of way of another company, but seeks to condemn the privilege of crossing generally, the damages are to be assessed, not only for any manner of crossing at present lawful and necessary, but also for lawful changes in the manner of crossing in the future); *In re* Lockport, etc., R. Co., 19 Hun (N. Y.) 38.

Nominal damages see *infra*, X, E, 14, b, (II).

98. *Illinois.*—Chicago, etc., R. Co. *v.* Joliet, etc., R. Co., 105 Ill. 388, 44 Am. Rep. 799; Peoria, etc., Union R. Co. *v.* Peoria, etc., R. Co., 105 Ill. 110, holding that the injury caused to the company whose right of way is crossed by the delay, danger, inconvenience, and impairment of the hauling capacity of its rolling-stock in stopping before crossing the tracks of a new company as required by law is too vague and uncertain to be taken in consideration in estimating the damages,

age.[99] However, the cost of erecting signals and maintaining a crossing system, as well as the cost of a watchman, is a proper element to be considered in awarding damages to the company whose right of way is sought to be crossed by another railroad.[1]

(B) *Use or Occupation of Tracks.* Where one railroad company is allowed by statute to appropriate the right to use the tracks of another company, it should make compensation for the use and wear and tear of the tracks of said company.[2]

(III) *USE BY TELEGRAPH OR TELEPHONE LINES.* The compensation which a telegraph or telephone company must pay for the right of constructing and maintaining its lines upon a railroad right of way is the amount of decrease in the value of the use of such right of way for railroad purposes necessarily and reasonably resulting from its use by the telegraph or telephone company.[3] The

since they are contingent upon the regulation of the legislature which might be changed at any time.

Massachusetts.— Massachusetts Cent. R. Co. *v.* Boston, etc., R. Co., 121 Mass. 124; Boston, etc., R. Corp. *v.* Old Colony R. Corp., 12 Cush. 605.

Michigan.— Flint, etc., R. Co. *v.* Detroit, etc., R. Co., 64 Mich. 350, 31 N. W. 281.

Missouri.— Kansas City Suburban Belt R. Co. *v.* Kansas City, etc., R. Co., 118 Mo. 599, 24 S. W. 478.

Ohio.— Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604, holding that the additional expense to the company whose right of way is crossed, rendered necessary in order to operate its road in compliance with the statutory requirements, cannot be taken into consideration.

See 18 Cent. Dig. tit. "Eminent Domain," § 350.

99. Massachusetts Cent. R. Co. *v.* Boston, etc., R. Co., 121 Mass. 124; Boston, etc., R. Co. *v.* Middlesex County, 1 Allen (Mass.) 324; Old Colony, etc., R. Co. *v.* Plymouth County, 14 Gray (Mass.) 155; Boston, etc., R. Corp. *v.* Old Colony, etc., R. Corp., 12 Cush. (Mass.) 605; Proprietors Locks, etc. *v.* Nashua, etc., R. Corp., 10 Cush. (Mass.) 385; Morris, etc., R. Co.'s Case, 9 N. J. L. J. 75.

1. Flint, etc., R. Co. *v.* Detroit, etc., R. Co., 64 Mich. 350, 31 N. W. 281; Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 62 Mich. 564, 29 N. W. 500, 4 Am. St. Rep. 875. See, however, Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604.

2. Metropolitan R. Co. *v.* Quincy R. Co., 94 Mass. 262 (holding that in estimating the damages, the commissioners may base their estimate upon the amount of business done by the second company upon the road of the first company, and may require an account to be kept, exhibiting the amount of such business, and to require such account to be open to the inspection of the officers of the first company); Grand Ave. R. Co. *v.* Citizens' R. Co., 148 Mo. 665, 50 S. W. 305 (holding, however, that the commissioners, in assessing the damages, cannot allow for the first company's loss of passengers by reason of the division of its patronage; nor for the delays, inconveniences, and jolts arising from making the connections from one track to the other); Grand Ave. R. Co. *v.* People's R. Co., 132 Mo. 34, 33 S. W. 472; Union Depot R. Co. *v.* Southern R. Co., 105 Mo. 562, 16 S. W. 920; Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 6 Ohio Cir. Ct. 362, 3 Ohio Cir. Dec. 493 (holding that where one street railroad occupies part of the tracks of another, the jury should take into consideration the value of so much of the railroad structure and materials in place of defendant company as is sought to be appropriated, including the cost of the paving constructed by defendant in conformity with city ordinances: also the damages which the structure will sustain in adapting it to the use of plaintiff company; but that defendant is not entitled to compensation for any depreciation in value of the franchise by the proposed joint use of its tracks; nor for the loss of fares which may be occasioned thereby; nor for the inconvenience or interruption to business which may be caused; nor for the consequential diminution in value of other portions of the line forming part of its system; and that the compensation awarded for the use of the tracks should be limited to the value of such use during the unexpired term of the franchise granted by the city to defendant).

3. *Mississippi.*— Mobile, etc., R. Co. *v.* Postal Tel. Cable Co., 76 Miss. 731, 26 So. 370, 45 L. R. A. 223.

Ohio.— Cleveland, etc., R. Co. *v.* Ohio Postal Tel. Cable Co., 68 Ohio St. 306, 67 N. E. 890, 62 L. R. A. 941.

Texas.—Texas Midland R. Co. *v.* Southwestern Tel., etc., Co., (Civ. App. 1900), 57 S. W. 312; San Antonio, etc., R. Co. *v.* Southwestern Tel., etc., Co., (Civ. App. 1900) 56 S. W. 201; Texas, etc., R. Co. *v.* Postal Tel. Cable Co., (Civ. App. 1899) 52 S. W. 108; Gulf, etc., R. Co. *v.* Southwestern Tel., etc., Co., (Civ. App. 1899) 52 S. W. 86.

Utah.— Postal Tel., etc., Co. *v.* Oregon, etc., R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

United States.— Montana Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 114 Fed. 787: Idaho Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 104 Fed. 623.

See 18 Cent. Dig. tit. "Eminent Domain," § 317.

Nominal damages see *infra*, X, E, 14, b, (IV).

value of the fee[4] or the expense to the railroad company of acquiring and maintaining its right of way[5] is not a proper element of damage. Nor is the particular advantage which the telegraph or telephone company will derive from the use of the railroad's right of way an element to be considered.[6]

b. Taking of Street or Highway — (i) *Occupation or Obstruction* — (a) *General Rule.* An owner of land abutting on a street or highway upon which a railroad or other public work is constructed is entitled to such damages only as are peculiar to him and are not shared with him by the public generally.[7] He may, however, recover all the damages resulting proximately to his property from the use to which such highway or street is put by the appropriating party, in addition to the value of his interest in the fee of the highway.[8]

4. St. Louis, etc., R. Co. *v.* Postal Tel. Co., 173 Ill. 508, 51 N. E. 382 (holding that the measure of damages is the value of the land actually taken for placing the poles and the extent to which the value of the use of the portions between poles and under the wires for railroad purposes is diminished by the telegraph company, since such company acquires no fee in any portion of the right of way, but merely an easement in what it condemns); Postal Tel. Cable Co. *v.* Louisiana Western R. Co., 49 La. Ann. 1270, 22 So. 219; Mobile, etc., R. Co. *v.* Postal Tel. Cable Co., 76 Miss. 731, 26 So. 370, 45 L. R. A. 223.

5. Texas, etc., R. Co. *v.* Postal Tel. Cable Co., (Tex. Civ. App. 1899) 52 S. W. 108; Postal Tel. Cable Co. *v.* Oregon, etc., R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705. See also Texas Midland R. Co. *v.* Southwestern Tel., etc., Co., (Tex. Civ. App. 1900) 57 S. W. 312; Southwestern Tel., etc., Co. *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1899) 52 S. W. 106, holding that the cost of clearing the grass from the poles where the company desires to burn off its right of way is not to be considered in estimating the damages, since the telegraph company will be charged with the performance of such duty. See, however, Postal Tel. Cable Co. *v.* Morgan's Louisiana, etc., Steamship Co., 49 La. Ann. 58, 21 So. 183, holding that a company condemning a railroad right of way for the erection of a telegraph line must make proportionate compensation for the expense which the railroad company will incur in putting its right of way in condition.

Change of route by railroad.— The possibility that a railroad company may in the future change its route and use for other purposes the land embraced in its right of way does not operate to make such possible use an element of damage on condemnation of the right of way for a telegraph line, as such contingency is too remote. Mobile, etc., R. Co. *v.* Postal Tel., etc., Co., 76 Miss. 731, 26 So. 370, 45 L. R. A. 223.

6. Texas, etc., R. Co. *v.* Postal Tel. Cable Co., (Tex. Civ. App. 1899) 52 S. W. 108; Gulf, etc., R. Co. *v.* Southwestern Tel., etc., Co., (Tex. Civ. App. 1899) 52 S. W. 86.

7. *Illinois.*— Winnetka *v.* Clifford, 201 Ill. 475, 66 N. E. 384.

Iowa.— McClean *v.* Chicago, etc., R. Co., 67 Iowa 568, 25 N. W. 782.

Kansas.— Central Branch Union Pac. R. Co. *v.* Andrews, 30 Kan. 590, 2 Pac. 677.

Massachusetts.— Bailey *v.* Boston, etc., R. Corp., 182 Mass. 537, 66 N. E. 203, holding that interference with the use of property for about twelve months while the work of construction is going on and properly incident thereto may be considered by a jury so far as the interference diminished the rental value of the property or its value for the uses to which it was adapted, and so far as the damage was special and peculiar as distinguished from that suffered in a greater or less degree by the public generally.

New York.— Mahady *v.* Bushwick R. Co., 91 N. Y. 148, 43 Am. Rep. 661.

Texas.— Morrow *v.* St. Louis, etc., R. Co., 81 Tex. 405, 17 S. W. 44; Gulf, etc., R. Co. *v.* Fuller, 63 Tex. 467; Haney *v.* Gulf, etc., R. Co., 3 Tex. App. Civ. Cas. § 278.

See 18 Cent. Dig. tit. "Eminent Domain," § 348.

Change in character of street.— The owner is not entitled to recover damages resulting merely from the fact that the presence of the railroad has changed the character of the street or neighborhood. Stacey *v.* Metropolitan El. R. Co., 15 N. Y. App. Div. 534, 44 N. Y. Suppl. 534; Moore *v.* New York El. R. Co., 15 Daly (N. Y.) 510, 8 N. Y. Suppl. 769, 24 Abb. N. Cas. (N. Y.) 74.

8. *Iowa.*— McClean *v.* Chicago, etc., R. Co., 67 Iowa 568, 25 N. W. 782; Kucheman *v.* C. C. & D. R. Co., 46 Iowa 366.

Kentucky.— Covington, etc., El. R., etc., Co. *v.* Ruffra, 40 S. W. 383, 19 Ky. L. Rep. 284.

Nebraska.— Chicago, etc., R. Co. *v.* O'Connor, 42 Nebr. 90, 60 N. W. 326, holding that cuts or fills made in the street, the proximity of the track, the danger of fire from passing trains, the probability of damage to the house from jars, the inconvenience to the occupants arising from the presence and ordinary use of the track for all time, the annoyance from smoke, dust, and noise and every other circumstance which would influence the market value of the property in the mind of a *bona fide* prospective purchaser, are all elements for consideration in computing the damages.

New York.— Drucker *v.* Manhattan R. Co., 106 N. Y. 157, 12 N. E. 568, 60 Am. Rep. 437, [*affirming* 51 N. Y. Super. Ct. 429] (holding that it is proper to take into con-

(B) *Diminution in Market Value.* The general rule is that the measure of damages of an abutting owner is the depreciation in the market value, for any use to which it may reasonably be put, of his property abutting on the street or highway where the railroad or other public improvement is constructed and operated,[9] and the amount of such damages should ordinarily be the difference between the fair value of the property before the appropriation of the street or highway to be used, or the contemplation thereof, and its value thereafter.[10]

sideration as elements of damages the impairment of plaintiff's easement of air caused by smoke, gases, ashes, and cinders from passing trains, the lessening of the easement of light caused by the construction of the road itself and passage of trains, and the interference with convenience of access caused by the drippings of oils and water); Cooper *v.* Manhattan R. Co., 85 Hun 217, 32 N. Y. Suppl. 1054. See also Bischoff *v.* New York El. R. Co., 138 N. Y. 257, 33 N. E. 1073.

Texas.— Williams *v.* Gulf, etc., R. Co., 1 Tex. App. Civ. Cas. § 312.

Wisconsin.— Blesch *v.* Chicago, etc., R. Co., 48 Wis. 168, 2 N. W. 113.

See 18 Cent. Dig. tit. "Eminent Domain," § 348.

Legality of intermittent obstruction.— A town ordinance prohibiting the obstruction of crossings by railroad trains for more than fifteen minutes at a time does not so legalize such obstruction for that interval as to exclude it from the estimate of damages in a proceeding to condemn the right of way for a side-track along the street and to assess damages to lots abutting within less than twenty feet. Mix *v.* Lafayette, etc., R. Co., 67 Ill. 319.

Number of trains.— The fact that but few trains are run over an elevated railroad cannot be considered in estimating the damages as showing that the injury to the property is small, since after compensation has once been made the owner has no further right to complain, although the number of trains is increased. Hughes *v.* New York El. R. Co., 21 N. Y. Suppl. 693.

Rights of owner of corner lot.— In ascertaining the compensation to be made to the owner of a lot on a corner forming a right angle for so much of his easement in one of the streets as is appropriated by a railroad, the street space affected is properly determined by a line drawn from said corner of the two streets to the corner diagonally opposite. Metropolitan El. R. Co. *v.* Levy, 13 N. Y. Suppl. 367.

Title of abutter.— It is immaterial, so far as the rights of an owner of land abutting on a street are concerned, as to damages sustained by reason of a diversion of the street from the use for which it was originally taken and its appropriation to other inconsistent uses, whether he obtained title by deed from the municipality, containing covenants protecting the street from any other use than that of a highway, or the street was laid out through the premises by proceedings *in invitum*, under a statute appropriating the fee, but providing that the land shall be held in trust for the purposes of a street. Lahr *v.* Metropolitan El. R. Co., 104 N. Y. 268, 10 N. E. 528.

9. *California.*— Muller *v.* Southern Pac. R. Co., 83 Cal. 240, 23 Pac. 265.

Colorado.— Denver, etc., R. Co. *v.* Bourne, 11 Colo. 59, 16 Pac. 839; Denver, etc., R. Co. *v.* Schmitt, 11 Colo. 56, 16 Pac. 842; Denver Circle R. Co. *v.* Nestor, 10 Colo. 403, 15 Pac. 714; Denver *v.* Bayer, 7 Colo. 113, 2 Pac. 6.

Georgia.— Streyer *v.* Georgia Southern, etc., R. Co., 90 Ga. 56, 15 S. E. 637.

Illinois.— Chicago, etc., R. Co. *v.* Hall, 90 Ill. 42; St. Louis, etc., R. Co. *v.* Haller, 82 Ill. 208.

Iowa.— Nicks *v.* Chicago, etc., R. Co., 84 Iowa 27, 50 N. W. 222.

Kentucky.— Jeffersonville, etc., R. Co. *v.* Esterle, 13 Bush 667; Elizabethtown, etc., R. Co. *v.* Combs, 10 Bush 382, 19 Am. Rep. 67.

Massachusetts.— Bailey *v.* Boston, etc., R. Corp., 182 Mass. 537, 66 N. E. 203.

Nebraska.— Chicago, etc., R. Co. *v.* O'Connor, 42 Nebr. 90, 60 N. W. 326.

New York.— Pappenheim *v.* Metropolitan El. R. Co., 128 N. Y. 436, 28 N. E. 518, 26 Am. St. Rep. 486, 13 L. R. A. 401 [*affirming* 59 N. Y. Super. Ct. 576, 13 N. Y. Suppl. 955]; Matter of Brooklyn El. R. Co., 55 Hun 165, 8 N. Y. Suppl. 78; *In re* Prospect Park, etc., R. Co., 16 Hun 261; *In re* Union El. R. Co., 8 N. Y. Suppl. 813; Matter of New York Cent. R. Co., 11 N. Y. St. 866.

West Virginia.— Stewart *v.* Ohio River R. Co., 38 W. Va. 438, 18 S. E. 604.

See 18 Cent. Dig. tit. "Eminent Domain," § 372.

10. *Georgia.*—Streyer *v.* Georgia Southern, etc., R. Co., 90 Ga. 56, 15 S. E. 637.

Kentucky.— Chesapeake, etc., R. Co. *v.* Smith, 51 S. W. 12, 21 Ky. L. Rep. 175; Maysville, etc., R. Co. *v.* Ingram, 30 S. W. 8, 16 Ky. L. Rep. 853; Maysville, etc., R. Co. *v.* Conner, 29 S. W. 344, 16 Ky. L. Rep. 635; M. & B. S. R. Co. *v.* Urban, 10 Ky. L. Rep. 1061; Louisville, etc., R. Co. *v.* Geikel, 9 Ky. L. Rep. 813; E. L. & B. S. R. Co. *v.* Walton, 9 Ky. L. Rep. 243.

Missouri.— Stevenson *v.* Missouri Pac. R. Co., (1895) 31 S. W. 793; Slattery *v.* St. Louis, 120 Mo. 183, 25 S. W. 521; Autenrieth *v.* St. Louis, etc., R. Co., 36 Mo. App. 354.

New York.— Roberts *v.* New York El. R. Co., 128 N. Y. 455, 28 N. E. 486, 13 L. R. A. 499.

Pennsylvania.— Lafean *v.* York County, 20 Pa. Super. Ct. 573.

(c) *Diminution in Rental Value.* It has been held in some jurisdictions that a diminution in the rental value of the property furnishes no basis for estimating the owner's compensation, except in its bearing on the general market value of the property.[11] In other jurisdictions, however, the difference in the fair rental value before and after the construction of the road is held to be the controlling factor in estimating the damages.[12]

(D) *Value of Property For Particular Purposes.* The general rule is that

Rhode Island.— Johnston v. Old Colony R. Co., 18 R. I. 642, 29 Atl. 594, 49 Am. St. Rep. 800.

Texas.— Eastern Texas R. Co. v. Eddings, 30 Tex. Civ. App. 170, 70 S. W. 98; Haney v. Gulf, etc., R. Co., 3 Tex. App. Civ. Cas. § 278.

See 18 Cent. Dig. tit. "Eminent Domain," § 373.

Compare Chicago, etc., R. Co. v. McGinnis, 79 Ill. 269.

Where a dirt road paralleling a macadamized public road is appropriated by a railroad company, the measure of damages is the cost of putting the macadamized road in as good order as the dirt road was, and the company has the right to do the work itself, if it so elects. Louisville, etc., R. Co. v. Hart County, 50 S. W. 60, 20 Ky. L. Rep. 1820.

Where a railroad obstructs a street in operating its road, the abutter's measure of damages is not the diminution in value of the abutting property, since the injury is not to the freehold, nor necessarily permanent in its nature, but the recovery should be confined to compensation for the injury occasioned up to the time the suit was commenced. Brakken v. Minneapolis, etc., R. Co., 29 Minn. 41, 11 N. W. 124.

For an unlawful excavation made in a street by a railroad company and removal of soil, an abutting owner is entitled to recover, not the cost of refilling, but the amount of the diminution of the value of the property injured by the excavation and removal. Baldwin v. Chicago, etc., R. Co., 35 Minn. 354, 29 N. W. 5; Karst v. St. Paul, etc., R. Co., 22 Minn. 118.

Fee damages and past damages.— There is no inconsistency in awarding fee damages and refusing past damages for the construction of an elevated road in front of plaintiff's property where it was not used by its owner for the purpose of obtaining proper rentals, but was leased at a merely nominal rent for a school which was controlled and managed by the directors of the corporation owning the property. Clinical Instruction Co. v. New York El. R. Co., 81 Hun (N. Y.) 608, 30 N. Y. Suppl. 1006.

Where one cause of action is barred.— Where the right of action of an abutting owner for the construction and operation of a railroad track is barred by limitations, but his right of action for another track laid in the same street is not barred, the measure of his damages is the amount of damages sustained by reason of the construction and operation of the two tracks, less the damage which would have been caused by the construction and operation of one track only. Klosterman v. Chesapeake, etc., R. Co., 71 S. W. 6, 24 Ky. L. Rep. 1233.

11. Streyer v. Georgia Southern, etc., R. Co., 90 Ga. 56, 15 S. E. 637; Chicago, etc., R. Co. v. McGinnis, 79 Ill. 269.

Probable loss of rent before commencement of action is not a proper element of damages. Slattery v. St. Louis, etc., R. Co., 120 Mo. 183, 25 S. W. 521.

12. Birch v. Lake Roland El. R. Co., 83 Md. 362, 34 Atl. 1013; Lake Roland El. R. Co. v. Webster, 81 Md. 529, 32 Atl. 186; Bailey v. Boston, etc., Corp., 182 Mass. 537, 66 N. E. 203; Woolsey v. New York El. R. Co., 134 N. Y. 323, 30 N. E. 387, 31 N. E. 891; Rumsey v. New York, etc., R. Co., 133 N. Y. 79, 30 N. E. 654, 28 Am. St. Rep. 600, 15 L. R. A. 618; McElroy v. Manhattan R. Co., 6 N. Y. App. Div. 367, 39 N. Y. Suppl. 497; Flynn v. Kings County El. R. Co., 3 N. Y. App. Div. 254, 38 N. Y. Suppl. 204; Matter of Brooklyn El. R. Co., 87 Hun (N. Y.) 88, 33 N. Y. Suppl. 881; Mortimer v. Manhattan R. Co., 57 N. Y. Super. Ct. 509, 8 N. Y. Suppl. 536; Mooney v. New York El. R. Co., 16 Daly (N. Y.) 145, 9 N. Y. Suppl. 522 (holding, however, that where the rental value of the premises was unfavorably affected by changes in the business character of the street, the owner should not be allowed the whole difference between the value of the premises before and after the construction of the road); Day v. New York El. R. Co., 3 Misc. (N. Y.) 616, 23 N. Y. Suppl. 179; Fitzpatrick v. New York El. R. Co., 17 N. Y. Suppl. 943; Kane v. Manhattan R. Co., 17 N. Y. Suppl. 109; Korn v. New York El. R. Co., 15 N. Y. Suppl. 10; Conkling v. Manhattan R. Co., 12 N. Y. Suppl. 846; Kearney v. Metropolitan El. R. Co., 14 N. Y. St. 854; Blesch v. Chicago, etc., R. Co., 43 Wis. 183. See also Tallman v. Metropolitan El. R. Co., 121 N. Y. 119, 23 N. E. 1134, 8 L. R. A. 173; Crampton v. Brooklyn El. R. Co., 3 N. Y. App. Div. 263, 38 N. Y. Suppl. 384.

Obstruction of street.— The measure of damages for the obstruction of an abutter's right of way in a street by a railway company in the operation of the road is the difference between the fair rental value of the property with the right obstructed and the rental value of the same unobstructed, and this rule applies, although the property is occupied by the abutter himself and is not rented. Brakken v. Minneapolis, etc., R. Co., 31 Minn. 45, 16 N. W. 459.

Party claiming under owner.— The measure of damages is the difference between the

evidence of the value of the abutting property for a particular purpose or use is inadmissible,[13] except as such evidence tends to show the market value of the property.[14]

(II) *ALTERATION OF GRADE.* The measure of damages to an abutting owner caused by a change of grade of a street or highway is generally held to be the difference between the value of the abutting property before the change of grade and its value thereafter;[15] consequential damages caused by the intervention of an independent agency not put in operation by the act of defendant being too remote to be considered.[16] Depreciation in the rental value of the property[17] and interference with the right of ingress and egress[18] are elements to be considered in estimating such damages.

(III) *VACATION OR CHANGE OF ROUTE.* Where a street or highway is closed or the route is changed the measure of damages to an abutting owner[19] or other

rental value of the property before the erection of the railroad and the rental value thereafter, regardless of the fact that plaintiff became the owner of the premises after the erection of the railroad during the existence of a lease of the premises. Werfelman *v.* Manhattan R. Co., 16 Daly (N. Y.) 355, 11 N. Y. Suppl. 66; Korn *v.* New York El. R. Co., 15 N. Y. Suppl. 10.

13. Streyer *v.* Georgia Southern, etc., R. Co., 90 Ga. 56, 15 S. E. 637; Woolsey *v.* New York, etc., R. Co., 134 N. Y. 323, 30 N. E. 387, 31 N. E. 891 (holding that the question is what did the owner suffer and not what he might have suffered had the land been devoted to some particular use to which it was not put); Rumsey *v.* New York, etc., R. Co., 133 N. Y. 79, 30 N. E. 654, 28 Am. St. Rep. 600, 15 L. R. A. 618; Sixth Ave. R. Co. *v.* Metropolitan El. R. Co., 56 Hun (N. Y.) 182, 9 N. Y. Suppl. 207.

14. Streyer *v.* Georgia Southern, etc., R. Co., 90 Ga. 56, 15 S. E. 637; Bailey *v.* Boston, etc., R. Corp., 182 Mass. 537, 66 N. E. 203. See also Wadham *v.* North Eastern R. Co., 16 Q. B. D. 227, 55 L. J. Q. B. 272, 34 Wkly. Rep. 342 [*affirming* 49 J. P. 599, 52 L. T. Rep. N. S. 894], where a railroad company stopped up a street in which stood a house and premises used as a hotel, and thereby the value of the premises as a hotel or public house was diminished, and the owner was held to be entitled to compensation for special injury caused by the depreciation of the premises as a hotel or public house.

15. *Colorado.*— Denver *v.* Bonesteel, 30 Colo. 107, 69 Pac. 595, 60 L. R. A. 383.

Georgia.— Moore *v.* Atlanta, 70 Ga. 611.

Illinois.— Chicago *v.* Lonergan, 196 Ill. 518, 63 N. E. 1018; Chicago *v.* Jackson, 196 Ill. 496, 63 N. E. 1013, 1135.

Kansas.— Parker *v.* Atchison, 46 Kan. 14, 26 Pac. 435.

Maryland.— Baltimore Belt R. Co. *v.* McColgan, 83 Md. 650, 35 Atl. 59.

Massachusetts.— New York, etc., R. Co. *v.* Blacker, 178 Mass. 386, 59 N. E. 1020; Buell *v.* Worcester County, 119 Mass. 372.

Minnesota.— Brakken *v.* Minneapolis, etc., R. Co., 32 Minn. 425, 21 N. W. 414, 31 Minn. 45, 16 N. W. 459, 29 Minn. 41, 11 N. W. 124.

Missouri.— Stickford *v.* St. Louis, 75 Mo. 309 [*affirming* 7 Mo. App. 217]; Farrar *v.* Midland Electric R. Co., 101 Mo. App. 140, 74 S. W. 500.

New York.— Henderson *v.* New York Cent. R. Co., 78 N. Y. 423 [*affirming* 17 Hun 344].

Pennsylvania.— May *v.* Carbondale Traction Co., 167 Pa. St. 343, 31 Atl. 667; Billinfelt *v.* Adamstown, 5 Lanc. L. Rev. 107.

South Carolina.— Mauldin *v.* Greenville, 64 S. C. 444, 42 S. E. 202, holding that the cost of lowering the floor of a house, the loss of tenants, and the depreciation in the rental value of the property are to be considered.

Tennessee.— Hamilton County *v.* Rape, 101 Tenn. 222, 47 S. W. 416.

Wisconsin.— Shealy *v.* Chicago, etc., R. Co., 77 Wis. 653, 46 N. W. 887.

See 18 Cent. Dig. tit. "Eminent Domain," § 374.

16. Montgomery *v.* Townsend, 80 Ala. 489, 2 So. 155, 60 Am. Rep. 112 (where the falling of a brick fence and the apprehended undermining of a house caused by subsequent rains were held to be too remote to be considered as elements of damage); Chicago *v.* Jackson, 193 Ill. 496, 63 N. E. 1013, 1135 (holding that diversion of traffic is not a proper element for the consideration of the jury, either as an element of damage or as bearing on the question whether access to the property has been interfered with by the change of grade); Chicago *v.* McShane, 102 Ill. App. 239.

17. Chicago *v.* Lonergan, 196 Ill. 518, 63 N. E. 1018; Chicago *v.* Jackson, 196 Ill. 496, 63 N. E. 1013, 1135; Chicago *v.* McShane, 102 Ill. App. 239; Mauldin *v.* Greenville, 64 S. C. 444, 42 S. E. 202.

18. Chicago *v.* Lonergan, 196 Ill. 518, 63 N. E. 1018. See also *infra*, X, E, 19, g.

19. *Illinois.*—Winnetka *v.* Clifford, 201 Ill. 475, 66 N. E. 384 (holding that the measure of damages in an action for injury to property in closing a street in front of the property and building a subway in the adjoining street is the difference between the fair cash value of the property as a whole before and after the improvement was made); Chicago *v.* Webb, 102 Ill. App. 232.

Maryland.— Baltimore Belt R. Co. *v.* McColgan, 83 Md. 650, 35 Atl. 59.

person having a vested interest in the way[20] is the actual injury caused thereby; and where such property has already deteriorated in value by reason of the exercise of the right of eminent domain damages must be assessed with reference to such deterioration upon the exercise of the same power by another corporation.[21]

10. WHERE RAILROAD IS LOCATED. Where a part of a tract is condemned for railroad purposes, the measure of damages is the difference between the fair market value of the entire tract at the time of the taking and the fair market value of the residue after the taking, in the condition in which it will be after the road is in operation.[22] The general rule being that railroad companies

Massachusetts.— Natick Gas Light Co. *v.* Natick, 175 Mass. 246, 56 N. E. 292.

New Hampshire.— Beard *v.* Henniker, 70 N. H. 197, 46 Atl. 738.

New York.— Matter of Kingsbridge Road, 34 Misc. 729, 70 N. Y. Suppl. 1029, holding that in making the award the assessors should not consider what benefit the owner of the property received from the opening of new streets, and that they could not deduct the value of the land which the owner obtained by the closing of the road. See, however, Matter of Gilroy, 43 N. Y. App. Div. 359, 60 N. Y. Suppl. 200 [*affirmed* in 164 N. Y. 576, 58 N. E. 1087], holding that where a statute authorized a city to take a highway in a town without imposing on the city the expense of maintaining a new highway in place of the one destroyed, the town was not entitled to damages for the estimated cost of such maintenance.

Virginia.— Mitchell *v.* Thornton, 21 Gratt. 164.

See 18 Cent. Dig. tit. "Eminent Domain," § 267.

20. *Kentucky.*— Richmond, etc., Turnpike Road Co. *v.* Madison County Fiscal Ct., 70 S. W. 1044, 24 Ky. L. Rep. 1260, holding that the just measure of compensation to be paid upon the condemnation of a turnpike is its actual value at the time of condemnation and not merely the cost of its construction.

Missouri.— St. Louis, etc., R. Co. *v.* Hannibal Union Depot Co., 125 Mo. 82, 28 S. W. 483.

Ohio.— Avondale *v.* Cincinnati, etc. Turnpike Co., 10 Ohio Dec. (Reprint) 82, 18 Cinc. L. Bul. 308 (holding that in assessing the value of that part of a turnpike which is within the limits of a municipal corporation the jury may ascertain the probable future net income of the whole road by considering the past net income, the probable future travel, the facilities for evading toll from cross streets that may be opened, also any contract with a street railway company for the use of the road, contracts for keeping the road in repair, and other expenses, and then what proportion of the net income will be taken by the appropriation of this part of the road); Cincinnati, etc., Turnpike Co. *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 259, 6 Ohio N. P. 233.

Pennsylvania.— *In re* Chambersburg, etc., Turnpike Road, 20 Pa. Super. Ct. 173, holding that where the entire rights of a turnpike company are taken, it is the value of the property to the owner and not to the party taking it that is to be determined. See also Perkiomen, etc., Turnpike Road *v.* Berks County, 196 Pa. St. 21, 46 Atl. 98; *In re* Kensington, etc., Turnpike Co., 97 Pa. St. 260.

Texas.— St. Louis, etc., R. Co. *v.* Grayson County, 31 Tex. Civ. App. 611, 73 S. W. 64.

See 18 Cent. Dig. tit. "Eminent Domain," § 267.

21. *California.*— Muller *v.* Southern Pac. Branch R. Co., 83 Cal. 240, 23 Pac. 265.

Illinois.— Emerson *v.* Western Union R. Co., 75 Ill. 176. See Trotier *v.* St. Louis, etc., R. Co., 180 Ill. 471, 54 N. E. 487.

Maine.— Thomson *v.* Sebasticook, etc., R. Co., 81 Me. 40, 16 Atl. 332.

Massachusetts.— See Murray *v.* Berkshire County Com'rs, 12 Metc. 455.

New Jersey.— Laing *v.* United New Jersey R., etc., Co., 54 N. J. L. 576, 25 Atl. 409, 33 Am. St. Rep. 682, holding that the damages should be estimated upon the basis of the value of the land subject to the public servitude.

Pennsylvania.— Lycoming Gas, etc., Co. *v.* Moyer, 99 Pa. St. 615. See also Schuylkill River East Side R. Co. *v.* Stocker, 128 Pa. St. 233, 18 Atl. 399.

Texas.— See Rio Grande, etc., R. Co. *v.* Ortiz, 75 Tex. 602, 12 S. W. 1129, holding that where the property sought to be condemned had already been condemned for similar purposes by the predecessor of the condemning corporation, the amount of the judgment rendered upon a prior condemnation is the proper amount of damages.

United States.— See U. S. *v.* Seufert Bros. Co., 87 Fed. 35.

22. Little Rock, etc., R. Co. *v.* Allen, 41 Ark. 431; South Buffalo R. Co. *v.* Kirkover, 176 N. Y. 301, 68 N. E. 366; Pochila *v.* Calvert, etc., R. Co., 31 Tex. Civ. App. 398, 72 S. W. 255.

Value of land taken and injury to residue. — The rule for assessing the damages for a railroad right of way is the actual value of the land condemned, and such consequential damages as may result from the particular manner in which the road is constructed, or the shape in which the residue is left. East Pennsylvania R. Co. *v.* Hottenstine, 47 Pa. St. 28; McDonald *v.* Texas, etc., R. Co., 1 Tex. Unrep. Cas. 191.

The owner of a private way may recover damages for its occupancy, but not necessarily to the amount required to construct

acquire by condemnation not the absolute fee but only the right to use the lands taken, it is proper in fixing the compensation to estimate what of value, if anything, will be left to the owner consistent with the enjoyment by the railroad company of its easement in the lands;[23] yet if the right acquired is a perpetual easement, the presumption is that it will be exercised forever, and the compensation should be assessed upon the basis of a permanent deprivation of the use of the land equivalent to the value of the land itself, if the whole is taken, or to the extent of the depreciation in the value of the whole if a part only is taken.[24] The damages recoverable include whatever of injury results to the owner from the structure itself and such as is incidental to its use.[25]

another. Gear *v.* C. C. & D. R. Co., 39 Iowa 23.

Unopened mines.— In estimating the damages that will be sustained by the construction of a railroad, the value of unopened mines beneath the surface cannot be considered. Searle *v.* Lackawanna, etc., R. Co., 33 Pa. St. 57.

23. Alabama, etc., R. Co. *v.* Burkett, 42 Ala. 83; Bate *v.* Philadelphia, etc., R. Co., 1 Montg. Co. Rep. (Pa.) 47.

24. *Arkansas.*— Fayetteville, etc., R. Co. *v.* Combs, 51 Ark. 324, 11 S. W. 418.

Illinois.— Sexton *v.* Union Stock Yard, etc., Co., 200 Ill. 244, 65 N. E. 638; Wabash, etc., R. Co. *v.* McDougall, 126 Ill. 111, 18 N. E. 291, 9 Am. St. Rep. 539, 1 L. R. A. 207.

Iowa.— Smith *v.* Hall, 103 Iowa 95, 72 N. W. 427.

North Carolina.— Haislip *v.* Wilmington, etc., R. Co., 102 N. C. 376, 8 S. E. 926.

Pennsylvania.— Bate *v.* Philadelphia, etc., R. Co., 1 Montg. Co. Rep. 47.

25. *Arkansas.*— Little Rock, etc., R. Co. *v.* Allen, 41 Ark. 431, holding that in estimating the value the jury should consider the present and prospective actual damages resulting to the owner from the prudent construction and operation of the road, and the effect the road will have in decreasing the value of the land for gardening purposes, and for the building of stables and outhouses.

Illinois.— Chicago Office Bldg. *v.* Lake St. El. R. Co., 87 Ill. App. 594.

New York.— Drucker *v.* Manhattan R. Co., 106 N. Y. 157, 12 N. E. 568, 60 Am. Rep. 437 [*affirming* 51 N. Y. Super. Ct. 429]; Glover *v.* Manhattan R. Co., 66 How. Pr. 77.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Vance, 115 Pa. St. 325, 8 Atl. 764 (holding that all such matters as may affect the convenient use and future enjoyment of the property should be considered in assessing the damages in comparison with the advantages as they affect the value of the land); Pennsylvania, etc., R., etc., Co. *v.* Bunnell, 81 Pa. St. 414 (holding that where a company constructed a canal, and afterward constructed a railroad through the same land, the fact that the canal was a cheap and sufficient means of conveying to market the owner's products was a material element in the assessment of damages, and the fact that the company owned and might abandon the canal did not alter the case).

Texas.— Roy *v.* Missouri, etc., R. Co., (Civ. App. 1895) 32 S. W. 72.

See, however, Kansas City, etc., R. Co. *v.* Farrell, 76 Mo. 183 (holding that where a railroad company which was about to erect a bridge over its road was requested by the owner to make a grade crossing instead, and it proceeded to do so, but before it was completed the owner changed his mind and demanded a bridge, he could not recover for the additional damages caused by the company having made a grade crossing); Missouri, etc., R. Co. *v.* O'Connor, (Tex. Civ. App. 1899) 51 S. W. 511 (holding that where the question is as to damages to property caused by the construction of a railroad, it cannot be shown that the city had not, by reason of the railroad being on it, graded the street in front of the lot, although it had graded other contiguous streets).

Cuts and fills necessary in the construction of a railroad should be considered as enhancing the damages. Little Rock, etc., R. Co. *v.* Allen, 41 Ark. 431; Ellsworth *v.* Chicago, etc., R. Co., 91 Iowa 386, 59 N. W. 78; Cummins *v.* Des Moines, etc., R. Co., 63 Iowa 397, 19 N. W. 268; Kansas City, etc., R. Co. *v.* Story, 96 Mo. 611, 10 S. W. 203.

Fencing.— It is proper to consider the injury, if any, by reason of the farm being thrown open until the company fences the right of way. Chicago, etc., R. Co. *v.* Greiney, 137 Ill. 628, 25 N. E. 798; Centralia, etc., R. Co. *v.* Brake, 125 Ill. 393, 17 N. E. 820; St. Louis, etc., R. Co. *v.* Kirby, 104 Ill. 345. So the additional expense to the owner of fencing rendered necessary by taking the strip for a railroad is to be considered in ascertaining the damages where the company is not bound to erect fences (Louisville, etc., R. Co. *v.* Glazebrook, 1 Bush (Ky.) 325; Winona, etc., R. Co. *v.* Denman, 10 Minn. 267; Pittsburgh, etc., R. Co. *v.* Vance, 115 Pa. St. 325, 8 Atl. 764), but not otherwise (Chicago, etc., R. Co. *v.* Baker, 102 Mo. 553, 15 S. W. 64. See also King *v.* Iowa Midland R. Co., 34 Iowa 458). Danger arising from absence of fencing see *infra*, X, E, 19, i.

Inconvenience arising from a division of the property should be considered. Pittsburgh, etc., R. Co. *v.* Vance, 115 Pa. St. 325, 8 Atl. 764.

Interference with use of residue.— The owner is entitled to the use and enjoyment of his farm for the highest and best use to which it is adapted, and if a large portion of the farm is cut off from the water-supply

11. Where Riparian Lands or Rights Are Taken[26] — a. Taking Lands. Where lands having appurtenant water-rights are condemned, the owner is entitled to the market value of the part actually taken,[27] and to the damages accruing to the residue of his property;[28] and the loss of the incidental water-rights or an injury thereto is a proper element of damage.[29]

and the several parts rendered inconvenient of access, so that the whole is depreciated in market value and damaged for all time, such facts should be considered in estimating the damages. Galesburg, etc., R. Co. *v.* Milroy, 181 Ill. 243, 54 N. E. 939.

Substitution of trestle for embankment.— Where a railroad embankment which had been used as a continuation of defendant's levee was washed away and was replaced by the railroad company with a trestle, the jury might upon a reassessment of damages properly take into consideration that but for the opening in the embankment defendant could continue to use it as a levee. Wabash, etc., R. Co. *v.* McDougall, 126 Ill. 111, 18 N. E. 291, 9 Am. St. Rep. 539, 1 L. R. A. 207.

Breach of crossing agreement.— An agreement by a railroad company to give a landowner a free subway under its bridge, as part consideration for a right of way over his land, secures a valuable right, the loss of which, by the erection by the company of a dam for a reservoir, constitutes a part of the damages to be allowed in a proceeding by it to condemn other lands belonging to the same owner for such reservoir. Chicago, etc., R. Co. *v.* Miller, 106 Mo. 458, 17 S. W. 499.

If there are two railroads already on the land over which a right of way for a new road is sought to be condemned, and the new road is to be near them, crossing both on the tract and joining one of them with its switch, the existing condition and operation of the two roads already there ought to be considered in estimating the value of the land taken by the new road and the value of the remaining land. Union R. Transfer, etc., Co. *v.* Moore, 80 Ind. 458.

Interference with access, air, light, and view as element of damages see *infra*, X, E, 19, g.

Risk of injuring by fire or otherwise as element of damages see *infra*, X, E, 19, i.

Smoke, cinders, noise, vibration, etc., as element of damage see *infra*, X, E. 19, j.

26. Interference with access to water see *infra*, X, E, 19, g.

27. Langdon *v.* New York, 59 Hun (N. Y.) 434, 13 N. Y. Suppl. 864, holding that the compensation to be paid for bulkhead property taken by a city in the construction of a new bulkhead line in front of it is not to be limited to a capitalization of the amount which might be received at the bulkhead for wharfage and cranage, since there is nothing in the nature of the property to take it out of the ordinary rule as to the measure of compensation, which is the market value of the property.

28. Finn *v.* Providence Gas, etc., Co. 99 Pa. St. 631, holding that the rule that the owner is entitled to compensation not only for the land actually taken but for injury to the residue applies where land containing springs is taken by a water company for a reservoir. See also Ely *v.* Conan, (Minn. 1903) 97 N. W. 737.

29. Rock Island, etc., R. Co. *v.* Leisy Brewing Co., 174 Ill. 547, 51 N. E. 572 (holding that it is an element of damage that the construction of the improvement will deprive the owners of their ice privileges); Concord R. Co. *v.* Greely, 23 N. H. 237 (holding that where, before a railroad was constructed, a river deposited sediment on meadow land, which greatly enriched it, and the deposit is greatly diminished in quantity and fertilizing properties by the construction of the road, this may be taken into consideration in fixing the compensation); Foote *v.* Lorain, etc., R. Co., 21 Ohio Cir. Ct. 319, 11 Ohio Cir. Dec. 685 (holding that where there is a well on the land, it is admissible, as one element of the value, to show the cost of it).

Bulkhead.— Where plaintiff's wharf rights were destroyed by the construction by a city of a bulkhead in front of his own, the fact that the city has granted to his lessees a revocable license to build a shed on a platform in front of the bulkhead, thus greatly increasing its value, does not authorize the additional revenue from such improvement to be considered in measuring plaintiff's damages. Kingsland *v.* New York, 110 N. Y. 569, 18 N. E. 435 [*affirming* 45 Hun 198].

Docks and wharves.— Where by the exercise of the right of eminent domain a permanent injury is caused to property used for dock or wharf purposes, it is proper to show how much less the property would sell for in consequence of the interference. Chicago, etc., R. Co. *v.* Stein, 75 Ill. 41. Where, however, the legislature authorized a public wharf and landing to be made on land on which there was a private wharf and landing, from which the owner derived large profits, he was not entitled to compensation for the loss of profits. Eddings *v.* Seabrook, 12 Rich. (S. C.) 504.

Ferry.— The value of a private ferry operated by a riparian owner cannot be considered in estimating the compensation due him for land taken for a public ferry landing. Mills *v.* St. Clair County Com'rs, 4 Ill. 53; Prosser *v.* Wapello County, 18 Iowa 327; Jones *v.* Keith, 37 Tex. 394, 14 Am. Rep. 382. Nor are riparian owners entitled to recover damages caused by the operation of a ferryboat, where there is no license authorizing the maintenance of a ferry for hire. Organ *v.* Memphis, etc., R. Co., 51 Ark. 235, 11 S. W. 96.

Percolating waters.— In determining the value of percolating waters, it is competent to consider whether the owner might not at

b. Flooding Lands. Permanent injury to land by flooding it is a proper element of damage.[30] Thus if surface water is deflected the owner of the lands injured thereby is entitled to compensation,[31] the measure of damages being the depreciation in the value of the land.[32]

c. Taking or Diverting Waters. The measure of damages to a riparian owner by the appropriation or diversion of the waters is the depreciation in the value of the property affected by the taking.[33]

any time be deprived of them by the exercise by others of the same right in their lands as that claimed by him with respect to his own. Los Angeles *v.* Pomeroy, 124 Cal. 597, 57 Pac. 585.

Submerged lands.— Where it is sought to condemn land covered by water, and there is no question respecting the title to the water itself other than that arising from the ownership of the land beneath it, the owner is entitled to no compensation other than the value of the land taken and the resulting damage to the residue of the land. Siedler *v.* Seely, 8 Colo. App. 499, 46 Pac. 848.

30. *Arkansas.*—Arkansas Cent. R. Co. *v.* Smith, 71 Ark. 189, 71 S. W. 947; Springfield, etc., R. Co. *v.* Rhea, 44 Ark. 258.

Illinois.— Illinois Cent. R. Co. *v.* Ferrell, 108 Ill. App. 659.

Maine.—Jones *v.* Phillips, 30 Me. 455, holding that where the owner claims damages for flowage, compensation for injury done to his fences and for the future annual expense of maintaining the fences may be included.

Maryland.— Baltimore *v.* Merryman, 86 Md. 584, 39 Atl. 98.

Michigan.— Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308.

31. *Illinois.*— Chicago, etc., R. Co. *v.* Moore, 63 Ill. App. 163.

Kansas.— Wichita, etc., R. Co. *v.* Kuhn, 38 Kan. 104, 16 Pac. 75.

Missouri.— Moss *v.* St. Louis, etc., R. Co., 85 Mo. 86; Jones *v.* St. Louis, etc., R. Co., 84 Mo. 151.

North Carolina.— Mullen *v.* Lake Drummond Canal, etc., Co., 130 N. C. 496, 41 S. E. 1027, 61 L. R. A. 833; Bell *v.* Norfolk Southern R. Co., 101 N. C. 21, 7 S. E. 467.

Pennsylvania.— *In re* Chatham St., 16 Pa. Super. Ct. 103.

Necessity of obstruction.— In an action for permanent damages to land caused by diverting water on to it, the question whether it would have been very expensive to drain the water any other way is immaterial. Rice *v.* Norfolk, etc., R. Co., 130 N. C. 375, 41 S. E. 1031.

32. *Arkansas.*— Newgass *v.* St. Louis, etc., R. Co., 54 Ark. 140, 15 S. W. 188; Bentonville R. Co. *v.* Baker, 45 Ark. 252.

Illinois.— Jacksonville, etc., R. Co. *v.* Cox, 91 Ill. 500. See, however, Kankakee, etc., R. Co. *v.* Horan, 22 Ill. App. 145, holding that in case a railroad company obstructs the flow of surface water to the injury of adjoining lands, the measure of damages, if the obstruction cannot be remedied, is the depreciation in the value of the lands injured; but if the injury can be obviated by a ditch or otherwise, the measure of damages is the cost of the ditch or other necessary remedy, the value of the land used, and the cost of maintaining the ditch.

Massachusetts.— Walker *v.* Old Colony, etc., R. Co., 103 Mass. 10, 4 Am. Rep. 509.

Minnesota.— Pfleger *v.* Hastings, etc., R. Co., 28 Minn. 510, 11 N. W. 72.

Missouri.— Clark *v.* Hannibal, etc., R. Co., 36 Mo. 202.

North Carolina.— Fleming *v.* Wilmington, etc., R. Co., 115 N. C. 676, 20 S. E. 714.

United States.— Chicago *v.* Taylor, 125 U. S. 161, 8 S. Ct. 520, 31 L. ed. 638, holding, however, that no recovery can be had for the flooding as such unless it affects the selling or rental value of the property; nor for the improvements on the lots, made for the purpose of putting it to a certain use, unless the lot was rendered useless for such purpose.

See 18 Cent. Dig. tit. "Eminent Domain," § 253.

33. Illinois Cent. R. Co. *v.* Smith, 110 Ky. 112, 61 S. W. 2, 22 Ky. L. Rep. 1655; Syracuse *v.* Stacey, 169 N. Y. 231, 62 N. E. 354 [*affirming* 45 N. Y. App. Div. 249, 61 N. Y. Suppl. 165] (holding that the damages to riparian owners on the outlet of a lake, where the right to divert the waters of the lake is appropriated, is the difference in the value of their lands with and without the water-rights; and as to the waters of the lake itself they have no rights for which they are entitled to any other compensation); Lee *v.* Springfield Water Co., 176 Pa. St. 223, 35 Atl. 184; Hankey *v.* Philadelphia Co., 5 Pa. Super. Co. 148. Accordingly, where a town condemned the waters of a brook, the fact that the owner was thereby wholly deprived of water for his pasturage land is a proper element of damage. Fosgate *v.* Hudson, 178 Mass. 225, 59 N. E. 809.

Extent of use of water.— Where a city diverted a stream of water for its purposes, and a riparian owner had a factory building on the stream below a dam, with the right to use the water for manufacturing purposes, but he had ceased to use the building as a factory, and had converted it into a tenement-house, and also possessed the right to flow certain lands above the dam, the committee is not required as a matter of law to assess the damages to the property below the dam at what it might be worth for manufacturing purposes, and that above the dam as equivalent to the gain to the owners of the land in being relieved of the flowage. New Britain *v.* Sargent, 42 Conn. 137. Where the right to use all the waters of a stream at a cer-

d. Polluting Waters. The injury caused by the pollution of water in a stream constitutes an element of damage in connection with the taking of land.[34]

e. Taking Water-Power. The measure of damages for taking or diminishing a water-power is the difference between the market value of the property before the power is affected and afterward.[35]

tain point is appropriated, the compensation should be on the basis of the market value of the use of all the water at that point; and the right to compensation for the value of all the water is not affected by the fact that the city which condemned the right was not then capable of holding or diverting the whole supply. Henderson *v.* Orange, 9 N. J. L. J. 71. See also Smith *v.* Concord, 143 Mass. 253, 9 N. E. 642. Where a stream running through a farm is taken by a village for its waterworks, the owner is entitled not only to the damages caused by being deprived of the water for farm purposes, but also, if he has laid out a part of the farm in village lots, to damages for being deprived of the opportunity to sell water-rights to purchasers of lots. Bridgeman *v.* Hardwick, 67 Vt. 653, 32 Atl. 502. Where a stream is taken by a water-supply company, the owner is entitled to compensation, notwithstanding that he made no use of the stream prior to its being taken, as the amount of the compensation is to be based not upon the past advantage to the owner of the use of the stream but upon the value of the right of which he is deprived. Trent-Stoughton *v.* Barbados Water Supply Co., [1893] A. C. 502, 62 L. J. P. C. 123, 69 L. T. Rep. N. S. 164, 1 Reports 403.

Rights affected.— The rights of a riparian proprietor in the waters of one stream above its junction with another are not impaired by the appropriation of his rights in the waters of the other; nor does such taking alter the existing rights of proprietors below the junction of the streams. Accordingly the award need include no compensation as for a consequential loss which he may subsequently suffer should his interruption of the natural flow of the stream not taken be at any time an infringement of the rights of the lower proprietors. New London Water Com'rs *v.* Perry, 69 Conn. 461, 37 Atl. 1059.

Worthlessness of water.— Where it was claimed that a right of way through a farm involved injury by the diversion of a stream which was useful for stock-watering purposes, evidence is competent that the stream had become worthless for such purposes by reason of pollution, although such pollution was the wrongful act of a third person. Kiernan *v.* Chicago, etc., R. Co., 123 Ill. 188, 14 N. E. 18.

Obstruction of waters.— If land bordering upon a navigable river is taken under legislative authority for the erection of a bridge, the owner of the land, a part of which was taken for the bridge, cannot claim compensation for the anticipated obstruction to navigation. Matter of Water Com'rs, 3 Edw. (N. Y.) 290. And where the flow of water in a stream is merely obstructed, the corporation so obstructing it, if acting under legislative authority, is liable for only such injury as results from the want of due care and skill in arranging its works. Bellinger *v.* New York Cent. R. Co., 23 N. Y. 42.

34. Joplin Consol. Min. Co. *v.* Joplin, 124 Mo. 129, 27 S. W. 406 (holding that, although the ordinance providing for the condemnation of a strip of land through a farm for the construction of a sewer does not expressly give the right to discharge the sewage into a stream passing through the farm, still if this is necessary, the owner should be compensated for the injury resulting from such discharge); Rudolph *v.* Pennsylvania Schuylkill Valley R. Co., 186 Pa. St. 511, 40 Atl. 1083 (holding that consequential damages from pollution of water on a tract of land over which a railroad is located are to be recovered in the condemnation proceedings, with the other damages for taking the right of way and the construction and operation of the road); New Odorless Sewerage Co. *v.* Wisdom, 30 Tex. Civ. App. 224, 70 S. W. 354 (holding that where defendant emptied its sewers into a creek which flowed through plaintiff's land, it is liable for the injuries caused, notwithstanding care, science, and skill were exercised in constructing the sewers, and the creek was the natural drainage of the territory included in the sewerage system). See also *supra*, X, D, 8.

35. Hot Springs R. Co. *v.* Tyler, 36 Ark. 205; Cowdry *v.* Woburn, 136 Mass. 409 (holding that, in assessing damages to a mill privilege caused by the taking of water from the pond for a public municipal purpose, the diminution in the fair market value of the mill with its appurtenant water-rights, caused by the present and prospective right to use the waters which would otherwise come to the mill, with interest from the time the water was first actually diverted, is the proper measure of compensation); Butler Hard Rubber Co. *v.* Newark, 61 N. J. L. 32, 40 Atl. 224 (holding that where two methods of ascertaining such difference in value are suggested, one based on a readjustment of an old engine, and the other on the installation of a new plant, it is proper to submit to the jury the feasibility of either of the two methods, with instructions to estimate the cost of supplying said power, as a means of deciding the question of compensation, and in case they decide on a readjustment to allow the owner the cost of the old engine, in comparison with the amount of work done by it elsewhere, and the amount to be done there). See also *supra*, X, E, 7.

Injury to the unused and surplus water-power is a legal ground of claim. Dorlan *v.* East Brandywine, etc., R. Co., 46 Pa. St. 520.

Storage reservoir privileges.— One having a mill on an outlet of a lake the waters of

12. Where Street or Highway Is Opened — a. General Rules. Where a highway is laid out through a tract of land, the owner is to be compensated for all injury done to his land, including not only the value of the land actually taken,[36] but also the injury to the residue.[37] It is commonly held that the proper elements of damage are whatever tend to make the land of less value after the location than it was before.[38] Thus the injury caused by separating a tract of land into inconvenient divisions,[39] by establishing a different grade,[40] or by cutting off the owner from water[41] has been held a proper element of damage. By the general rule the necessity of building additional fences caused by the opening of the highway is, at least when country property is taken, an element of the owner's damage,[42]

which are condemned for a city water-supply can claim compensation only for the water-power privileges, and not for storage reservoir privileges. Matter of Daly, 72 N. Y. App. Div. 394, 76 N. Y. Suppl. 28.

Separate award.— In condemning land for a public park, there can be no separate award for a water-power which is merely appurtenant to the land taken, but its value should be included in the award for the land. Matter of Public Parks, 53 Hun (N. Y.) 280, 6 N. Y. Suppl. 750

36. Com. *v.* Coombs, 2 Mass. 489; *In re* Mt Washington Road Co., 35 N. H. 134.

Damages where a highway is laid out across a railroad right of way see *supra*, X, E, 9, a, (I).

37 District of Columbia *v.* Moore, 5 App. Cas. (D. C.) 497 (where the owner was divested of the beneficial use of the residue); Dickinson County *v.* Hogan, 39 Kan. 606, 18 Pac. 611; Com. *v.* Coombs, 2 Mass. 489; *In re* Mt. Washington Road Co., 35 N. H. 134.

38. Dickinson County *v.* Hogan, 39 Kan. 606, 18 Pac. 611.

39. Dickinson County *v.* Hogan, 39 Kan. 606, 18 Pac 611; *In re* Mt. Washington Road Co., 35 N. H 134; Perryman, etc., Plank-Road Co. *v.* Ramage, 20 Pa. St. 95, holding that damage was recoverable for destroying the symmetry of the owner's fields if any real injury was done thereby to the farm.

40. Hartshorn *v.* Worcester County, 113 Mass 111 (holding that, where the new grade is below the level of the adjoining house and lot, the cost of cutting down the land and building a basement under the house with a door and interior ascent are proper elements of damage, if such alterations are the most reasonable and economical means of restoring the property to its former condition; and that the damages are not confined simply to the injury caused to the right of lateral support for the soil exclusive of the building); *In re* Oration St., 9 N. J. L. J 346; Patton *v.* Philadelphia, 175 Pa. St 88, 34 Atl. 344 (holding that if the new grade is above the abutting property, evidence of the amount it would cost to fill up the lot so that it may conform to and be available for use at the new grade is admissible to be considered in connection with the other circumstances in determining the value of the lot before and after the street was opened).

Damages sufficient to erect a retaining wall to support the soil of the lot cannot be recovered by the owner, but his damages must be reckoned only by the actual value of the property taken, less the enhanced value, if any, resulting from the improvement of the street. "The appellant may build a wall and continue in the enjoyment of his garden; but upon no legal principle can he charge the expense to the public, if, by adopting another course, he might avoid the necessity of incurring it." *In re* Furman St., 17 Wend. (N. Y.) 649, 671.

Where the city appropriates only the easement of lateral support and leaves to the owner the general dominion over the property and the use of it for all purposes not inconsistent with the special purpose of furnishing the necessary support to the street, the owner is not entitled to the value of the fee, but his damages are only for the taking of the easement. Dodson *v.* Cincinnati, 34 Ohio St. 276.

41. Readington *v.* Dilley, 24 N. J. L. 209. See also Parker County *v.* Jackson, 5 Tex. Civ. App. 36, 23 S. W. 924, holding, however, that evidence of this fact is admissible only to show the diminution in the value of the land.

42. *Indiana.*— Watson *v.* Crowsore, 93 Ind. 220.

Kansas.— Van Bentham *v.* Osage County, 49 Kan. 30, 30 Pac. 111; Dickinson County *v.* Hogan, 39 Kan. 606, 18 Pac. 611.

Massachusetts.— Stone *v.* Heath, 135 Mass. 561; Com. *v.* Coombs, 2 Mass. 489.

New Hampshire.— *In re* Mt. Washington Road Co., 35 N. H. 134.

New Jersey.— Readington Tp. *v.* Dilley, 24 N. J. L. 209.

Oregon.— Putnam *v.* Douglas County, 6 Oreg. 328, 25 Am. Rep. 527.

Pennsylvania.— Perrysville, etc., Plank-Road Co. *v.* Ramage, 20 Pa. St. 95. *Contra*, McClenachan *v.* Curwen, 6 Binn. 509, the difference in the two cases being due to the fact that the supplement of April 27, 1849, had not been passed when the latter case was decided.

South Carolina.— Eddings *v.* Seabrook, 12 Rich. 504.

See 18 Cent. Dig. tit. "Eminent Domain," § 248.

See, however, Dulaney *v.* Nolan County, 85 Tex. 225, 20 S. W. 70, holding that if, before the land is inclosed or the claimant for damages has an interest therein, the highway is laid out, the claim for damages will not be allowed.

If a road is laid along the line of a farm, but takes no portion of the farm, the owner

whether such necessity is a present one or one which will arise in the future.[43] In some jurisdictions, however, no allowance can be made for a fence as such, although the fact that the land has been thrown open and left unfenced may enter into the consideration of the appraisers in arriving at the appreciative value of the remaining premises.[44] If the land taken is city property the owner is not entitled, in the absence of an ordinance requiring it, to damages for fencing his property, unless the fencing is shown to be necessary.[45] Upon opening a street in a city no compensation need be made for injury to lots not abutting on the street.[46] The owner is not entitled, as a distinct element of damage, to the cost of curbing, paving, etc., which will probably be required in the future;[47] neither can he have damages for the cost of removing snow from the sidewalk of the street to be opened.[48] Injuries which may arise from the opening of a neighboring street which has been laid out but which is not yet opened cannot be considered,[49] and the fact that another street had many years before been laid out across the same plat but never opened cannot be considered, for the damages should be assessed with reference only to the proposed opening.[50]

b. Taking of Private Way. A private way cannot be changed into a public highway without compensation to the owner of the land, even though the new way may be straighter, wider, and a better road for the public,[51] and the damages should be sufficient to cover all the incidents of its condition.[52] The value of the existing way with reference to the cost of construction and state of repairs should be considered.[53]

13. General and Special Damages. To entitle an owner to damages for injuries to the residue of a tract of which a part is taken, the injuries must be special and peculiar to that tract, and not such as are general and common to other lands in the neighborhood not abutting on the improvement.[54]

is not entitled to compensation for the extra expense of maintaining the fence after the road is used. People *v.* Oneida County Sup'rs, 19 Wend. (N. Y.) 102, so holding under a statute which provided for damages to be assessed by a jury upon the application of the commissioners, or of the owner of the land "through which the road is laid out."

43. Jones *v.* Barclay, 2 J. J. Marsh. (Ky.) 73.

44. Hanrahan *v.* Fox, 47 Iowa 102 [*following* Henry *v.* Dubuque, etc., R. Co., 2 Iowa 288]; Parker County *v.* Jackson, 5 Tex. Civ. App. 36, 23 S. W. 924.

45. Detroit *v.* Beecher, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813.

46. Beale *v.* Boston, 166 Mass. 53, 43 N. E. 1029. See also Evansville, etc., R. Co. *v.* Charlton, 6 Ind. App. 56, 33 N. E. 129.

47. Detroit *v.* Beecher, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813; *In re* Barbadoes St., 8 Phila. (Pa.) 498; *In re* Fifty-Second St., 2 Pa. Co. Ct. 554, in which case it was held that such a charge is merely speculative. See *In re* Passyunk Ave., 2 Pa. Co. Ct. 269.

48. Detroit *v.* Beecher, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813.

49. Grugan *v.* Philadelphia, 158 Pa. St. 337, 27 Atl. 1000. See also Gamble *v.* Philadelphia, 162 Pa. St. 413, 29 Atl. 739.

50. *In re* Negley Ave., 146 Pa. St. 456, 23 Atl. 221.

51. Ayres *v.* Richards, 41 Mich. 680, 3 N. W. 179.

52. Ford *v.* Lincoln County Com'rs, 64 Me. 408, holding that a bridge upon the way is not the subject of distinct appraisal, but the land as it existed at the time of its taking should be so appraised as to give the owner full compensation for all damages sustained by the sequestration of his property.

53. Beale *v.* Boston, 166 Mass. 53, 43 N. E. 1029 (holding that where the city has taken the private way of a man who owned the fee thereof, it is proper to admit evidence to show not only the market value of the land but the value of the improvement made by the owner in grading the way and putting a sewer into it, as well as the increased cost of building on the owner's remaining abutting lots by reason of the existing city ordinances and regulations applicable to public streets, and the increased cost of the movement of soil from the lots); *In re* Reed, 13 N. H. 381. *Contra*, Prince *v.* Braintree, 64 Vt. 540, 542, 26 Atl. 1095.

54. Chicago, etc., R. Co. *v.* Stein, 75 Ill. 41; Bangor, etc., R. Co. *v.* McComb, 60 Me. 290; Kansas City, etc., R. Co. *v.* Dawley, 50 Mo. App. 480.

A mere delay in travel resulting from the lawful construction of railroad tracks in a street is not a damage to property not directly abutting upon that street, for the reason that whatever injury is suffered thereby is an injury suffered in common with the entire community; and even though one piece of property may suffer in a greater degree than another, nevertheless the injury is not different in kind. Robert Mitchell Furniture Co. *v.* Cleveland, etc., R. Co., 10 Ohio S. & C. Pl. Dec. 218, 7 Ohio N. P. 639.

14. Nominal Damages — a. In General. While substantial damages should be awarded where there is a reasonable probability that the owner may suffer substantial injury, yet where there is no evidence tending to show that fact, only nominal damages should be assessed, even if any are to be allowed.[55]

b. Taking Property Previously Devoted to Public Use or Subject to Easement — (i) *For Street Purposes* — (a) *Easement Taken* — (1) In General. One whose property is taken for street purposes is not *ipso facto* entitled to even nominal damages.[56] Where real estate taken for a street is already subject to an easement requiring the owner to keep open a private way having all the characteristics of a public street, as where for example he has platted it and sold lots with reference to the streets shown on the plot, the measure of damages to the owner of the fee is not the full value of the property, but its value subject to the

Depreciation in value.—Both values of land of which a part is taken for a railroad, that before and that after the taking, are the general market values of the particular lot, considering such advantages or disadvantages as are special and peculiar to it, without reference to the rise or fall common to that lot with the property in the neighborhood consequent on the coming in of the railroad. Harris *v.* Schuylkill River East Side R. Co., 141 Pa. St. 242, 21 Atl. 590, 23 Am. St. Rep. 278.

Inconveniences and annoyances common to other lands in the neighborhood do not constitute elements of damage. Gates *v.* Kansas City, etc., R. Co., 111 Mo. 28, 19 S. W. 957; Sedalia, etc., R. Co. *v.* Abell, 18 Mo. App. 632; Ft. Worth, etc., R. Co. *v.* Garvin, (Tex. Civ. App. 1894) 29 S. W. 794; Chicago, etc., R. Co. *v.* Ritter, 1 Tex. App. Civ. Cas. § 266; Brainard *v.* Mississippi R. Co., 48 Vt. 107, holding that where a plank-road running through a farm is taken by a railroad for its right of way, the deprivation of the use of the plank-road by the owner of the farm was not an injury different from that sustained in common by the whole public.

Special damages.—The proximity of a depot and the number of tracks laid upon the right of way (Cummins *v.* Des Moines, etc., R. Co., 63 Iowa 397, 19 N. W. 268), as well as the exposure of the property to particular injuries from the proximity of the road (Fremont, etc., R. Co. *v.* Meeker, 28 Nebr. 94, 44 N. W. 79; Missouri Pac. R. Co. *v.* Hays, 15 Nebr. 224, 18 N. W. 51), are proper to be considered in assessing damages for taking a right of way for a railroad. Injury to land arising from the proximity of a sewer, so far as it is due to proximity caused by taking part of the land and is such as would not have resulted but for the taking, may be considered in determining the damages, although the owner would not be entitled to compensation for similar injury if no land had been taken. Lincoln *v.* Com., 164 Mass. 368, 41 N. E. 489.

Special injury: To business see *infra*, X, E, 19, d, (I). Where street or highway is taken for other public use see *supra*, X, E, 9, b, (I), (A).

55. Brown *v.* Waterbury, 75 Conn. 727, 54 Atl. 1005; Matter of Brookfield, 78 N. Y. App. Div. 520, 79 N. Y. Suppl. 1022, 81 N. Y. Suppl. 10 (a case in which it was held that, even if it be conceded that the fee in land deeded for flowage was in the successors of the grantors, their interest was so intangible and practically valueless that a commissioners' report fixing the damages at a nominal sum would not be considered erroneous); Crary *v.* Port Arthur Channel, etc., Co., (Tex. Civ. App. 1899) 49 S. W. 703 (holding that where land on a water front is appropriated for a ship channel, evidence that the channel will interfere with navigation in a certain bayou is inadmissible, in the absence of a showing that the land not taken extends to the bayou or will at least be substantially damaged).

Bare legal title.— Petitioner is at liberty to show that defendant has only a bare legal title, without any equitable interest, and that consequently his damages are merely nominal. Colorado Cent. R. Co. *v.* Allen, 13 Colo. 229, 22 Pac. 605.

Street taken for park.—Substantial awards should be made for those streets which are embraced within park limits, where the department of parks may close them; because the land, being thus diverted from the purpose to which it was dedicated, would revert to the original owner. Matter of Public Parks, 53 Hun (N. Y.) 280, 6 N. Y. Suppl. 750.

Value of reversion.— Where the land sought to be condemned has been leased by one defendant to another defendant for a term of nine hundred and ninety-nine years, and the only evidence as to the value of the reversion is that it has no market value, it is not erroneous to refuse even nominal damages to the lessor. Chicago West Div. R. Co. *v.* Metropolitan West Side El. R. Co., 152 Ill. 519, 38 N. E. 736.

Personal property.— Where personal property is taken, the owner cannot recover even nominal damages, if there was no actual injury. Morris, etc., Mut. Coal Co. *v.* Delaware, etc., R. Co., 190 Pa. St. 448, 42 Atl. 883.

Nominal damages for taking possession before award see *infra*, X, E, 18, n.

56. Matter of One Hundred and Sixteenth St., 1 N. Y. App. Div. 436, 37 N. Y. Suppl. 508 (holding that if an easement in land taken for a street is for a purpose with which the use of the land as a street will not interfere, the owner of the easement is entitled to no damages); Gamble *v.* Philadelphia, 2 Pa.

easement,[57] the general rule being that the damages are nominal.[58] So the holder of the fee in a street which has not been opened is not entitled to substantial but only to nominal compensation on its being opened, where it has been previously dedicated as a street.[59] Where a grantee takes under a conveyance bounding him on a road reserved by his grantors for a public highway, he is not entitled to compensation when the road is opened by the public authorities, there not having been twenty years' adverse possession.[60]

(2) HIGHWAY OVER RAILROAD. Where a municipality extends a street across a railroad right of way, the damages are ordinarily only nominal, since the railroad company still retains the right to use its land as before.[61]

(B) *Fee Taken.* It is well settled that the owner of land which is subject to easements vested in adjoining owners is entitled to substantial damages, where the fee is sought to be acquired under legislative or municipal authority for the purposes of a public street.[62]

(II) *FOR RAILROAD PURPOSES.* An abutting owner can recover only nominal damages for the occupation of a street by a railroad, unless he shows that he has sustained actual damages.[63] Where one railroad company crosses the tracks of

Dist. 560 (so holding, although the land taken is all the owner possesses, and although it lies wholly within the body of the proposed street, as the jury may find it to be substantially worthless).

57. Moale *v.* Baltimore, 5 Md. 314, 61 Am. Dec. 276; *In re* Eleventh St., 169 N. Y. 607, 62 N. E. 1098; Matter of One Hundred and Sixteenth St., 1 N. Y. App. Div. 436, 37 N. Y. Suppl. 508; Matter of Ninety-Fourth St., 22 Misc. (N. Y.) 32, 49 N. Y. Suppl. 600.

The fact that the land is already subject to a right of way is one for the consideration of the jury. Crowell *v.* Beverly, 134 Mass. 98; Gamble *v.* Philadelphia, 162 Pa. St. 413, 29 Atl. 739. See, however, Easton Borough *v.* Rinek, 116 Pa. St. 1, 9 Atl. 63.

The owner is entitled to at least nominal damages. Speir *v.* Utrecht, 121 N. Y. 420, 24 N. E. 692 [*modifying* 49 Hun 294, 2 N. Y. Suppl. 426]. See also Reinhardt *v.* Buffalo, 15 N. Y. Suppl. 844. And where a house is built on land over which a private way exists in favor of a third person, and a street is laid out over the way, the owner may recover the value of the right to have the house remain on the land until its removal is required for the purposes of the way. Tufts *v.* Charlestown, 4 Gray (Mass.) 537.

58. Stetson *v.* Bangor, 73 Me. 357; Bartlett *v.* Bangor, 67 Me. 460; Moale *v.* Baltimore, 5 Md. 314, 61 Am. Dec. 276; *In re* Adams, 141 N. Y. 297, 36 N. E. 318; Olean *v.* Steyner, 135 N. Y. 341, 32 N. E. 9, 17 L. R. A. 640; *In re* Buffalo, 131 N. Y. 293, 30 N. E. 233, 27 Am. St. Rep. 592, 15 L. R. A. 413; Matter of North Fifth St., 64 N. Y. App. Div. 611, 71 N. Y. Suppl. 644; Matter of Eleventh St., 64 N. Y. App. Div. 609, 71 N. Y. Suppl. 824; Matter of New York, 54 N. Y. App. Div. 479, 67 N. Y. Suppl. 57; Matter of Ethel St., 3 Misc. (N. Y.) 403, 24 N. Y. Suppl. 689; *In re* Olean, 14 N. Y. Suppl. 54; *In re* North Third Ave., 3 N. Y. Suppl. 641; Matter of Munson, 9 N. Y. St. 126. See, however, *In re* Brooklyn Heights, 48 Barb. (N. Y.) 288.

59. Franklin Wharf Co. *v.* Portland, 46 Me. 42; Walker *v.* Manchester, 58 N. H. 438; *In re* Public Parks, 6 Hun (N. Y.) 486; *In re* Twenty-Ninth St., 1 Hill (N. Y.) 189.

Previous user.— Where village trustees commence proceedings to lay out a road, the landowner is entitled to compensation for such part of his land as is taken for the road, evidence being admissible to show what part of the road was used as a highway before the order was made. People *v.* Haverstraw, 20 N. Y. Suppl. 7.

60. Baldwin *v.* Buffalo, 35 N. Y. 375; *In re* Thirty-Second St., 19 Wend. (N. Y.) 128.

61. Chicago, etc., R. Co. *v.* Pontiac, 169 Ill. 155, 48 N. E. 485 (holding that this is the rule unless actual damages are shown); Chicago, etc., R. Co. *v.* Cicero, 155 Ill. 51, 39 N. E. 577 (holding that where the part of the right of way taken for a street is used only for the two main tracks of the railroad, and there is nothing to show that it is peculiarly adapted to any special use, only nominal damages should be allowed).

The possible future use of the land by the company for other purposes cannot be considered (Illinois Cent. R. Co. *v.* Chicago, 169 Ill. 329, 48 N. E. 492), the possibility of such use being purely speculative (Chicago, etc., R. Co. *v.* Cicero, 157 Ill. 48, 41 N. E. 640).

62. Matter of One Hundred and Seventy-Third St., 78 Hun (N. Y.) 487, 29 N. Y. Suppl. 205; Matter of Summit Ave., 35 Misc. (N. Y.) 59, 71 N. Y. Suppl. 207; Matter of Trinity Ave., 35 Misc. (N. Y.) 56, 71 N. Y. Suppl. 24. See also Buffalo *v.* Pratt, 131 N. Y. 293, 30 N. E. 233, 27 Am. St. Rep. 592, 15 L. R. A. 413.

Where the fee is taken under authority of the legislature, the owner is entitled to substantial damages, although other parties have easements in the land. Matter of Summit Ave., 35 Misc. (N. Y.) 59, 71 N. Y. Suppl. 207; Matter of Trinity Ave., 35 Misc. (N. Y.) 56, 71 N. Y. Suppl. 24.

63. Baltimore Belt R. Co. *v.* McColgan, 83 Md. 650, 35 Atl. 59 (holding that if the mere right of way of an abutting owner on an unopened street freed from the railroad cut would not add to the value of his land with-

another, the compensation of the latter is not limited to nominal damages, but it is entitled to be compensated for such injuries as depreciate the value of its property.[64]

(III) *For Sewer Purposes.* Where land has been dedicated as a public street in a city, the owner of the fee is entitled to no more than nominal damages for the additional burden imposed by reason of placing a sewer in the street.[65]

(IV) *For Telegraph Purposes.* Where poles are erected and wires strung in front of property in the country, the owner is ordinarily entitled only to nominal damages.[66] So a telegraph company will ordinarily be required to pay only nominal damages where it constructs its line over the right of way of a railroad company.[67]

15. **Prospective Damages — a. Prospective Increase in Value.** While everything which actually enhances the present worth of the land which is to be appropriated may be considered in awarding compensation or estimating damages,[68] yet a speculative or prospective increase in its value cannot be considered,[69] whether it be such as will result from the proposed improvement[70] or from other

out the opening of the street and material changes in the grade, only nominal damages can be recovered); Iron Mountain R. Co. *v.* Bingham, 87 Tenn. 522, 11 S. W. 705, 4 L. R. A. 622.

The owner is entitled to at least nominal damages, although no excess of injuries over benefits is shown. Moore *v.* New York El. R. Co., 4 Misc. (N. Y.) 132, 23 N. Y. Suppl. 863, 30 Abb. N. Cas. (N. Y.) 306. See also Quigley *v.* Pennsylvania Schuylkill Valley R. Co., 22 Wkly. Notes Cas. (Pa.) 214. *Contra,* Burkham *v.* Ohio, etc., R. Co., 122 Ind. 344, 23 N. E. 799.

Easements in a street occupied by an elevated railroad have in themselves only a nominal value, aside from any damage to the land from the taking. Sullivan *v.* North Hudson County R. Co., 51 N. J. L. 518, 18 Atl. 689; Saxton *v.* New York El. R. Co., 139 N. Y. 320, 34 N. E. 728; Sperb *v.* Metropolitan El. R. Co., 137 N. Y. 596, 33 N. E. 319; Sloane *v.* New York El. R. Co., 137 N. Y. 595, 33 N. E. 335; Bookman *v.* New York El. R. Co., 137 N. Y. 302, 33 N. E. 333; Hadden *v.* Metropolitan El. R. Co., 75 Hun (N. Y.) 63, 26 N. Y. Suppl. 995; Lazarus *v.* Metropolitan El. R. Co., 69 Hun (N. Y.) 190, 23 N. Y. Suppl. 515; Kahn *v.* New York El. R. Co., 3 Misc. (N. Y.) 611, 22 N. Y. Suppl. 793; Mooney *v.* New York El. R. Co., 3 Misc. (N. Y.) 312, 22 N. Y. Suppl. 795; Cook *v.* New York El. R. Co., 3 Misc. (N. Y.) 248, 22 N. Y. Suppl. 790.

64. Chicago, etc., R. Co. *v.* Englewood Connecting R. Co., 115 Ill. 375, 4 N. E. 246, 56 Am. Rep. 173. See also *supra,* X, E, 9, a, (II), (A).

65. *In re* Wells Ave., 4 N. Y. Suppl. 301.

66. Postal Tel.-Cable Co. *v.* Bruen, 39 N. Y. Suppl. 220. If, however, there is evidence that the value of the land with the telegraph line on the highway in front of it is less than its value without the line, it is erroneous to limit the recovery to nominal damages. Shevalier *v.* Postal Tel. Co., 22 Pa. Super. Ct. 506.

67. Ohio Postal Tel. Co. *v.* Cleveland, etc., R. Co., 11 Ohio S. & C. Pl. Dec. 52, 8 Ohio N. P. 121; Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705; Montana Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 114 Fed. 787.

Where the part of the right of way taken is not in actual use by the railroad company, the damages for such taking should be only nominal. Mobile, etc., R. Co. *v.* Postal Tel. Cable Co., 120 Ala. 21, 24 So. 408; Mobile, etc., R. Co. *v.* Postal Tel. Cable Co., 101 Tenn. 62, 46 S. W. 571, 41 L. R. A. 403.

68. Chicago Sanitary Dist. *v.* Loughran, 160 Ill. 362, 43 N. E. 359; Virginia, etc., R. Co. *v.* Elliott, 5 Nev. 358; Canandaigua, etc., R. Co. *v.* Payne, 16 Barb. (N. Y.) 273.

69. *Missouri.*— St. Louis, etc., R. Co. *v.* Knapp, etc., Co., 160 Mo. 396, 61 S. W. 300.

Texas.— Sullivan *v.* Missouri, etc., R. Co., 29 Tex. Civ. App. 429, 68 S. W. 745.

Virginia.— Richmond, etc., R. Co. *v.* Chamblin, 100 Va. 401, 41 S. E. 750.

Washington.— Bellingham Bay, etc., R. Co. *v.* Strand, 4 Wash. 311, 30 Pac. 144.

United States.— Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170; Kerr *v.* South Park Com'rs, 117 U. S. 379, 6 S. Ct. 801, 29 L. ed. 924.

England.— Reg. *v.* Poulter, 20 Q. B. D. 132, 52 J. P. 244, 57 L. J. Q. B. 138, 58 L. T. Rep. N. S. 534, 36 Wkly. Rep. 117.

See 18 Cent. Dig. tit. "Eminent Domain," § 237.

70. *California.*— San Diego Land, etc., Co. *v.* Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83, holding that in proceedings to condemn lands for a reservoir to be used for irrigation purposes, the fact that the lands are considerably enhanced in value by having irrigation facilities afforded them cannot be taken into account; nor can the fact that a dam was already in course of construction by plaintiff for its reservoir and the consequent increase in the value of defendant's land.

Illinois.— Chicago Sanitary Dist. *v.* Loughran, 160 Ill. 362, 43 N. E. 359; South Park Com'rs *v.* Dunlevy, 91 Ill. 49.

Kentucky.— Louisville, etc., R. Co. *v.* Ingram, 14 S. W. 534, 12 Ky. L. Rep. 456.

Maryland.— McCormick *v.* Baltimore, 45

causes.[71] In some jurisdictions, however, the rule is laid down that while the possible increase in value on account of the proposed improvement cannot be considered, yet the present value of the tract of which the whole or a part is condemnned may properly be taken into consideration, although such value is enhanced by the prospective improvement for which it is condemned;[72] some of the cases going to the length of holding that the present condition of the locality as to business and demand for property, and also any increase or development

Md. 512; Moale *v.* Baltimore, 5 Md. 314, 61 Am. Dec. 276, both holding that in an assessment of damages in opening a street, the lot taken should be valued precisely as though no street was to be opened.

Massachusetts.— Bowditch *v.* Boston, 164 Mass. 107, 41 N. E. 132; May *v.* Boston, 158 Mass. 21, 32 N. E. 902 (holding under the betterment act that land taken for a park at a time when its use for that purpose had long been contemplated, and when the expectation of such use had increased the value of land in the neighborhood, must be assessed at its market value before the contemplated improvement); Benton *v.* Brookline, 151 Mass. 250, 23 N. E 846

Minnesota.— Union Depot, etc., Co. *v.* Brunswick, 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789; Carli *v.* Stillwater, etc., R. Co., 16 Minn. 260.

Missouri.— Pacific R. Co. *v.* Chrystal, 25 Mo. 544. See Kansas City *v.* Hill, 80 Mo. 523, holding that in proceedings to extend a street long since located, the fact that the land sought to be condemned lies in the line of the street extended and that its value was diminished in consequence may be considered.

New York.— Water Com'rs *v.* Lawrence, 3 Edw. 552, holding that where land is taken for the purpose of obtaining materials, the increased value of the land or materials in consequence of the proximity of the public work is not to be taken into consideration.

Ohio.— Gibson *v.* Norwalk, 13 Ohio Cir. Ct. 428, 7 Ohio Cir Dec. 6.

Pennsylvania.— Reiber *v.* Butler, etc., R. Co., 201 Pa. St 49, 50 Atl. 311; Whitaker *v* Phœnixville Borough, 141 Pa. St. 327, 21 Atl. 604; Harvey *v.* Lloyd, 3 Pa. St. 331.

Tennessee.— Woodfolk *v.* Nashville, etc., R. Co., 2 Swan 422.

Washington.— Northern Pac., etc., R Co. *v.* Coleman, 3 Wash. 228, 28 Pac. 514.

See 18 Cent. Dig. tit. "Eminent Domain," § 355.

71. *Connecticut.*— New Milford Water Co. *v.* Watson, 75 Conn. 237, 52 Atl. 947, 53 Atl, 57.

Massachusetts.— Emery *v.* Boston Terminal Co., 178 Mass. 172, 59 N E. 763, 86 Am. St. Rep 473 (holding that where the rights of lessees in a wharf were to be condemned, the fact that the owners had renewed the lease for many years did not render admissible evidence to show an increased value to the lessees by reason of the probability of their lease being further renewed); May *v.* Boston, 158 Mass. 21, 32 N. E. 902.

Nebraska.— Omaha Belt R Co. *v* McDermott, 25 Nebr. 714, 41 N. W. 648.

New York.— *In re* New York, etc., R. Co., 27 Hun 151.

Ohio.— Powers *v.* Hazelton, etc., R. Co., 33 Ohio St. 429, holding that in proceedings to appropriate land for a railroad, the difference in the value of the property with the improvement and its value without it is the rule of compensation; and that this is to be ascertained with reference to the present character and surroundings of the land, and not by proof of facts of a contingent and prospective character, such as probable rents or an anticipated monopoly of a roadway for transporting coal through a ravine.

Pennsylvania.— Reiber *v.* Butler, etc., R. Co., 201 Pa. St. 49, 50 Atl. 311.

United States.— Gage *v.* Judson, 111 Fed 350.

See 18 Cent. Dig. tit. "Eminent Domain," § 237.

72. *Arkansas.*— See Newgass *v.* St. Louis, etc., R. Co., 54 Ark. 140, 15 S. W 188, holding that, in determining the value of the land taken for a railroad, any appreciation or deterioration caused to it especially from the building of the road on it will be disregarded, but such as may have resulted to the specific land in common with other lands in the neighborhood will be considered.

Illinois.— Chicago Sanitary Dist. *v.* Loughran, 160 Ill. 362, 43 N. E. 359.

Iowa.— Snouffer *v.* Chicago, etc., R. Co., 105 Iowa 681, 75 N. W. 501, holding that where land is taken for railroad purposes, the jury may consider the prospective location of a depot thereon at the time of the taking

Minnesota.— See Morin *v.* St. Paul, etc., R. Co., 30 Minn. 100, 14 N. W. 460, holding that while the effect of the construction and operation of a railroad in increasing the general market value of real estate would necessarily be included in the estimate by the witnesses of the market value of the particular tract in question, yet the jury should not be instructed that they may consider "what the value of the farm would be if the rail road was not on it, but if it were in the immediate neighborhood, and then consider what it is now, and the difference would be the general damage to the farm."

Rhode Island.— *In re* New State House, 19 R. I. 382, 33 Atl. 523.

Texas.— Gulf, etc., R. Co. *v* Brugger, 24 Tex. Civ App. 367, 59 S. W. 556; Allen *v.* Missouri, etc., R. Co., (Civ. App. 1894) 25 S W. 826.

Wisconsin.— Aspinwall *v.* Chicago, etc., R. Co., 41 Wis. 474

See 18 Cent. Dig. tit. "Eminent Domain," § 355.

thereof that may reasonably be expected in the near future, in the natural course of events, may properly be considered.[73]

b. Prospective Injury. In estimating the damages to the residue of a tract of which a part is taken, such prospective damages should be included as will naturally result from the permanent appropriation of the property for public use.[74] However, only such injuries as are capable of ascertainment at the time of the construction of the improvement should be considered.[75]

16. Remote and Speculative Damages. The general rule is that damages, to be recoverable, must be direct and certain. Contingent or speculative damages,[76]

73. Sullivan *v.* Missouri, etc., R. Co., 29 Tex. Civ. App. 429, 68 S. W. 745. Thus the fact that provision has been made by law for bringing the land within the corporate limits of a city (Duluth, etc., R. Co. *v.* West, 51 Minn. 163, 53 N. W. 197), or that a car line is to be extended to it (St. Louis Southwestern R. Co. *v.* Hughes, (Tex. Civ. App. 1903) 73 S. W. 976) may be considered.

74. *Georgia.*— Young *v.* Harrison, 17 Ga. 30.

Illinois.— Centralia *v.* Wright, 156 Ill. 561, 41 N. E. 217; Penn Mut. L. Ins. Co. *v.* Heiss, 141 Ill. 35, 31 N. E. 138, 33 Am. St. Rep. 273; Pinckneyville *v.* Hutchings, 63 Ill. App. 137; Chicago, etc., R. Co. *v.* Brinkman, 47 Ill. App. 287.

Indiana.— Chicago, etc., R. Co. *v.* Hunter, 128 Ind. 213, 27 N. E. 477.

Maine.— Joy *v.* Grindstone-Neck Water Co., 85 Me. 109, 26 Atl. 1052, holding that so long as the appropriation of the land is kept within the scope of the original sequestration, compensation is made once for all, and is to be estimated according to the full measure of the right acquired under the charter, and not merely according to the mode and time of the exercise of that right in the first instance.

Missouri.— Kansas, etc., Coal Co. *v.* Northwestern Coal, etc., Co., 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L. R. A. 936 (holding, however, that the court must deal with conditions existing at the time of the institution of condemnation proceedings and cannot take into account conditions which may or may not arise or be created thereafter); Bennett *v.* Woody, 137 Mo. 377, 38 S. W. 972.

Nebraska.— Chicago, etc., R. Co. *v.* Hazels, 26 Nebr. 364, 42 N. W. 93; Blakeley *v.* Chicago, etc., R. Co., 25 Nebr. 207, 40 N. W. 956.

New Jersey.— Packard *v.* Bergen Neck R. Co., 54 N. J. L. 553, 25 Atl. 506; Columbia Delaware Bridge Co. *v.* Geisse, 35 N. J. L. 474 (where in authorizing the erection of a bridge the intent plainly was to perpetually extinguish the rights of the owners in a near-by ferry); Van Schoick *v.* Delaware, etc., Canal Co., 20 N. J. L. 249; Trenton Water Power Co. *v.* Chambers, 13 N. J. Eq. 199.

Rhode Island.—Nason *v.* Woonsocket Union R. Co., 4 R. I. 377.

Tennessee.— Colcough *v.* Nashville, etc., R. Co., 2 Head 171.

Canada.— McQuade *v.* Rex, 7 Can. Exch. 318.

All injuries should be included which are appreciably the result of the construction of the railroad over the land (St. Louis, etc., R. Co. *v.* Mollet, 59 Ill. 235), such as the necessity of additional fences (Grand Rapids, etc., R. Co. *v.* Horn, 41 Ind. 479; Dickinson County *v.* Hogan, 39 Kan. 606, 18 Pac. 611; Dalrymple *v.* Whitingham, 26 Vt. 345. See also *supra*, X, E, 10; X, E, 12; X, E, 19, d, (III)), the overflowing of other parts of the land caused by embankments, injuries caused by excavations for earth made outside of a strip appropriated (Grand Rapids, etc., R. Co. *v.* Horn, 41 Ind. 479), the destruction of wells, springs, barns, and outhouses (Robbins *v.* Milwaukee, etc., R. Co., 6 Wis. 636), or the destruction of a drainage system (Vicksburg, etc., R. Co. *v.* Dillard, 35 La. Ann. 1045).

75. Los Angeles *v.* Pomeroy, 124 Cal. 597, 57 Pac. 585; Pennsylvania R. Co. *v.* Marchant, 119 Pa. St. 541, 13 Atl. 690, 4 Am. St. Rep. 659; Pennsylvania R. Co. *v.* Lippincott, 116 Pa. St. 472, 9 Atl. 871, 2 Am. St. Rep. 618; Searle *v.* Lackawanna, etc., R. Co., 33 Pa. St. 57 (holding that in valuing land taken for public use, the gross estimates of common life, the market prices, are all that courts and juries can use as measures of value; all other measures are necessarily arbitrary and fanciful); High Bridge Lumber Co. *v.* U. S., 69 Fed. 320, 16 C. C. A. 460; Wetzel *v.* U. S., 25 Ct. Cl. 277.

Where the United States condemns land for an addition to a reservation on which it had already constructed permanent fortifications, but there is no evidence as to the purpose for which the land so taken is to be used, or that it is the intention to construct additional fortifications or additional guns on it, the possibility or probability of damages to the remaining land of the owner from the use which might be made of the additional land so taken is too vague and indefinite to afford a basis for the allowance of damages. Sharpe *v.* U. S., 112 Fed. 893, 50 C. C. A. 597, 57 L. R. A. 932.

76. *Illinois.*— Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515; East Indiana, etc., R. Co. *v.* Miller, 201 Ill. 413, 66 N. E. 275; Board of Trade Tel. Co. *v.* Darst, 192 Ill. 47, 61 N. E. 398, 85 Am. St. Rep. 288; Chicago, etc., R. Co. *v.* Pontiac, 169 Ill. 155, 48 N. E. 485.

Massachusetts.— Taft *v.* Com., 158 Mass. 526, 33 N. E. 1046, holding that in assessing

such as speculative profits,[77] will not be allowed. Likewise damages which

damages for a sewer it is improper to take into account imagined annoyances which would have been actionable unless authorized by the taking, and possible quasi-annoyances which would not have been actionable, or the detrimental effect resulting from the mere fact of the existence of the sewer apart from any annoyances.

Nebraska.— Otoe County *v.* Heye, 19 Nebr. 289, 27 N. W. 145; Fremont, etc., R. Co. *v.* Ward, 11 Nebr. 597, 10 N. W. 524; Fremont, etc., R. Co. *v.* Lamb, 11 Nebr. 592, 10 N. W. 493; Fremont, etc., R. Co. *v.* Whalen, 11 Nebr. 585, 10 N. W. 491.

New York.— Tallman *v.* Metropolitan El. R. Co., 121 N. Y. 119, 23 N. E. 1134, 8 L. R. A. 173; Canandaigua, etc., R. Co. *v.* Payne, 16 Barb. 273.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* McCloskey, 110 Pa. St. 436, 1 Atl. 555 (holding that an amount to recover the cost of fencing, or to provide indemnity against losses by fire, or to provide for casualties to stock on a farm cannot be awarded for the appropriation of land for the construction of a railroad); Schuylkill Nav. Co. *v.* Thoburn, 7 Serg. & R. 411; Shaw *v.* Pennsylvania Schuylkill Valley R. Co., 17 Phila. 210.

South Dakota.— Bockoven *v.* Lincoln Tp., 13 S. D. 317, 83 N. W. 335.

Virginia.— Richmond, etc., R. Co. *v.* Chamblin, 100 Va. 401, 41 S. E. 750.

Washington.— Bellingham Bay, etc., R. Co. *v.* Strand, 4 Wash. 311, 30 Pac. 144.

Wisconsin.— Chapman *v.* Oshkosh, etc., Co., 33 Wis. 629, holding that an owner is not entitled to compensation for any remote or possible injuries which might result from the building of a railroad, but only for such as would result from the construction thereof in a suitable manner with proper crossings.

United States.— *In re* Jamestown, 112 Fed. 622; Laflin *v.* Chicago, etc., R. Co., 33 Fed. 415.

See 18 Cent. Dig. tit. "Eminent Domain," § 237.

The fact that the life-tenant had fitted up a building for his business, and that he would lose the use in his business of the conveniences, is not an element of damage, any more than the loss of the good-will would be. Williams *v.* Com., 168 Mass. 364, 47 N. E. 115.

Speculative increase in value see *supra*, X, E, 15, a.

77. *Illinois.*— Illinois Cent. R. Co. *v.* Lostant, 167 Ill. 85, 47 N. E. 62; Dupuis *v.* Chicago, etc., R. Co., 115 Ill. 97, 3 N. E. 720, both holding that supposed profits arising from a business carried on in connection with the lands taken are not a proper element of damage.

Maryland.— Tide Water Canal Co. *v.* Archer, 9 Gill & J. 479.

New York.— Sutro *v.* Manhattan R. Co., 137 N. Y. 592, 33 N. E. 334; Tallman *v.* Metropolitan El. R. Co., 121 N. Y. 119, 23 N. E. 1134, 8 L. R. A. 173, holding that where damages are caused by the construction of an elevated railroad, evidence of what it would have cost to erect dwelling-houses on the abutting lots, what they would have rented for if they had been built with the road in the street, and what they would have rented for if the road had not been constructed is inadmissible as eliciting elements of damage which are merely speculative and contingent.

Pennsylvania.— Philadelphia Ball Club *v.* Philadelphia, 192 Pa. St. 632, 44 Atl. 265, 73 Am. St. Rep. 835, 46 L. R. A. 724; Hamilton *v.* Pittsburg, etc., R. Co., 190 Pa. St. 51, 42 Atl. 369, 51 L. R. A. 319; Becker *v.* Philadelphia, etc., R. Co., 177 Pa. St. 252, 35 Atl. 617, 35 L. R. A. 583; Wallace *v.* Jefferson Gas Co., 147 Pa. St. 205, 23 Atl. 416; Schuylkill Nav. Co. *v.* Freedley, 6 Whart. 109. *Compare* Davis *v.* Jefferson Gas Co., 147 Pa. St. 130, 23 Atl. 218.

United States.— U. S. *v.* Taffe, 86 Fed. 830.

See, however, Ripley *v.* Great Northern R. Co., L. R. 10 Ch. 435, 31 L. T. Rep. N. S. 869, 23 Wkly. Rep. 685, holding that where land was taken by a railroad company upon which there would probably have been built cotton mills, and the owner of the land had built a reservoir on other land belonging to him from which water might have been supplied to such mills if built, the umpire properly received evidence as to the profits which might have been realized from supplying water to the mills when built.

Illustrations.—Where the premises are used as a box factory, the fact that it costs more for insurance to pile lumber nearer the mill does not constitute a proper element of damage; nor is the probable difference in freight which the owner will have to pay in the ensuing five years for hauling lumber by rail rather than by water. Cook, etc., Co. *v.* Chicago Sanitary Dist., 177 Ill. 599, 52 N. E. 870. Damages for the inability of the owner to open streets and alleys on the land taken are contingent and speculative. Ellsworth, etc., R. Co. *v.* Maxwell, 39 Kan. 651, 18 Pac. 819. The fact that because of the proximity of the railroad the danger of fire is increased, and customers are thereby rendered unwilling to bring their cotton to the owner's gin-house, is too remote. Kansas City, etc., R. Co. *v.* Roberts, 49 La. Ann. 859, 21 So. 630. See also *supra*, X, E, 19, i. It is not a proper element of damage that the railroad company may remove a farm crossing already established. St. Louis, etc., R. Co. *v.* North, 31 Mo. App. 345. On a question as to the damage for being deprived of a right to collect wharfage, caused by the extinguishment of a bulk-head line by a city, evidence that the extinguishment precluded the wharf owner from ever obtaining the privilege of erecting a platform and shed, valuable by way of increasing the wharfage, is not admissible, where the acquisition of such a privilege is only a mere possibility. Langdon *v.* New York, 9 N. Y. St. 766. Although contingent disadvantages arising from the inconvenience

are too remote[78] or indirect[79] to form the proper basis for a recovery should be excluded from consideration.

17. DIMINUTION OR REDUCTION OF DAMAGES[80] Any fact which, by reason of the conditions upon which the property is taken, or the character of the improvement or the manner in which it is made, or the nature and situation of the land taken or of the residue, tends to ameliorate, counteract, diminish, mitigate, or reduce the damages otherwise accruing to the landowner, may properly be considered in favor of the appropriator in the assessment of damages, although the benefit is not one necessarily accruing from the construction of the improvement.[81] Thus

that may be sustained in future in case of some possible use of the property may be set off against the advantages to be derived from the construction of the road, they cannot be taken into consideration as a substantive claim for damages. Searle *v.* Lackawanna, etc., R. Co., 33 Pa. St. 57. The fact that the construction of a ship channel would divert the waters of a navigable bayou, would cause the deposit of débris in it, and thereby increase the cost of dredging, thus hindering navigation, is not an element of damage to land, a part of which was taken for the channel, since the cost of dredging is borne by the United States, and the damage is too speculative and remote. Crary *v.* Port Arthur Channel, etc., Co., (Tex. Civ. App. 1899) 49 S. W. 703. Where the purpose of the condemnation is the construction of a boat railway over the land, the injuries likely to result to the fishing grounds of the owner are too conjectural to be the basis of an award; and so is the possibility of the construction of the road being followed by a change in the track of a railroad company, so as to injure the owner's shipping facilities. U. S. *v.* Taffe, 86 Fed. 830. Nor can an anticipated change in the current of a stream be considered. High Bridge Lumber Co. *v.* U. S., 69 Fed. 320, 16 C. C. A. 460.

Adaptability of land.— The probable returns from an investment of land because of the use which may be made of it may, however, properly be considered. Gearhart *v.* Clear Spring Water Co., 202 Pa. St. 292, 51 Atl. 891. See *infra*, X, E, 19, a.

78. *Connecticut.*— Clark *v.* Saybrook, 21 Conn. 313.

Illinois.— Chicago, etc., R. Co. *v.* Hildebrand, 136 Ill. 467, 27 N. E. 69; Kiernan *v.* Chicago, etc., R. Co., 123 Ill. 188, 14 N. E. 18; Hyde Park *v.* Dunham, 85 Ill. 569 See also East St. Louis *v.* Lockhead, 7 Ill. App. 83

Massachusetts.— Woburn First Parish *v.* Middlesex County, 7 Gray 106, holding that, upon the taking for a highway of a part of land held by a parish for a meeting-house and its appurtenances, there could be no recovery for the anticipated annoyances of the worshipers in the meeting-house by the use of the highway on Sunday by noisy and dissolute persons riding for pleasure.

Michigan.— Detroit *v.* Beecher, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813.

Wisconsin.— Robbins *v.* Milwaukee, etc., R. Co., 6 Wis. 636.

United States.— Sharpe *v.* U. S., 112 Fed. 893, 50 C. C. A. 597, 57 L. R. A. 932; Wetzel *v.* U. S., 25 Ct. Cl. 277.

See 18 Cent. Dig. tit. "Eminent Domain," § 237.

79 Bangor, etc., R. Co. *v.* McComb, 60 Me. 290; Kansas City, etc., R. Co. *v.* Dawley, 50 Mo. App. 480; Paine Lumber Co. *v.* U. S., 55 Fed. 854. See also Alexander *v.* U. S., 25 Ct. Cl. 329.

80. **Deduction of benefits accruing from improvement** see *infra*, X, E, 20.

81. Atlanta *v.* Hunnicutt, 95 Ga. 138, 22 S. E. 130 (holding that the fact that the owner of land taken for sewer purposes may still use the premises in any way not inconsistent with the servitude for the sewer is proper to be considered); Illinois, etc., R., etc., Co. *v.* Switzer, 117 Ill. 399, 7 N. E. 664, 57 Am. Rep. 875 (holding that where a railway company takes a strip of property crossing a mill-pond, and thereby damages the water-supply of the mill, the fact that there are several other water-supplies available may be considered by the jury in estimating the compensation); Rex *v.* Young, 7 Can. Exch. 282 (holding that where a lessee is under covenant to build on the premises, and a part of the land is expropriated for a public work, the fact that by the expropriation the lessee is relieved from his covenant, and the further fact that his rent is reduced by reason of the taking of a part of the premises, will be taken into consideration in fixing the amount of compensation to be paid him).

Bridge or crossing over railroad.— The fact that a railroad company has constructed a private crossing over its right of way where it passes through the owner's premises may be considered (Kansas City, etc., R. Co. *v.* Kregelo, 32 Kan. 608, 5 Pac. 15), but if it has not done or agreed to do this, and the right to cross is not reserved by agreement or by the judgment, the damages are to be assessed on the theory that the owner has no right of crossing (Presbrey *v.* Old Colony, etc., R. Co., 103 Mass. 1; Cedar Rapids, etc., R. Co. *v.* Raymond, 37 Minn. 204, 33 N. W. 704; Seattle, etc., R. Co. *v.* Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864. See also *infra*, notes 82, 84). It has been held, however, that the fact that some time after the road was constructed a bridge was built across the cut in which it was laid, so as to lessen the inconvenience suffered by the owner, will not be considered in mitigation of damages, at least unless it is so pleaded. Denison, etc., Suburban R.

a stipulation entered into between the owner and the appropriator whereby some right or privilege is granted to the owner or reserved by him with reference to the property or its use may properly be considered in reduction of the compensation to which he would otherwise be entitled.[82] In some states a condemning party cannot diminish the damages by an offer to allow a right or privilege to be

Co. *v.* Smith, 19 Tex. Civ. App. 114, 47 S. W. 278.

Drainage and irrigation.— Where, according to the plans for construction of the railroad, certain irrigating ditches were to be placed by the company in the same condition as before, and afterward maintained in that condition at the company's expense, this should be considered on the question of damages. Oregon R., etc., Co. *v.* Owsley, 3 Wash. Terr. 38, 13 Pac. 186. See, however, Seattle, etc., R. Co. *v.* Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864, holding that where, in an action to condemn land for a railroad right of way, the company stipulates to construct culverts to carry the water across the right of way, but the stipulation contains nothing binding it not to obstruct the flow of water, or to carry it across the right of way at any particular place or places as should be convenient to defendants, as the water naturally flows, the jury may consider as an element of damage any interference with the bringing of water over the right of way.

Removal of timber or improvements.— If timber (Gardner *v.* Brookline, 127 Mass. 358) or improvements (New York, etc., R. Co. *v.* Price, 4 Pennyp. (Pa.) 200) on the land taken are removed by the owner, the damages are reduced by the amount of the value thereof.

Switching facilities.—Although it has been the custom of a railroad company to make no charge for switching on to its road, yet it is under no obligation to continue such custom, and hence the damages are not thereby reduced. St. Louis, etc., R. Co. *v.* Clark, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751.

Telegraph lines.—A stipulation in a petition for condemnation of part of a railroad right of way for a telegraph line that if the railroad company ever desires to change the location of its track or to construct new ones, the telegraph company will remove its poles to such other points on the right of way as the railroad company shall designate, is binding on the telegraph company, and is properly considered as affecting the question of compensation. St. Louis, etc., R. Co. *v.* Postal Tel. Co., 173 Ill. 508, 51 N. E. 382; Mobile, etc., R. Co. *v.* Postal Tel. Cable Co., 76 Miss. 731, 26 So. 370, 45 L. R. A. 223. So the fact that, while wires are usually strung twenty-five feet from the road, the telegraph company intends, for the greater portion of the distance, to erect its lines more than twenty-five feet from the center of the track, is admissible. Houston, etc., R. Co. *v.* Postal Tel. Cable Co., 18 Tex. Civ. App. 502, 45 S. W. 179.

82. Lieberman *v.* Chicago, etc., R. Co., 141 Ill. 140, 30 N. E. 544 (holding that in a proceeding by an elevated railroad company, a stipulation that the road should be used only for passenger traffic, that no soft coal should be used in its locomotives, and that its motive power should be fully equipped with the best modern devices to render it noiseless and smokeless, is proper for consideration in assessing the damages); Hayes *v.* Ottawa, etc., R. Co., 54 Ill. 373 (holding that a stipulation that a railroad company should erect a depot near the land should be considered, although the location of the depot was not determined upon until the time of trial of the action brought by the owner); Tyler *v.* Hudson, 147 Mass. 609, 18 N. E. 582 (holding that a reservation allowing the owner access over the land to a pond to water his cattle, cut ice, etc., may be shown in reduction of his damages).

Ability to comply with condition.— It is not proper to submit to the jury the question whether the government can comply with a condition on which its proposed condemnation is sought, and permit them to award damages in advance based upon its failure to comply therewith. U. S. *v.* Seufert Bros. Co., 87 Fed. 35.

Legality of stipulation.— The condemning company cannot lawfully agree to dispense with the future exercise of its powers, and cannot therefore agree that their use of the land should be restricted in any way. Ayr Harbour Trustees *v.* Oswald, 8 App. Cas. 623.

License.— Where a strip is so taken as to leave land of the owner on each side of it, the fact that suitable provision is made for crossing from one side to the other and for draining the land, and that the owner accepts and uses such provision, with the permission of the company but without any reservation of such right in the original location, should not be considered in reduction of damages, since such permission may be at any time revoked. Old Colony R. Co. *v.* Miller, 125 Mass. 1, 28 Am. Rep. 194; St. Louis, etc., R. Co. *v.* St. Louis Union Stock Yards Co., 120 Mo. 541, 25 S. W. 399.

Private crossing over railroad.—A stipulation giving an owner, a part of whose land is taken for a railroad, a right of crossing which is not enjoyed by the public generally should be considered in reduction of damages. Lyon *v.* Hammond, etc., R. Co., 167 Ill. 527, 47 N. E. 775; Atchison, etc., R. Co. *v.* Davenport, 65 Kan. 206, 69 Pac. 195; Boston, etc., R. Corp. *v.* Doherty, 154 Mass. 314, 28 N. E. 277; Boston, etc., R. Co. *v.* Middlesex County, 1 Allen (Mass.) 324; St. Louis, etc., R. Co. *v.* Clark, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751. See also *supra*, note 81; *infra*, note 84.

reserved to the owner,[83] but there are cases to the contrary.[84] It is proper to deduct from the amount awarded the value of the use and occupation of the property by the owner from the date of the appropriation to the time of payment;[85] but the compensation to be awarded in a proceeding to acquire a right to continue a railroad upon certain land is not affected by the fact that the owner has recovered damages in trespass for the unlawful construction and operation of the road thereon.[86] The fact that the condemning party does not exercise to the full extent the rights acquired should not be considered in reduction of the damages, where there is nothing to prevent a full exercise thereof,[87] since the presumption is that the appropriator will exercise his rights and use and enjoy the property taken to the full extent.[88]

18. Time as of Which Damages Are Estimated — a. Time of Taking. The fundamental doctrine that private property cannot be taken for public use without just compensation requires that the owner shall receive the market value of his property at the time of the taking.[89] Upon this the courts are well agreed, but

83. Old Colony R. Co. *v.* Miller, 125 Mass. 1, 28 Am. Rep. 194 (holding that an offer on the part of a railroad company that suitable provision shall be made for draining the land through which the right of way is taken cannot be considered in reduction of the compensation); Matter of New York, etc., R. Co., 49 Hun (N. Y.) 539, 2 N. Y. Suppl. 478 (holding that the commissioners should not consider a voluntary offer by a condemning party which, if accepted, might tend to counteract an inconvenience otherwise resulting to the owner).

84. St. Louis, etc., R. Co. *v.* Clark, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751 (holding that where the strip which a railroad company seeks to condemn is used as a whole for sawmill purposes and ends in a wharf, the land being within the limits of a city where the speed of trains is regulated by ordinance, the company may offer to build and maintain for the owner open crossings to enable him to use his land as one tract. See also St. Louis, etc., R. Co. *v.* Postal Tel. Co., 173 Ill. 508, 51 N. E. 382; Mobile, etc., R. Co. *v.* Postal Tel. Cable Co., 76 Miss. 731, 26 So. 370, 45 L. R. A. 223; Houston, etc., R. Co. *v.* Postal Tel. Cable Co., 18 Tex. Civ. App. 502, 45 S. W. 179.

Enforceability of offer.— Where petitioner offers certain reservations in favor of the owner, the jury may consider whether such offers are so made as to be binding. Indiana, etc., R. Co. *v.* Rinehart, 14 Ind. App. 588, 43 N. E. 238; Lind *v.* Chicago, etc., R. Co., 42 Kan. 352, 22 Pac. 423; Ham *v.* Salem, 100 Mass. 350; Boston, etc., R. Co. *v.* Middlesex County, 1 Allen (Mass.) 324.

Time of offer.— If it proposed to take an unqualified right of way, and the award is made on that basis, an offer made by the company, after an appeal taken by it, to maintain a perpetual crossing, cannot be considered. Schermeely *v.* Stillwater, etc., R. Co., 16 Minn. 506.

85. Fink *v.* Newark, 40 N. J. L. 11; *In re* New York, 167 N. Y. 627, 60 N. E. 1116 [*affirming* 59 N. Y. App. Div. 603, 69 N. Y. Suppl. 742]; Matter of New York, 40 N. Y. App. Div. 281, 58 N. Y. Suppl. 58. *Contra*, Pegler *v.* Hyde Park, 176 Mass. 101, 57 N. E. 327 [*citing* Imbescheid *v.* Old Colony R. Co., 171 Mass. 209, 50 N. E. 609; Old Colony R. Co. *v.* Miller, 125 Mass. 1, 28 Am. Rep. 194; Edmands *v.* Boston, 108 Mass. 535].

86. Lafayette, etc., R. Co. *v.* Murdock, 68 Ind. 137; Hopson *v.* Louisville, etc., R. Co., 71 Miss. 503, 15 So. 37; Canton, etc., R. Co. *v.* French, 68 Miss. 22, 8 So. 512.

87. Old Colony R. Co. *v.* Miller, 125 Mass. 1, 28 Am. Rep. 194; St. Louis, etc., R. Co. *v.* St. Louis Union Stock Yards Co., 120 Mo. 541, 25 S. W. 399; *In re* Barre Water Co., 72 Vt. 413, 48 Atl. 653, holding that the damage sustained by the owners of a water-power on a stream below the point from which a city draws its water-supply is not diminished by the fact that a large part of the water taken is returned to the stream in the form of sewage, since such sewage is entirely under the control of the city and may be diverted at any time.

88. St. Louis, etc., R. Co. *v.* Clark, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751; Seattle, etc., R. Co. *v.* Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864.

Presumption of permanent deprivation of land taken for railroad see *supra*, X, E, 10.

89. *Arkansas.*—Little Rock Junction R. Co. *v.* Woodruff, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51.

California.— San Francisco, etc., R. Co. *v.* Mahoney, 29 Cal. 112; Bensley *v.* Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575.

Georgia.— Young *v.* Harrison, 17 Ga. 30.

Idaho.— Spokane, etc., R. Co. *v.* Lieuallen, 3 Ida. 381, 29 Pac. 854.

Illinois.— Wabash, etc., R. Co. *v.* McDougall, 118 Ill. 229, 8 N. E. 678.

Indiana.— Logansport, etc., R. Co. *v.* Buchanan, 52 Ind. 163; Indiana Cent. R. Co. *v.* Hunter, 8 Ind. 74; Vanblaricum *v.* State, 7 Blackf. 209; Muncie Natural Gas Co. *v.* Allison, 31 Ind. App. 50, 67 N. E. 111.

Iowa.— Van Husen *v.* Omaha Bridge, etc., R. Co., 118 Iowa 366, 92 N. W. 47.

Kansas.— Central Branch Union Pac. R. Co. *v.* Andrews, 26 Kan. 702.

owing to the diversity of the various statutes in the several states there is much apparent conflict upon the question of what constitutes a taking within the meaning of the rule.[90] Generally speaking the land may be regarded as taken at that moment when by the terms of the statute the owner is divested of his title and it vests in the condemning party.[91]

b. Time of Filing Plat. If the statute provides that the condemning party shall acquire no rights until the filing of a location or plan, the damages are to be assessed as of the date of such filing.[92]

c. Time of Decision to Take Particular Tract. Under a statutory provision that such lands shall be taken as shall be by proper authority declared to be requisite for the proposed improvement, the date of such decision is to be considered the date of appropriation.[93]

d. Time of Filing Bond For Payment. In some states the damages are to be

Massachusetts.— Hampden Paint, etc., Co. *v.* Springfield, etc., R. Co., 124 Mass. 118; Wood *v.* West Boston, etc., Bridges, 122 Mass. 394; Squire *v.* Somerville, 120 Mass. 579; Cobb *v.* Boston, 109 Mass. 438; Whitman *v.* Boston, etc., R. Co., 7 Allen 313; Dickenson *v.* Fitchburg, 13 Gray 546; Parks *v.* Boston, 15 Pick. 198.

Missouri.— McElroy *v.* Kansas City, etc., Air Line R. Co., 172 Mo. 546, 72 S. W. 913; Miller *v.* St. Louis, etc., R. Co., 162 Mo. 424, 63 S. W. 85; Hosher *v.* Kansas City, etc., R. Co., 60 Mo. 303.

New Jersey.— Price *v.* Weehawken Ferry Co., 31 N. J. Eq. 31.

New York.— Matter of New York, 80 N. Y. App. Div. 622, 80 N. Y. Suppl. 842; Port Henry *v.* Kidder, 39 N. Y. App. Div. 640, 57 N. Y. Suppl. 102; Sternberger *v.* Manhattan R. Co., 16 N. Y. Suppl. 539.

Pennsylvania.— *In re* Devine, 29 Leg. Int. 220.

Texas.— Gulf, etc., R. Co. *v.* Brugger, 24 Tex. Civ. App. 367, 59 S. W. 556.

Virginia.— Richmond, etc., R. Co. *v.* Humphreys, 90 Va. 425, 18 S. E. 901.

West Virginia.— Chesapeake, etc., R. Co. *v.* Tyree, 7 W. Va. 693.

United States.— Bauman *v.* Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. ed. 270; U. S. *v.* Honolulu Plantation Co., 122 Fed. 581, 58 C. C. A. 279; Benedict *v.* New York City, 98 Fed. 789, 39 C. C. A. 290.

Canada.— McQuade *v.* Rex, 7 Can. Exch. 318.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 332, 333.

Prior depreciation in value.— The amount of the compensation depends upon the value of the land at the time of the taking, although it has depreciated in value since the owner acquired it. Rex *v.* Sedger, 7 Can. Exch. 274.

A subsequent release to the claiming owner from another owner of contiguous land cannot enlarge the claimant's rights. Wood *v.* West Boston, etc., Bridges, 122 Mass. 394.

Subsequent change in property.— The valuation of property injured in the exercise of eminent domain must be made immediately before and immediately after the damage is inflicted, and the measure of damages recoverable is the difference between those valuations, unaffected by any subsequent change in the circumstances or condition of the property. Philadelphia Ball Club *v.* Philadelphia, 192 Pa. St. 632, 44 Atl. 265, 73 Am. St. Rep. 835, 46 L. R. A. 724.

Subsequent losses by fire are not to be considered in assessing the damages for the taking. Gilmore *v.* Pittsburgh, etc., R. Co., 104 Pa. St. 275.

Subsequent taking of same land.— The value of land covered by a public road which was laid out through the land after the railroad company had taken it should not be excluded. New York, etc., R. Co. *v.* Stanley, 39 N. J. Eq. 361.

Subsequent improvements as an element of damage see *infra*, X, E, 19, n, (I), (B).

Subsequent use and occupation as diminishing damages see *supra*, X, E, 17.

90. See Benedict *v.* New York City, 98 Fed. 789, 39 C. C. A. 290.

91. *Kentucky.*—Arnold *v.* Covington, etc., Bridge Co., 1 Duv. 372.

Massachusetts.— Bancroft *v.* Cambridge, 126 Mass. 438.

Mississippi.— Louisville, etc., R. Co. *v.* Hopson, 73 Miss. 773, 19 So. 718.

New Hampshire.— Gregg *v.* Northern R. Co., 67 N. H. 452, 41 Atl. 271.

Pennsylvania.— *In re* Devine, 29 Leg. Int. 220.

Wisconsin.—Aspinwall *v.* Chicago, etc., R. Co., 41 Wis. 474; Driver *v.* Western Union R. Co., 32 Wis. 569, 14 Am. Rep. 726.

United States.—Benedict *v.* New York City, 98 Fed. 789, 39 C. C. A. 290.

See, however, Matter of New York, 80 N. Y. App. Div. 622, 80 N. Y. Suppl. 842.

92. Spaulding *v.* Arlington, 126 Mass. 492; Hampden Paint, etc., Co. *v.* Springfield, etc., R. Co., 124 Mass. 118; Com. *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 25; *In re* Munson, 29 Hun (N. Y.) 325. *Contra*, San Francisco, etc., R. Co. *v.* Mahoney, 29 Cal. 112; Benedict *v.* New York City, 98 Fed. 789, 39 C. C. A. 290.

93. Shannahan *v.* Waterbury, 63 Conn. 420, 28 Atl. 611; Matter of New York, 40 N. Y. App. Div. 281, 58 N. Y. Suppl. 58; *In re* New State House, 19 R. I. 382, 33 Atl. 523.

assessed as of the time the condemning party files a bond for the payment of damages.[94]

e. Time of Entry. Ordinarily the actual entry upon the property is not a test of the time of taking so as to render the damages assessable as of that time.[95]

f. Time of Construction of Improvement. It has been held that the time of the construction of the improvement is not the time as of which the compensation should be estimated,[96] but there are cases to the contrary.[97]

g. Time of Enactment of Law Authorizing Improvement. In some instances the requirement is that the damages shall be assessed as of the date of the enactment of the statute under which the power of eminent domain is exercised.[98]

h. Time of Institution of Proceeding. In many states the appropriation by the condemning party and the divesting of the owner's title take effect by relation to the date of commencing the condemnation proceedings, and the damages are to be assessed as of that date.[99]

94. Graham *v.* Pittsburgh, etc., R. Co., 145 Pa. St. 504, 22 Atl. 983.

95. *Arkansas.*— Newgass *v.* St. Louis, etc., R. Co., 54 Ark. 140, 15 S. W. 188.

California.— San Francisco, etc., R. Co. *v.* Mahoney, 29 Cal. 112.

Massachusetts.— Hampden Paint, etc., Co. *v.* Springfield, etc., R. Co., 124 Mass. 118.

Minnesota.—Blue Earth County *v.* St. Paul, etc., R. Co., 28 Minn. 503, 11 N. W. 73; Winona, etc., R. Co. *v.* Denman, 10 Minn. 267.

New Jersey.— Leeds *v.* Camden, etc., R. Co., 53 N. J. L. 229, 23 Atl. 168, holding that the commissioners must award the present value of the land and the damages incident to the construction of the road, and have no authority to determine whether the original entry, made many years before, was legal, and assess the damages as of that time.

Pennsylvania.— Graham *v.* Pittsburgh, etc., R. Co., 145 Pa. St. 504, 22 Atl. 983.

Texas.— San Antonio, etc., R. Co. *v.* Ruby, 80 Tex. 172, 15 S. W. 1040; Texas Western R. Co. *v.* Cave, 80 Tex. 137, 15 S. W. 786.

See, however, *infra*, X, E, 18, k.

96. Lyon *v.* Green Bay, etc., R. Co., 42 Wis. 538 (holding that the rule extends to the appraisement of damages to contiguous lands of the same owner); Milwaukee, etc., R. Co. *v.* Eble, 3 Pinn. (Wis.) 334, 4 Chandl. (Wis.) 68.

97. Pitkin *v.* Springfield, 112 Mass. 509 (holding that where a highway has been illegally laid out and damages awarded for the land taken, and the location and assessment have been declared valid by statute, the damages are to be assessed, not as of the time the statute takes effect but as of the time of the location); Matter of New York, 80 N. Y. App. Div. 622, 80 N. Y. Suppl. 842 (holding that damages to buildings on the line of a proposed street are to be ascertained, so far as can be, as of the time when the street is actually opened, and not the time when the city acquired the land for the street).

98. Mowry *v.* Boston, 173 Mass. 425, 53 N. E. 885; Matter of Public Parks, 53 Hun (N. Y.) 280, 6 N. Y. Suppl. 750. See, however, Pitkin *v.* Springfield, 112 Mass. 509.

Passage of ordinance.— It has been held, however, that in a proceeding to appropriate private property for street purposes, the value of the property is to be taken at the time of the trial, and not at the date of the condemnation ordinance. Stribley *v.* Cincinnati, 9 Ohio Cir. Ct. 122, 6 Ohio Cir. Dec. 54 [*reversing* 11 Ohio Dec. (Reprint) 859, 30 Cinc. L. Bul. 249]. *Contra*, Toledo *v.* Bayer, 5 Ohio S. & C. Pl. Dec. 87, 7 Ohio N. P. 324.

99. *Arkansas.*— Newgass *v.* St. Louis, etc., R. Co., 54 Ark. 140, 15 S. W. 188.

California.—San Jose, etc., R. Co. *v.* Mayne, 83 Cal. 566, 23 Pac. 522; Pacific Coast R. Co. *v.* Porter, 74 Cal. 261, 15 Pac. 774; Tehama County *v.* Bryan, 68 Cal. 57, 8 Pac. 673. See, however, *infra*, X, E, 18, i.

Illinois.— Concordia Cemetery Assoc. *v.* Minnesota, etc., R. Co., 121 Ill. 199, 12 N. E. 536; Chicago, etc., R. Co. *v.* Catholic Bishop, 119 Ill. 525, 10 N. E. 372; Dupuis *v.* Chicago, etc., R. Co., 115 Ill. 97, 3 N. E. 720; South Park Com'rs *v.* Dunlevy, 91 Ill. 49; McAuley *v.* Columbus, etc., R. Co., 83 Ill. 348.

Massachusetts.— Burt *v.* Merchants' Ins. Co., 115 Mass. 1.

Minnesota.— Miller *v.* Troost, 14 Minn. 365.

Missouri.— Chicago, etc., R. Co. *v.* Randolph Town-Site Co., 103 Mo. 451, 15 S. W. 437; *In re* Pasco, 78 Mo. App. 518.

Nebraska.— Hogsett *v.* Harlan County, (1903) 93 N. W. 1001; Harlan County *v.* Hogsett, 60 Nebr. 362, 83 N. W. 171; Fremont, etc., R. Co. *v.* Bates, 40 Nebr. 381, 58 N. W. 959; Northeastern Nebraska R. Co. *v.* Frazier, 25 Nebr. 53, 40 N. W. 609; Missouri Pac. R. Co. *v.* Hays, 15 Nebr. 224, 18 N. W. 51.

New York.— *In re* New York El. R. Co., 12 N. Y. Suppl. 857.

Ohio.— Schaible *v.* Lake Shore, etc., R. Co., 10 Ohio Cir. Ct. 334, 6 Ohio Cir. Dec. 505.

Oregon.— Oregon, etc., R. Co. *v.* Barlow, 3 Oreg. 311.

Pennsylvania.— Walker *v.* South Chester R. Co., 174 Pa. St. 288, 34 Atl. 560; Shevalier *v.* Postal Tel. Co., 22 Pa. Super. Ct. 506, holding that the damages are to be assessed from the time when the greatest injury is imposed on the land, and that is when petitioner first indicates by a lawful proceeding its intention to impose a permanent servitude.

Rhode Island.— Stafford *v.* Providence, 10 R. I. 567, 14 Am. Rep. 710.

i. Time of Trial. In some states the damages are to be assessed as of the date of the trial.[1]

j. Time of Award. In some states and under some statutes the damages are to be assessed as of the date of the award by the commissioners.[2]

k. Where Taking Is by Consent. The foregoing rules[3] are not always applicable where the improvement is constructed with the landowner's consent.[4]

See 18 Cent. Dig. tit. "Eminent Domain," § 338.

Amendment of petition.— Where the petition is amended for the purpose of giving a fuller and more certain description of the land, and not in order to substitute one piece of land for another, evidence as to value should be limited to the date of filing the original petition (Lieberman *v.* Chicago, etc., R. Co., 141 Ill. 140, 30 N. E. 544); but if the proceedings are commenced by summons against a trustee in a deed of trust, and the owner is afterward made a party by amendment and by voluntary appearance, the damages should be estimated as of the date of his appearance (Oregon, etc., R. Co. *v.* Mitchell, 7 Utah 505, 27 Pac. 693).

Evidence.— While the date of filing the petition is deemed the time of the appropriation, yet evidence is not limited to that particular day, and although the petition was filed in June, a witness may testify to the value in the following August. Northeastern Nebraska R. Co. *v.* Frazier, 25 Nebr. 53, 40 N. W. 609.

1. *California.*— Stockton, etc., R. Co. *v.* Galgiani, 49 Cal. 139; Bensley *v.* Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575; California Southern R. Co. *v.* Colton Land, etc., Co., (1884) 2 Pac. 38. See, however, *supra*, X, E, 18, h, note 99.

Colorado.— Denver, etc., R. Co. *v.* Griffith, 17 Colo. 598, 31 Pac. 171.

Massachusetts.— Burt *v.* Merchants' Ins. Co., 115 Mass. 1.

Minnesota.— See Winona, etc., R. Co. *v.* Denman 10 Minn. 267.

Missouri.— St. Louis, etc., R. Co. *v.* Fowler, 142 Mo. 670, 44 S. W. 771.

Ohio.— Stribley *v.* Cincinnati, 9 Ohio Cir. Ct. 122, 6 Ohio Cir. Dec. 54 [*reversing* 11 Ohio Dec. (Reprint) 859, 30 Cinc. L. Bul. 249]. See also Pittsburgh, etc., R. Co. *v.* Perkins, 49 Ohio St. 326, 31 N. E. 350.

Texas.— San Antonio, etc., R. Co. *v.* Ruby, 80 Tex. 172, 15 S. W. 1040; Texas Western R. Co. *v.* Cave, 80 Tex. 137, 15 S. W. 786; San Antonio, etc., R. Co. *v.* Hunnicutt, 18 Tex. Civ. App. 310, 44 S. W. 535.

Wisconsin.— West *v.* Milwaukee, etc., R. Co., 56 Wis. 318, 14 N. W. 292.

United States.— New York Fifth Nat. Bank *v.* New York El. R. Co., 28 Fed. 231.

Contra.— Logansport, etc., R. Co. *v.* Buchanan, 52 Ind. 163; Indiana Cent. R. Co. *v.* Hunter, 8 Ind. 74; Central Branch Union Pac. R. Co. *v.* Andrews, 26 Kan. 702.

See 18 Cent. Dig. tit. "Eminent Domain," § 340.

See *infra*, X, E, 18, k.

2. *Colorado.*— Lamborn *v.* Bell, 18 Colo. 346, 32 Pac. 989, 20 L. R. A. 241; Twin Lakes Hydraulic Gold Min. Syndicate *v.* Colorado Midland R. Co., 16 Colo. 1, 27 Pac. 258; Colorado Cent. R. Co. *v.* Allen, 13 Colo. 229, 22 Pac. 605.

Minnesota.— Leber *v.* Minneapolis, etc., R. Co., 29 Minn. 256, 13 N. W. 31; Blue Earth County *v.* St. Paul, etc., R. Co., 28 Minn. 503, 11 N. W. 73; Sherwood *v.* St. Paul, etc., R. Co., 21 Minn. 122; St. Paul, etc., R. Co. *v.* Murphy, 19 Minn. 500; Winona, etc., R. Co. *v.* Denman, 10 Minn. 267.

Missouri.— Doyle *v.* Kansas City, etc., R. Co., 113 Mo. 280, 20 S. W. 970; Missouri Pac. R. Co. *v.* Wernwag, 35 Mo. App. 449, holding that any change in the condition of the property after the date of the commissioners' award cannot be considered.

New Jersey.— Trimmer *v.* Pennsylvania, etc., R. Co., 55 N. J. L. 46, 25 Atl. 932; Leeds *v.* Camden, etc., R. Co., 53 N. J. L. 229, 233, 23 Atl. 168, 169.

New York.— Manhattan R. Co. *v.* Comstock, 35 Misc. 326, 71 N. Y. Suppl. 941.

Wisconsin.— West *v.* Milwaukee, etc., R. Co., 56 Wis. 318, 14 N. W. 292; Lyon *v.* Green Bay, etc., R. Co., 42 Wis. 538; Milwaukee, etc., R. Co. *v.* Eble, 3 Pinn. 334, 4 Chandl. 68.

United States.— Reed *v.* Chicago, etc., R. Co., 25 Fed. 886.

See 18 Cent. Dig. tit. "Eminent Domain," § 341.

Filing of report.— In Nebraska the valuation should not be as of the date of the filing of the commissioners' report. Missouri Pac. R. Co. *v.* Hays, 15 Nebr. 224, 18 N. W. 51. In New York, however, owners are not allowed damages from the time of the confirmation of the commissioners' report, but from the time of the filing, if the delay has been occasioned by their conduct. *In re* Lexington Ave., 17 N. Y. Suppl. 872.

3. See *supra*, X, E, 18, a–j.

4. Wier *v.* St. Louis, etc., R. Co., 40 Kan. 130, 19 Pac. 316 (holding that where a railroad company enters on land and constructs its road by consent of the owner upon conditions to be performed by it, both parties treating the taking as a permanent appropriation, and later the owner institutes proceedings to obtain compensation on the ground that the company has not performed the conditions, the compensation must be assessed as of the time when the company first took possession); Trimmer *v.* Pennsylvania, etc., R. Co., 55 N. J. L. 46, 25 Atl. 932 (holding that if, after a railroad company is permitted to construct its road without compensation first made, the question of compensation arises in a suit in equity, the measure of compensation is the value of the land and damages at the time of entry, with interest; but if in such case the

l. **Where Taking Was Wrongful.** Where lands are wrongfully entered upon and afterward condemned, the prior trespass cannot be considered, and the damages are to be assessed in some states as of the time of the lawful appropriation,[5] and in others as of the time of trial.[6]

m. Assessment on Appeal or Second Trial.[7] The general rule is that where damages are assessed on appeal they are to be estimated as of the date when the report of the commissioners was filed.[8] This rule is not affected by any intermediate change of title,[9] nor by the fact that expenses were subsequently incurred by the owner;[10] but where the constitution requires that payment or tender of the damages shall be made before the condemning party can take possession, and no tender is made, the owner is entitled to the land pending the appeal, and is therefore entitled to its value at the time of the trial of the appeal.[11] Where the first proceeding has been abandoned, it cannot be shown on the trial of a second proceeding what the value of the land was at the time of the first proceeding.[12]

company institutes a statutory proceeding to condemn the land, the measure of compensation is the value of the land and damages at the time of the appraisement); Aspinwall *v.* Chicago, etc., R. Co., 41 Wis. 474 (holding that the value of mortgaged lands which have been conveyed by the mortgagor to a railroad company must be estimated as they were when the company acquired the title).

5. Lafayette, etc., R. Co. *v.* Murdock, 68 Ind. 137; Daniels *v.* Cincinnati, etc., R. Co., 41 Iowa 52; Hempstead *v.* Carghill, 46 Minn. 118, 48 N. W. 558; Canton, etc., R. Co. *v.* French, 68 Miss. 22, 8 So. 512. *Contra*, Childs *v.* Newport, 70 Vt. 62, 39 Atl. 627, holding that where a municipality authorized to take land has commenced condemnation proceedings, all the damages occasioned by such a taking as the act authorized, whether before or after the proceedings were commenced, are to be included in the assessment.

Time of filing bond.— If a railroad constructs its road across a farm under a contested claim of title in fee which is afterward decided against it, the measure of damages is the difference between the value of the entire farm at the time the company filed its statutory bond for damages, in the condition the farm was in when the company first entered upon it, and its value as affected by the existence of the road. Graham *v.* Pittsburgh, etc., R. Co., 145 Pa. St. 504, 22 Atl. 983.

6. Pittsburgh, etc., R. Co. *v.* Perkins, 49 Ohio St. 326, 31 N. E. 350 (time of assessment); San Antonio, etc., R. Co. *v.* Hunnicutt, 18 Tex. Civ. App. 310, 44 S. W. 535; Lyon *v.* Green Bay, etc., R. Co., 42 Wis. 538.

Right of election.— If a railroad company, with full knowledge of the owner, takes and uses land for a right of way, and subsequently secures the condemnation of that and an additional tract for depot purposes, but makes no entry thereon, the owner is entitled to compensation for the land actually taken, with election to take the present value or the value at the time of entry, and the company may elect to take all the land condemned or only that used for its right of way. Williams *v.* New Orleans, etc., R. Co., 60 Miss. 689.

7. See also *infra*, X, E, 18, n.

8. *Iowa.*— Ellsworth *v.* Chicago, etc., R. Co., 91 Iowa 386, 59 N. W. 78.

Minnesota.— Minneapolis *v.* Wilkin, 30 Minn. 145, 15 N. W. 668; Conter *v.* St. Paul, etc., R. Co., 22 Minn. 342.

Missouri.— St. Louis, etc., R. Co. *v.* Fowler, 113 Mo. 458, 20 S. W. 1069; Missouri Pac. R. Co. *v.* Wernwag, 35 Mo. App. 449, both holding that if a railroad company pays into court the amount awarded as soon as the award is made, a subsequent reassessment by a jury should be made on the basis of the value at the time of the commissioners' report. See, however, Matter of Forsyth Boulevard, 127 Mo. 417, 30 S. W. 188, holding that under Mo. Rev. St. (1899) §§ 9418, 9419, the date of an assessment of value in the county court of land taken for a highway is the date of the appropriation, and that on a trial of the case in the circuit court two years later the testimony should show the value of the land at the date of the trial in the county court.

New Hampshire.—Dearborn *v.* Boston, etc., R. Co., 24 N. H. 179.

New Jersey.—Metler *v.* Easton, etc., R. Co., 37 N. J. L. 222.

See 18 Cent. Dig. tit. "Eminent Domain," § 343.

Time of taking.— The owner will not be allowed on a second trial to show the comparative value of his property before and after the construction of the improvement between the dates of the two trials. Los Angeles, etc., R. Co. *v.* Rumpp, 104 Cal. 20, 37 Pac. 859.

9. Trogden *v.* Winona, etc., R. Co., 22 Minn. 198.

10. Holton *v.* Butler, 22 Iowa 557.

11. Georgia Southern, etc., R. Co. *v.* Small, 87 Ga. 355, 13 S. E. 515; Arnold *v.* Covington, etc., Bridge Co., 1 Duv. (Ky.) 372; Louisville, etc., R. Co. *v.* Asher, 10 Ky. L. Rep. 1021; Morris *v.* Coleman County, (Tex. Civ. App. 1894) 28 S. W. 380; Gulf, etc., R. Co. *v.* Lyons, 2 Tex. App. Civ. Cas. § 139.

12. Kansas City *v.* Mulkey, 176 Mo. 229, 75 S. W. 973.

n. Damages Accruing Pendente Lite.[13] In some states the award of damages should include those accruing between the institution of the proceedings and the judgment.[14]

19. Particular Elements of Damage[15] **— a. Adaptability of Property to Particular Uses**[16] **—** (1) *General Rules.* If a tract of which the whole or a part is taken for a public use possesses a special value to the owner which can be measured by money, he is entitled to have that value considered in the estimate of compensation and damages.[17] Compensation is not to be estimated simply with reference to the value of the land to the owner in the condition in which he has maintained it, but with reference to what its present value is in view of the uses to which it is reasonably capable of being put.[18] If a part of a lot or tract is

13. See also *supra*, X, E, 18, m.

14. Matter of Buffalo Grade Crossing Com'rs, 52 N. Y. App. Div. 27, 64 N. Y. Suppl. 769 (holding that the owner is entitled to recover for damages suffered while the work of changing the grade of a street is progressing and before the easement has been acquired under the condemnation proceedings, as well as those resulting permanently to the fee); Rice *v.* Norfolk, etc., R. Co., 130 N. C. 375, 41 S. E. 1031.

Nominal damages.— Where condemnation proceedings are instituted by a railroad company, and an award is made to the owner for the value of his title in the street, and the award is accepted by him, he is entitled to only nominal damages for the withholding of the *locus in quo* from the time of the company's entry to the time of the award by the commissioners. Judge *v.* New York Cent., etc., R. Co., 56 Hun (N. Y.) 60, 9 N. Y. Suppl. 158.

15. **Costs and counsel fees** as an element of compensation see *infra*, XI, A, 2.

16. **Adaptability to use of taker** see *infra*, X, E, 19, k.

Unlawful use see *supra*, X, Q, 1.

17. *In re* Rugheimer, 36 Fed. 376.

18. *California.*— Muller *v.* Southern Pac. Branch R. Co., 83 Cal. 240, 23 Pac. 265.

Colorado.— Colorado Midland R. Co. *v.* Brown, 15 Colo. 193, 25 Pac. 87, holding that where a railroad company sought to condemn a right of way through land used as a mill site and lumber yard, and particularly valuable on account of the water-power, evidence is admissible to show the market value of the water-power and its adaptability to the operation of mining machinery and electric motors in and about a neighboring city, although such uses had not been actually arranged for at the time.

Georgia.— Harrison *v.* Young, 9 Ga. 359, holding that its value is not restricted to its agricultural or productive qualities.

Illinois.— Galesburg, etc., R. Co. *v.* Milroy, 181 Ill. 243, 54 N. E. 939; Chicago, etc., R. Co. *v.* Pontiac, 169 Ill. 155, 48 N. E. 485; Reed *v.* Ohio, etc., R. Co., 126 Ill. 48, 17 N. E. 807; Calumet River R. Co. *v.* Moore, 124 Ill. 329, 15 N. E. 764 (holding that where the situation of property on a river increases its market value in that the land can in the future be used for dock purposes, this fact may be considered in estimating the compensation); Chicago, etc., R. Co. *v.* Catholic Bishop, 119 Ill. 525, 10 N. E. 372 (holding that the fact that a strip of ground, owned by the catholic bishop and lying across the street from a cemetery, was especially adapted to the location of a restaurant, may be taken into consideration, although it had never been in fact used for that purpose, where it does not appear that the title of the church authorities is such as to place any restrictions on its use).

Kentucky.— West Virginia, etc., R. Co. *v.* Gibson, 94 Ky. 234, 21 S. W. 1055, 15 Ky. L. Rep. 7.

Massachusetts.— Muskeget Island Club *v.* Nantucket, 185 Mass. 303, 70 N. E. 61; Boston Belting Co. *v.* Boston, 183 Mass. 254, 67 N. E. 428; Chandler *v.* Jamaica Pond Aqueduct Corp., 125 Mass. 544. See Fosgate *v.* Hudson, 178 Mass. 225, 59 N. E. 809. See also Fales *v.* Easthampton, 162 Mass. 422, 38 N. E. 1129, holding that, where a town takes certain water-rights belonging to plaintiff and lays water-pipes on his land, it is proper to consider the value of the land as a mill site, not only in connection with the water-power then possessed, but also with reference to the right the owner might acquire under a statute to flood lands on the stream above his own by building a mill.

Mississippi.— Louisville, etc., R. Co. *v.* Ryan, 64 Miss. 399, 8 So. 173, holding that where the land taken is a narrow street on a navigable stream where the commerce of a city enters and is discharged, evidence as to its value as a mill site is admissible, if its adaptability as such gives it a present value, although no one presently proposes to use it for that purpose.

Missouri.— Mississippi River Bridge Co. *v.* Ring, 58 Mo. 491.

New Hampshire.— Low *v.* Concord R. Co., 63 N. H. 557, 3 Atl. 739.

New York.— Hall *v.* State, 72 N. Y. App. Div. 360, 77 N. Y. Suppl. 282; Shepard *v.* Metropolitan El. R. Co., 48 N. Y. App. Div. 452, 62 N. Y. Suppl. 977; College Point *v.* Dennett, 2 Hun 669, 5 Thomps. & C. 217. But see *In re* William, etc., Sts., 19 Wend. 678.

Tennessee.— McKinney *v.* Nashville, 102 Tenn. 131, 52 S. W. 781, 73 Am. St. Rep. 859.

Texas.— Dallas Terminal R., etc., Co. *v.* Mosher Mfg. Co., (Civ. App. 1901) 60 S. W. 893.

taken, the owner may, in order to prove the injury to the remaining part, show the uses to which it might profitably be applied before and after the taking.[19] All facts which contribute to produce injury, as that the residue is put into a worse condition for a particular use, or for the use for which it was designed,[20] or that it is rendered useless for a profitable purpose,[21] may be considered. In determining the uses of which the property is capable, it is necessary to have regard to the existing business or wants of the community or such as may reasonably be expected in the immediate future.[22] This does not mean that the estimate may be based on any future profits that may be derived from the property when improved for a particular use when the business wants of the community may make it profitable to use the land in that particular way, but it means only that the fact of the property's capability or adaptability to the use may be considered as an element of its present value.[23] The land must be shown to be marketable

Virginia.— Richmond, etc., R. Co. *v.* Chamblin, 100 Va. 401, 41 S. E. 750.

Washington.— Seattle, etc., R. Co. *v.* Murphine, 4 Wash. 448, 30 Pac. 720.

Wisconsin.— Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364, 18 N. W. 328.

United States.— See Cumberland Tp. *v.* U. S., 101 Fed. 661, 41 C. C. A. 580.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 356, 366.

That the land has a mine under it and that there is water-power on it may be considered, if these two facts add to the market value of the land, although neither the mine nor the water-power has ever been used. Haslam *v.* Galena, etc., R. Co., 64 Ill. 353.

Witnesses should not give their opinions as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. Santa Ana *v.* Harlin, 99 Cal. 538, 34 Pac. 224.

19. Drury *v.* Midland R. Co., 127 Mass. 571; Henderson *v.* Orange, 9 N. J. L. J. 71; Cincinnati, etc., R. Co. *v.* Longworth, 30 Ohio St. 108; Shenango, etc., R. Co. *v.* Braham, 79 Pa. St. 447.

20. *Arkansas.*— Little Rock, etc., R. Co. *v.* Allen, 41 Ark. 431, holding that the decreased value of the land for gardening purposes, and for building stables and outhouses, may be considered.

Illinois.— Snodgrass *v.* Chicago, 152 Ill. 600, 38 N. E. 790; Hercules Iron Works *v.* Elgin, etc., R. Co., 141 Ill. 491, 30 N. E. 1050; Chicago, etc., R. Co. *v.* Blume, 137 Ill. 448, 27 N. E. 601; Chicago, etc., R. Co. *v.* Nix, 137 Ill. 141, 27 N. E. 81; St. Louis, etc., R. Co. *v.* Kirby, 104 Ill. 345; Keithsburg, etc., R. Co. *v.* Henry, 79 Ill. 290.

Indiana.— Baltimore, etc., R. Co. *v.* Lansing, 52 Ind. 229; Chicago, etc., R. Co. *v.* Curless, 27 Ind. App. 306, 60 N. E. 467.

Massachusetts.— Lincoln *v.* Com., 164 Mass. 368, 41 N. E. 489; Maynard *v.* Northampton, 157 Mass. 218, 31 N. E. 1062.

Pennsylvania.— East Pennsylvania R. Co. *v.* Hottenstine, 47 Pa. St. 28; Searle *v.* Lackawanna, etc., R. Co., 33 Pa. St. 57; Pennsylvania Canal Co. *v.* Hill, 6 Wkly. Notes Cas. 182 (holding that where a strip of a farm is taken for a canal, the fact that land near the canal is rendered unfit for cultivation by reason of the water permeating it by leakage through the banks of the canal is proper to be considered); Griffin *v.* Pennsylvania Schuylkill Valley R. Co., 2 Del. Co. 425.

United States.— Laflin *v.* Chicago, etc., R. Co., 33 Fed. 415; Lyons *v.* U. S., 26 Ct. Cl. 31.

21. Chicago, etc., R. Co. *v.* Bowman, 122 Ill. 595, 13 N. E. 814.

Where part of a school lot is taken for a railroad, the measure of depreciation to the residue is the difference between the value of the property for school purposes before the construction of the railroad and its market value for any purpose afterward, in case its value for school purposes has been wholly destroyed; but if it has not been wholly destroyed, then the difference between its value for school purposes before and after the construction of the road. Board of Education *v.* Kanawha, etc., R. Co., 44 W. Va. 71, 29 S. E. 503.

22. *California.*— Santa Ana *v.* Harlin, 99 Cal. 538, 34 Pac. 224.

Illinois.— Calumet River R. Co. *v.* Moore, 124 Ill. 329, 15 N. E. 764.

Kentucky.— West Virginia, etc., R. Co. *v.* Gibson, 94 Ky. 234, 21 S. W. 1055, 15 Ky. L. Rep. 7.

New Hampshire.— Low *v.* Concord R. Co., 63 N. H. 557, 3 Atl. 739; Amoskeag Mfg. Co. *v.* Worcester, 60 N. H. 522.

Texas.— Gulf, etc., R. Co. *v.* Burger, (Civ. App. 1898) 45 S. W. 613.

West Virginia.— Shenandoah Valley R. Co. *v.* Shepherd, 26 W. Va. 672.

Wisconsin.— Munkwitz *v.* Chicago, etc., R. Co., 64 Wis. 403, 25 N. W. 438.

United States.— Mississippi, etc., Boom Co. *v.* Patterson, 98 U. S. 403, 25 L. ed. 206; Laflin *v.* Chicago, etc., R. Co., 33 Fed. 415.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 356, 366.

23. Calumet River R. Co. *v.* Moore, 124 Ill. 329, 16 N. E. 764; Harris *v.* Schuylkill River East Side, etc., R. Co., 141 Pa. St. 242, 21 Atl. 590, 23 Am. St. Rep. 278. And see Concordia Cemetery Assoc. *v.* Minnesota, etc., R. Co., 121 Ill. 199, 12 N. E. 536, holding that where a railroad condemned a part of a tract of land not yet laid out for cemetery purposes, the proposed right of way being about four hundred feet from the grounds improved for a cemetery, and where, before burials were

for the particular purpose,[24] or that there is a reasonable expectation of some demand at some time for the use of the land for that purpose.[25] The particular use to which the property is adapted or applied, although a proper matter to be considered, is not controlling as to the value;[26] witnesses may be required in estimating the market value to show its value for other purposes also.[27]

(II) *Instances of Uses or Adaptabilities* — (A) *Adaptability For Building Lots.* It may be shown that the ground is adapted to be cut up into city lots and used for city improvements.[28] It is immaterial that the land is not at the time built upon,[29] that the owner has not filed a town plat,[30] or that the land is used by the owner only for farming or dairy purposes.[31] If the land is suitable for another purpose as well as for being adapted to division into city lots, the owner cannot be compelled to elect whether he will prove the value for one purpose or the other;[32] but evidence as to the number of lots into which the tract of land in question can be divided and the value of each lot is inadmissible. It is proper to inquire what the tract is worth, having in view the purposes for which it is best adapted; but it is the tract, not the lots into which it may be divided, that is to be valued.[33] Evidence is admissible in behalf of the con-

allowed on the grounds of the corporation, the lots therein were laid out and improved, only that part of the tract actually used as a cemetery could be considered as such, and the corporation could not recover the value for cemetery purposes of the strip of land condemned.

24. Daly *v.* Smith, 18 N. Y. App. Div. 194, 45 N. Y. Suppl. 785. See also Bellingham Bay, etc., R. Co. *v.* Strand, 4 Wash. 311, 30 Pac. 144, holding that if the lands are shore lands no damage should be allowed for any rights in the lands below the high-tide mark, where at the time of the proceedings there is no law in force giving to the littoral proprietor any rights whatever in tide lands, the possibility of the legislature granting him such rights being too remote.

25. U. S. *v.* Seufert Bros. Co., 78 Fed. 520.

26. McKinney *v.* Nashville, 102 Tenn. 131, 52 S. W. 781, 73 Am. St. Rep. 859.

27. St. Louis Terminal R. Co. *v.* Heiger, 139 Mo. 315, 49 S. W. 947. See also Lough *v.* Minneapolis, etc., R. Co., 116 Iowa 31, 89 N. W. 77.

28. *Illinois.*— South Park Com'rs *v.* Dunlevy, 91 Ill. 49.

Kansas.— Chicago, etc., R. Co. *v.* Davidson, 49 Kan. 589, 31 Pac. 131.

Massachusetts.— Dickenson *v.* Fitchburg, 13 Gray 546.

Nebraska.— Omaha Southern R. Co. *v.* Beeson, 36 Nebr. 361, 54 N. W. 557.

New Jersey.— Doughty *v.* Somerville, etc., R. Co., 22 N. J. L. 495.

New York.— Daly *v.* Smith, 18 N. Y. App. Div. 194, 45 N. Y. Suppl. 785. See also Matter of Armory Bd., 73 N. Y. App. Div. 152, 76 N. Y. Suppl. 766.

Pennsylvania.— Warden *v.* Philadelphia, 167 Pa. St. 523, 31 Atl. 928; Wilson *v.* Equitable Gas Co., 152 Pa. St. 566, 25 Atl. 635.

Texas.— St. Louis Southwestern R. Co. *v.* Hughes, (Civ. App. 1903) 73 S. W. 976, holding that where land is near the city and there is a probability of an extension of a car line to it, evidence as to its probable character and condition as high class suburban property is admissible.

Vermont.— Hooker *v.* Montpelier, etc., R. Co., 62 Vt. 47, 19 Atl. 775.

Wisconsin.— Alexian *v.* Oshkosh, 95 Wis. 221, 70 N. W. 162; Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364, 18 N. W. 328.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 356, 366.

Contra.— Everett *v.* Union Pac. R. Co., 59 Iowa 243, 13 N. W. 109, holding that the value must be estimated from what the property is worth in its condition at the time, not what its prospective value would be if laid out into city lots, in case it is not in fact so laid out. In Cedar Rapids, etc., R. Co. *v.* Ryan, 37 Minn. 38, 33 N. W. 6, it was held that the eligible situation of land near a town and the effect thereof upon the present value of the land were proper subjects for consideration, but that the opinions of the witnesses as to the probable future use of the land were inadmissible.

29. See Montana R. Co. *v.* Warren, 6 Mont. 275, 12 Pac. 641 [*affirmed* in 137 U. S. 348, 11 S. Ct. 96, 34 L. ed. 681].

30. Cincinnati, etc., R. Co. *v.* Longworth, 30 Ohio St. 108, where the owner showed that before he knew that the land was to be condemned he had laid it out for sale as town lots.

31. Hooker *v.* Montpelier, etc., R. Co., 62 Vt. 47, 19 Atl. 775. See also Chicago, etc., R. Co. *v.* Davidson, 49 Kan. 589, 31 Pac. 131; Wilson *v.* Equitable Gas Co., 152 Pa. St. 566, 25 Atl. 635; Rex *v.* Turnbull Real Estate Co., 8 Can. Exch. 163.

32. Northern Pac., etc., R. Co. *v.* Forbis, 15 Mont. 452, 39 Pac. 571, 48 Am. St. Rep. 692 [*explaining* Montana R. Co. *v.* Warren, 6 Mont. 275, 12 Pac. 641, as meaning that the owner is put to his election only where one use is exclusive of the other]. See Matter of Armory Board, 73 N. Y. App. Div. 152, 76 N. Y. Suppl. 766.

33. Pennsylvania Schuylkill Valley R. Co. *v.* Cleary, 125 Pa. St. 442, 17 Atl. 468, 11 Am. St. Rep. 913. See Matter of Armory

demning party to show the expense necessary to be incurred in making the land suitable for city lots.[34]

(B) *Use to Which Property Is Already Devoted.* The particular use to which the property is devoted and in consequence of which it has an intrinsic value to the owner is a fact which he has a right to have considered.[35]

(C) *Owner's Intended Use.* In some jurisdictions evidence of what the owner intended to do with the land may be considered as one of the facts in estimating the compensation due him;[36] in others this fact cannot be considered,

Board, 73 N. Y. App. Div. 152, 76 N. Y. Suppl. 766.

That the witnesses based their estimates on the dividing of the property into lots and valuing each lot is no ground for an objection, where the jury was instructed that whether this method was the best for determining the value was a matter for them to consider, but that the ultimate question for their consideration was the value of the entire block as it stood and the extent to which that value had been diminished. Blue Earth County *v.* St. Paul, etc., R. Co., 28 Minn. 503, 11 N. W. 73.

34. Farwell *v.* Chicago, etc., R. Co., 52 Nebr. 614, 72 N. W. 1036, where it was shown that the ground was so low that it would be necessary to fill in and grade it to make it entirely fit for the purpose of city lots.

35. *California.*— Santa Ana *v.* Harlin, 99 Cal. 538, 34 Pac. 224, holding that it is error for the court to refuse to allow evidence showing the adaptability of the land for a college or for a school or for other particular purposes.

Illinois.— Chicago, etc., R. Co. *v.* Pontiac, 169 Ill. 155, 48 N. E. 485; Dupuis *v.* Chicago, etc., R. Co., 115 Ill. 97, 3 N. E. 720; Chicago, etc., R. Co. *v.* Jacobs, 110 Ill. 414 (holding that the owner may show that the land has been highly fertilized and is consequently especially valuable for gardening purposes); St. Louis, etc., R. Co. *v.* Kirby, 104 Ill. 345.

Massachusetts.— Boston Belting Co. *v.* Boston, 183 Mass. 254, 67 N. E. 428, holding that in awarding damages to a manufacturer of rubber products against a city for diversion of water in carrying out an authorized improvement of a stream, the amount of damages is to be determined by the diminution in value of petitioner's real estate for the uses to which it is adapted, including that to which it was being put when the water was diverted, but allowing nothing for loss of business or diminution of profits.

Texas.— McFadden *v.* Schill, 84 Tex. 77, 19 S. W. 368.

Wisconsin.— Welch *v.* Milwaukee, etc., R. Co., 27 Wis. 108.

In a proceeding to condemn land belonging to a railroad company the company may prove that the land taken has a special value by reason of the fact that the company needed a large tract untraversed by alleys or streets; and it may in addition give evidence as to the land's value for the best use to which it could be put. West Chicago St. R. Co. *v.* Chicago, 172 Ill. 198, 50 N. E. 185. So it is proper to admit estimates of the value of the land with reference to the special use of making railroad transfers to which it is devoted. Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 100 Ill. 21.

Where the property is used as a homestead, the owner may show the injury to it as a homestead, since the party causing the injury has no right to lessen its value for home purposes without compensation (Eastern Texas R. Co. *v.* Scurlock, (Tex. Civ. App. 1903) 75 S. W. 366), but the sentimental value as a homestead is not a proper element of damage (Cane Belt R. Co. *v.* Hughes, 31 Tex. Civ. App. 565, 72 S. W. 1020. See, however, Rex *v.* Sedger, 7 Can. Exch. 274, where it was held that where the property appropriated to the public use is the owner's home and he has no desire to sell it, the compensation ought to be liberally assessed).

That the land would continue to be devoted to the same use may properly be assumed by the jury. Phillips *v.* Scales Mound, 195 Ill. 353, 63 N. E. 180.

As to the special value to the lessee see *supra*, note 75.

36. *Illinois.*— See Illinois Cent. R. Co. *v.* Lostant, 167 Ill. 85, 47 N. E. 62.

Kansas.— See Union Terminal R. Co. *v.* Peet Bros. Mfg. Co., 58 Kan. 197, 48 Pac. 860, holding that it is not substantial error to admit testimony showing the plans of the owner for the future use of the land, where the estimates of damages are confined to the market value of the land immediately before and after the appropriation to public use, and where no evidence is offered of future profits or values based on contemplated improvements.

New York.— Roundout, etc., R. Co. *v.* Deyo, 5 Lans. 298, holding that the owner's intention may be shown as one of the circumstances under which the land is taken.

Ohio.— Cincinnati, etc., R. Co. *v.* Longworth, 30 Ohio St. 108, holding that the owner may show that before he knew the land was to be condemned he had laid it out for sale as town lots, although there had been no legal dedication and no filing of a town plat.

Texas.— See Hamilton County *v.* Garrett, 62 Tex. 602, holding that the compensation to which the owner of uninclosed land which he has intended to fence and use as a pasturage is entitled is the full permanent injuries sustained by him, and recovery is not limited to a fair rental for the portion of the land actually appropriated.

England.—Ripley *v.* Great Northern R. Co., L. R. 10 Ch. 435, 31 L. T. Rep. N. S. 869, 23 Wkly. Rep. 685, holding that where land was taken by a railway company upon which

but the damages must be estimated with reference to the use of the land and its condition at the time, and by inquiring as to what extent, if at all, the appropriation to public use would affect its market value.[37] But if the intended use is shown this does not prevent the admission of testimony as to the market value of the land in consideration of other purposes for which it is adapted.[38]

b. Injury From Negligence, Nuisance, and Trespass. In proceedings to condemn land or to obtain compensation for land already taken or injured, damages are assessed upon the theory of a lawful taking and a proper construction and operation of the improvement in question.[39] No damages are included except such as will necessarily arise in the proper construction and operation of the work.[40] Anticipated or past negligence in the construction of the improvement is not therefore an element of damage,[41] and the same is true where the completed improvement is maintained and operated in a negligent manner[42] or so as

there would probably have been built cotton mills, and the owner had built a reservoir on other lands belonging to him, from which water might have been supplied to such mills if built, the umpire properly received evidence as to the rents which might have been realized from supplying water to the mills when built.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 356, 366.

37. Goodwine *v.* Evans, 134 Ind. 262, 33 N. E. 1031 (holding that proof that the owner contemplated converting a portion of his farm at some time in the future into a stock or grazing farm was inadmissible); Cumberland Tp. *v.* U. S., 101 Fed. 661, 41 C. C. A. 580. See also Pinkham *v.* Chelmsford, 109 Mass. 225.

If the intended use is dependent upon an uncertain act of another person, the intention cannot be considered. Munkwitz *v.* Chicago, etc., R. Co., 64 Wis. 403, 25 N. W. 438, where it was held that it could not be shown that the construction of a railroad would prevent the dredging of the canal by which the land would be improved, if it appeared that the dredging work could be made only by a connection with another proposed canal the construction of which was uncertain and dependent upon many contingencies.

38. Lough *v.* Minnesota, etc., R. Co., 116 Iowa 31, 89 N. W. 77; St. Louis Terminal R. Co. *v.* Hieger, 139 Mo. 315, 40 S. W. 947.

39. King *v.* Iowa Midland R. Co., 34 Iowa 458; Fleming *v.* Chicago, etc., R. Co., 34 Iowa 353; Oregon, etc., R. Co. *v.* Barlow, 3 Oreg. 311; Norfolk, etc., R. Co. *v.* Carter, 91 Va. 587, 22 S. E. 517.

40. Mullen *v.* Lake Drummond Canal, etc., Co., 130 N. C. 496, 41 S. E. 1027, 61 L. R. A. 833; Stolze *v.* Manitowoc Terminal Co., 100 Wis. 287, 75 N. W. 987; Nelson *v.* Chicago, etc., R. Co., 58 Wis. 516; Lyon *v.* Green Bay, etc., R. Co., 42 Wis. 538.

41. *Arkansas.*—Arkansas Cent. R. Co. *v.* Smith, 71 Ark. 189, 71 S. W. 947; Newgass *v.* St. Louis, etc., R. Co., 54 Ark. 140, 15 S. W. 188, both holding that if the appropriation of part of a tract for a railroad results in flooding the residue because of an improper construction or maintenance of the road-bed the injury cannot be considered.

Indiana.— Chicago, etc., R. Co. *v.* Hunter, 128 Ind. 213, 27 N. E. 477.

Iowa.— Gear *v.* C. C. & D. R. Co., 43 Iowa 83.

Kentucky.—Louisville, etc., R. Co. *v.* Asher, 15 S. W. 517, 12 Ky. L. Rep. 815.

New Hampshire.— Dearborn *v.* Boston, etc., R. Co., 24 N. H. 179, holding that if a part of the land is liable to be washed and to cave off as an unavoidable result of building a railroad in a suitable and proper manner it should be considered in assessing the damages; but if it results from the building of the road in an improper manner it should not be allowed.

Pennsylvania.— Edmundson *v.* Pittsburgh, etc., R. Co., 111 Pa. St. 316, 2 Atl. 404; *In re* Chatham St., 16 Pa. Super. Ct. 103, holding that in assessing damages resulting from the construction of a sewer, the fact that the city had not relaid the pavement since the work of constructing the sewer was done, and that the surface of the street consequently had been in such a condition as was inconsistent with tolerable use by vehicles, cannot be considered, as there is no necessary connection between the exercise of eminent domain and the condition in which the street was negligently permitted to be since the act was complete.

Vermont.— Clark *v.* Vermont, etc., R. Co., 28 Vt. 103.

Wisconsin.— Stolze *v.* Manitowoc Terminal Co., 100 Wis. 208, 75 N. W. 987.

United States.— Laflin *v.* Chicago, etc., R. Co., 33 Fed. 415.

42. Newgass *v.* St. Louis, etc., R. Co., 54 Ark. 140, 15 S. W. 188; Louisville, etc., R. Co. *v.* Asher, 15 S. W. 517, 12 Ky. L. Rep. 815; Edmundson *v.* Pittsburgh, etc., R. Co., 111 Pa. St. 316, 2 Atl. 404; Darlington *v.* Allegheny City, 28 Pittsb. Leg. J. N. S. 381.

Risk of fire.— It is only the risk of fire from the ordinary and careful use of the railroad, and not from the negligence of employees, which can be so considered in estimating the damages for taking a right of way. Kansas City, etc., R. Co. *v.* Kregelo, 32 Kan. 608, 5 Pac. 15; Mundorf *v.* New York El. R. Co., 62 Hun (N. Y.) 465, 17 N. Y. Suppl. 124; Pennsylvania, etc., Canal, etc., Co. *v.* Roberts, 2 Walk. (Pa.) 482. But *compare* Chicago, etc., R. Co. *v.* Palmer, 44 Kan. 110, 24 Pac.

to constitute a nuisance.[43] So in such a proceeding there can be no recovery for an original wrongful entry,[44] nor for trespasses committed in constructing the improvement.[45] The remedy of the landowner in such cases is a common-law action for damages.[46] The rules stated in this section are strictly applicable, although the constitution provides that compensation shall be made for injuring or destroying property as well as for taking it,[47] and they also apply under statutes providing not only that just compensation for the land taken shall be made but likewise for incidental loss or damage such as must necessarily or reasonably result from the appropriation of the land and construction of the road.[48]

c. Injury to Contiguous Tracts. The owner of contiguous lots or tracts of which one or a part of one is taken under the power of eminent domain is not ordinarily entitled to damages accruing from the improvement to the other lots or tracts owned by him.[49] If, however, several contiguous lots or tracts in reality

342, where the court said that the liability that fires will be set out by locomotives, passengers, and employees is an element of damage, regardless of whether the acts be done negligently or accidentally.

43. Gear *v.* C. C. & D. R. Co., 43 Iowa 83, holding that the obstruction of the public highway should not be considered in the estimation of the damages to which the owner of adjacent land is entitled for the appropriation of right of way by a railway company.

44. See *supra*, X, E, 18, l.

45. Doud *v.* Mason City, etc., R. Co., 76 Iowa 438, 41 N. W. 65 (holding that the owner cannot recover for detriment to his land outside of the right of way of a railroad caused by the taking of soil from it); People *v.* Schuyler, 69 N. Y. 242 (holding that damages sustained by an appropriation of land for a canal cannot be extended to include those for trespasses committed on other lands of the same person by workmen employed in taking the lands and in constructing the canal); *In re* Thompson, 2 N. Y. Suppl. 34 (applying the same rule where the trespass was committed by a contractor for a public work); Marshall *v.* American Tel., etc., Co., 16 Pa. Super. Ct. 615.

46. *Iowa.*— Doud *v.* Mason City, etc., R. Co., 76 Iowa 438, 41 N. W. 65.

New York.— *In re* Thompson, 2 N. Y. Suppl. 34.

Pennsylvania.— Marshall *v.* American Tel., etc., Co., 16 Pa. Super. Ct. 615; *In re* Chatham St., 16 Pa. Super. Ct. 103.

Virginia.— Norfolk, etc., R. Co. *v.* Carter, 91 Va. 587, 22 S. E. 517.

Wisconsin.— Lyon *v.* Green Bay, etc., R. Co., 42 Wis. 538.

If a fire is due to negligence of railroad employees the owner may recover full damages therefor in an action at law. Kansas City, etc., R. Co. *v.* Kregelo, 32 Kan. 608, 5 Pac. 15; Pennsylvania, etc., Canal, etc., Co. *v.* Roberts, 2 Walk. (Pa.) 482.

Injury from smoke, noise, vibration, foul odors, etc., if due to negligence or improper construction or operation of a railroad or other improvement, may be recovered for in a common-law action for damages. Metropolitan West Side El. R. Co. *v.* Goll, 100 Ill. App. 323; Louisville R. Co. *v.* Foster, 108 Ky. 743, 57 S. W. 480, 22 Ky. L. Rep. 458, 50 L. R. A. 813; Louisville Southern R. Co. *v.* Cogar, 15 Ky. L. Rep. 444.

47. Denniston *v.* Philadelphia Co., 161 Pa. St. 41, 28 Atl. 1007; Edmundson *v.* Pittsburgh, etc., R. Co., 111 Pa. St. 316, 2 Atl. 404; Denniston *v.* Philadelphia Co., 1 Pa. Super. Ct. 599.

48. Colcough *v.* Nashville, etc., R. Co., 2 Head (Tenn.) 171. See also *In re* Thompson, 43 Hun (N. Y.) 416, holding that where land is taken for an aqueduct, damages cannot be awarded for an injury caused by a dynamite explosion to a house and land not taken, the court saying that the statute was not intended to include possible accidents as a part of land damage, even if caused by negligence.

49. *Illinois.*— Metropolitan West Side El. R. Co. *v.* Johnson, 159 Ill. 434, 42 N. E. 871.

Indiana.— Evansville, etc., R. Co. *v.* Charlton, 6 Ind. App. 56, 33 N. E. 129.

Maine.— Kennebec Water Dist. *v.* Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

Massachusetts.— Wellington *v.* Boston, etc., R. Co., 158 Mass. 185, 33 N. E. 393.

Minnesota.— Minnesota Valley R. Co. *v.* Doran, 15 Minn. 230.

New York.— Reilly *v.* Manhattan R. Co., 43 N. Y. App. Div. 80, 59 N. Y. Suppl. 335.

Pennsylvania.— Potts *v.* Pennsylvania, etc., R. Co., 119 Pa. St. 278, 13 Atl. 291, 4 Am. St. Rep. 646.

Washington.— Sultan Water, etc., Co. *v.* Weyerhauser Timber Co., 31 Wash. 558, 72 Pac. 114.

United States.— Sharp *v.* U. S., 191 U. S. 341, 24 S. Ct. 114, 48 L. ed. 211.

See 18 Cent. Dig. tit. "Eminent Domain," § 370.

Plottage value.— Where the lots are contiguous, the owner is entitled to their value considered as one parcel, thus including their plottage value, but is not in that case entitled to the full value of each building on each lot, if the buildings would have to be destroyed to give the land its plottage value; or he may have the value of each lot and each building, in which case he is not entitled to the plottage value. Matter of Armory Bd., 73 N. Y. App. Div. 152, 76 N. Y. Suppl. 766.

constitute an entire parcel used for one general purpose by the common owner, the inquiry should embrace all injuries which will be caused to the entire body of land.[50] Thus if several tracts are used together as one farm, in determining the compensation to be paid the owner for the location of a railroad across one or more of the tracts the injury to the whole farm should be considered.[51] So in estimating the value of the part actually taken, the part is to be considered with reference to the whole tract and as a portion thereof.[52] To constitute a unity of property between two or more contiguous but *prima facie* distinct parcels of

50. *Illinois.*— Galena, etc., R. Co. *v.* Birkbeck, 70 Ill. 208.

Iowa.— Haggard *v.* Algona Independent School Dist., 113 Iowa 486, 85 N. W. 777; Cummins *v.* Des Moines, etc., R. Co., 63 Iowa 397, 19 N. W. 268.

Minnesota.—Blue Earth County *v.* St. Paul, etc., R. Co., 28 Minn. 503, 11 N. W. 73; Sherwood *v.* St. Paul, etc., R. Co., 21 Minn. 127.

Missouri.— Kansas City Suburban Belt R. Co. *v.* Norcross, 137 Mo. 415, 38 S. W. 299.

Nebraska.— Atchison, etc., R. Co. *v.* Boerner, 34 Nebr. 240, 51 N. W. 842, 33 Am. St. Rep. 637.

New York.— Matter of Armory Bd., 73 N. Y. App. Div. 152, 76 N. Y. Suppl. 766.

See 18 Cent. Dig. tit. "Eminent Domain," § 367.

51. *Illinois.*— Conness *v.* Indiana, etc., R. Co., 193 Ill. 464, 62 N. E. 221.

Iowa.— Lough *v.* Minneapolis, etc., R. Co., 116 Iowa 31, 89 N. W. 77; Winklemans *v.* Des Moines, etc., R. Co., 62 Iowa 11, 17 N. W. 82; Hartshorn *v.* Burlington, etc., R. Co., 52 Iowa 613, 3 N. W. 648.

Minnesota.— Cedar Rapids, etc., R. Co. *v.* Ryan, 36 Minn. 546, 33 N. W. 35; St. Paul, etc., R. Co. *v.* Murphy, 19 Minn. 500; Minnesota Valley R. Co. *v.* Doran, 15 Minn. 230.

Missouri.— Kansas City, etc., R. Co. *v.* Story, 96 Mo. 611, 10 S. W. 203; Springfield, etc., R. Co. *v.* Calkins, 90 Mo. 538, 3 S. W. 82.

Nebraska.— Omaha Southern R. Co. *v.* Todd, 39 Nebr. 818, 58 N. W. 289; Northeastern Nebraska R. Co. *v.* Frazier, 25 Nebr. 42, 40 N. W. 604.

New York.— New York, etc., R. Co. *v.* Le Fevre, 27 Hun 537.

Ohio.— Miller *v.* Weber, 1 Ohio Cir. Ct. 130, 1 Ohio Cir. Dec. 77 [*affirmed* in 19 Cinc. L. Bul. 350].

Pennsylvania.— Sloan *v.* Baltimore, etc., R. Co., 131 Pa. St. 568, 18 Atl. 903.

Wisconsin.— Parks *v.* Wisconsin Cent. R. Co., 33 Wis. 413; Robbins *v.* Milwaukee, etc., R. Co., 6 Wis. 636.

Division by creek and county line.— Where a farm lay in one compact tract, except that a creek which was also the boundary line between two counties ran through it, and a railroad company commenced condemnation proceedings in one county to appropriate a right of way through that part of the farm which lay in that county, compensation for the injury to the entire farm should be assessed in that proceeding without regard to the fact that a part of it was in the other county. Atchison, etc., R. Co. *v.* Gough, 29 Kan. 94.

52. *Connecticut.*— Imlay *v.* Union Branch R. Co., 26 Conn. 249, 68 Am. Dec. 392.

Georgia.— Selma, etc., R. Co. *v.* Redwine, 51 Ga. 470.

Illinois.— Illinois, etc., R. Co. *v.* Humiston, 208 Ill. 100, 69 N. E. 880 (holding that where the part taken is of greater value in connection with the whole than as a separate parcel, the measure of damages for the part taken is the fair cash value of the part taken as a part of the whole); Chicago, etc., Electric R. Co. *v.* Mawman, 206 Ill. 182, 69 N. E. 66; Chicago, etc., R. Co. *v.* Bowman, 122 Ill. 595, 13 N. E. 814; Chicago, etc., R. Co. *v.* Blake, 116 Ill. 163, 4 N. E. 488; Chicago, etc., R. Co. *v.* Hopkins, 90 Ill. 316; Bloomington *v.* Miller, 84 Ill. 621; Osgood *v.* Chicago, 44 Ill. App. 532 [*affirmed* in 154 Ill. 194, 41 N. E. 40].

Indiana.— Fifer *v.* Ritter, 159 Ind. 8, 64 N. E. 463; Manufacturers' Natural Gas Co. *v.* Leslie, (Sup. 1898) 49 N. E. 946.

Kentucky.— Louisville, etc., R. Co. *v.* Barrett, 91 Ky. 487, 16 S. W. 278, 13 Ky. L. Rep. 57; Henderson, etc., R. Co. *v.* Dickerson, 17 B. Mon. 173, 66 Am. Dec. 148; Louisville, etc., R. Co. *v.* Asher, 15 S. W. 517, 12 Ky. L. Rep. 815. See also Robb *v.* Maysville, etc., Turnpike Road Co., 3 Metc. 117.

Minnesota.— Kremer *v.* Chicago, etc., R. Co., 51 Minn. 15, 52 N. W. 977, 38 Am. St. Rep. 468; Scott *v.* St. Paul, etc., R. Co., 21 Minn. 322; Winona, etc., R. Co. *v.* Denman, 10 Minn. 267.

Mississippi.— Balfour *v.* Louisville, etc., R. Co., 62 Miss. 508; Sullivan *v.* Lafayette County, 58 Miss. 790.

New Jersey.— Gautier *v.* Hudson County Bd. of Chosen Freeholders, 55 N. J. L. 88, 25 Atl. 322, 17 L. R. A. 785.

New York.— Westphal *v.* New York, 75 N. Y. App. Div. 252, 78 N. Y. Suppl. 56; *In re* New York, etc., R. Co., 6 Hun 149; Dieckman *v.* New York, 34 Misc. 684, 70 N. Y. Suppl. 1021.

Ohio.— Grant *v.* Hyde Park, 67 Ohio St. 166, 65 N. E. 891; Cleveland, etc., R. Co. *v.* Ball, 5 Ohio St. 568.

Pennsylvania.— Baltimore, etc., R. Co. *v.* Springer, (1888) 13 Atl. 76.

South Carolina.— Greenville, etc., R. Co. *v.* Partlow, 5 Rich. 428.

Texas.—Telephone, etc., Co. *v.* Forke, 2 Tex. App. Civ. Cas. § 365.

Virginia.— Richmond, etc., R. Co. *v.* Chamblin, 100 Va. 401, 41 S. E. 750.

Wisconsin.— Orth *v.* Milwaukee, 92 Wis.

land, there must be such a connection or relation of adaptation, convenience, and actual and permanent use as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcels left, in the most advantageous and profitable manner in the business for which they are used.[53] The fact

230, 65 N. W. 1029; Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364, 18 N. W. 328; Driver *v.* Western Union R. Co., 32 Wis. 569, 14 Am. Rep. 726; Snyder *v.* Western Union R. Co., 25 Wis. 60.

United States.— Lehigh Valley Coal Co. *v.* Chicago, 26 Fed. 415.

England.— Reg. *v.* Brown, L. R. 2 Q. B. 630, 8 B. & S. 456, 36 L. J. Q. B. 322, 16 L. T. Rep. N. S. 827, 12 Wkly. Rep. 988, holding that if the part taken is of greater value in connection with the whole than as a separate parcel, the measure of damages would be the fair cash value of the part taken as a part of the whole.

Canada.— *In re* Ontario, etc., R. Co., 6 Ont. 338 [*explaining* Buccleuch *v.* Metropolitan Bd. of Works, L. R. 5 H. L. 418, 41 L. J. Exch. 137, 27 L. T. Rep. N. S. 1].

See 18 Cent. Dig. tit. "Eminent Domain," § 363.

Contra.— New Orleans, etc., R. Co. *v.* Lagarde, 10 La. Ann. 150.

Test of value.— The actual value of property condemned for public use is determined solely by its market value when available for business purposes, and by its relative value as part of the entire lot, and by other considerations, when not available for such purposes. Metropolitan West Side El. R. Co. *v.* Springer, 171 Ill. 170, 49 N. E. 416; Green *v.* Chicago, 97 Ill. 370.

Improvements on residue.— In condemnation proceedings for a portion of a farm by a railroad for a right of way, the value of the land taken, as a part of the farm, should be determined with the improvements on the balance of the farm. Illinois, etc., R. Co. *v.* Humiston, 208 Ill. 100, 69 N. E. 880. If, however, taking a part does not affect the value of the residue, evidence is inadmissible to show the value or extent of improvements upon the remaining portion of the tract. U. S. *v.* Honolulu Plantation Co., 122 Fed. 581, 58 C. C. A. 279.

53. *Illinois.*— White *v.* Metropolitan West Side El. R. Co., 154 Ill. 620, 39 N. E. 270.

Iowa.— Westbrook *v.* Muscatine, etc., R. Co., 115 Iowa 106, 88 N. W. 202.

Maine.— Kennebec Water Dist. *v.* Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856, holding that where the property of a water company is condemned no compensation can be allowed it for incidental damages to its other property, if such other property has no relation to it except that which grows out of common ownership.

Minnesota.— Koerper *v.* St. Paul, etc., R. Co., 42 Minn. 340, 44 N. W. 195; Cedar Rapids, etc., R. Co. *v.* Ryan, 37 Minn. 38, 33 N. W. 6; Peck *v.* Superior Short Line R. Co., 36 Minn. 343, 31 N. W. 217; Wilcox *v.* St. Paul, etc., R. Co., 35 Minn. 439, 29 N. W. 148.

Pennsylvania.— Kossler *v.* Pittsburg, etc., R. Co., 208 Pa. St. 50, 57 Atl. 66.

United States.— Sharpe *v.* U. S., 112 Fed. 893, 50 C. C. A. 597, 57 L. R. A. 932 [*affirmed* in 191 U. S. 341, 24 S. Ct. 114, 48 L. ed. 211].

See 18 Cent. Dig. tit. "Eminent Domain," § 367.

Abuttal on two streets.—Although a building which abuts on a street upon which an elevated railroad has been constructed also abuts on another street, this does not render it any the less one property, if it is so treated by the owner. Tischoff *v.* New York El. R. Co., 138 N. Y. 257, 33 N. E. 1073; Stevens *v.* New York El. R. Co., 130 N. Y. 95, 28 N. E. 667 [*affirming* 57 N. Y. Super. Ct. 416, 8 N. Y. Suppl. 313]. Where, however, a building is divided into separate and distinct apartments, damages are to be awarded only for those fronting on the street in which the structure is built. Reilly *v.* Manhattan R. Co., 43 N. Y. App. Div. 80, 59 N. Y. Suppl. 335; Keene *v.* Metropolitan El. R. Co., 79 Hun (N. Y.) 451, 29 N. Y. Suppl. 971. Where the property extends back to another street parallel to that occupied by the railroad, having a frontage and entrance on both streets, and basements connected, so that access to either frontage can be had from the other, the owner will be entitled to compensation only for the easements of light, air, and access appurtenant to the frontage on the street occupied by the railroad (Ottinger *v.* New York El. R. Co., 18 N. Y. Suppl. 238), but the fact that access from one street is unimpaired will not defeat a recovery for interference with access from the other street (Hulett *v.* Missouri, etc., R. Co., 80 Mo. App. 87).

Connection of tracts by right of way.— Although the several tracts do not actually adjoin, yet they may be regarded as one if the owner has a connecting right of way over the intervening lands. Westbrook *v.* Muscatine North, etc., R. Co., 115 Iowa 106, 88 N. W. 202 (holding that the mere fact that the private way over an intervening tract owned by a third person existed only by the latter's license was not sufficient to show that the other tracts did not constitute a single farm); Union Terminal R. Co. *v.* Peet Bros. Mfg. Co., 58 Kan. 197, 48 Pac. 860; Cameron *v.* Pittsburg, etc., R. Co., 157 Pa. St. 617, 27 Atl. 668, 22 L. R. A. 443. But see Pennsylvania Co. *v.* Pennsylvania Schuylkill Val. R. Co., 151 Pa. St. 334, 25 Atl. 107, 31 Am. St. Rep. 762.

Contiguity of tracts.— Where one owns a farm consisting of distinct parcels of land, separated by lands which he does not own and over which he has no private right of way, he is not entitled to have the parcels treated as one tract. Cameron *v.* Chicago, etc., R. Co., 42 Minn. 75, 43 N. W. 785. See

that several tracts used as one are separated by a street or highway[54] or a railroad

also White *v.* Metropolitan West Side El. R. Co., 154 Ill. 620, 39 N. E. 270. So, in proceedings to condemn land for the construction of a dam and flume, damage to lands not adjacent to those taken caused by increased expense of floating logs therefrom cannot be considered. Sultan Water, etc., Co. *v.* Weyerhaeuser Timber Co., 31 Wash. 558, 72 Pac. 114.

Fee and leasehold.— Where a livery-stable keeper owned stables on one side of an alley, and leased a building on the opposite side for use in connection with his business, and the leased property was that which was condemned, he is entitled only to the value of the lease. Kohl *v.* U. S., 91 U. S. 367, 23 L. ed. 449; U. S. *v.* Inlots, 24 Fed. Cas. No. 15,441*a*.

Nature and use of tracts.— If the separate tracts of which a part of one is taken are not put to a joint use, they cannot be considered as one parcel in assessing the damages to the land not taken. Haines *v.* St. Louis, etc., R. Co., 65 Iowa 216, 21 N. W. 573 (holding that where one owns village property suitable for residence purposes, and farm lands adjoining, and a portion of the village property is taken, there should not be included any damages to the farm lands); Leavenworth, etc., R. Co. *v.* Wilkins, 45 Kan. 674, 26 Pac. 16 (holding that no damages can be awarded on account of outlying lands which corner with a farm and are used as pastures in connection with it); Providence, etc., R. Co. *v.* Worcester, 155 Mass. 35, 29 N. E. 56 (holding that where three acres belonging to a railroad company are taken, in which there is a large quantity of gravel, the company is not entitled to damages to its plant as a whole); Cameron *v.* Chicago, etc., R. Co., 51 Minn. 153, 53 N. W. 199 (holding that where the portion of a farm taken is chiefly valuable as a gravel-pit, the injury done to the residue of the farm is not to be considered). This is especially true where the tracts are separated by a street (White *v.* Metropolitan West Side El. R. Co., 154 Ill. 620, 39 N. E. 270; Wellington *v.* Boston, etc., R. Co., 164 Mass. 380, 41 N. E. 652) or watercourse (Kossler *v.* Pittsburg, etc., R. Co., 208 Pa. St. 50, 57 Atl. 66). However, the fact that part of the land is river bottom and part upland, and that different parts of it might be most advantageously used for different purposes, does not preclude its being regarded as one tract, if the owner has treated the land as an entirety, and has not contemplated any division. Doud *v.* Mason City, etc., R. Co., 76 Iowa 438, 41 N. W. 65.

Separate buildings.— The fact that there are two buildings on a tract does not preclude its being regarded as one parcel (Cooper *v.* Manhattan R. Co., 85 Hun (N. Y.) 217, 32 N. Y. Suppl. 1054; White *v.* Fifth Ave., etc., Bridge Co., 189 Pa. St. 500, 42 Atl. 136), but two buildings on adjoining lots cannot be regarded as one, although both are operated as a hotel under a single management (Shaw *v.* Manhattan Ave. R. Co., 35 Misc. (N. Y.) 47, 71 N. Y. Suppl. 22).

Separate ownership of tracts.— The fact that several tracts are owned by different persons does not preclude them from being regarded as one in the assessment of damages where they are contiguous and are used in common by the owners under a contract and each tract is more valuable by reason of that use than if used separately. Smith County *v.* Lebore, 37 Kan. 480, 15 Pac. 577. Where the one who owns the tract from which a railroad right of way is taken owns also the remainder after a life-estate in the undivided half of the adjacent tract, his interests must nevertheless be considered separately, although he has farmed the two tracts as one, since they are distinct at law, and this is so, although he holds a verbal lease of the life-estate, since such a lease is voidable. Conness *v.* Indiana, etc., R. Co., 193 Ill. 464, 62 N. E. 221. Where, however, both life-tenant and remainder-men join in a proceeding against the railroad company, the two tracts may be regarded as one. Westbrook *v.* Muscatine North, etc., R. Co., 115 Iowa 106, 88 N. W. 202.

Severance of mortgaged tract.— Where a mortgagor grants a right of way across the premises for a railroad, which is built, and on foreclosure the land is sold in two parcels, first the land not covered by the road and then the residue, the purchaser of the latter parcel, although he also purchased the former, cannot, in a proceeding subsequently instituted by the railroad company to condemn the right of way, recover damages to that portion of the land outside the right of way. St. Louis, etc., R. Co. *v.* Nyce, 61 Kan. 394, 59 Pac. 1040, 48 L. R. A. 241.

54. Westbrook *v.* Muscatine North, etc., R. Co., 115 Iowa 106, 88 N. W. 202; Ham *v.* Wisconsin, etc., R. Co., 61 Iowa 716, 17 N. W. 157; Renwick *v.* Davenport, etc., R. Co., 49 Iowa 664; Kansas City, etc., R. Co. *v.* Merrill, 25 Kan. 421; Colvill *v.* St. Paul, etc., R. Co., 19 Minn. 283; Union Elevator Co. *v.* Kansas City Suburban Belt R. Co., 135 Mo. 353, 36 S. W. 1071 [*affirming* (Sup. 1896) 33 S. W. 926]. See also Cameron *v.* Pittsburg, etc., R. Co., 157 Pa. St. 617, 27 Atl. 668, 22 L. R. A. 443. See, however, White *v.* Metropolitan West Side El. R. Co., 154 Ill. 620, 39 N. E. 270; Fleming *v.* Chicago, etc., R. Co., 34 Iowa 353; Wellington *v.* Boston, etc., R. Co., 164 Mass. 380, 41 N. E. 652; Sharpe *v.* U. S., 112 Fed. 893, 50 C. C. A. 597, 57 L. R. A. 932 [*affirmed* in 191 U. S. 341, 24 S. Ct. 114, 48 L. ed. 211].

Alley.— The rule is the same where the land is intersected by an alley. Haggard *v.* Algona Independent School Dist., 113 Iowa 486, 85 N. W. 777; Port Huron, etc., R. Co. *v.* Voorheis, 50 Mich. 506, 15 N. W. 882. See, however, Kohl *v.* U. S., 91 U. S. 367, 23 L. ed. 449; U. S. *v.* Inlots, 26 Fed. Cas. No. 15,441*a*.

Unopened way.— The mere intervention of

right of way[55] does not necessarily preclude them from being considered as one in determining the damages; nor does the mere platting of a tract of land on a map constitute such a division of it into separate lots that the owner's damage must be limited to the particular lot a portion of which, as shown on the map, is actually taken.[56] The fact that less than all the tracts are described in a petition for condemnation[57] or in a bond for appeal[58] does not preclude them from being considered as one in assessing the damages, if in fact they constitute but one tract.

d. Injury to Business, Inconvenience, Expense, Etc.—(i) *Injury to Trade or Business in General.* Strictly speaking business is not property within the meaning of the statutes relating to eminent domain,[59] and in the absence of statutory provision therefor,[60] one whose land is taken cannot ordinarily recover compensation for loss or interruption of business or trade,[61] inability to perform

a way which has been legally established but is not visible on the surface of the ground does not prevent the treatment of the tract as a whole (Lincoln *v.* Com., 164 Mass. 368, 41 N. E. 489) unless the land covered by the way is owned by the city (*In re* New York Cent., etc., R. Co., 6 Hun (N. Y.) 149).

55. Chicago, etc., R. Co. *v.* Hildebrand, 136 Ill. 467, 27 N. E. 69; Cook *v.* Boone Suburban Electric R. Co., 122 Iowa 437, 98 N. W. 293; Rudolph *v.* Pennsylvania Schuylkill Valley R. Co., 186 Pa. St. 541, 40 Atl. 1083, 47 L. R. A. 782. See, however, *In re* New York Cent., etc., R. Co., 6 Hun (N. Y.) 149.

56. Metropolitan West Side El. R. Co. *v.* Johnson, 159 Ill. 434, 42 N. E. 871; Chicago, etc., R. Co. *v.* Dresel, 110 Ill. 89; Cox *v.* Mason City, etc., R. Co., 77 Iowa 20, 41 N. W. 475; Currie *v.* Waverly, etc., R. Co., 52 N. J. L. 381, 20 Atl. 56, 19 Am. St. Rep. 452; Phillips *v.* St. Clair Inclin Plane Co., 166 Pa. St. 21, 31 Atl. 69, 71. See, however, Todd *v.* Kankakee, etc., R. Co., 78 Ill. 530 (holding that where a town has for many years been laid out into blocks and streets, and they have always been recognized and dealt with by the owners and the people as blocks and streets, each block should be treated as a distinct tract of land, although the plat may not have been made according to the requirements of the statute); Wilcox *v.* St. Paul, etc., R. Co., 35 Minn. 439, 29 N. W. 148 (holding that the platting of vacant and unused land constitutes a severance of it); Banning *v.* Southern R. Co., 7 Ohio Dec. (Reprint) 560, 3 Cinc. L. Bul. 965 (holding that where a landowner records the plat, and one buys the land so subdivided, the lots are subdivided for all purposes as if actually separated by real lines).

Government subdivisions.—The owner is entitled to full damages for the decreased value of the body of his land taken as a whole, and is not confined to the government subdivisions as they are described in the petition for condemnation. Chicago, etc., R. Co. *v.* Baker, 102 Mo. 553, 15 S. W. 64. See also Atchison, etc., R. Co. *v.* Gough, 29 Kan. 94.

57. Wilmes *v.* Minneapolis, etc., R. Co., 29 Minn. 242, 13 N. W. 39; Chicago, etc., R. Co. *v.* Baker, 102 Mo. 553, 15 S. W. 64.

58. Chicago, etc., R. Co. *v.* Brunson, 43 Kan. 371, 23 Pac. 495.

59. Sawyer *v.* Com., 182 Mass. 245, 65 N. E. 52, 59 L. R. A. 726; Stanwood *v.* Malden, 157 Mass. 17, 31 N. E. 702, 16 L. R. A. 591.

60. The Massachusetts Metropolitan Water Supply Act (St. (1895) c. 488, § 14) allows compensation to the owners of an established business decreased in value by the carrying out of the act. See Earle *v.* Com., 180 Mass. 579, 63 N. E. 10, 57 L. R. A. 292, holding that the professional practice of a physician is "business" within the meaning of the act. *Compare* Gavin *v.* Com., 182 Mass. 190, 65 N. E. 37, holding that the act does not apply to a widow who keeps a home for herself and children, they paying board, and occasionally boards relatives during their vacations.

61. *Illinois.*—Chicago *v.* Jackson, 196 Ill. 496, 63 N. E. 1013, 1135 (holding that diversion of traffic by changing the grade of a street is not a proper element of damage to abutting owners); Chicago, etc., R. Co. *v.* Dresel, 110 Ill. 89. In this state, however, it is held that loss from interruption of business may be allowed in exceptional cases. Braun *v.* Metropolitan West Side El. R. Co., 166 Ill. 434, 46 N. E. 974; St. Louis, etc., R. Co. *v.* Capps, 72 Ill. 188.

Massachusetts.—Bailey *v.* Boston, etc., R. Corp., 182 Mass. 537, 66 N. E. 203; New York, etc., R. Co. *v.* Blacker, 178 Mass. 386, 59 N. E. 1020; Pegler *v.* Hyde Park, 176 Mass. 101, 57 N. E. 327; Massachusetts Cent. R. Co. *v.* Boston, etc., R. Co., 121 Mass. 124; Edmands *v.* Boston, 108 Mass. 535.

Missouri.—St. Louis, etc., R. Co. *v.* Knapp, etc., Co., 160 Mo. 396, 61 S. W. 300. But see Chicago, etc., R. Co. *v.* McGrew, 104 Mo. 282, 15 S. W. 931, holding that where a railroad was constructed over land on which there was a coal-mine, so as to shut off railway connection and facilities for transportation of coal, if the business of defendant as a miner of coal was necessarily interrupted by reason of the appropriation of a part of his land compensation should be allowed for the reasonable value of the use of the mine during the period of such necessary interruption.

Nevada.—Virginia, etc., R. Co. *v.* Henry, 8 Nev. 165.

New York.—Matter of Public Parks, 53 Hun 280, 6 N. Y. Suppl. 750; *In re* New York, etc., R. Co., 35 Hun 633; Taylor *v.*

contracts,[62] or inconvenience in carrying on trade or business,[63] whether the loss be a present or future one,[64] and whether the inconvenience and interruption be temporary or permanent.[65] Much less can compensation be recovered for such injuries, when the land of the person injured is not taken, but the improvement is placed upon a public highway, or upon land belonging to the corporation constructing it.[66] Loss arising from the competition of the condemning party does not constitute an element of damage;[67] and the same is true of loss arising from increased competition on the part of others, growing out of the use to which the

Metropolitan El. R. Co., 50 N. Y. Super. Ct. 311; *In re* New York, etc., Bridge, 4 N. Y. Suppl. 222; Matter of Buffalo, 1 N. Y. St. 742. See also *In re* New York, etc., R. Co., 29 Hun 1.

Ohio.— Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604.

Pennsylvania.— Spring City Gaslight Co. *v.* Pennsylvania Schuylkill Valley R. Co., 167 Pa. St. 6, 31 Atl. 368.

Virginia.—Richmond, etc., R. Co. *v.* Chamblin, 100 Va. 401, 41 S. E. 750.

United States.— Laflin *v.* Chicago, etc., R. Co., 33 Fed. 415 (loss of patronage to a hotel); U. S. *v.* Inlots, 26 Fed. Cas. No. 15,441 (holding that there can be no allowance for loss of custom of storekeepers carrying on business in the condemned building by failure to find or delay in finding another place, or for depreciation of stock during suspension of business, or loss of sales by removal to a less favorable location).

England.— Bigg *v.* London, L. R. 15 Eq. 376, 28 L. T. Rep. N. S. 336; Cameron *v.* The Charing-Cross R. Co., 19 C. B. N. S. 764, 11 Jur. N. S. 282, 12 L. T. Rep. N. S. 121, 13 Wkly. Rep. 390, 115 E. C. L. 764. But see Senior *v.* Metropolitan R. Co., 2 H. & C. 258, 9 Jur. N. S. 802, 32 L. J. Exch. 225, 8 L. T. Rep. N. S. 544, 11 Wkly. Rep. 836.

See 18 Cent. Dig. tit. "Eminent Domain," § 291 *et seq.*

Contra.— Detroit Park, etc., Com'rs *v.* Moesta, 91 Mich. 149, 51 N. W. 903; Grand Rapids, etc., R. Co. *v.* Weiden, 70 Mich. 390, 38 N. W. 294 (holding that where landowners were using their property in a lucrative business, in which the locality and its surroundings have some bearing on its value apart from the money value of the property itself, they are entitled to be compensated so as to lose nothing by the interruption of their business and its damage by the change); State *v.* Chapman, 69 N. J. L. 464, 55 Atl. 94. And see Allison *v.* Chandler, 11 Mich. 542.

Interruption of railroad traffic by condemnation of right of way see *supra*, X, E, 9, a, (I), (C).

Rights of lessee see *infra*, X, E, 19, d, (IV).

62. *In re* New York, etc., R. Co., 35 Hun (N. Y.) 633; Matter of Buffalo, 1 N. Y. St. 742.

63. Massachusetts Cent. R. Co. *v.* Boston, etc., R. Co., 121 Mass. 124; St. Louis, etc., R. Co. *v.* Knapp, etc., Co., 160 Mo. 396, 61 S. W. 300; Missouri Pac. R. Co. *v.* Porter, 112 Mo. 361, 20 S. W. 568; Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 6 Ohio Cir. Ct. 362, 3 Ohio Cir. Dec. 493. See also *infra*, X, E, 19, d, (II).

Loss of gratuitous privilege.— A party whose land is taken for public use cannot have his damages increased on account of the loss of a gratuitous privilege which he has been enjoying by the sufferance of another. Ranlet *v.* Concord R. Corp., 62 N. H. 561.

64. See Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604; Spring City Gaslight Co. *v.* Pennsylvania Schuylkill Valley R. Co., 167 Pa. St. 6, 31 Atl. 368; and other cases above cited.

65. Cameron *v.* Charing-Cross R. Co., 19 C. B. N. S. 764, 11 Jur. N. S. 282, 12 L. T. Rep. N. S. 121, 13 Wkly. Rep. 390, 115 E. C. L. 764; and other cases cited above.

Temporary taking or injury see *supra*, X, E, 5.

66. Bailey *v.* Boston, etc., R. Corp., 182 Mass. 537, 66 N. E. 203; Cameron *v.* Charing-Cross R. Co., 19 C. B. N. S. 764, 11 Jur. N. S. 282, 12 L. T. Rep. N. S. 121, 13 Wkly. Rep. 390, 115 E. C. L. 764; Bigg *v.* London, L. R. 15 Eq. 376, 28 L. T. Rep. N. S. 336.

67. *Illinois.*— Mills *v.* St. Clair County Com'rs, 4 Ill. 53.

Iowa.— Prosser *v.* Wapello County, 18 Iowa 327.

Kentucky.—Piatt *v.* Covington, etc., Bridge Co., 8 Bush 31; Richmond, etc., Turnpike Road Co. *v.* Rogers, 1 Duv. 135.

Missouri.— Missouri Pac. R. Co. *v.* Porter, 112 Mo. 361, 20 S. W. 568.

New Hampshire.— *In re* Mt. Washington Road Co., 35 N. H. 134.

New York.— Troy, etc., R. Co. *v.* Northern Turnpike Co., 16 Barb. 100.

Ohio.— Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 6 Ohio Cir. Ct. 362, 3 Ohio Cir. Dec. 493. See also Cincinnati, etc., R. Co. *v.* Zinn, 18 Ohio St. 417.

Pennsylvania.— Allentown, etc., Turnpike Co. *v.* Lehigh Valley Traction Co., 174 Pa. St. 273, 34 Atl. 565.

South Carolina.— Eddings *v.* Seabrook, 12 Rich. 504; Fuller *v.* Edings, 11 Rich. 239. But see Ragsdale *v.* Southern R. Co., 60 S. C. 381, 38 S. E. 609.

Tennessee.— Hydes Ferry Turnpike Co. *v.* Davidson County, 91 Tenn. 291, 18 S. W. 626; Moses *v.* Sanford, 11 Lea 731.

Texas.— Jones *v.* Keith, 37 Tex. 394, 14 Am. Rep. 382.

United States.— Omaha Horse R. Co. *v.* Cable Tramway Co., 32 Fed. 727.

See 18 Cent. Dig. tit. "Eminent Domain," § 291.

condemned land is to be put.[68] Nor as a rule does the loss or inconvenience arising from a removal of one's business or property which is necessitated by the appropriation of the land constitute an element of the damages to be allowed.[69] There are many decisions to the effect not only that loss of profits, present or future, does not constitute an element of damage,[70] but also that neither the value of the business carried on upon land taken,[71] nor the amount of the profits derived from it,[72] is to be considered in determining the market value of the land. The good-will of a business is not property for which compensation can be claimed.[73] There is, however, much authority in support of the doctrine that while profits which are merely speculative cannot be considered as an element of damage,[74] and while profits, although not merely speculative, cannot be considered as elements of damage strictly speaking,[75] yet it is proper to take into consideration, as bearing upon the question of the market value of the property, the advantages for business of the land taken or injured,[76] and its productiveness,

Diminution of rental value by reason of competition has been held a proper element of damages. Ragsdale *v.* Southern R. Co., 60 S. C. 381, 38 S. E. 609.

68. Harvey *v.* Lackawanna, etc., R. Co., 47 Pa. St. 428; Shenandoah Valley R. Co. *v.* Shepherd, 26 W. Va. 672.

69. *California.*— Central Pac. R. Co. *v.* Pearson, 35 Cal. 247.

Illinois.— Braun *v.* Metropolitan West Side El. R. Co., 166 Ill. 434, 46 N. E. 974. In exceptional cases, however, the damage to personal property, cost of removal, interruption, and reëstablishment of business, etc., may be considered in estimating the just compensation to be paid for the property condemned. Braun *v.* Metropolitan West Side El. R. Co., *supra*; St. Louis, etc., R. Co. *v.* Capps, 72 Ill. 188.

Massachusetts.— New York, etc., R. Co. *v.* Blacker, 178 Mass. 386, 59 N. E. 1020.

Missouri.— St. Louis, etc., R. Co. *v.* Knapp, etc., Co., 160 Mo. 396, 61 S. W. 300.

New Hampshire.— Ranlet *v.* Concord R. Corp., 62 N. H. 561.

New York.— *In re* New York, etc., R. Co., 35 Hun 633; New York Cent., etc., R. Co. *v.* Pierce, 35 Hun 306; *In re* New York, etc., Bridge, 4 N. Y. Suppl. 222; Matter of Buffalo, 1 N. Y. St. 742.

Pennsylvania.—Becker *v.* Philadelphia, etc., R. Co., 177 Pa. St. 252, 35 Atl. 617, 35 L. R. A. 583.

See 18 Cent. Dig. tit. "Eminent Domain," § 273.

Contra.—Colorado Midland R. Co. *v.* Brown, 15 Colo. 193, 25 Pac. 87.

Right of lessee to recover for removal of property see *infra*, X, E, 19, d, (IV).

Cost of removing improvements see *infra*, X, E, 19, n, (I), (C).

70. *Illinois.*— Chicago, etc., R. Co. *v.* Dresel, 110 Ill. 89; Jacksonville, etc., R. Co. *v.* Walsh, 106 Ill. 253.

Massachusetts.— Bailey *v.* Boston, etc., R. Co., 182 Mass. 537, 66 N. E. 203.

Missouri.— St. Louis, etc., R. Co. *v.* Knapp, etc., Co., 160 Mo. 396, 61 S. W. 300.

New York.— Syracuse *v.* Stacey, 45 N. Y. App. Div. 249, 61 N. Y. Suppl. 165 (holding that evidence of profits earned in a milling business is not admissible on the question of damages for condemnation of water-rights); *In re* New York, etc., R. Co., 35 Hun 633; Taylor *v.* Metropolitan El. R. Co., 50 N. Y. Super. Ct. 311.

Pennsylvania.—Becker *v.* Philadelphia, etc., R. Co., 177 Pa. St. 252, 35 Atl. 617, 35 L. R. A. 583; Pittsburgh, etc., R. Co. *v.* Patterson, 32 Pittsb. Leg. J. 257.

South Carolina.— Eddings *v.* Seabrook, 12 Rich. 504.

United States.— Laflin *v.* Chicago, etc., R. Co., 33 Fed. 415.

England.— Cameron *v.* Charing-Cross R. Co., 19 C. B. N. S. 764, 11 Jur. N. S. 282, 12 L. T. Rep. N. S. 121, 13 Wkly. Rep. 390, 115 E. C. L. 764.

See 18 Cent. Dig. tit. "Eminent Domain," § 291.

Loss of profits see also *supra*, p. 695 notes 78–81.

71. Jacksonville, etc., R. Co. *v.* Walsh, 106 Ill. 253.

The prospective value of the business cannot be considered. Spring City Gaslight Co. *v.* Pennsylvania Schuylkill Valley R. Co., 167 Pa. St. 6, 31 Atl. 368.

72. Jacksonville, etc., R. Co. *v.* Walsh, 106 Ill. 253; Matter of Gilroy, 26 N. Y. App. Div. 314, 49 N. Y. Suppl. 798.

73. *Maine.*— See Kennebec Water Dist. *v.* Waterhill, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

Massachusetts.— Williams *v.* Com., 168 Mass. 364, 47 N. E. 115; Edmands *v.* Boston, 108 Mass. 535.

New York.— *In re* New York, etc., R. Co., 35 Hun 633.

Pennsylvania.— *In re* Race St., 9 Pa. Dist. 615, 24 Pa. Co. Ct. 433.

England.— Cameron *v.* Charing-Cross R. Co., 19 C. B. N. S. 764, 11 Jur. N. S. 282, 12 L. T. Rep. N. S. 121, 13 Wkly. Rep. 390, 115 E. C. L. 764.

See 18 Cent. Dig. tit. "Eminent Domain," § 291.

74. See *supra*, X, E, 16.

75. See *supra*, note 70.

76. *Illinois.*—Chicago, etc., R. Co. *v.* Eaton, 136 Ill. 9, 26 N. E. 575; Jacksonville, etc., R. Co. *v.* Walsh, 106 Ill. 253.

and the income and net profits which may reasonably be derived from it;[77] and further that in fixing the compensation evidence is competent which tends to show such incidental loss, inconvenience, injury to business, present or prospective, and other like injuries, as may be known, or may reasonably be expected, to result from the construction and operation in a legal manner of the proposed improvement,[78] whether it is constructed on the land condemned, on a highway, or on other lands;[79] and this includes a deprivation of lateral or subjacent sup-

New York.— Coatsworth *v.* Lehigh Valley R. Co., 24 N. Y. App. Div. 273, 48 N. Y. Suppl. 511.

Washington.— Seattle, etc., R. Co. *v.* Murphine, 4 Wash. 448, 30 Pac. 720.

West Virginia.— Shenandoah Valley R. Co. *v.* Shepherd, 26 W. Va. 672.

United States.— Laflin *v.* Chicago, etc., R. Co., 33 Fed. 415.

England.—Ripley *v.* Great Northern R. Co., L. R. 10 Ch. 435, 31 L. T. Rep. N. S. 869, 23 Wkly. Rep. 685.

Compare Spring City Gaslight Co. *v.* Pennsylvania, etc., R. Co., 167 Pa. St. 6, 31 Atl. 368.

Adaptability of property to particular uses see *supra*, X, E, 19, a.

77. *Maine.*—Kennebec Water Dist. *v.* Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856.

New York.— Matter of State Reservation, 16 Abb. N. Cas. 159.

Ohio.— Cincinnati, etc., R. Co. *v.* Zinn, 18 Ohio St. 417.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Vance, 115 Pa. St. 325, 8 Atl. 764.

Wisconsin.— Stolze *v.* Manitowoc Terminal Co., 100 Wis. 208, 75 N. W. 987; Weyer *v.* Chicago, etc., R. Co., 68 Wis. 180, 31 N. W. 710.

United States.— See Laflin *v.* Chicago, etc., R. Co., 33 Fed. 415.

England.— Ripley *v.* Great Northern R. Co., L. R. 10 Ch. 435, 31 L. T. Rep. N. S. 869, 23 Wkly. Rep. 685.

Contra.—Jacksonville, etc., R. Co. *v.* Walsh, 106 Ill. 253.

78. *Colorado.*— Colorado, etc., R. Co. *v.* Brown, 15 Colo. 193, 25 Pac. 87.

Illinois.— Chicago, etc., R. Co. *v.* Pontiac, 169 Ill. 155, 48 N. E. 485; Chicago, etc., R. Co. *v.* Atterbury, 156 Ill. 281, 40 N. E. 826; Chicago, etc., R. Co. *v.* Eaton, 136 Ill. 9, 26 N. E. 575; St. Louis, etc., R. Co. *v.* Capps, 72 Ill. 188; Peoria, etc., R. Co. *v.* Sawyer, 71 Ill. 361.

Kansas.—St. Louis, etc., R. Co. *v.* McAuliff, 43 Kan. 185, 23 Pac. 102; Missouri, etc., R. Co. *v.* Haines, 10 Kan. 439.

Kentucky.— Maysville, etc., R. Co. *v.* Conner, 29 S. W. 344, 16 Ky. L. Rep. 635.

Nebraska.— Fremont, etc., R. Co. *v.* Ward, 11 Nebr. 597, 10 N. W. 524; Fremont, etc., R. Co. *v.* Lamb, 11 Nebr. 592, 10 N. W. 493; Fremont, etc., R. Co. *v.* Whalen, 11 Nebr. 585, 10 N. W. 491.

New York.— Sloan *v.* New York El. R. Co., 63 Hun 300, 17 N. Y. Suppl. 769.

Pennsylvania.— Allentown, etc., Turnpike Co. *v.* Lehigh Valley Traction Co., 174 Pa. St. 273, 34 Atl. 565; Baird *v.* Schuylkill River East Side R. Co., 154 Pa. St. 459, 25 Atl. 833; Griffin *v.* Pennsylvania Schuylkill Valley R. Co., 2 Del. Co. 425. But see Clements *v.* Philadelphia Co., 3 Pa. Super. Ct. 14, 39 Wkly. Notes Cas. 299.

South Carolina.— Ragsdale *v.* Southern R. Co., 60 S. C. 381, 38 S. E. 609.

Virginia.— Richmond, etc., R. Co. *v.* Chamblin, 100 Va. 401, 41 S. E. 750.

Wisconsin.— Chapman *v.* Oshkosh, etc., R. Co., 33 Wis. 629.

United States.— Laflin *v.* Chicago, etc., R. Co., 33 Fed. 415; Omaha Horse R. Co. *v.* Tram-Way Co., 32 Fed. 727.

Homestead.— Where property is used as a homestead the owner may show damage to its use as such. Eastern Texas R. Co. *v.* Eddings, 30 Tex. Civ. App. 170, 70 S. W. 98.

Elevation of railroad grade crossing.— In assessing damages to land, which was used as a lumber yard, and which lay along a railroad track, caused by the elevation of a railroad grade crossing, whereby the owner was prevented from maintaining two side-tracks running into his lumber yard, it was held that the value given the land by its being next to the railroad and on a level with it was not affected by the passage of the Massachusetts grade crossing act (St. (1890) c. 428), which rendered it probable that the grade would be changed. New York, etc., R. Co. *v.* Blacker, 178 Mass. 386, 59 N. E. 1020.

79. *Kentucky.*— Maysville, etc., R. Co. *v.* Conner, 29 S. W. 344, 16 Ky. L. Rep. 635.

Maryland.— Birch *v.* Lake Roland El. R. Co., 83 Md. 362, 34 Atl. 1013.

Massachusetts.— Ashby *v.* Eastern R. Co., 5 Metc. 368, 38 Am. Dec. 426.

New York.— Rorke *v.* Kings County El. R. Co., 22 N. Y. App. Div. 511, 48 N. Y. Suppl. 42, construction of elevated railroad in street.

Oregon.— McQuaid *v.* Portland, etc., R. Co., 18 Oreg. 237, 22 Pac. 899.

Wisconsin.— Chapman *v.* Oshkosh, etc., R. Co., 33 Wis. 629.

England.— An injury to business by reason of a temporary occupation of a highway or of lands not belonging to plaintiff is a subject of compensation. Ford *v.* Metropolitan, etc., R. Co., 17 Q. B. D. 12, 50 J. P. 661, 55 L. J. Q. B. 296, 54 L. T. Rep. N. S. 718, 34 Wkly. Rep. 426; East India, etc., R. Co. *v.* Gattke, 15 Jur. 261, 20 L. J. Ch. 217, 3 Macn. & G. 155, 6 R. & Can. Cas. 371, 49 Eng. Ch. 118, 42 Eng. Reprint 220. *Compare* Ricket *v.* Metropolitan R. Co., L. R. 2 H. L. 175, 36 L. J. Q. B. 205, 16 L. T. Rep. N. S. 542, 15 Wkly. Rep. 937; Herring *v.* Metropolitan Bd. of Works, 19 C. B. N. S. 510, 34 L. J. M. C. 224, 115 E. C. L. 510. Where

port.[80] But the injuries referred to above must be special to the individual, and not merely such as he suffers in common with the community at large.[81]

(II) *Inconvenience in Use of Property.* While mere inconvenience in carrying on business and mere interruption of business do not of themselves constitute elements of damage for which the owner of land must be compensated,[82] yet it by no means follows that inconvenience in the use of property, whether for business or for other purposes, is never to be considered. On the contrary it may be stated as a general rule that inconvenience arising from a division of property, or from increased difficulty of access, the burden of increased fencing, ordinary dangers from accidental fires, and generally all such matters as owing to the location of the improvement may affect the convenient use and future enjoyment of the property are proper for consideration,[83] not as in themselves elements of dam-

a railway company so constructs its road upon a highway as to obstruct and divert passage thereon, thereby rendering the houses on the highway difficult of access and therefore less suitable to be used as shops, such injury is an element of compensation. Chamberlain *v.* West End of London, etc., R. Co., 2 B. & S. 605, 9 Jur. N. S. 1051, 32 L. J. Q. B. 173, 8 L. T. Rep. N. S. 149, 11 Wkly. Rep. 472, 110 E. C. L. 605. See also Wood *v.* Stourbridge R. Co., 16 C. B. N. S. 222, 111 E. C. L. 222. Where a municipality, in constructing a roadway, destroys a public dock which is principally used by the occupants of the adjoining premises, such occupants are entitled to compensation for the diminished value of their premises for business purposes by reason of the destruction of the dock. Metropolitan Bd. of Works *v.* McCarthy, L. R. 7 H. L. 243, 43 L. J. C. P. 385, 31 L. T. Rep. N. S. 182, 23 Wkly. Rep. 115.

See 18 Cent. Dig. tit. "Eminent Domain," § 271 *et seq.*

80. Hartshorn *v.* Worcester County, 113 Mass. 111.

Taking for purpose of gas mains.—The fact that a gas company, seeking to condemn a right of way for the purpose of laying its pipe-line across coal land, has released all claim to the owner's coal as a means of subjacent support for its pipe-line and accepted the risk of subsidence does not eliminate from the case the element of risk and consequent damage to the mine owner arising from the removal of such support, since the property will still be depreciated by the danger of gas escaping into the mine from the breaking of pipes. Davis *v.* Jefferson Gas Co., 147 Pa. St. 130, 23 Atl. 218. *Compare* Wallace *v.* Jefferson Gas Co., 147 Pa. St. 205, 23 Atl. 416. The landowner's measure of damages in such case is the actual damage done in the construction of the line over the surface, including injury to fences and crops, and the depreciation in value of the land as a whole by the entry and appropriation of the gas company, excluding from consideration all servitude of the coal to the surface, and all damage that may result from the negligence of the company. McGregor *v.* Equitable Gas Co., 139 Pa. St. 230, 21 Atl. 13.

81. Bailey *v.* Boston, etc., R. Corp., 182 Mass. 537, 66 N. E. 203; *In re* Mt. Washington Road Co., 35 N. H. 134; Gorgas *v.* Philadelphia, etc., R. Co., 144 Pa. St. 1, 22 Atl. 715; Shenandoah Valley R. Co. *v.* Shepherd, 26 W. Va. 672.

Illustrations.— The danger that the cars of a railroad company may injure the cattle of the landowner without negligence is not peculiar to the landowner, a part of whose land is taken for the road. Raleigh, etc., R. Co. *v.* Wicker, 74 N. C. 220. So an owner of land abutting on a street over which a railroad has been built cannot recover for loss of trade occasioned by the diversion of travel to another street on account of the presence of the railroad. Jackson *v.* Chicago, etc., R. Co., 41 Fed. 656. But see Hatch *v.* Cincinnati, etc., R. Co., 18 Ohio St. 92; Williams *v.* Tripp, 11 R. I. 447 (holding that injury to the business of a shopkeeper by reason of the fact that he is prevented from receiving and delivering goods, and that the attendance of customers is interfered with, all caused by obstruction of the street on which his shop stands, is not an injury common to the public, but one peculiar to himself); Schuler *v.* Lincoln Tp., 12 S. D. 460, 81 N. W. 890.

82. See cases cited *supra*, note 59 *et seq.*

83. *Arkansas.*— Texas, etc., R. Co. *v.* Cella, 42 Ark. 528; Little Rock, etc., R. Co. *v.* Allen, 41 Ark. 431.

Colorado.— Colorado Midland R. Co. *v.* Brown, 15 Colo. 193, 25 Pac. 87.

Illinois.— Chicago, etc., R. Co. *v.* Greiney, 137 Ill. 628, 25 N. E. 798; Peoria, etc., R. Co. *v.* Sawyer, 71 Ill. 361; St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144. See also Chicago, etc., R. Co. *v.* Atterbury, 156 Ill. 281, 40 N. E. 826; Keithsburg, etc., R. Co. *v.* Henry, 79 Ill. 290.

Indiana.— Fifer *v.* Fifer, 159 Ind. 8, 64 N. E. 463; Montmorency Gravel Road Co. *v.* Stockton, 43 Ind. 328; White Water Valley R. Co. *v.* McClure, 29 Ind. 536, to the same effect.

Iowa.— Dudley *v.* Minnesota, etc., R. Co., 77 Iowa 408, 42 N. W. 359.

Kansas.—St. Louis, etc., R. Co. *v.* McAuliff, 43 Kan. 185, 23 Pac. 102.

Kentucky.— Maysville, etc., R. Co. *v.* Connor, 29 S. W. 344, 16 Ky. L. Rep. 635.

Massachusetts.— Bailey *v.* Boston, etc., R. Corp., 182 Mass. 537, 66 N. E. 537; New York, etc., R. Co. *v.* Blacker, 178 Mass. 386, 59 N. E. 1020.

age, but as, when weighed with the advantages resulting from the improvement, affecting the market value of the land.[84] Thus where land is taken for a railroad or for a public highway, evidence as to inconvenience, annoyance, and discomfort which will necessarily be caused by the construction and use of such improvement is competent as bearing on the diminished value of the property.[85] So too

Minnesota.— Minnesota Valley R. Co. *v.* Doran, 17 Minn. 188.

Missouri.— Chicago, etc., R. Co. *v.* McGrew, 104 Mo. 282, 15 S. W. 931.

Nebraska.— Fremont, etc., R. Co. *v.* Bates, 40 Nebr. 381, 58 N. W. 959; Omaha Southern R. Co. *v.* Todd, 39 Nebr. 818, 58 N. W. 289, to the same effect.

New Hampshire.— *In re* Mt. Washington Road Co., 35 N. H. 134.

New Jersey.— Doughty *v.* Somerville, etc., R. Co., 22 N. J. L. 495.

New York.— *In re* New York Cent., etc., R. Co., 15 Hun 63; *In re* Utica, etc., R. Co., 56 Barb. 456.

Ohio.— See Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604.

Oregon.— Putnam *v.* Douglas County, 6 Oreg. 328, 25 Am. Rep. 527.

Pennsylvania.— Allentown, etc., Turnpike Co. *v.* Lehigh Valley Traction Co., 174 Pa. St. 273, 34 Atl. 565; Pittsburgh, etc., R. Co. *v.* Vance, 115 Pa. St. 325, 8 Atl. 764; Pennsylvania R. Co. *v.* Bruner, 55 Pa. St. 318; Watson *v.* Pittsburgh, etc., R. Co., 37 Pa. St. 469; Pittsburgh Junction R. Co. *v.* McCutcheon, 18 Wkly. Notes Cas. 527. See McMillan *v.* Philadelphia Co., 1 Pa. Super. Ct. 648, 38 Wkly. Notes Cas. 222. See, however, Patten *v.* Northern Cent. R. Co., 33 Pa. St. 426, 75 Am. Dec. 612, holding that in estimating the damages to be sustained by the construction of a railroad an owner of lands through which it passes is not entitled to compensation for the increased rates of insurance which he may have to pay, because of the danger to his property from locomotives.

South Dakota.— Schuler *v.* Lincoln Tp., 12 S. D. 460, 81 N. W. 890.

Texas.— Gainesville, etc., R. Co. *v.* Waples, 3 Tex. App. Civ. Cas. § 409.

Virginia.—Richmond, etc., R. Co. *v.* Chamblin, 100 Va. 401, 41 S. E. 750. See also Norfolk, etc., R. Co. *v.* Carter, 91 Va. 587, 22 S. E. 517.

Washington.— Seattle, etc., R. Co. *v.* Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864.

Wisconsin.— Weyer *v.* Chicago, etc., R. Co., 68 Wis. 180, 31 N. W. 710.

United States.— Laflin *v.* Chicago, etc., R. Co., 33 Fed. 415. *Compare* Jackson *v.* Chicago, etc., R. Co., 41 Fed. 656.

See 18 Cent. Dig. tit. "Eminent Domain," § 271 *et seq.*

Extension of highway over railroad.— The above rules apply to a case where a highway is extended over a railroad. New York, etc., R. Co. *v.* Blackstone, 184 Mass. 491, 69 N. E. 315. See also *supra*, X, E, 9, a, (I).

Where land is taken for a highway, the value of the land taken and the expense of fencing against the highway are the only damages to be considered. Dalrymple *v.* Whitingham, 26 Vt. 345.

Fencing as an element of damage: Where highway is opened see *supra*, X, E, 12. Where railroad is located see *supra*, X, E, 10. See also *infra*, X, E, 19, d, (III).

Obstruction of light, air, access, etc., see *infra*, X, E, 19, g.

Risk of injury to person or property see *infra*, X, E, 19, i.

84. *Iowa.*— Dudley *v.* Minnesota, etc., R. Co., 77 Iowa 408, 42 N. W. 359.

Massachusetts.— New York, etc., R. Co. *v.* Blacker, 178 Mass. 386, 59 N. E. 1020.

Missouri.— Chicago, etc., R. Co. *v.* McGrew, 104 Mo. 282, 15 S. W. 931.

New York.— Matter of Buffalo, 1 N. Y. St. 742.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Vance, 115 Pa. St. 325, 8 Atl. 764.

Washington.— Seattle, etc., R. Co. *v.* Murphine, 4 Wash. 448, 30 Pac. 720.

85. *Arkansas.*— Little Rock, etc., R. Co. *v.* Allen, 41 Ark. 431.

Illinois.— Illinois Cent. R. Co. *v.* Turner, 194 Ill. 575, 62 N. E. 798 [*affirming* 97 Ill. App. 219]; Chicago, etc., R. Co. *v.* Atterbury, 156 Ill. 281, 40 N. E. 826; Chicago, etc., R. Co. *v.* Eaton, 136 Ill. 9, 26 N. E. 575; Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 100 Ill. 21; Peoria, etc., R. Co. *v.* Sawyer, 71 Ill. 361; Illinois Cent. R. Co. *v.* Kuehle, 95 Ill. App. 185.

Indiana.— Fifer *v.* Ritter, 159 Ind. 8, 64 N. E. 463.

Kansas.— St. Louis, etc., R. Co. *v.* McAuliff, 43 Kan. 185, 23 Pac. 102; Missouri, etc., R. Co. *v.* Haines, 10 Kan. 439. But it is held in Florence, etc., R. Co. *v.* Pember, 45 Kan. 625, 26 Pac. 1, that evidence is not competent that teams used in cultivating the land near the railroad are liable to be frightened, and that in crossing the railroad the owner has to leave his team while opening and shutting gates.

Kentucky.— In this state a decision goes so far as to hold that the jury are not confined to the market value of the property, but may consider the inconvenience and loss resulting to the owner from being deprived of his home and established place of business. Covington Short Route Transfer Co. *v.* Piel, 87 Ky. 267, 8 S. W. 449, 10 Ky. L. Rep. 146.

Minnesota.—Blue Earth County *v.* St. Paul, etc., R. Co., 28 Minn. 503, 11 N. W. 73; Spencer *v.* St. Paul, etc., R. Co., 22 Minn. 29; Minnesota Valley R. Co. *v.* Doran, 17 Minn. 188, holding that the delay to the owner in time and labor in necessarily opening and shutting down and putting up bars, in crossing the track from one side to the other, is proper to be considered.

it is proper to take into consideration, as bearing on the diminution in market value, or in some states as a distinct element of damage, the inconvenience arising from the manner in which the tract is divided, and the increased difficulty or entire destruction of communication between the different parts of the tract,[86] or

New York.— *In re* New York Cent., etc., R. Co., 15 Hun 63; *In re* Utica, etc., R. Co., 56 Barb. 456. But see American Bank Note Co. *v.* New York El. R. Co., 59 N. Y. Super. Ct. 175, 13 N. Y. Suppl. 626.

Oregon.— Putnam *v.* Douglas County, 6 Oreg. 328, 25 Am. Rep. 527.

Pennsylvania.—Philadelphia *v.* Linnard, 97 Pa. St. 242.

South Carolina.— Eddings *v.* Seabrook, 12 Rich. 504.

Virginia.— Richmond, etc., R. Co. *v.* Chamblin, 100 Va. 401, 41 S. E. 750.

Wisconsin.— Weyer *v.* Chicago, etc., R. Co., 68 Wis. 180, 31 N. W. 710.

Compare Jamison *v.* Springfield, 53 Mo. 224 (holding that the owner of land cannot claim compensation for the damage and inconvenience caused him by bringing the street near his door); Laflin *v.* Chicago, etc., R. Co., 33 Fed. 415 (holding that in an action for damages by the construction of a railroad across a tract of land plaintiff cannot recover for injury to drives about the premises).

Injury to church property.— Upon an inquiry in a summary proceeding by a railroad company to condemn land belonging to a church for the purpose of constructing its road, evidence of the value of the land prior to the construction of the road and subsequent thereto, for church purposes, and also evidence that the congregations accustomed to worship there were disturbed, and facilities for the accommodation of their horses and vehicles were destroyed or impaired, whereby the utility and value of the land was diminished as church property, is competent in ascertaining the damages to be assessed. Durham, etc., R. Co. *v.* Bullock Church, 104 N. C. 525, 10 S. E. 761.

86. *Arkansas.*— Springfield, etc., R. Co. *v.* Rhea, 44 Ark. 258.

Illinois.— Rock Island, etc., R. Co. *v.* Gordon, 184 Ill. 456, 56 N. E. 810; McReynolds *v.* Burlington, etc., R. Co., 106 Ill. 152; Louisville, etc., R. Co. *v.* Chalcraft, 14 Ill. App. 516.

Indiana.— Baltimore, etc., R. Co. *v.* Lansing, 52 Ind. 229.

Iowa.— Bell *v.* Chicago, etc., R. Co., 74 Iowa 343, 37 N. W. 768.

Kentucky.— Louisville, etc., R. Co. *v.* Barrett, 91 Ky. 487, 16 S. W. 278, 13 Ky. L. Rep. 57.

Maine.— Mason *v.* Kennebec, etc., R. Co., 31 Me. 215.

Massachusetts.— Tucker *v.* Massachusetts Cent. R. Co., 118 Mass. 546.

Minnesota.— Schmidt *v.* Minneapolis, etc., R. Co., 38 Minn. 491, 38 N. W. 487.

Missouri.— St. Joseph, etc., R. Co. *v.* Shambaugh, 106 Mo. 557, 17 S. W. 581; Chicago, etc., R. Co. *v.* Baker, 102 Mo. 553, 15 S. W. 64; Autenrieth *v.* St. Louis, etc., R. Co., 36 Mo. App. 254.

New Hampshire.— *In re* Mt. Washington Road Co., 35 N. H. 134.

New Jersey.— Doughty *v.* Somerville, etc., R. Co., 22 N. J. L. 495.

New York.— *In re* Utica, etc., R. Co., 56 Barb. 456.

Pennsylvania.— Watson *v.* Pittsburgh, etc., R. Co., 37 Pa. St. 469.

Texas.— Texas, etc., R. Co. *v.* Durrett, 57 Tex. 48. See also International, etc., R. Co. *v.* Pape, 62 Tex. 313 (holding that damages which result from the increased difficulty of communication between the parts of a tract of land severed by the bed of a railroad are such as are construed to have been included in the assessment of damages in proceedings condemning the land for the use of the road); Gainesville, etc., R. Co. *v.* Waples, 3 Tex. App. Civ. Cas. § 409.

England.— Where a railroad so passes through a farm as to separate the farm buildings from the arable land, so that the buildings cannot be conveniently used, this constitutes an injury to the farm buildings within the meaning of section 68 of the English Lands Clauses Act. *Re* Oxford, etc., R. Co., 27 Beav. 571, 6 Jur. N. S. 478, 29 L. J. Ch. 245, 1 L. T. Rep. N. S. 153.

In condemning a railroad right of way over a farm, evidence as to the inconvenience of crossing the track from one part of the farm to another is competent for the jury's consideration in determining the depreciation in value of the residue. St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144; Fremont, etc., R. Co. *v.* Bates, 40 Nebr. 381, 58 N. W. 950; Omaha Southern R. Co. *v.* Todd, 39 Nebr. 818, 58 N. W. 289. And they may take into consideration not only the value of the land actually taken, but the fact that the land is cut in an inconvenient shape for farming purposes, and that there will be inconvenience in crossing the track. Chicago, etc., R. Co. *v.* Greiney, 137 Ill. 628, 25 N. E. 798; Montmorency Gravel Road Co. *v.* Stockton, 43 Ind. 328; White Water Valley R. Co. *v.* McClure, 29 Ind. 536. It is a matter proper to be considered that the track will lie in a four-foot cut. Cummins *v.* Des Moines, etc., R. Co., 63 Iowa 397, 19 N. W. 268. The fact that the railroad separates the wood, water, and timber from the balance of the farm, and the inconvenience from the perpetual use of the track for moving trains may also be considered. Chicago, etc., R. Co. *v.* Hopkins, 90 Ill. 316. And the necessary labor and delay in opening and shutting gates, putting up and letting down bars, rendered necessary by the construction of the railroad through the farm, may be taken into consideration. Minnesota Valley R. Co. *v.* Doran, 17 Minn. 188. See also Hatch *v.* Cincinnati, etc., R. Co., 18 Ohio St. 92.

Canals.— Where a person claimed damages of the state because a canal was cut through

the separation of the owner's land from convenient and necessary facilities,[87]

his land, separating that part of it on which his dwelling-house stood from the rest and causing a part of the land to be overflowed, the state may prove to lessen the damages how much it would cost to bridge the canal and what would be the expense of draining off the water. State *v.* Beachmo, 6 Blackf. (Ind.) 488.

Crossings.— In estimating the market value of land before and after it is appropriated for railroad purposes, the jury may consider the owner's right to a passageway across the track. Bell *v.* Chicago, etc., R. Co., 74 Iowa 343, 37 N. W. 768. They may allow the actual damages incident to taking the road, arising from inconvenience in crossing, and from interference with crossings already established, and also arising from the failure or neglect of the company to construct the crossings as required by law, but not for making the crossings themselves. East Pennsylvania R. Co. *v.* Hiester, 40 Pa. St. 53. See also Lough *v.* Minneapolis, etc., R. Co., 116 Iowa 31, 89 N. W. 77. In Kansas, however, it has been held that it is proper to consider the probable expense of constructing and maintaining farm crossings. Kansas City, etc., R. Co. *v.* Baird, 41 Kan. 69, 21 Pac. 227. Where a large machine shop and a foundry were erected on land which was cut in two by a railroad, but plaintiff did not request the company to construct a crossing, it was held that neither the cost of making the crossing nor damages to plaintiff occasioned by its want could be considered. Robinson *v.* Pittsburgh, etc., R. Co., 27 Pittsb. Leg. J. (Pa.) 137. And in Arkansas, it is held that it is only where the construction of the railroad is completed before the trial that the absence of proper crossings is an element of damage. Springfield, etc., R. Co. *v.* Rhea, 44 Ark. 258. Where, as under the general railroad act of New York, the owner is entitled to farm crossings wherever they are needed, his damages are less than if the privilege of crossings were denied him. Rochester, etc., R. Co. *v.* Myers, 17 N. Y. Suppl. 311. If the jury finds that a certain crossing is necessary, they should assess damages on the theory of its perpetual maintenance. St. Paul, etc., R. Co. *v.* Murphy, 19 Minn. 500. Where the statute requires the railroad company to provide and keep in repair a suitable passage across its road, the jury cannot include the expense of constructing a bridge. Philadelphia, etc., R. Co. *v.* Trimble, 4 Whart. (Pa.) 47. In Massachusetts, where the statutes conferred upon railroad companies no right to inclose land taken for their road with high fences, so as to prevent the passage of the landowner to and from the different portions of his estate, it was held that the landowner cannot present such anticipated obstruction as a ground of compensation. Boston, etc., R. Corp. *v.* Old Colony R. Corp., 12 Cush. (Mass.) 605. And in New York the inconvenience of grade crossings is ordinarily not a proper item of damages. Beardsley *v.* Lehigh Valley R. Co., 65 Hun (N. Y.) 502, 20 N. Y. Suppl. 458. It is held in Bell *v.* Chicago, etc., R. Co., 74 Iowa 343, 37 N. W. 768, that where a track on plaintiff's land was carried over trestlework which was not fenced in, under which plaintiff was accustomed to cross the road, but had acquired no right to do so, he was not entitled to damages for being deprived of it; but if the company closed it up they must provide another crossing. An owner cannot recover for constructing cattle-guards, since they are an obstruction of the free use by the railroad of its right of way, and therefore cannot be constructed without the permission of the company. St. Louis, etc., R. Co. *v.* Mollet, 59 Ill. 235. Where the right of way of a railroad divides a tract of land, the owner has no right to make crossings unless the necessities of the farm may require it. Chicago, etc., R. Co. *v.* Cosper, 42 Kan. 561, 22 Pac. 634. Where a tract of land is intersected by a railroad, the owner is entitled to one adequate crossing to be furnished at his request at a place designated; but the damages should be fixed without regard to whether the crossing will be a surface or an under crossing, and it should be assumed that the crossing will be provided as requested. Lough *v.* Minneapolis, etc., R. Co., 116 Iowa 31, 89 N. W. 77. Where the value of a piece of land cut off from the rest of a farm is less than the cost of constructing a farm crossing, the court may in its discretion authorize the payment of the value of the land, instead of requiring the construction of the crossing. Martin *v.* Maine Cent. R. Co., 19 Quebec Super. Ct. 561.

87. *Massachusetts.*— New York, etc., R. Co. *v.* Blacker, 178 Mass. 386, 59 N. E. 1020.

Minnesota.— Brakken *v.* Minneapolis, etc., R. Co., 31 Minn. 45, 16 N. W. 459.

Missouri.— Chicago, etc., R. Co. *v.* McGrew, 104 Mo. 282, 15 S. W. 931; Autenrieth *v.* St. Louis, etc., R. Co., 36 Mo. App. 254, where the only outlet from plaintiff's farm to a public road was cut off, and where it was held to be no answer to a claim for damages that the best possible crossing was made for the owner, in view of the topographical and physical surroundings.

Nebraska.— Sioux City, etc., R. Co. *v.* Weimer, 16 Nebr. 272, 20 N. W. 349.

New Jersey.— Readington Tp. *v.* Dilley, 24 N. J. L. 209.

New York.— Rumsey *v.* New York, etc., R. Co., 133 N. Y. 79, 30 N. E. 654, 44 N. Y. St. 248, 28 Am. St. Rep. 600, 15 L. R. A. 618 (holding that where a railroad was laid across a riparian owner's water front, evidence offered to prove the additional expense of shipping bricks to market on the river was proper); Coatsworth *v.* Lehigh Valley R. Co., 24 N. Y. App. Div. 273, 48 N. Y. Suppl. 511; *In re* Utica, etc., R. Co., 56 Barb. 456.

Ohio.— Cleveland, etc., R. Co. *v.* Ball, 5 Ohio St. 568, holding, however, that where

unless it appears that such separation does not violate any legal right of the landowner.[88]

(III) *EXPENSES INCURRED.* The right of one whose land is taken under the power of eminent domain to recover as a part of his damages for necessary expense occasioned thereby is considered to some extent in other connections.[89] As a general rule it is proper to take into consideration as bearing on the diminution in the market value of the land not taken, or in some states as a distinct item of damage, the expense necessarily incurred by reason of the improvement,[90]

compensation was claimed for the building of a railroad between a navigable river and coal-mines, whereby the river transportation was injured or cut off, the railroad company might show in reduction of damages that the river transportation was lessened in value by the facilities furnished by the railroad.

Pennsylvania.— Pennsylvania, etc., Canal Co. *v.* Bunnell, 2 Wkly. Notes Cas. 633. But it seems that a landowner may not recover for the inconvenience and delay caused by having to convey his manufactured articles across the railroad, nor for that arising from the obstruction by trains passing along it. Patten *v.* Northern Cent. R. Co., 33 Pa. St. 426, 75 Am. Dec. 612.

Virginia.— Richmond, etc., R. Co. *v.* Chamblin, 100 Va. 401, 41 S. E. 750.

88. Union Elevator Co. *v.* Kansas City Suburban Belt R. Co., 135 Mo. 353, 36 S. W. 1071; Bergen Neck R. Co. *v.* Point Breeze Ferry, etc., Co., 57 N. J. L. 163, 30 Atl. 584, (1895) 31 Atl. 724; Ranlet *v.* Concord R. Corp., 62 N. H. 561; Gorgas *v.* Philadelphia, etc., R. Co., 144 Pa. St. 1, 22 Atl. 715; Philadelphia, etc., R. Co. *v.* Reading, etc., R. Co., 2 Pa. Dist. 857; Philadelphia, etc., R. Co. *v.* Rochester, etc., R. Co., 12 Pa. Co. Ct. 513.

89. **Expenses:** Incurred by lessee see *infra*, X, E, 19, a, (IV). Of crossings, etc., see *supra*, X, E, 9, a, (I), (II); X, E, 19, d, (II). Of removing property see *supra*, X, E, 19, d, (I); *infra*, X, E, 19, n, (I), (C). Where railroad right of way is taken for other use see *supra*, X, E, 9, a.

Temporary expense see *supra*, X, E, 5.

90. *California.*— San Bernardino, etc., R. Co. *v.* Haven, 94 Cal. 489, 29 Pac. 875, increased cost of irrigating.

Colorado.— Colorado, etc., R. Co. *v.* Brown, 15 Colo. 193, 25 Pac. 87, cost of making certain changes in a flume.

Illinois.— Chicago, etc., R. Co. *v.* Wolf, 137 Ill. 360, 27 N. E. 78 (holding that if, by the construction and operation of a railroad over the property of a coal mining company situated near another railway, the switches and side-tracks of such company must be taken up and relaid, in whole or in part, and its tram-way remodeled or rebuilt, and its scales taken up and removed to another place, are proper to be considered); St. Louis, etc., R. Co. *v.* Mollet, 59 Ill. 235 (holding that the cost of ditching the adjacent land is a proper element of damage, but that the cost of cattle-guards is not).

Kansas.—Kansas City, etc., R. Co. *v.* Baird, 41 Kan. 69, 21 Pac. 227; Atchison, etc., R. Co. *v.* Gough, 29 Kan. 67, both holding that where the railroad company is not required by statute to go to the expense of constructing and maintaining farm crossings, the jury are justified in taking into account the probable expense of constructing and maintaining them. See *supra*, note 86.

Massachusetts.— New York, etc., R. Co. *v.* Blackstone, 184 Mass. 491, 69 N. E. 315 (cost of removing fixtures); Butchers' Slaughtering, etc., Assoc. *v.* Com., 163 Mass. 386, 40 N. E. 176 (holding that if land is to be condemned for a public sewer, the reasonable cost of any necessary and reasonable adaptation of the land to the new conditions caused by the sewer may be shown); Hartshorn *v.* Worcester County, 113 Mass. 111 (holding that in the assessment of damage caused by the laying out of a highway at a grade below the level of the petitioner's adjoining house and land, the cost of cutting down the land and of building a basement under the house, with a door, and an interior ascent in the house, is an admissible element). But see Blood *v.* Nashua, etc., R. Corp., 2 Gray 137, 61 Am. Dec. 444, holding that a railroad corporation, building a bridge across a stream, is not liable for the damage suffered by the owner's being impeded and put to increased expense in getting logs up the stream to his mill.

Michigan.— Detroit *v.* Beecher, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813, holding, however, that in the absence of an ordinance requiring streets to be fenced, a property-owner through whose land one is opened is not charged with such a duty; and, in the absence of evidence showing the necessity for such fencing, the condemnation jury is not warranted in allowing the expense of such fencing as an item of damages; and holding further that the landowner is not entitled to an allowance for the expense of clearing snow from sidewalks along the proposed street, or because of a claim that the cost of grading and paving such street may be assessed upon his adjoining property.

Missouri.— Chicago, etc., R. Co. *v.* McGrew, 104 Mo. 282, 15 S. W. 931, holding that where a railroad was constructed across land on which the owner had a coal-mine, the connection of the mine with a railroad other than plaintiffs was a valuable property right, and if necessary changes and readjustment of engine, shaft, and other appliances rendered it necessary to change the railroad connection the reasonable expense of the same should be allowed in estimating damages.

Pennsylvania.— Baird *v.* Schuylkill River East Side R. Co., 154 Pa. St. 459, 25 Atl.

including expense incurred in preserving the property,[91] and the expense of fencing.[92] But the cost of fencing may be considered only where there is no obli-

833. But see Wallace *v.* Jefferson Gas Co., 147 Pa. St. 205, 23 Atl. 416 (holding that where land was underlaid with coal at a depth of one hundred and forty-three feet, and a gas-pipe sixteen inches in diameter was laid across it three feet below the surface, the increased cost of mining the coal on account of the manner in which the pipe was laid could not be considered); *In re* Barbadoes St., 8 Phila. 498 (holding that it was error for a jury appointed to assess damages occasioned by widening a street to increase the assessment of damages by including in it the estimated costs of the curbing and paving rendered necessary by such opening and widening, although the charter of the city required the landowners to do the curbing and paving).

Texas.— Galveston, etc., R. Co. *v.* Waples, 3 Tex. App. Civ. Cas. § 409. But it was held that a landowner was not entitled to recover the cost of drains and ditches along a railroad, in the absence of any claim of actual pecuniary loss thereby, or that he had constructed such drains, or done any work on them, or paid for them. International, etc., R. Co. *v.* Pape, 62 Tex. 313.

See 18 Cent. Dig. tit. "Eminent Domain," § 273.

Railroad crossings.—A railroad corporation, across and twenty feet above whose road another railroad is laid out, cannot recover damages for the expense of maintaining a flagman, at the crossing of a highway, alleged to be necessary to guard against the greater liability to accidents occasioned by the obstruction of the view along its railroad, by means of the abutments of the new railroad of the other corporation. Massachusetts Cent. R. Co. *v.* Boston, etc., R. Co., 121 Mass. 124. So in a proceeding under the Ohio statute by a railroad company to appropriate a strip of land across the track of another company to be used in common by each as a railroad crossing at a common grade, it was held that the owner of such track had no right to recover as consequential damages the additional expense rendered necessary in operating its road caused by complying with the provisions of the statute. The Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604. See further as to crossings, *supra*, note 86.

91. Thompson *v.* Milwaukee, etc., R. Co., 27 Wis. 93.

Cost of retaining wall.— It has been held that the owner cannot recover for the cost of erecting or maintaining a retaining wall along an excavation made by the party taking a part of his land. *In re* Furman Street, 17 Wend. (N. Y.) 649; Laflin *v.* Chicago, etc., R. Co., 33 Fed. 415. *Contra*, Manson *v.* Boston, 163 Mass. 479, 40 N. E. 850; Thompson *v.* Milwaukee, etc., R. Co., 27 Wis. 93.

92. *Arkansas.*— Newgass *v.* St. Louis, etc., R. Co., 54 Ark. 140, 15 S. W. 188; Texas, etc., R. Co. *v.* Cella, 42 Ark. 528. If there is no evidence that in order to use the land as it will probably be used in the future any additional fences are necessary it is proper to charge the jury that the owner is entitled to nothing for fences. Newgass *v.* St. Louis, etc., R. Co., *supra*.

California.— Butte County *v.* Boydston, 64 Cal. 110, 29 Pac. 511 (holding that the fact that a statute relieves every person from an obligation to fence his land does not preclude the cost of fencing from being considered where it is necessary; and that the fact that a statute requires the cost of fencing to be assessed where land is taken for a railroad right of way does not preclude its being considered in other cases); Sacramento Valley R. Co. *v.* Moffatt, 6 Cal. 74. However, the cost of fencing is not necessarily an element of damage (California Southern R. Co. *v.* Southern Pac. R. Co., 67 Cal. 59, 7 Pac. 123), and a statute authorizing the cost of fencing to be considered does not include the cost of maintaining the fence (Los Angeles, etc., R. Co. *v.* Rumpp, 104 Cal. 20, 37 Pac. 859).

Illinois.— Under the Illinois railroad act of 1855 providing that the cost of erecting and maintaining a fence is a proper element of damage, if the company itself erected the fence the owner was entitled only to such sum as would cover the cost of keeping it in repair. St. Louis, etc., R. Co. *v.* Mitchell, 47 Ill. 165.

Indiana.— Fifer *v.* Ritter, 159 Ind. 8, 64 N. E. 463 (holding, however, that an instruction that if the additional fences added to the value of the farm as much as it was worth to build them, the property-owner was entitled to nothing on their account, was proper); Baltimore, etc., R. Co. *v.* Lansing, 52 Ind. 229; Montmorency Gravel Road Co. *v.* Stockton, 43 Ind. 328; White Water Valley R. Co. *v.* McClure, 29 Ind. 536; Evansville, etc., Straight Line R. Co. *v.* Cochran, 10 Ind. 560; Evansville, etc., Straight Line R. Co. *v.* Stringer, 10 Ind. 551; Evansville, etc., Straight Line R. Co. *v.* Fitzpatrick, 10 Ind. 120.

Kentucky.— Barrall *v.* Quick, 111 Ky. 22, 63 S. W. 33, 23 Ky. L. Rep. 421; Louisville, etc., R. Co. *v.* Barrett, 91 Ky. 487, 16 S. W. 278, 13 Ky. L. Rep. 57 [*overruling* Louisville, etc., R. Co. *v.* Glazebrook, 1 Bush 325].

Louisiana.— Street *v.* New Orleans, etc., R. Co., 43 La. Ann. 116, 9 So. 15.

Massachusetts.— Stone *v.* Heath, 135 Mass. 561; Massachusetts Cent. R. Co. *v.* Boston, etc., R. Co., 121 Mass. 124.

Minnesota.— Winona, etc., R. Co. *v.* Denman, 10 Minn. 267.

New Hampshire.— *In re* Mt. Washington Road Co., 35 N. H. 134.

New Jersey.— Readington Tp. *v.* Dilley, 24 N. J. L. 209; New York, etc., R. Co. *v.* Stanley, 35 N. J. Eq. 283.

North Carolina.— Raleigh, etc., Air Line R. Co. *v.* Wicker, 74 N. C. 220, holding that

gation, statutory or otherwise, on the part of the corporation to construct the necessary fences along its right of way.[92]

(IV) *INJURIES TO LESSEES.* The question whether, when a leasehold is taken, the lessee can recover for interruption of or interference with a business

the owner is entitled to the expenses of additional fencing of cultivated lands, made necessary by reason of the construction of the road; but as he is not required by law to fence uncleared or uncultivated land, the expense of fencing such, should it at any future time be cleared or cultivated, is too remote and uncertain to be estimated.

Oregon.— Putnam *v.* Douglas County, 6 Oreg. 328, 25 Am. Rep. 527.

Pennsylvania.— In this state the cost of fencing may be considered for the purpose of determining how much the burden of fencing will detract from the value of the land, but it cannot be recovered as a distinct item of damages. Curtin *v.* Nittany Valley R. Co., 135 Pa. St. 20, 19 Atl. 740; Pittsburgh, etc., R. Co. *v.* Vance, 115 Pa. St. 325, 8 Atl. 764; Pittsburgh, etc., R. Co. *v.* McCloskey, 110 Pa. St. 436, 1 Atl. 555; Delaware, etc., R. Co. *v.* Burson, 61 Pa. St. 369; Watson *v.* Pittsburgh, etc., R. Co., 37 Pa. St. 469; Montour R. Co. *v.* Scott, 11 Wkly. Notes Cas. 51; Pennsylvania, etc., Canal, etc., Co. *v.* Bunnell, 2 Wkly. Notes Cas. 633; Griffin *v.* Pennsylvania Schuylkill Valley R. Co., 2 Del. Co. 425; Robinson *v.* South Chester, 3 Del. Co. 176.

South Carolina.— Eddings *v.* Seabrook, 12 Rich. 504; Greenville, etc., R. Co. *v.* Partlow, 5 Rich. 428. The cost of fencing along a railroad through uninclosed land used for grazing is not to be considered, however. North Eastern R. Co. *v.* Sineath, 8 Rich. 185.

South Dakota.— Schuler *v.* Lincoln Tp., 12 S. D. 460, 81 N. W. 890.

Texas.— Anderson *v.* Wharton County, 27 Tex. Civ. App. 115, 65 S. W. 643. *Compare* Texas Midland R. Co. *v.* Southwestern Tel., etc., Co., (Civ. App. 1900) 57 S. W. 312.

Vermont.— Dalrymple *v.* Whitingham, 26 Vt. 345.

Virginia.— Norfolk, etc., R. Co. *v.* Stephens, 85 Va. 302, 7 S. E. 251.

Washington.— Seattle, etc., R. Co. *v.* Murphine, 4 Wash. 448, 30 Pac. 720, holding that where fencing is made necessary by reason of the appropriation of lands for a right of way, no specific sum should be allowed for fences or crossings as distinct items of damage, but the allowance should be made only to the extent of the depreciation of the market value of the land.

Wisconsin.—Milwaukee, etc., R. Co. *v.* Eble, 3 Pinn. 334, 4 Chandl. 68.

See 18 Cent. Dig. tit. "Eminent Domain," § 274 *et seq.*

Contra.— Kennedy *v.* Dubuque, etc., R. Co., 2 Iowa 521; Henry *v.* Dubuque, etc., R. Co., 2 Iowa 288; St. Louis, etc., R. Co. *v.* Knapp, etc., Co., 160 Mo. 396, 61 S. W. 300. And see Alabama, etc., R. Co. *v.* Burkett, 46 Ala. 569.

Expense of fencing: Where highway is opened see *supra*, X, E, 12. Where railroad is located see *supra*, X, E, 10.

93. *California.*— California Southern R. Co. *v.* Southern Pac. R. Co., 67 Cal. 59, 7 Pac. 123.

Illinois.— See Jones *v.* Chicago, etc., R. Co., 68 Ill. 380.

Kentucky.— Louisville, etc., R. Co. *v.* Barrett, 91 Ky. 487, 16 S. W. 278, 13 Ky. L. Rep. 57 [*overruling* Louisville, etc., R. Co. *v.* Glazebrook, 1 Bush 325].

Minnesota.— Winona, etc., R. Co. *v.* Waldron, 11 Minn. 515, 88 Am. Dec. 100. See Minnesota Valley R. Co. *v.* Doran, 17 Minn. 188, holding that it is proper for the jury to consider as an element of damages for running a railroad through a farm whether a fence which the company is required by law to construct on each side of its line does not create a further obstruction to the free use of the farm; that is, whether the fence and road do not damage the farm more than the road alone would do.

Missouri.— St. Joseph, etc., R. Co. *v.* Shambaugh, 106 Mo. 557, 17 S. W. 581; Chicago, etc., R. Co. *v.* Baker, 102 Mo. 553, 15 S. W. 64; Sedalia, etc., R. Co. *v.* Abell, 18 Mo. App. 632.

New York.— See Matter of Rensselaer, etc., R. Co., 4 Paige 553, where it was held that equity will compel a railroad company and an adjoining landowner to contribute equally toward the erection and maintenance of partition fences; and therefore that in estimating the damages which the landowner would sustain by the running of the roads through his lands he should be allowed for the expense of making and maintaining only one half of the necessary partition fences.

Wisconsin.—Milwaukee, etc., R. Co. *v.* Eble, 3 Pinn. 334, 4 Chandl. 68.

See 18 Cent. Dig. tit. "Eminent Domain," § 275.

Statutes imposing penalty merely.— This rule does not apply where the statute does not impose upon a railroad company the duty of constructing fences, but merely imposes, in case of its failure to do so, the penalty of paying for stock killed or injured on its right of way. Such a statute is no ground for disallowing the expense of fencing as an element of damages to the owner. Baltimore, etc., R. Co. *v.* Lansing, 52 Ind. 229; Curtin *v.* Nittany Valley R. Co., 135 Pa. St. 20, 19 Atl. 740.

Under Va. Acts (1883–1884), c. 524, § 6, providing that, where a railroad runs through an inclosed farm, and the company has paid the owner damages for making fences on each side and for keeping them in repair, the act imposing a penalty upon the company for failure to build and keep such fences in repair shall not apply, the company does not have the option of fencing the road-bed or

conducted by him on the premises is an unsettled one, and the decisions are not harmonious.[94]

e. Interest.[95] According to the weight of authority, the owner of land condemned is entitled to interest, to be allowed from the time of the taking,[96] and the

suffering the penalty, and an assessment of damages which includes the cost of fencing is proper. Norfolk, etc., R. Co. *v.* Stephens, 85 Va. 302, 7 S. E. 251.

94. In Georgia where the lessee has abandoned the premises because the improvement has made them valueless to him, he may show that the business conducted by him on the premises was profitable, but he cannot recover the profits of the business, nor the cost of fixtures or improvements, nor of articles purchased for the business, nor the diminution in the value of such fixtures, improvements, or articles as are removed from the premises, although the increased value of the premises for rent by reason of such fixtures and improvements may be considered. Pause *v.* Atlanta, 98 Ga. 92, 26 S. E. 489, 58 Am. St. Rep. 290.

In Illinois a diversion of customers from a saloon is not an element of damages for which the lessee can recover. Hohmann *v.* Chicago, 140 Ill. 226, 29 N. E. 671. In proceedings to condemn a leasehold interest in premises used as a factory, the lessees are not entitled to the cost of taking down and putting up a sprinkling apparatus in the premises, nor for injury to it, although it is a permanent attachment to the building, and cannot be taken down and put up elsewhere to any advantage. Nor are they entitled to be allowed the salary of employees, engaged at a yearly salary, during the time required to remove the stock and machinery from such premises to a new location, where such employees are mostly buyers and sellers engaged elsewhere than at the factory; especially if the lessees are allowed for the interruption to their business. Metropolitan West Side El. R. Co. *v.* Siegel, 161 Ill. 638, 44 N. E. 276.

In Massachusetts, under a statute which provides that a lessee of the land condemned shall be allowed three months in which to remove, a lessee is not entitled to damages on account of a depreciation in his fixtures because of the removal, since the same depreciation would occur by removing at the expiration of the lease. Emery *v.* Boston Terminal Co., 178 Mass. 172, 59 N. E. 763, 86 Am. St. Rep. 473. In an early case it is held that, where part of a building leased as a store is taken by the city for the purpose of widening a street, the lessee may recover for the injury caused by being deprived of the use of the store for the time necessary to remove his goods and make repairs, and move back again (Patterson *v.* Boston, 20 Pick. 159); also that the lessee was entitled to be compensated for the loss of earnings for the few days occupied in removing, and a reasonable sum for the rent of another store for so long a time as would reasonably have been required for erecting a new front wall to the store (Patterson *v.* Boston, 23 Pick. 425). It is proper to admit evidence of the value of the lessee's plants, flowers, and potted soil, and the extent of his business, for the purpose of showing the capacity of the real estate for use, the jury being unable to view the property in its condition at the time of the taking, because of the removal of the greenhouses and the filling up of the land; but no damages can be allowed for the good-will, nor for injury to the business, plants, or flowers. Pegler *v.* Hyde Park, 176 Mass. 101, 57 N. E. 327.

In New York the compensation to be paid to the lessee is the value of the unexpired term, less the rent reserved, and he is not entitled to compensation for removing his personal property, nor for the resulting interruption of his business. Matter of New York, etc., Bridge, 4 N. Y. Suppl. 222.

In Pennsylvania the lessee is entitled to compensation for the time necessarily required in removing, and the expense of such removal, and for other losses directly resulting from the company's acts. Pennsylvania R. Co. *v.* Eby, 107 Pa. St. 166. And it seems the value of the leasehold is not *prima facie* the rental value of the term, if it appears that, although the rent was a fair one so far as concerned the landlord, yet as the lessee had established his business on the lands, had his hot-beds prepared, his stock on the ground, and was carrying on his trade when interrupted by the railroad company, his lease was worth to him what he could make out of the ground after paying the rent. Taylor *v.* Baltimore, etc., R. Co., 3 Del. Co. 545.

95. Interest on award see *infra*, XI, N, 10.

96. *Georgia.*— Selma, etc., R. Co. *v.* Redwine, 51 Ga. 470.

Iowa.— Hayes *v.* Chicago, etc., R. Co., 64 Iowa 753, 19 N. W. 245.

Kansas.— Cohen *v.* St. Louis, etc., R. Co., 34 Kan. 158, 8 Pac. 138, 35 Am. Rep. 242; Missouri River, etc., R. Co. *v.* Owen, 8 Kan. 409.

Louisiana.— Lawrence *v.* Second Municipality, 2 La. Ann. 651. *Compare* Shreveport, etc., R. Co. *v.* Hollingsworth, 42 La. Ann. 749, 7 So. 693, holding that interest is allowable on the amount assessed as the value of the land, from judicial demand, when the company has taken possession and has not paid prior thereto, but on the damages only from judicial liquidation.

Maine.— Bangor, etc., R. Co. *v.* McComb, 60 Me. 290.

Massachusetts.— Hay *v.* Com., 183 Mass. 294, 67 N. E. 334; Imbescheid *v.* Old Colony R. Co., 171 Mass. 209, 50 N. E. 609; Sawyer *v.* Boston, 144 Mass. 470, 11 N. E. 711; Frazer *v.* Bigelow Carpet Co., 141 Mass. 126, 4 N. E. 620; Sherwin *v.* Wigglesworth, 129 Mass. 64; Drury *v.* Midland R. Co., 127 Mass. 571; Chandler *v.* Jamaica Pond Aqueduct

fact that there has been a delay for many years in bringing a petition for damages seasonably filed to a hearing is immaterial, as it is in the power of either party to

Corp., 125 Mass. 544; Old Colony R. Co. *v.* Miller, 125 Mass. 1, 28 Am. Rep. 194; Hampden Paint, etc., Co. *v.* Springfield, etc., R. Co., 124 Mass. 118; First Baptist Soc. *v.* Fall River, 119 Mass. 95; Kidder *v.* Oxford, 116 Mass. 165; Edmands *v.* Boston, 108 Mass. 585; Reed *v.* Hanover Branch R. Co., 105 Mass. 303; Whitman *v.* Boston, etc., R. Co., 7 Allen 313; Parks *v.* Boston, 15 Pick. 198.

Missouri.— Webster *v.* Kansas City, etc., R. Co., 116 Mo. 114, 22 S. W. 474.

New York.— See Moore *v.* New York El. R. Co., 126 N. Y. 671, 27 N. E. 791, holding that while the jury may award interest on damages for property by eminent domain the power is discretionary and they are not bound to do so.

North Carolina.— Miller *v.* Asheville, 112 N. C. 759, 16 S. E. 762.

Ohio.— Longworth *v.* Cincinnati, 48 Ohio St. 637, 29 N. E. 274.

Pennsylvania.— Weiss *v.* South Bethlehem Borough, 136 Pa. St. 294, 20 Atl. 801; Delaware, etc., R. Co. *v.* Burson, 61 Pa. St. 369; Philadelphia, etc., R. Co. *v.* Gesner, 20 Pa. St. 240. And see Klages *v.* Philadelphia, etc., Terminal Co., 160 Pa. St. 386, 28 Atl. 862; Richards *v.* Citizens' Natural Gas Co., 130 Pa. St. 37, 18 Atl. 600; Shevalier *v.* Postal Tel. Co., 22 Pa. Super. Ct. 506; Hewitt *v.* Pittsburg, etc., R. Co., 19 Pa. Super. Ct. 304; Pennsylvania Schuylkill Valley R. Co. *v.* Ziemer, 23 Wkly. Notes Cas. 42, which are to the effect that in this state interest as such is not allowable on damages in condemnation proceedings, but that the jury may properly consider the lapse of time between the taking of the land and the time of trial in making up the amount of damages for which to render the verdict; and that the reasonable "compensation" for delay or "detention in payment" may be added to the damages, in no case to exceed legal interest. There is no substantial conflict in these two lines of cases as they reach approximately the same result by a different method.

Tennessee.— Alloway *v.* Nashville, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123.

Texas.— Missouri, etc., R. Co. *v.* O'Connor, (Civ. App. 1899) 51 S. W. 511.

Vermont.— Bridgeman *v.* Hardwick, 67 Vt. 653, 32 Atl. 502.

Wisconsin.— Sweaney *v.* U. S., 62 Wis. 396, 22 N. W. 609.

England.— Rhys *v.* Dare Valley R. Co., L. R. 19 Eq. 93, 23 Wkly. Rep. 23; Cooper *v.* Metropolitan Bd. of Works, 25 Ch. D. 472, 53 L. J. Ch. 109, 50 L. T. Rep. N. S. 602, 32 Wkly. Rep. 709; Blount *v.* Great Southern, etc., R. Co., 2 Ir. Ch. 40; *In re* Navan, etc., R. Co., Ir. R. 10 Eq. 113.

See 18 Cent. Dig. tit. "Eminent Domain," 397 *et seq.*

The date of the taking is to be established by evidence, and calls for an adjudication. Hayes *v.* Chicago, etc., R. Co., 64 Iowa 753, 19 N. W. 245.

What is a taking within the rule.— The decisions on this question are not harmonious. In cases of condemnation for railroad purposes, some decisions hold that the location of the road constitutes the taking and that interest or damages in the nature of interest are to be computed from that date. Old Colony R. Co. *v.* Miller, 125 Mass. 1, 28 Am. Rep. 194; Hagner *v.* Pennsylvania Schuylkill Valley R. Co., 154 Pa. St. 475, 25 Atl. 1082; Williamsport, etc., R. Co. *v.* Philadelphia, etc., R. Co., 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220; Pittsburgh, etc., R. Co. *v.* Com., 101 Pa. St. 192; Myers *v.* Schuylkill River East Side R. Co., 5 Pa. Co. Ct. 643; Getz *v.* Philadelphia, etc., R. Co., 15 Wkly. Notes Cas. (Pa.) 357. Others hold that the location is not a taking and that interest is allowable only after there has been an actual taking of possession. Selma, etc., R. Co. *v.* Redwine, 51 Ga. 470; South Park Com'rs *v.* Dunlevy, 91 Ill. 49. Yet others hold that the filing of the award of the commissioners is a constructive entering and taking and that interest should be allowed from the date of the filing thereof to the time of entering judgment, unless it appears that such interest was included in the verdict for second assessment, and that in the absence of anything in the record to the contrary it must be presumed that the verdict had reference to the damages which the claimant was entitled to receive at the time the award appealed from was filed and that no interest was included. Minneapolis *v.* Wilkin, 30 Minn. 145, 15 N. W. 668; Whitacre *v.* St. Paul, etc., R. Co., 24 Minn. 311; Knauft *v.* St. Paul, etc., R. Co., 22 Minn. 173; Warren *v.* First Div. St. Paul, etc., R. Co., 21 Minn. 424. And see Metler *v.* Easton, etc., R. Co., 37 N. J. L. 222. With respect to lands completely submerged and their use destroyed by a government dam, the time of the submergence and not the date of an appraisement by commissioners is the time of the actual taking and interest runs from that date. Velte *v.* U. S., 76 Wis. 278, 45 N. W. 119. With respect to highways, where the statute gives to persons claiming damages no right to demand them until the land is entered upon and possession taken for the purpose of constructing the way, interest does not run from the date of the location but only after the land is entered upon for the purpose of such construction (Pegler *v.* Hyde Park, 176 Mass. 101, 57 N. E. 327; Edmands *v.* Boston, 108 Mass. 535), but where commissioners of parks decide what land shall be acquired and the same, already by a statute under which the commissioners are acting, are declared to be a public park, the appropriation takes place as of that date (Matter of New York, 40 N. Y. App. Div. 281, 58 N. Y. Suppl. 58). In regard to the taking of water-rights, it has been held in one state that on an application under the statute, the landowner is not entitled to interest on the damages from the time when the in-

bring it to trial.[97] Where, however, by constitutional and statutory provisions, the party who seeks to condemn is not entitled to possession until the damages have been assessed and actually paid, it has been held that the owner of the property condemned is not entitled to interest on the sum assessed as damages for the taking,[98] nor should interest be allowed where the taking of possession pending condemnation proceedings was prevented by injunction until after verdict,[99] nor where the delay in payment of damages is due to the unreasonable demands of the owner.[1] So it has been held that if the owner continues to have the beneficial use after the taking, an allowance must be made for the value of such use,[2] and if such use is equal in value to the interest, interest should not be allowed.[3]

f. Loss of Privacy. In estimating the damages to easements caused by the construction and operation of an elevated railway or other public work, the court should submit to the consideration of the jury, as an element of damage, the resulting loss of privacy.[4]

g. Obstruction of Light, Air, Access, Etc. The owner of land abutting on a street is entitled to damages for a permanent diminution in the value of his property, caused by loss or obstruction of light, air, and access, resulting directly from a structure in the street and its use there,[5] although he does not own the fee of

terest commenced, since there is no taking in the sense of a constitutional guarantee until the commencement of condemnation proceedings. New Milford Water Co. *v.* Watson, 75 Conn. 237, 52 Atl. 947, 53 Atl. 57.

Where the proceedings are against two railroad companies, one of which was the original taker of the land and the other the present owner under a foreclosure, interest should be assessed against each from the date of its possession. Adams *v.* St. Johnsbury, etc., R. Co., 57 Vt. 240, 660.

One who purchases land subsequent to its occupancy by the condemning party is not entitled to interest accruing prior to his purchase. Pick *v.* Rubicon Hydraulic Co., 27 Wis. 433.

Interest on deposit in court.— A railroad company is required to deposit money in court before it can take possession of land in a condemnation proceeding, as security that compensation will be paid when ascertained in a subsequent proceeding. The landowner, if he does not withdraw it, is entitled to whatever interest it earns while so deposited, and if not loaned while so deposited the railroad company is not chargeable with interest thereon. St. Louis, etc., R. Co. *v.* Fowler, 142 Mo. 670, 44 S. W. 771. See also Chicago, etc., R. Co. *v.* Eubanks, 130 Mo. 270, 32 S. W. 658; St. Louis, etc., R. Co. *v.* Clark, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751.

Necessity of demand in complaint.— It has been held that if interest on the damages is not demanded in the complaint, interest will not be allowed from the time of the injury. Morris *v.* Coleman County, (Tex. Civ. App. 1896) 35 S. W. 29; Cunningham *v.* San Saba County, 11 Tex. Civ. App. 557, 32 S. W. 928, 33 S. W. 892.

97. Drury *v.* Midland R. Co., 127 Mass. 571. To the same effect see Philadelphia, etc., R. Co. *v.* Gesner, 20 Pa. St. 240.

98. Bauman *v.* Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. ed. 270; Shoemaker *v.* U. S., 147 U. S. 282, 321, 13 S. Ct. 361, 37 L. ed. 170, in which it was said: "It is true that, by the institution of proceedings to condemn, the possession and enjoyment by the owner are to some extent interfered with. He can put no permanent improvements on the land, nor sell it, except subject to the condemnation proceedings. But the owner was in receipt of rents, issues, and profits during the time occupied in fixing the amount to which he was entitled, and the inconveniences to which he was subjected by the delay are presumed to be considered and allowed for in fixing the amount of the compensation." See also South Park Com'rs *v.* Dunlevy, 91 Ill. 49.

99. Cincinnati *v.* English, 6 Ohio Dec. (Reprint) 972, 9 Am. L. Rec. 310.

1. Philadelphia Ball Club *v.* Philadelphia, 192 Pa. St. 632, 44 Atl. 265, 73 Am. St. Rep. 835, 46 L. R. A. 724.

2. Fink *v.* Newark, 40 N. J. L. 11; Matter of New York, 40 N. Y. App. Div. 281, 58 N. Y. Suppl. 58.

3. Matter of New York, 40 N. Y. App. Div. 281, 58 N. Y. Suppl. 58; Matter of Public Parks, 53 Hun (N. Y.) 280, 6 N. Y. Suppl. 750.

4. Moore *v.* New York El. R. Co., 130 N. Y. 523, 29 N. E. 997, 14 L. R. A. 731 [*reversing* 15 Daly 506, 8 N. Y. Suppl. 329, 18 N. Y. Civ. Proc. 146, 24 Abb. N. Cas. 77]; Shano *v.* Fifth Ave., etc., Bridge Co., 189 Pa. St. 245, 42 Atl. 128, 69 Am. St. Rep. 808. See, however, Patten *v.* Northern Cent. R. Co., 33 Pa. St. 426, 75 Am. Dec. 612, holding that in estimating the damages sustained by the construction of a railroad, the fact that the owner is deprived of the advantage of keeping off others from his neighborhood, and thus saving himself from the risk and annoyance of their proximity, is not to be considered; the court remarking that such a claim is essentially anti-social in its principle.

5. *Arkansas.*— Little Rock, etc., R. Co. *v.* Allen, 41 Ark. 431.

Colorado.— Pueblo *v.* Strait, 20 Colo. 13,

the street,[6] for the right to air is private property which cannot be taken without

36 Pac. 789, 46 Am. St. Rep. 273, 24 L. R. A. 392.

Connecticut.— Bradley *v.* New York, etc., R. Co., 21 Conn. 294.

Illinois.— Galesburg, etc., R. Co. *v.* Milroy, 181 Ill. 243, 54 N. E. 939; Chicago, etc., R. Co. *v.* Berg, 10 Ill. App. 607.

Kansas.— Central Branch Union Pac. R. Co. *v.* Andrews, 41 Kan. 370, 21 Pac. 276; Central Branch Union Pac. R. Co. *v.* Twine, 23 Kan. 585, 33 Am. Rep. 203.

Kentucky.— Jeffersonville, etc., R. Co. *v.* Esterle, 13 Bush 667; Louisville, etc., R. Co. *v.* Finley, 7 Ky. L. Rep. 129.

Missouri.— St. Louis, etc., R. Co. *v.* Clark, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751, holding that the fact that, by the condemnation by one railroad company of a strip of land, another railroad company empowered by the city to run spurs for private use is cut off from access to an adjoining wharf, is to be considered in assessing damages to the owner of such wharf.

New York.— Sloane *v.* New York El. R. Co., 137 N. Y. 595, 33 N. E. 335; Bookman *v.* New York El. R. Co., 137 N. Y. 302, 33 N. E. 333; Drucker *v.* Manhattan R. Co., 106 N. Y. 157, 12 N. E. 568, 60 Am. St. Rep. 437 [*affirming* 51 N. Y. Super. Ct. 429]; Story *v.* New York El. R. Co., 90 N. Y. 122, 43 Am. Rep. 146 [*reversing* 3 Abb. N. Cas. 478]; Egerer *v.* New York Cent., etc., R. Co., 70 N. Y. App. Div. 421, 75 N. Y. Suppl. 476; Stacey *v.* Metropolitan El. R. Co., 15 N. Y. App. Div. 534, 44 N. Y. Suppl. 534; Matter of Seaside, etc., R. Co., 83 Hun 143, 31 N. Y. Suppl. 630; Peyser *v.* Metropolitan El. R. Co., 13 Daly 122; Mattlage *v.* New York El. R. Co., 11 N. Y. Suppl. 482. See also Welde *v.* New York, etc., R. Co., 29 Misc. 13, 60 N. Y. Suppl. 319 [*affirmed* in 53 N. Y. App. Div. 637, 66 N. Y. Suppl. 1147], holding a railroad company liable to abutting owners for blockading the street during the construction of the work.

Ohio.— Hatch *v.* Cincinnati, etc., R. Co., 18 Ohio St. 92.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Vance, 115 Pa. St. 325, 8 Atl. 764; *In re* Chatham St., 16 Pa. Super. Ct. 103.

South Carolina.— South Bound R. Co. *v.* Burton, 67 S. C. 515, 46 S. E. 340.

Texas.— See Ft. Worth, etc., R. Co. *v.* Garvin, (Civ. App. 1894) 29 S. W. 794.

Vermont.— Wead *v.* St. Johnsbury, etc., R. Co., 64 Vt. 52, 24 Atl. 361.

Virginia.—Richmond, etc., R. Co. *v.* Chamblin, 100 Va. 401, 41 S. E. 750, holding that where land not taken is occupied by a foundry, the fact that the movement of freight to and from the foundry will be rendered more difficult and expensive may be taken into consideration.

West Virginia.— See Fox *v.* Baltimore, etc., R. Co., 34 W. Va. 466, 12 S. E. 757.

Canada.— McQuade *v.* Rex, 7 Can. Exch. 318.

See 18 Cent. Dig. tit. "Eminent Domain," § 282 *et seq.*

Contra.— Nottingham *v.* Baltimore, etc., R. Co., 3 MacArthur (D. C.) 517, holding that although a railroad, which is constructed according to law upon the established grade of a street, renders abutting lots inaccessible and useless for business or residence, this gives no right of action to the abutting owner; and this too notwithstanding the land was further damaged by the neglect of the railroad company to provide means for carrying off water. See also Selden *v.* Jacksonville, 28 Fla. 558, 10 So. 457, 29 Am. St. Rep. 278, 14 L. R. A. 370.

The rule is especially applicable where the owner or his grantor has paid an assessment for the improvement of the street in front of his premises. Stevens *v.* New York El. R. Co., 57 N. Y. Super. Ct. 416, 8 N. Y. Suppl. 313.

Discontinuance of street.— The owner of abutting property cannot recover for obstruction of light and air, where that portion of the street upon which his lot abuts has been discontinued by proper authority. Egerer *v.* New York Cent., etc., R. Co., 2 N. Y. Suppl. 69.

Abandonment of easements.— The fact that an abutting owner whose premises front a street occupied by an elevated railroad erects an awning from his building to the railroad structure does not constitute an abandonment of the easement of light and air, especially if the structure interferes with the light and air to the stories above the awning. Mattlage *v.* New York El. R. Co., 11 N. Y. Suppl. 482.

Rule applies to obstruction caused by grading or changing grade. Dana *v.* Rock Creek R. Co., 7 App. Cas. (D. C.) 482; Macon *v.* Wing, 113 Ga. 90, 38 S. E. 392; Chicago *v.* Lonergan, 196 Ill. 518, 63 N. E. 1018; Hulett *v.* Missouri, etc., R. Co., 80 Mo. App. 87.

What matters proper for consideration.— Where defendant's railroad ran along the eastern line of plaintiff's land, crossing at right angles two other railroads, which cut plaintiff's land in two, it was held that the jury should take into consideration not only the condition of the two existing railroads, as affecting ingress and egress, but the conditions which would exist when all three roads were constructed and in operation. Union R. Transfer, etc., Co. *v.* Moore, 80 Ind. 458.

Question for jury.— Where there was not enough space for two vehicles to pass between the railroad track and a gutter next to the sidewalk, the question whether ingress and egress to the abutting lot were unreasonably obstructed was properly submitted to the jury. Chesapeake, etc., R. Co. *v.* Moats, 50 S. W. 31, 20 Ky. L. Rep. 1757.

6. Little Rock, etc., R. Co. *v.* Shelton, 45 Ark. 446; Hot Springs R. Co. *v.* Williamson, 45 Ark. 429; Lamm *v.* Chicago, etc., R. Co., 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268; Adams *v.* Chicago, etc., R. Co., 39 Minn. 286, 39 N. W. 629, 12 Am. St. Rep. 644, 1 L. R. A. 493; Duyckinck *v.* New York El. R. Co., 125 N. Y. 710, 26 N. E. 755; Kane *v.* New York

compensation,[7] and the same is true of the right to light,[8] and of access to the owner's premises,[9] and to a river or tide water.[10] He is also entitled to compensation for an obstruction of his view,[11] and for being deprived of the use of the front of his building for the placing of signs.[12] The easements of light, air, and access extend to the full width of the street in front of the lot,[13] but are appurtenant only to the buildings or apartments fronting on the street,[14] and on that part

El. R. Co., 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640 [*affirming* 15 Daly 294, 6 N. Y. Suppl. 526]; Abendroth *v.* Manhattan R. Co., 122 N. Y. 1, 25 N. E. 496, 19 Am. St. Rep. 461, 11 L. R. A. 634 [*affirming* 54 N. Y. Super. Ct. 417]; Story *v.* New York El. R. Co., 90 N. Y. 122 [*reversing* 3 Abb. N. Cas. 478]; Egerer *v.* New York Cent., etc., R. Co., 70 N. Y. App. Div. 421, 75 N. Y. Suppl. 476.

7. Sperb *v.* Metropolitan El. R. Co., 61 Hun (N. Y.) 539, 16 N. Y. Suppl. 392; *In re* New York El. R. Co., 36 Hun (N. Y.) 427; Lewis *v.* New York, etc., R. Co., 25 Misc. (N. Y.) 13, 54 N. Y. Suppl. 434; Carter *v.* New York El. R. Co., 14 N. Y. St. 859; State *v.* King County Super. Ct., 30 Wash. 219, 70 Pac. 484.

8. Rorke *v.* Kings County El. R. Co., 22 N. Y. App. Div. 511, 48 N. Y. Suppl. 42; Sperb *v.* Metropolitan El. R. Co., 61 Hun (N. Y.) 539, 16 N. Y. Suppl. 392; *In re* New York El. R. Co., 36 Hun (N. Y.) 427; Lafean *v.* York County, 20 Pa. Super. Ct. 573; Lewis *v.* New York, etc., R. Co., 25 Misc. (N. Y.) 13, 54 N. Y. Suppl. 434; Stanley *v.* New York El. R. Co., 17 N. Y. Suppl. 931; State *v.* King County Super. Ct., 30 Wash. 219, 70 Pac. 484.

Extra consumption of gas.— Where an allowance has been made for injury to the rental value of the property, it is improper to allow further damages for extra consumption of gas caused by the obstruction of light, especially where the allowance as to the rental value was based principally on the loss of light. Mattlage *v.* New York El. R. Co., 17 N. Y. Suppl. 536.

Advantage of artificial light.— The facts that the building is used for the display of cut glass, and that artificial light is better than natural light for that purpose, cannot be considered in determining the injury to the rental value. Scott *v.* Manhattan R. Co., 60 N. Y. Super. Ct. 233, 17 N. Y. Suppl. 364.

9. *Alabama.*— Hooper *v.* Savannah, etc., R. Co., 69 Ala. 529.

Arkansas.— Little Rock, etc., R. Co. *v.* Allen, 41 Ark. 431.

Georgia.— Macon *v.* Wing, 113 Ga. 90, 38 S. E. 392.

Illinois.— Chicago *v.* Lonergan, 196 Ill. 518, 63 N. E. 1018.

Kentucky.— Henderson Belt R. Co. *v.* Dechamp, 95 Ky. 219, 24 S. W. 605, 16 Ky. L. Rep. 82; Jeffersonville, etc., R. Co. *v.* Esterle, 13 Bush 667; Elizabethtown, etc., R. Co. *v.* Catlettsburg Water Co., 61 S. W. 47, 22 Ky. L. Rep. 1632; Maysville, etc., R. Co. *v.* Ingram, 30 S. W. 8, 16 Ky. L. Rep. 853; Maysville, etc., R. Co. *v.* Connor, 29 S. W. 344, 16 Ky. L. Rep. 635.

Massachusetts.— Parker *v.* Boston, etc., R. Co., 3 Cush. 107, 50 Am. Dec. 709.

Pennsylvania.— Lafean *v.* York County, 20 Pa. Super. Ct. 573.

England.— Wedmore *v.* Bristol, 7 L. T. Rep. N. S. 459.

See 18 Cent. Dig. tit. "Eminent Domain," § 284.

10. Drury *v.* Midland R. Co., 127 Mass. 571; Rumsey *v.* New York, etc., R. Co., 133 N. Y. 79, 30 N. E. 654, 28 Am. St. Rep. 600, 15 L. R. A. 618 [*reversing* 15 N. Y. Suppl. 509]; Rumsey *v.* New York, etc., R. Co., 63 Hun (N. Y.) 200, 17 N. Y. Suppl. 672; Clark *v.* Peckham, 10 R. I. 35, 14 Am. Rep. 654. *Contra*, Tomlin *v.* Dubuque, etc., R. Co., 32 Iowa 106, 7 Am. Rep. 176 (holding that the owner of land lying along a navigable stream cannot recover for deprivation of access to the stream by reason of the construction of a railroad along the bank between high and low water mark); Scranton *v.* Wheeler, 113 Mich. 565, 71 N. W. 1091, 67 Am. St. Rep. 484 [*affirmed* in 179 U. S. 141, 21 S. Ct. 48, 45 L. ed. 126] (holding that a pier erected by the United States on land submerged under navigable water, the title to which is in the riparian proprietor, will not entitle such owner to compensation, if done merely for the improvement of navigation, although it permanently destroys his access to the navigable waters); Getty *v.* Hudson River R. Co., 21 Barb. (N. Y.) 617 (where the obstruction was built by authority of the state, and on lands belonging to the state); Gould *v.* Hudson River R. Co., 12 Barb. (N. Y.) 616.

Obstruction of access to ferry see *supra*, p. 695, note 79.

11. Shepard *v.* Metropolitan El. R. Co., 48 N. Y. App. Div. 452, 62 N. Y. Suppl. 977. But see *In re* New York El. R. Co., 36 Hun (N. Y.) 427, holding that it was error to allow compensation for the damages arising from the unsightly character of the structure.

12. Hine *v.* New York El. R. Co., 54 Hun (N. Y.) 425, 7 N. Y. Suppl. 464; Mortimer *v.* New York El. R. Co., 57 N. Y. Super. Ct. 244, 6 N. Y. Suppl. 898.

13. Lamm *v.* Chicago, etc., R. Co., 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268; Adams *v.* Chicago, etc., R. Co., 39 Minn. 286, 39 N. W. 629, 12 Am. St. Rep. 644, 1 L. R. A. 493.

14. Keene *v.* Metropolitan El. R. Co., 79 Hun (N. Y.) 451, 29 N. Y. Suppl. 971; Mooney *v.* New York El. R. Co., 16 Daly (N. Y.) 145, 9 N. Y. Suppl. 522, holding that damages are not recoverable for a rear building, wholly unconnected with the main building, and having its entrance on, and receiving its light and air from another street.

of the street which is occupied for the railroad or other public use;[15] but the right of recovery is not limited to the injury caused by that portion of the structure which is directly in front of the property.[16] The right to compensation is not affected by the fact that the obstruction is occasional only and not continuous,[17] that it is the necessary concomitant of the construction and operation of the railroad and not the consequence of negligence,[18] that the proposed location of the tracks would be as little injurious as in any other part of the highway,[19] that the structure is a necessary street improvement,[20] that the structure does not encroach upon the premises[21] and is skilfully built,[22] that the owner's deed to the lot contained no covenant that the street should remain open forever,[23] or that the lot is a vacant one.[24] But in order to warrant a recovery as for obstruction of access, there must be a real and substantial obstruction resulting from the structures erected by the corporation from which damages are claimed.[25] The rule of damages, where it is sought to condemn the easements of light, air, and access appur-

Connection with adjoining property.— Where it is claimed that an elevated railroad obstructs the easements of light, air, and access appurtenant to premises fronting on the street, if the rear of the premises adjoins other premises owned by plaintiffs, the advantages from such connection with the adjoining property are not to be taken into consideration, especially where no allowance is made to the owner for indirect damage to such adjoining property by obstruction of the easements to the property directly in question. Fitzpatrick *v.* New York El. R. Co., 17 N. Y. Suppl. 943; Kane *v.* Manhattan R. Co., 17 N. Y. Suppl. 109. Property abutting on two streets see also *supra*, p. 731, note 53.

15. Lamm *v.* Chicago, etc., R. Co., 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268; Rummel *v.* New York, etc., R. Co., 9 N. Y. Suppl. 404. But *compare* McQuade *v.* Rex, 7 Can. Exch. 318, holding that the owner of premises is entitled to compensation for depreciation in their value occasioned by the closing of a highway on which they front by the construction of a public work, although the closing is at a point two hundred and fifty feet distant from the premises, and no part of the premises is taken.

16. Kearney *v.* Metropolitan El. R. Co., 59 N. Y. Super. Ct. 563, 13 N. Y. Suppl. 608 (holding that where plaintiff's light was cut off by shadows cast by defendant's station, which was not in front of plaintiff's premises, but on the street some twenty-five feet distant, plaintiff was nevertheless entitled to compensation); Galway *v.* Metropolitan El. R. Co., 13 N. Y. Suppl. 47 (holding that where an elevated railway company constructed its road in front of plaintiff's lot, and erected a station on the street, nearly twenty-five feet of which was directly in front of plaintiff's property, the remainder extending beyond it along the street, the abutting owner was entitled to compensation not only for the obstruction of light and air by that part of the structure which was in front of his land, but also for that caused by the extended portion).

17. Hayes *v.* Chicago, etc., R. Co., 46 Minn. 349, 49 N. W. 61.

18. Drucker *v.* Manhattan R. Co., 106 N. Y. 157, 12 N. E. 568, 60 Am. Rep. 437 [*affirming* 51 N. Y. Super. Ct. 429].

19. Cincinnati, etc., St. R. Co. *v.* Cumminsville, 14 Ohio St. 523.

20. Pueblo *v.* Strait, 20 Colo. 13, 36 Pac. 789, 46 Am. St. Rep. 273, 24 L. R. A. 392, a case of a viaduct.

21. Little Rock, etc., R. Co. *v.* Shelton, 45 Ark. 446; Hot Springs R. Co. *v.* Williamson, 45 Ark. 429; Leavenworth, etc., R. Co. *v.* Curtan, 51 Kan. 432, 33 Pac. 297.

22. Little Rock, etc., R. Co. *v.* Shelton, 45 Ark. 446; Hot Springs R. Co. *v.* Williamson, 45 Ark. 429.

23. Peyser *v.* Metropolitan El. R. Co., 12 Daly (N. Y.) 70.

24. Chesapeake, etc., R. Co. *v.* Rice, 50 S. W. 541, 20 Ky. L. Rep. 1930.

25. See Chicago, etc., R. Co. *v.* Union Invest. Co., 51 Kan. 600, 33 Pac. 378 [*followed* in Ottawa, etc., R. Co. *v* Peterson, 51 Kan. 604, 33 Pac. 606], holding that where a railroad company, laying its road in a street under state or municipal authority, leaves sufficient space between its road and the abutting lots for ordinary travel, there is no such obstruction of access as to warrant compensation for any depreciation in the value of the abutting lots.

Illustrations.—The proper construction and operation of an electric railway on a street where there are two other such railways, and so near a store building on the street as to inconvenience the occupants in receiving and delivering goods, is nevertheless not such an infringement of the right of access as to entitle the owner to compensation based on the depreciation of the value of the property (San Antonio Rapid Transit St. R. Co. *v.* Limburger, 88 Tex. 79, 30 S. W. 533, 53 Am. St. Rep. 730); nor is it an unlawful infringement of an abutting owner's easement to construct a double track street railway so close to the sidewalk as to prevent teams standing at right angles with the street between the curb and the car track (Sells *v.* Columbus St. R. Co., 11 Ohio Dec. (Reprint) 643, 23 Cinc. L. Bul. 172); nor will the mere failure of a railroad company properly to ballast its road-bed warrant a recovery for damages occasioned by the interference with ingress and egress, if sufficient space is left in the

tenant to abutting property, is the same as in proceedings by the owner for the invasion of his general property rights;[26] and a diminution in the value of the property may be shown by evidence of loss of rents resulting from the use to which the street is put.[27]

h. Productiveness and Rental Value. Where a tract of land is injured or partially taken in the exercise of the power of eminent domain, it is proper, in determining the damages, to consider its productiveness and the income which may be derived from it.[28] Accordingly, if the rental value of the land has been permanently decreased, it is a proper element of damage.[29]

street for ordinary vehicles and teams to pass in front of the property (Wichita, etc., R. Co. *v.* Smith, 45 Kan. 264, 25 Pac. 623). The fact that horses in front of plaintiff's property might be frightened by passing trains is not such an interference with access as to entitle the abutting owner to compensation. Jones *v.* Erie, etc., R. Co., 151 Pa. St. 30, 25 Atl. 134, 31 Am. St. Rep. 722, 17 L. R. A. 758.

26. Matter of Brooklyn El. R. Co., 6 N. Y. App. Div. 53, 39 N. Y. Suppl. 474; San Antonio Rapid Transit St. R. Co. *v.* Limburger, 88 Tex. 79, 30 S. W. 533, 53 Am. St. Rep. 730.

27. Autenrieth *v.* St. Louis, etc., R. Co., 36 Mo. App. 254; Mattlage *v.* New York El. R. Co., 17 N. Y. Suppl. 536.

28. Weyer *v.* Chicago, etc., R. Co., 68 Wis. 180, 31 N. W. 710.

29. *Illinois.*— Chicago *v.* Lonergan, 196 Ill. 518, 63 N. E. 1018.

Michigan.— Hoffman *v.* Flint, etc., R. Co., 114 Mich. 316, 72 N. W. 167, holding that the measure of yearly damages accruing to an abutting owner for the wrongful occupancy of the street by a railroad is the diminished rental.

Nebraska.— Chicago, etc., R. Co. *v.* Sturey, 55 Nebr. 137, 75 N. W. 557.

New York.— Roberts *v.* New York El. R. Co., 155 N. Y. 31, 49 N. E. 262; Malcolm *v.* New York El. R. Co., 147 N. Y. 308, 41 N. E. 790; Manhattan R. Co. *v.* O'Sullivan, 6 N. Y. App. Div. 571, 40 N. Y. Suppl. 326; McElroy *v.* Manhattan R. Co., 6 N. Y. App. Div. 367, 39 N. Y. Suppl. 497; Lazarus *v.* Metropolitan El. R. Co., 5 N. Y. App. Div. 398, 39 N. Y. Suppl. 294; Boetzkes *v.* Manhattan R. Co., 1 N. Y. App. Div. 526, 37 N. Y. Suppl. 461; Ryder *v.* Brooklyn El. R. Co., 89 Hun 29, 35 N. Y. Suppl. 42; Elias *v.* Manhattan R. Co., 85 Hun 383, 32 N. Y. Suppl. 1053; Alger *v.* New York El. R. Co., 60 N. Y. Super. Ct. 1, 15 N. Y. Suppl. 960; Benson *v.* Manhattan R. Co., 59 N. Y. Super. Ct. 578, 13 N. Y. Suppl. 957; Rich *v.* New York El. R. Co., 16 Daly 518, 14 N. Y. Suppl. 167; Johnson *v.* New York El. R. Co., 10 Misc. 136, 30 N. Y. Suppl. 920; Lindheim *v.* New York El. R. Co., 5 Misc. 585, 25 N. Y. Suppl. 85; Struthers *v.* New York El. R. Co., 5 Misc. 239, 25 N. Y. Suppl. 81; Knapp *v.* New York El. R. Co., 4 Misc. 408, 24 N. Y. Suppl. 324; Mooney *v.* New York El. R. Co., 3 Misc. 612, 22 N. Y. Suppl. 795; Kahn *v.* New York El. R. Co., 3 Misc. 611, 22 N. Y. Suppl. 793; Cook *v.* New York El. R. Co., 3 Misc. 248, 22 N. Y. Suppl. 790; Hoffman *v.* Manhattan El. R. Co., 1 Misc. 155, 20 N. Y. Suppl. 625; Brush *v.* Manhattan R. Co., 17 N. Y. Suppl. 540; Cunningham *v.* Manhattan R. Co., 13 N. Y. Suppl. 622; Korn *v.* New York El. R. Co., 13 N. Y. Suppl. 514.

United States.— Chicago *v.* Taylor, 125 U. S. 161, 8 S. Ct. 820, 31 L. ed. 638.

See 18 Cent. Dig. tit. "Eminent Domain," § 375.

However, the owner is not entitled to the depreciation in the rental value so long as he continues to occupy the premises for his business as before the interference with it. Seventh Ward Nat. Bank *v.* New York El. R. Co., 53 N. Y. Super. Ct. 412. So if the property has not been held for rental purposes, the difference in its rental value furnishes no criterion for estimating the damages. St. Louis, etc., R. Co. *v.* Haller, 82 Ill. 208. And if the owner recovers damages measured by the entire value of the property he is not entitled in addition to the amount of the rental value. Ireland *v.* Metropolitan El. R. Co., 52 N. Y. Super. Ct. 450.

The rental value for a particular appropriate purpose may be shown where access to a river is obstructed, although the premises have never been used for such purpose. Rumsey *v.* New York, etc., R. Co., 63 Hun (N. Y.) 200, 17 N. Y. Suppl. 672. But in an action against a railroad company by a riparian owner for damages to his uplands, caused by the construction of the railroad across plaintiff's water front, thereby cutting off access to the river, if it appears that the use of the uplands as a brick-yard was discontinued by plaintiff some years prior to the construction of the railroad, the damages cannot be based on the rental or usable value of the property as a brick-yard, but they are the diminished rental or usable value of the property in the condition in which it is in consequence of the loss of access to the river. Rumsey *v.* New York, etc., R. Co., 133 N. Y. 79, 30 N. E. 654, 28 Am. St. Rep. 600, 15 L. R. A. 618 [*reversing* 15 N. Y. Suppl. 509].

Temporary loss of rents is ground for recovery. St. Louis *v.* Brown, 155 Mo. 545, 56 S. W. 298.

Future value.— An owner of a lot injured by the construction of a sewer mouth on it is entitled to compensation for the injury to the rental value of the lot as it originally stood, but not its rental value after improvements are placed on it. Harris *v.* Philadelphia, 155 Pa. St. 76, 26 Atl. 874. However the jury may assume that the amount of rental paid at the time of the trial would continue in the future. Seattle, etc., R. Co. *v.* Roeder,

1. Risk of Injury to Person or Property. While it has been frequently laid down that the risk or possibility of future injury to person or to property by reason of the construction and operation of a contemplated improvement cannot be considered as a distinct element of damage,[80] there are also a number of cases

30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 880.

Value to other persons.— The measure of damages for temporary use of property by a railroad company cannot be confined to the rental value at market rates to any person other than the company, thus ignoring the purpose for which the land was used. Baltimore, etc., R. Co. *v.* Boyd, (Md. 1890) 20 Atl. 902.

Partial taking.— Where part of a store is taken for widening a street, the lessee of the store is entitled to compensation for loss of the rent of the whole store only for such time as was reasonably necessary for repairing it. Brooks *v.* Boston, 19 Pick. (Mass.) 174.

Capitalizing rent.—The owner of land which was leased at a small rent for the purposes of a public park, with a proviso that in case any part of it should be compulsorily taken he might reënter and repossess the land, is entitled upon its condemnation to its commercial value considered as free from the lease, and not merely at the capitalized value of the rental paid. *In re* Morgan, etc., R. Co., [1896] 2 Q. B. 469, 66 L. J. Q. B. 30, 75 L. T. Rep. N. S. 226, 45 Wkly. Rep. 176.

Corporation owner.— The rule of damages against an elevated railroad company which allows the loss of rental value is not applicable to the case of a corporation owner in occupancy of abutting premises, since a corporation cannot be subjected to personal inconvenience and discomfort; and in such case the recovery can only be for the additional expenses incurred. American Bank Note Co. *v.* New York El. R. Co., 59 N. Y. Super. Ct. 175, 13 N. Y. Suppl. 626 [*modified* in 129 N. Y. 252, 29 N. E. 302].

Taking for elevated railroad.—The measure of damages caused by the operation of an elevated railroad in close proximity to abutting premises is the difference between the actual fee value of the property and what it would be worth if there were no elevated railway, and the amount of the decrease in the rental value due to the operation of the road from a date six years prior to that of bringing the action. Bischoff *v.* New York El. R. Co., 138 N. Y. 257, 33 N. E. 1073; Douglas *v.* New York El. R. Co., 45 N. Y. App. Div. 596, 61 N. Y. Suppl. 411. See also the New York cases cited *supra*, this note.

Taking for highway.— Since a county acquires only an easement in the land condemned for a highway, the entire rental value of the land taken is not recoverable. Hagaman *v.* Moore, 84 Ind. 496.

Taking for pest-house.— In an action against a city for appropriating property for a pest-house, plaintiff is not entitled to the entire value of the property on the ground that no one would occupy it afterward, but the measure of damages is the fair rental value of the property for the purpose for which it was taken. Brown *v.* Pierce County, 28 Wash. 345, 68 Pac. 872.

Diminution of rental value: Where grade of highway is altered see *supra*, X, E, 9, b, (II). Where highway is taken for additional use see *supra*, X, E, 9, b, (I), (C).

Occupation or obstruction of street or highway as affecting rental value see *supra*, X, E, 9, b, (I), (C).

80. *Alabama.*— Alabama, etc., R. Co. *v.* Burkett, 46 Ala. 569, holding that, where the charter of a railroad company required the jury to take into consideration the possible advantages the owner might derive from the construction of the road in increasing the value of his land, this did not authorize the jury to consider the possible damage that might arise from the killing of stock.

Georgia.— Campbell *v.* Metropolitan St. R. Co., 82 Ga. 320, 9 S. E. 1078; Guess *v.* Stone Mountain Granite, etc., Co., 72 Ga. 320.

Illinois.— Chicago, etc., Electric R. Co. *v.* Mawman, 206 Ill. 182, 69 N. E. 66; Conness *v.* Indiana, etc., R. Co., 193 Ill. 464, 62 N. E. 221 (holding that in a proceeding to condemn a railroad right of way the jury should not take into account the danger to which defendant's stock or property might be exposed, if the statute compels the railroad company to fence its tracks, prescribes equipments for its engines to prevent the setting of fires, and creates remedies to adjacent landowners for injuries to stock and property); McReynolds *v.* Burlington, etc., R. Co., 106 Ill. 152.

Indiana.— Chicago, etc., R. Co. *v.* Mason, 26 Ind. App. 395, 59 N. E. 185.

Kansas.— St. Louis, etc., R. Co. *v.* Hammers, 51 Kan. 127, 32 Pac. 922; Florence, etc., R. Co. *v.* Pember, 45 Kan. 625, 26 Pac. 1; St. Louis, etc., R. Co. *v.* Hammers, (App. 1899) 57 Pac. 550; Southwestern Mineral R. Co. *v.* Harvey, 8 Kan. App. 489, 54 Pac. 806. *Contra*, St. Louis, etc., R. Co. *v.* McAuliff, 43 Kan. 185, 23 Pac. 102.

Massachusetts.— Presbey *v.* Old Colony, etc., R. Co., 103 Mass. 1; Boston, etc., R. Corp. *v.* Old Colony R. Corp., 12 Cush. 605.

Nebraska.— Chicago, etc., R. Co. *v.* Shafer, 49 Nebr. 25, 68 N. W. 342.

Pennsylvania.— Miller *v.* E. & W. V. R. Co., 2 C. Pl. 10.

See 18 Cent. Dig. tit. "Eminent Domain," § 294 *et seq.*

Compare Chicago, etc., R. Co. *v.* McGrew, 104 Mo. 282, 15 S. W. 931; Doughty *v.* Somerville, etc., R. Co., 22 N. J. L. 495; Pecksport Connecting R. Co. *v.* West, 45 N. Y. Suppl. 644.

The increased risk to an orchard on the premises, by reason of its being more free of access to persons traveling along the rail-

holding that these matters may be considered as bearing on the question of market value, and tending to show the necessary depreciation,[31] and if compensation for damage to business is to be allowed, the fact that access to the place of business has been made difficult or dangerous may be considered as showing how the business is affected.[32] A number of cases have arisen in reference to the increased risk of fire arising from the danger that it will be communicated by locomotives, and the weight of authority is that the jury may take this into consideration,[33]

road, and to tramps and employees of the company, is too remote to be considered. Kansas City, etc., R. Co. *v.* Kregelo, 32 Kan. 608, 5 Pac. 15; Miller *v.* E. & W. V. R. Co., 2 C. Pl. (Pa.) 10.

The extra care necessary in the use of teams liable to be frightened because of the proximity of the railroad should not be considered. Atchison, etc., R. Co. *v.* Lyon, 24 Kan. 745.

Possible leakage from gas-pipes.— Where land is appropriated for the laying of natural gas mains, damages cannot be allowed for possible injury from leakage or explosions and the like. Manufacturers' Natural Gas Co. *v.* Leslie, 22 Ind. App. 677, 51 N. E. 510; Indiana Natural Gas, etc., Co. *v.* Jones, 14 Ind. App. 55, 42 N. E. 487; McGregor *v.* Equitable Gas Co., 139 Pa. St. 230, 21 Atl. 13.

Water-pipes.— It has been held that where a large water main is laid through plaintiff's land, the danger of injury to the land from the leaking or breaking of the main is an element of damages, although injury caused by possible future negligence is not an element. Darlington *v.* Allegheny City, 28 Pittsb. Leg. J. N. S. 381.

If the statute does not require the railroad company to fence its road during the first six months after it is open for use, the danger of injury to stock attending the keeping open of the farm for that length of time may properly be taken into consideration. Centralia, etc., R. Co. *v.* Brake, 125 Ill. 393, 17 N. E. 820. See also Clark *v.* Vermont, etc., R. Co., 28 Vt. 103.

The increased danger of an overflow is an element of damage for the taking of a private levee. Russell *v.* St. Louis, etc., R. Co., 71 Ark. 451, 75 S. W. 725.

31. *Arkansas.*— Fayetteville, etc., R. Co. *v.* Combs, 51 Ark. 324, 11 S. W. 418; Little Rock, etc., R. Co. *v.* Allen, 41 Ark. 431.

Illinois.— Chicago, etc., R. Co. *v.* Greiney, 137 Ill. 628, 25 N. E. 798; Chicago, etc., R. Co. *v.* Aldrich, 134 Ill. 9, 24 N. E. 763; Chicago, etc., R. Co. *v.* Hopkins, 90 Ill. 316; Stone *v.* Fairbury, etc., R. Co., 68 Ill. 394, 18 Am. Rep. 556; St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144. *Contra*, Chicago, etc., R. Co. *v.* Blume, 137 Ill. 488, 27 N. E. 601.

Massachusetts.— Johnson *v.* Boston, 130 Mass. 452.

Minnesota.— Curtis *v.* St. Paul, etc., R. Co., 20 Minn. 28.

Nebraska.— Chicago, etc., R. Co. *v.* Shafer, 49 Nebr. 25, 68 N. W. 342; Fremont, etc., R. Co. *v.* Bates, 40 Nebr. 381, 58 N. W. 959; Omaha Southern R. Co. *v.* Todd, 39 Nebr. 818, 58 N. W. 289.

Pennsylvania.— Davis *v.* Jefferson Gas Co., 147 Pa. St. 130, 23 Atl. 218.

Wisconsin.— Wooster *v.* Sugar River Valley R. Co., 57 Wis. 311, 15 N. W. 401.

See 18 Cent. Dig. tit. "Eminent Domain," § 294 *et seq.*

Evidence.— Where it is apparent that the maintenance and operation of a railroad near buildings increases the risk, the jury may consider such risk, although no witness has directly testified that it will increase it. Johnson *v.* Chicago, etc., R. Co., 37 Minn. 519, 35 N. W. 438.

Probable defects and accidents.— While it is to be assumed that land appropriated for a reservoir will be used in a skilful and proper manner, yet reasonable apprehension of danger from inherent defects and unavoidable accidents may be considered. Alloway *v.* Nashville, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123.

Increased risk of operating railroad where right of way has been condemned for highway see *supra*, X, E, 9, a, (I), (C).

32. Pittsburgh, etc., R. Co. *v.* Vance, 115 Pa. St. 325, 8 Atl. 764; Western Pennsylvania R. Co. *v.* Hill, 56 Pa. St. 460.

Damage must appear.— In estimating damages done to property used as a ferry by reason of the near proximity of railroad tracks, the increased inconvenience and danger to the public in reaching the ferry cannot be considered, unless it appears that the public are for this reason largely deterred from using it. Missouri Pac. R. Co. *v.* Porter, 112 Mo. 361, 20 S. W. 568.

33. *Arkansas.*— Texas, etc., R. Co. *v.* Cella, 42 Ark. 528; Little Rock, etc., R. Co. *v.* Allen, 41 Ark. 431.

Illinois.— Chicago, etc., R. Co. *v.* Greiney, 137 Ill. 628, 25 N. E. 798; Chicago, etc., R. Co. *v.* Aldrich, 134 Ill. 9, 24 N. E. 763; Centralia, etc., R. Co. *v.* Brake, 125 Ill. 393, 17 N. E. 820; Jones *v.* Chicago, etc., R. Co., 68 Ill. 380; St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144. *Compare* Conness *v.* Indiana, etc., R. Co., 193 Ill. 464, 62 N. E. 221.

Indiana.— Swinney *v.* Ft. Wayne, etc., R. Co., 59 Ind. 205.

Kansas.— St. Louis, etc., R. Co. *v.* McAuliff, 43 Kan. 185, 23 Pac. 102; Kansas City, etc., R. Co. *v.* Kregelo, 32 Kan. 608, 5 Pac. 15.

Maine.— Bangor, etc., R. Co. *v.* McComb, 60 Me. 290.

Minnesota.— Lehmicke *v.* St. Paul, etc., R. Co., 19 Minn. 464; Colvill *v.* St. Paul, etc., R. Co., 19 Minn. 283.

Nebraska.— Chicago, etc., R. Co. *v.* O'Connor, 42 Nebr. 90, 60 N. W. 326.

but only as it affects the market value of the land.[34] It is not the purpose to provide an indemnity against loss by fire,[35] nor to compensate the owner for any supposed increase in the rate of insurance which he will have to pay;[36] and there are authorities to the effect that, where buildings or property will be exposed to imminent risk of fire, the owner is entitled only to the amount which it will cost to remove them to a safe place.[37]

j. Smoke, Ashes, Foul Odors, Noise, Vibration, Etc.[38] In some jurisdictions the courts refuse to allow the owner of property abutting on a street on which a railroad is constructed, or otherwise situated near the line of road, or near any other public improvement, any compensation for the annoyance, injury, or depre-

New Hampshire.— Adden *v.* White Mountains New Hampshire R. Co., 55 N. H. 413, 20 Am. Rep. 220.

New Jersey.— Somerville, etc., R. Co. *v.* Doughty, 22 N. J. L. 495.

New York.— *In re* Utica, etc., R. Co., 56 Barb. 456. *Contra,* Matter of Brooklyn El. R. Co., 6 N. Y. App. Div. 53, 39 N. Y. Suppl. 474.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Vance, 115 Pa. St. 325, 8 Atl. 764; Wilmington, etc., R. Co. *v.* Stauffer, 60 Pa. St 374, 100 Am. Dec. 574; Philadelphia, etc., R. Co. *v.* Yeiser, 8 Pa. St. 366; Pennsylvania, etc., Canal R. Co. *v.* Roberts, 2 Walk. 482; Philadelphia, etc., R. Co. *v.* Rogers, 2 Walk. 275. But see Lehigh Valley R. Co. *v.* Lazarus, 28 Pa. St. 203; Sunbury, etc., R. Co. *v.* Hummell, 27 Pa. St. 99.

West Virginia.— Kay *v.* Glade Creek, etc., R. Co., 47 W. Va. 467, 35 S. E. 973.

Wisconsin.— Wooster *v.* Sugar River Valley R. Co., 57 Wis. 311, 15 N. W. 401.

United States.— Laflin *v.* Chicago, etc., R. Co., 33 Fed. 415. But see High Bridge Lumber Co. *v.* U. S., 69 Fed. 320, 16 C. C. A. 460, holding that where proceedings to condemn land for a lock and dam on a navigable river are taken by the United States in a state which has no statute relating to the condemnation of land for such purposes, anticipated increase of danger to the property of the owner from fire during the construction cannot be taken into account.

England.— *Re* Stockport, etc., R. Co., 10 Jur. N. S. 614, 33 L. J. Q. B. 251, 10 L. T. Rep. N. S. 426, 12 Wkly. Rep. 762.

See 18 Cent. Dig. tit. "Eminent Domain," § 298.

Compare Lance *v.* Chicago, etc., R. Co., 57 Iowa 636, 11 N. W. 612; Seattle, etc., R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738.

The danger must be real, imminent, and reasonably to be apprehended, and not remote or merely possible. Conness *v.* Indiana, etc., R. Co., 193 Ill. 464, 62 N. E. 221; Kay *v.* Glade Creek, etc., R. Co., 47 W. Va. 467, 36 S. E. 973.

Danger need not be averred.— An instruction that the jury may consider the danger of fire is proper, although such danger is not averred in the complaint, since danger from fire is a well known element of damage, and one of the necessary results from the act of appropriation. Chicago, etc., R. Co. *v.* Patterson, 26 Ind. App. 295, 59 N. E. 688.

Fire resulting from negligence see *supra,* X, E, 19, b.

34. *Alabama.*— Mobile, etc., R. Co. *v.* Hester, 122 Ala. 249, 25 So. 220.

Arkansas.— North Arkansas, etc., R. Co. *v.* Cole, 71 Ark. 38, 70 S. W. 312.

Illinois.— Rock Island, etc., R. Co. *v.* Gordon, 184 Ill. 456, 56 N. E. 810; Centralia, etc., R. Co. *v.* Brake, 125 Ill. 393, 17 N. E. 820; St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144.

Kansas.— Kansas City, etc., R. Co. *v.* Kregelo, 32 Kan. 608, 5 Pac. 15.

Minnesota.— Curtis *v.* St. Paul, etc., R. Co., 20 Minn. 28.

Nebraska.— Fremont, etc., R. Co. *v.* Bates, 40 Nebr. 381, 58 N. W. 959; Omaha Southern R. Co. *v.* Todd, 39 Nebr. 818, 58 N. W. 289.

Pennsylvania.—Hamilton *v.* Pittsburg, etc., R. Co., 190 Pa. St. 51, 42 Atl. 369, 51 L. R. A. 319; Pennsylvania, etc., Canal R. Co. *v.* Roberts, 2 Walk. 482.

West Virginia.— Kay *v.* Glade Creek, etc., R. Co., 47 W. Va. 467, 36 S. E. 973.

See 18 Cent. Dig. tit. "Eminent Domain," § 298.

Injury to business because of possible fires. — The commissioners should not add to the value of the land an amount for consequential damages, based upon the possibility, or even probability, that the particular business of the owner might be injured, and his property decreased in value in consequence of danger to be apprehended from fire communicated from the engines. *In re* Union Village, etc., R. Co., 53 Barb. (N. Y.) 457, 35 How. Pr. (N. Y.) 420.

Evidence is competent, as bearing on the question of the effect of the railroad on the market value of the property, which tends to show that the exposure to fire of a barn one hundred and twenty-five feet from the railroad is not enough to increase the rate of insurance. North Arkansas, etc., R. Co. *v.* Cole, 71 Ark. 38, 70 S. W. 312.

35. Pittsburg, etc., R. Co. *v.* McCloskey, 110 Pa. St. 436, 1 Atl. 555.

36. Patten *v.* Northern Cent. R. Co., 33 Pa. St. 426, 75 Am. Dec. 612; Philadelphia, etc., R. Co. *v.* Rogers, 2 Walk. (Pa.) 275. *Compare* Indiana, etc., R. Co. *v.* Stauber, 185 Ill. 9, 56 N. E. 1079.

37. Oregon, etc., R. Co. *v.* Barlow, 3 Oreg. 311; Hamilton *v.* Pittsburg, etc., R. Co., 190 Pa. St. 51, 42 Atl. 369, 51 L. R. A. 319.

38. **Injury from improper operation of railroad** see *supra,* X, E, 19, b.

ciation in value caused by the smoke, soot, ashes, cinders, dust, gases, odors, noise, vibration, or jarring necessarily incident to the proper operation of the railroad or other work,[39] but in the greater number of jurisdictions the courts do allow compensation for the injury resulting from all these causes, or at least consider such injury in estimating the depreciation in value of the property.[40] In

39. *Georgia.*— Austin *v.* Augusta Terminal R. Co., 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755.

Kansas.— Atchison, etc., R. Co. *v.* Garside, 10 Kan. 552. But see Omaha, etc., R. Co. *v.* Doney, 3 Kan. App. 515, 43 Pac. 831, holding that, although these matters cannot be taken into account as a basis for awarding damages, the jury may consider them in determining the depreciation in value.

Louisiana.— New Orleans, etc., R. Co. *v.* Barton, 43 La. Ann. 171, 9 So. 19.

Maine.— Bangor, etc., R. Co. *v.* McComb, 60 Me. 290.

England.— Reg. *v.* Metropolitan Bd. of Works, L. R. 4 Q. B. 358, 10 B. & S. 391, 38 L. J. Q. B. 201, 17 Wkly. Rep. 1094; Glasgow Union R. Co. *v.* Hunter, L. R. 2 H. L. Sc. 78.

See 18 Cent. Dig. tit. "Eminent Domain," § 278 *et seq.*

40. *Arkansas.*— Little Rock, etc., R. Co. *v.* Allen, 41 Ark. 431.

California.— Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604, holding that even a temporary escape of sewer gas may occasion substantial injury.

Illinois.— Calumet, etc., Canal, etc., Co. *v.* Morawetz, 195 Ill. 398, 63 N. E. 165 (holding that noise, smoke, and cinders are elements of damage which may be considered so far as they tend to depreciate the market value); Chicago, etc., R. Co. *v.* Atterbury, 156 Ill. 281, 40 N. E. 826 (smoke, dust, cinders, etc.); Chicago, etc., R. Co. *v.* Leah, 152 Ill. 249, 38 N. E. 556 (noise); Chicago, etc., R. Co. *v.* Darke, 148 Ill. 226, 35 N. E. 750 (noise); Chicago, etc., R. Co. *v.* Nix, 137 Ill. 141, 27 N. E. 81 (noise); Chicago, etc., R. Co. *v.* Hall, 90 Ill. 42 (smoke, dust, cinders, jarring, etc.); Illinois Cent. R. Co. *v.* Turner, 97 Ill. App. 219 [*affirmed* in 194 Ill. 575, 62 N. E. 798] (smoke, dust, cinders, etc.); Chicago, etc., R. Co. *v.* Moore, 63 Ill. App. 163 (noise, jarring, smoke, cinders, and dust); Chicago, etc., R. Co. *v.* Leah, 41 Ill. App. 584; Chicago, etc., R. Co. *v.* Berg, 10 Ill. App. 607 (smoke, dust, cinders, etc.). *Contra*, as to ordinary noise, Metropolitan West Side El. R. Co. *v.* Goll, 100 Ill. App. 323. And see Chicago, etc., R. Co. *v.* Hall, 90 Ill. 42 [*followed* in Chicago, etc., R. Co. *v.* Berg, 10 Ill. App. 607], holding that the loss sustained through injury from jarring the building can be considered, but not the noise or confusion in the vicinity, as the injury must be physical.

Iowa.— Wilson *v.* Des Moines, etc., R. Co., 67 Iowa 509, 25 N. W. 754.

Kentucky.— Henderson Belt R. Co. *v.* Dechamp, 95 Ky. 219, 24 S. W. 605, 16 Ky. L. Rep. 82 (smoke, cinders, soot, and vibrations); Jeffersonville, etc., R. Co. *v.* Esterle, 13 Bush 667 (smoke, sparks, cinders, cracking of walls of houses, etc.); Elizabethtown, etc., R. Co. *v.* Combs, 10 Bush 382, 19 Am. Rep. 67 (smoke, soot, and fire blown from locomotives); Maysville, etc., R. Co. *v.* Ingram, 30 S. W. 8, 16 Ky. L. Rep. 853 (smoke, etc.); Maysville, etc., R. Co. *v.* Conner, 29 S. W. 344, 16 Ky. L. Rep. 635 (where evidence as to noise and smoke as a cause of diminution in value was held properly admitted); Short Route Transfer R. Co. *v.* Fulton, 12 Ky. L. Rep. 232 (jarring, noise, dust, and cinders). *Contra*, as to noise, Cosby *v.* Owensboro, etc., R. Co., 10 Bush 288. And see Louisville, etc., R. Co. *v.* Geikel, 9 Ky. L. Rep. 813, holding that an individual owning property adjacent to a railroad may recover damages occasioned by having smoke, cinders, and fire from passing engines thrown or blown into or against his house, but that the ordinary noise of moving trains is not an element of damage.

Massachusetts.— Baker *v.* Boston El. R. Co., 183 Mass. 178, 66 N. E. 711, noise. *Compare* Walker *v.* Old Colony, etc., R. Co., 103 Mass. 10, 4 Am. Rep. 509.

Minnesota.— Lamm *v.* Chicago, etc., R. Co., 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268 (smoke, jarring, etc.); Adams *v.* Chicago, etc., R. Co., 39 Minn. 286, 39 N. W. 629, 12 Am. St. Rep. 644, 1 L. R. A. 493 (smoke, dust, etc.); Blue Earth County *v.* St. Paul, etc., R. Co., 28 Minn. 503, 11 N. W. 73 (holding evidence of the noise of passing trains competent as bearing on the question of the diminished value of property caused by the construction of a railroad across the same). *Contra*, where owner of property has no interest in land on which the road is operated, Carroll *v.* Wisconsin Cent. R. Co., 40 Minn. 168, 41 N. W. 661.

Nebraska.— Chicago, etc., R. Co. *v.* O'Connor, 42 Nebr. 90, 60 N. W. 326 (smoke, dust, noise, and jarring); Omaha Southern R. Co. *v.* Beeson, 36 Nebr. 361, 54 N. W. 557 (holding that proof of annoyance by smoke and ashes from passing trains is admissible, not as an independent element of damage, but as tending to prove the value of the property after the construction of the road); Omaha, etc., R. Co. *v.* Janecek, 30 Nebr. 276, 46 N. W. 478, 27 Am. St. Rep. 399 (holding that smoke, soot, and cinders from passing engines are proper elements of damage).

New Jersey.— Pennsylvania R. Co. *v.* Angel, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. Rep. 1.

New York.— Morton *v.* New York, 140 N. Y. 207, 35 N. E. 490, 22 L. R. A. 241 [*affirming* 65 Hun 32, 19 N. Y. Suppl. 603] (holding a city liable for injury to adjoining buildings through noise and vibration from a pumping station, although the buildings were erected after the pumping station); Syracuse

New York it has been held that in ascertaining fee damages or compensation to be paid for the future appropriation of a street for the purposes of an elevated

Solar Salt Co. *v.* Rome, etc., R. Co., 43 N. Y. App. Div. 203, 60 N. Y. Suppl. 40 [*affirmed* in 168 N. Y. 650, 61 N. E. 1135] (soot, cinders, dust, and smoke); *In re* New York Cent., etc., R. Co., 15 Hun 63 (noise, smoke, and jarring); *In re* Utica, etc., R. Co., 56 Barb. 456 (holding that if the value of the property is depreciated by reason of the noise, smoke, etc., this should be considered in estimating the damages); Welde *v.* New York, etc., R. Co., 29 Misc. 13, 60 N. Y. Suppl. 319 [*affirmed* in 53 N. Y. App. Div. 637, 66 N. Y. Suppl. 1147] (noise during construction of work). But see Matter of Squire, 57 Hun 591, 10 N. Y. Suppl. 881 (holding that the owner of land contiguous to an aqueduct cannot recover for injury to his lands by reason of the noise, dust, and smoke made by the building of the aqueduct); Cogswell *v.* New York, etc., R. Co., 48 N. Y. Super. Ct. 31.

Ohio.— Columbus, etc., R. Co. *v.* Gardner, 45 Ohio St. 309, 13 N. E. 69 [*distinguishing* Parrot *v.* Cincinnati, etc., R. Co., 10 Ohio St. 624], noises, smoke, and sparks. See also Cleveland, etc., R. Co. *v.* Reeder, 6 Ohio Cir. Ct. 354, 3 Ohio Cir. Dec. 489. But see Fliehman *v.* Cleveland, etc., R. Co., 11 Ohio Dec. (Reprint) 543, 27 Cinc. L. Bul. 302.

Pennsylvania.— The courts do not allow these items to be considered as elements of damage (Shano *v.* Fifth Ave., etc., Bridge Co., 189 Pa. St. 245, 42 Atl. 128, 80 Am. St. Rep. 808; Philips *v.* Philadelphia, etc., R. Co., 184 Pa. St. 537, 39 Atl. 298; Comstock *v.* Clearfield, etc., R. Co., 169 Pa. St. 582, 32 Atl. 431; Pennsylvania L. Ins., etc., Co. *v.* Pennsylvania Schuylkill Valley R. Co., 151 Pa. St. 334, 25 Atl. 107, 31 Am. St. Rep. 762; Jones *v.* Erie, etc., R. Co., 151 Pa. St. 30, 25 Atl. 134, 31 Am. St. Rep. 722, 17 L. R. A. 758; Pennsylvania R. Co. *v.* Marchant, 119 Pa. St. 541, 13 Atl. 690, 4 Am. St. Rep. 659; Pennsylvania R. Co. *v.* Lippincott, 116 Pa. St. 472, 9 Atl. 871, 2 Am. St. Rep. 618 [*distinguishing* Pennsylvania R. Co. *v.* Duncan, 111 Pa. St. 352, 5 Atl. 742; Pusey *v.* Allegheny, 98 Pa. St. 552; Pittsburg Junction R. Co. *v.* McCutcheon, 18 Wkly. Notes Cas. 527; Pennsylvania R. Co.'s Appeal, 18 Wkly. Notes Cas. 418]; Struthers *v.* Dunkirk, etc., R. Co., 87 Pa. St. 282), but hold that they should be considered as affecting the market value of the property (Shano *v.* Fifth Ave., etc., Bridge Co., *supra*; Comstock *v.* Clearfield, etc., R. Co., *supra*).

South Carolina.— South Bound R. Co. *v.* Burton, 67 S. C. 515, 46 S. E. 340, holding that noise, smoke, etc., can be considered so far as they depreciate the value of the property.

Texas.— Gainesville, etc., R. Co. *v.* Hall, 78 Tex. 169, 14 S. W. 259, 22 Am. St. Rep. 42, 9 L. R. A. 298; Ft. Worth, etc., R. Co. *v.* Pearce, 75 Tex. 281, 12 S. W. 864; Ft. Worth, etc., R. Co. *v.* Garvin, (Civ. App. 1894) 29 S. W. 794.

West Virginia.— Fox *v.* Baltimore, etc., R. Co., 34 W. Va. 466, 12 S. E. 757.

Wisconsin.— Weyer *v.* Chicago, etc., R. Co., 68 Wis. 180, 31 N. W. 710, holding that smoke, noise, etc., may be considered, although not of themselves a basis for separate and distinct damages.

See 18 Cent. Dig. tit. "Eminent Domain," § 278 *et seq.*

Elevation of road.— Where damages were originally assessed with a view to the existence of a surface road and a subsequent elevation of the tracks results in throwing more smoke, cinders, and dust upon the property of an adjoining owner, he is entitled to recover for the additional damage. Chicago, etc., R. Co. *v.* Cogswell, 44 Ill. App. 388.

Portion of road in front of premises.— In some cases the owner's right of recovery has been limited to the injury from smoke, dust, noise, jarring, and the like, caused by the operation of the road on that part of the street immediately in front of the premises for the injury of which damages are claimed, and no recovery allowed for injuries resulting from the operation of the road along other portions of the street. Lamm *v.* Chicago, etc., R. Co., 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268; Adams *v.* Chicago, etc., R. Co., 39 Minn. 286, 39 N. W. 629, 12 Am. St. Rep. 644, 1 L. R. A. 493. See also Cleveland, etc., R. Co. *v.* Reeder, 6 Ohio Cir. Ct. 354, 3 Ohio Cir. Dec. 489.

Purchase after deed to right of way recorded.— One who purchases a lot adjoining a railroad right of way after the recording of the deed granting the right of way takes with notice of the railroad's right in the use of such right of way and cannot recover for the damage resulting from noise, dust, cinders, smoke, gases, etc., caused by an increased use of the right of way. Kotz *v.* Illinois Cent. R. Co., 188 Ill. 578, 59 N. E. 240.

Smoke not coming in contact with buildings.— Where it is not shown that the smoke escaping from the smoke-stacks of passing locomotives comes in immediate contact with any building owned by the person claiming damages he cannot recover. Cosby *v.* Owensboro, etc., R. Co., 10 Bush (Ky.) 288.

Injury not necessarily due to proximity of railroad.— An instruction that the owner of abutting property was entitled to damages for the injury resulting from the falling of soot and cinders upon the property, or from smoke entering the house, or from the vibrations or concussions of the running trains, but not for a diminution of value caused by or resulting from a mere dislike of residing near a railroad, or from smoke, cinders, and soot which would not reach or fall on the property except by reason of currents of wind, has been held proper. Henderson Belt R. Co. *v.* Dechamp, 95 Ky. 219, 24 S. W. 605, 16 Ky. L. Rep. 82.

The use of a street need not be obstructed to the detriment of an abutting lot owner

railroad, the question of noise cannot be considered,[41] but it may enter as an element into the award in ascertaining past or rental damages,[42] while the discharge of smoke, cinders, noxious gases, and the like should be considered in estimating the compensation to an abutting owner for future use of the street as well as in awarding damages for past use.[43] Damages cannot be recovered for injuries to land

by the construction and operation of a railroad along it in order to entitle him to recover for the injury to his property resulting from the jarring, noise, dust, and cinders caused by moving trains. Short Route Transfer, etc., R. Co. *v.* Fulton, 12 Ky. L. Rep. 232.

41. Bischoff *v.* New York El. R. Co., 138 N. Y. 257, 33 N. E. 1073; American Bank Note Co. *v.* New York El. R. Co., 129 N. Y. 252, 29 N. E. 302 [*modifying* and *affirming* 13 N. Y. Suppl. 626]; Church of Holy Apostles *v.* New York El. R. Co., 21 N. Y. App. Div. 47, 47 N. Y. Suppl. 418; Seaside, etc., Bridge El. R. Co. *v.* South Reformed Dutch Church, 83 Hun (N. Y.) 143, 31 N. Y. Suppl. 630; Flood *v.* Brooklyn El. R. Co., 75 Hun (N. Y.) 601, 27 N. Y. Suppl. 662, 1111; Kopetzky *v.* Metropolitan El. R. Co., 14 Misc. (N. Y.) 311, 35 N. Y. Suppl. 766 [*affirmed* in 159 N. Y. 539, 53 N. E. 1127]; Kiep *v.* Manhattan El. R. Co., 17 N. Y. Suppl. 804. See also Jordan *v.* Metropolitan El. R. Co., 60 N. Y. Super. Ct. 385, 18 N. Y. Suppl. 205; Golden *v.* Metropolitan El. R. Co., 1 Misc. (N. Y.) 142, 20 N. Y. Suppl. 630; Ottinger *v.* New York El. R. Co., 17 N. Y. Suppl. 912.

Admissibility of evidence of noise.— In Matter of Kings County El. R. Co., 15 N. Y. Suppl. 516, 517, an award of damages by commissioners was objected to on the ground that witnesses were permitted to state the causes and amount of diminution in value of the property, the especial objection being to the statements of witnesses that noise and vibration were elements of depreciation. But the court refused to sustain the objection, saying: "To ascertain the amount of depreciation . . . a general examination and inquiry was proper and necessary, so that, upon a general survey of all the causes of diminution, that portion which was attributable to the deprivation of light and air and convenience of access might be ascertained and allowed, and the residue rejected. In this view the testimony was admissible."

Finding not including effect of noise and vibration.— A finding that the value of the easements appurtenant to certain premises taken by an elevated railroad company is twelve hundred dollars does not necessarily include the effect of noise and vibration on that value merely because the damage in the past was adjudged to be at the rate of sixty dollars a year and the proportion of yearly rent to the fee value was shown to be about one tenth. Steinert *v.* Metropolitan El. R. Co., 12 Misc. (N. Y.) 370, 33 N. Y. Suppl. 560.

42. Bischoff *v.* New York El. R. Co., 138 N. Y. 257, 33 N. E. 1073; American Bank Note Co. *v.* New York El. R. Co., 129 N. Y. 252, 29 N. E. 302 [*modifying* and *affirming* 13 N. Y. Suppl. 626]; Kane *v.* New York El. R. Co., 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640; Church of Holy Apostles *v.* New York El. R. Co., 21 N. Y. App. Div. 47, 47 N. Y. Suppl. 418; Flood *v.* Brooklyn El. R. Co., 75 Hun (N. Y.) 601, 27 N. Y. Suppl. 662, 1111; Ode *v.* Manhattan R. Co., 56 Hun (N. Y.) 199, 9 N. Y. Suppl. 338; Taylor *v.* Metropolitan El. R. Co., 55 N. Y. Super. Ct. 555, 14 N. Y. St. 850; Ireland *v.* Metropolitan El. R. Co., 52 N. Y. Super. Ct. 450; Kiep *v.* Manhattan El. R. Co., 17 N. Y. Suppl. 804; Moss *v.* Manhattan R. Co., 13 N. Y. Suppl. 46.

The reason for this is that with regard to past damages the elevated road was a trespasser and responsible for all injuries resulting from its wrongful act. American Bank Note Co. *v.* New York El. R. Co., 129 N. Y. 252, 29 N. E. 302 [*modifying* and *affirming* 13 N. Y. Suppl. 626]; Kane *v.* New York El. R. Co., 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640.

43. Sperb *v.* Metropolitan El. R. Co., 137 N. Y. 155, 32 N. E. 1050, 20 L. R. A. 752 [*reversing* 61 Hun 539, 16 N. Y. Suppl. 392]; Abendroth *v.* New York El. R. Co., 122 N. Y. 1, 25 N. E. 496, 19 Am. St. Rep. 461, 11 L. R. A. 634 [*affirming* 54 N. Y. Super. Ct. 417]; Drucker *v.* Manhattan R. Co., 106 N. Y. 157, 12 N. E. 568, 60 Am. Rep. 437 [*affirming* 51 N. Y. Super. Ct. 429]; Lahe *v.* Metropolitan El. R. Co., 104 N. Y. 268, 10 N. E. 528 [*followed* in Wagner *v.* Metropolitan El. R. Co., 104 N. Y. 665, 10 N. E. 535]; Sloane *v.* New York El. R. Co., 63 Hun (N. Y.) 300, 17 N. Y. Suppl. 769; Jordan *v.* Metropolitan El. R. Co., 60 N. Y. Super. Ct. 385, 18 N. Y. Suppl. 205; Jones *v.* Metropolitan El. R. Co., 59 N. Y. Super. Ct. 437, 14 N. Y. Suppl. 632; Abendroth *v.* Manhattan R. Co., 54 N. Y. Super. Ct. 417, 7 N. Y. St. 43, 19 Abb. N. Cas. (N. Y.) 247; Ireland *v.* Metropolitan El. R. Co., 52 N. Y. Super. Ct. 450; Jones *v.* New York El. R. Co., 18 N. Y. Suppl. 952; Seebach *v.* Metropolitan El. R. Co., 18 N. Y. Suppl. 208 (holding, however, that the sum to be paid by an elevated railroad company to avoid an injunction cannot be made to include the prospective damages for dirt, cinders, steam, smoke, etc., incidental to the running of trains, but the abutting owner may maintain a separate action for these); Frank *v.* Metropolitan El. R. Co., 18 N. Y. Suppl. 207; Smith *v.* New York El. R. Co., 18 N. Y. Suppl. 132. See also Stanley *v.* New York El. R. Co., 17 N. Y. Suppl. 931; Johnson *v.* Manhattan R. Co., 16 N. Y. Suppl. 434. *Contra, In re* New York El. R. Co., 36 Hun (N. Y.) 427, where the court denied any right in an abutting owner to any compensation for annoyance or disturbance created by smoke, noise, vibration, ashes, dust, or cinders created by the operation of an elevated

which is not itself overflowed, but is rendered less valuable by reason of the noxious and offensive smells which proceed from other land which is overflowed.[44]

k. Special Value to Taker and Adaptability to Particular Public Use. Compensation must be reckoned from the standpoint of what the landowner loses by having his property taken, not by the benefit which the property may be to the other party to the proceedings; therefore the value of a particular piece of land to a person or corporation exercising the right of eminent domain, or the necessities of that particular person or corporation to acquire that piece of property for the particular purpose, cannot be considered as an element of damage to the landowner.[45] Neither can an amount that has at some time been expended upon the property in question, which has rendered it specially suitable for the use for which it is being condemned, be claimed by the landowner.[46] Some courts have gone so far as to say that in estimating the value of land taken for a public use its value for such use cannot be considered;[47] but the weight of authority is contrary to such a rule. There is a recognized difference between estimating damages by the value of the property to the person or corporation exercising the right of condemnation and considering the availability or adaptability of a piece of land for the purpose for which it is condemned as an element of value which would attract any buyer for that purpose. The true rule is that any use for which the property is capable may be considered, and if the land has an adaptability for the purposes for which it is taken, the owner may have this considered in the estimate as well as

railroad along the street. And see Emigrant Mission Committee *v.* Brooklyn El. R. Co., 20 N. Y. App. Div. 596, 47 N. Y. Suppl. 344, holding that injury from ashes and cinders can be treated as past damage only, and cannot be included in the fee damages.

44. Fuller *v.* Chicopee Mfg. Co., 16 Gray (Mass.) 46; Eames *v.* New England Worsted Co., 11 Metc. (Mass.) 570; Rooker *v.* Perkins, 14 Wis. 79.

45. *Georgia.*— See Selma, etc., R. Co. *v.* Keith, 53 Ga. 178.

Illinois.— Ligare *v.* Chicago, etc., R. Co., 166 Ill. 249, 46 N. E. 803.

Kentucky.— West Virginia, etc., R. Co. *v.* Gibson, 94 Ky. 234, 21 S. W. 1055, 15 Ky. L. Rep. 7.

Minnesota.— Union Depot, etc., Co. *v.* Brunswick, 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789 (holding that evidence tending to show that there is no other route by which the railroad can be built except across the land in question is not admissible); Stinson *v.* Chicago, etc., R. Co., 27 Minn. 284, 291, 6 N. W. 784. See Union Depot, etc., Co. *v.* Brunswick, 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789.

Mississippi.—Sullivan *v.* Lafayette County, 61 Miss. 271.

Missouri.— St. Louis, etc., R. Co. *v.* Knapp, etc., Co., 160 Mo. 396, 61 S. W. 300.

Nevada.— Virginia, etc., R. Co. *v.* Elliott, 5 Nev. 358.

New York.— Matter of Daly, 72 N. Y. App. Div. 394, 76 N. Y. Suppl. 28 [*distinguishing* Matter of Gilroy, 85 Hun 424, 32 N. Y. Suppl. 891]; *In re* Boston, etc., R. Co., 22 Hun 176; Black River, etc., R. Co. *v.* Barnard, 9 Hun 104.

Ohio.— Gibson *v.* Norwalk, 13 Ohio Cir. Ct. 428, 7 Ohio Cir. Dec. 6.

Pennsylvania.— *In re* Chambersburg, etc., Turnpike Road, 20 Pa. Super. Ct. 173.

Texas.— San Antonio, etc., R. Co. *v.* Southwestern Tel., etc., Co., (Civ. App. 1900) 56 S. W. 201; Texas, etc., R. Co. *v.* Postal Tel. Cable Co., (Civ. App. 1899) 52 S. W. 108.

United States.— Cumberland Tp. *v.* U. S., 101 Fed. 661, 41 C. C. A. 580.

England.— Stebbing *v.* Metropolitan Bd. of Works, L. R. 6 Q. B. 37, 40 L. J. Q. B. 1, 23 L. T. Rep. N. S. 530, 19 Wkly. Rep. 73.

46. Black River, etc., R. Co. *v.* Barnard, 9 Hun (N. Y.) 104, where a railroad company, after expending over five thousand dollars in making a rock cutting and constructing embankments, abandoned the route, and subsequently proceedings were instituted by another company to acquire title to the same land from a person who had bought it from the old company, and it was held that the owner was entitled only to the fair market value of the land and not necessarily the amount that had been spent upon it. See also Orleans, etc., R. Co. *v.* Jefferson, etc., R. Co., 51 La. Ann. 1605, 26 So. 278 (holding that the owner is not entitled to recover what it would cost the railroad company to bring other lands in the neighborhood up to a similar condition of improvement, although he is entitled to a reasonable compensation in view of its condition having made it specially adapted and ready for railroad purposes); *In re* New York, etc., R. Co., 27 Hun (N. Y.) 116; *In re* Boston, etc., R. Co., 22 Hun (N. Y.) 176.

47. See *In re* Boston, etc., R. Co., 22 Hun (N. Y.) 176 (holding that the amount of compensation should be neither increased nor diminished by the fact that the land to be taken is peculiarly well or ill adapted to the uses of a railroad. This case cannot be reconciled with a number of the decisions in New York state. See *infra*, notes 49, 51); U. S. *v.* Seufert Bros. Co., 78 Fed. 520 [*distin-*

any other use for which it is capable.[48] Thus, in proceedings to condemn land for railroad purposes, for a bridge site, or for a reservoir or water-supply, it may be shown that the land has an especial availability which would render it valuable to any one who might wish to purchase it for railroad purposes,[49] for a bridge site,[50] or for the purpose of a reservoir or water-supply,[51] and the owner may insist upon this availability of his land for the particular purpose as an element in estimating its value. This special adaptability for the purpose for which the land is taken cannot be made the sole basis of estimate,[52] especially where the property possesses other capabilities, for it is the general value of the land in view of all its elements that is to be estimated.[53]

l. **Taxes.** It has been held that the owner of property taken for a public improvement is entitled to an allowance for taxes imposed between the date of the appropriation and the payment of the award.[54]

m. **Value of Crops, Grass, Trees, Etc.** In determining the compensation or damages to which a person is entitled whose land or a part thereof has been taken under the power of eminent domain, it is proper to consider the value of crops, trees, grass, etc., growing on the land at the time of the taking and thereby injured or destroyed.[55] So a lessee is entitled to the value of crops which are

guishing Mississippi, etc., Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206].

48. Young v. Harrison, 17 Ga. 30; Mississippi, etc., Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206, where a corporation was authorized to construct booms between certain points on the river and to occupy any land necessary for conducting its business, and the land in question was certain islands in the river especially adapted to boom purposes.

49. *Arkansas.*— Little Rock Junction R. Co. v. Woodruff, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51.

Illinois.— Johnson v. Freeport, etc., R. Co., 111 Ill. 413.

Louisiana.— Orleans, etc., R. Co. v. Jefferson, etc., R. Co., 51 La. Ann. 1605, 26 So. 278.

New Jersey.— Currie v. Waverly, etc., R. Co., 32 N. J. L. 381, 20 Atl. 56, 19 Am. St. Rep. 542.

New York.— *In re* New York, etc., R. Co., 27 Hun 116 (holding that where a railroad company takes land held by a canal corporation, which land the latter corporation had been intending for some time to utilize as a railroad, it being especially adapted to that purpose, the true measure of damages is its market value for railroad purposes); Matter of Staten Island R. Co., 10 N. Y. St. 393 (where it was held that in estimating the true value of land upon a water front, the fact that it had a special value for railroad and wharf purposes must be considered). See, however, *supra*, note 47.

50. Little Rock Junction R. Co. v. Woodruff, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51; Young v. Harrison, 17 Ga. 30.

51. *California.*— Spring Valley Water-Works v. Drinkhouse, 92 Cal. 528, 22 Pac. 681; San Diego Land, etc., Co. v. Neale, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604; 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83 [*overruling* Gilmer v. Lime Paint, 19 Cal. 47].

Massachusetts.— Moulton v. Newburyport Water Co., 137 Mass. 163.

Minnesota.— Ely v. Conan, (1903) 97 N. W. 737 [*distinguishing* Union Depot, etc., Co. v. Brunswick, 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789].

New York.— Matter of Gilroy, 85 Hun 424, 32 N. Y. Suppl. 891; College Point v. Dennett, 2 Hun 669, 5 Thomps. & C. 217. See Matter of State Reservation, 16 Abb. N. Cas. 159.

Tennessee.— Alloway v. Nashville, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123.

See 18 Cent. Dig. tit. "Eminent Domain," § 356.

52. See Moulton v. Newburyport Water Co., 137 Mass. 163; Alloway v. Nashville, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123, and cases cited *supra*, note 45 *et seq.*

53. Alloway v. Nashville, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123.

54. *In re* New York, 40 N. Y. App. Div. 281, 58 N. Y. Suppl. 58, holding that the owner is entitled to an allowance for taxes imposed since the date of the appropriation, and for assessments imposed for improvements authorized after the appropriation and begun since, with interest from the date when such taxes and assessments became a lien to the date when the award is paid, and if they have been paid, then with interest from the date of payment to the date when the award is paid.

55. *Indiana.*— Fifer v. Ritter, 159 Ind. 8, 64 N. E. 463.

Iowa.— Lance v. Chicago, etc., R. Co., 57 Iowa 636, 11 N. W. 612.

Louisiana.— Street v. New Orleans, etc., R. Co., 43 La. Ann. 116, 9 So. 15.

Massachusetts.— White v. Foxborough, 151 Mass. 28, 23 N. E. 652; Murray v. Norfolk County, 149 Mass. 328, 21 N. E. 757.

Missouri.— McAntire v. Joplin Telephone Co., 75 Mo. App. 535.

New York.— Rider v. Stryker, 63 N. Y. 136.

North Carolina.— Haislip v. Wilmington, etc., R. Co., 102 N. C. 376, 8 S. E. 926.

injured or destroyed by the appropriation of the leased premises for a public improvement.[56]

n. Value of Improvements — (1) *Improvements by Owner* — (A) *In General.* The owner is entitled to the value of the improvements which are destroyed or injured by the appropriation of the land on which they are erected.[57] Buildings

Ohio.— Foote *v.* Lorain, etc., R. Co., 21 Ohio Cir. Ct. 319, 11 Ohio Cir. Dec. 685.

Pennsylvania.— Clements *v.* Philadelphia Co., 184 Pa. St. 28, 38 Atl. 1090, 39 L. R. A. 532; Lafferty *v.* Schuylkill River East Side R. Co., 124 Pa. St. 297, 16 Atl. 869, 10 Am. St. Rep. 587, 3 L. R. A. 124; Gilmore *v.* Pittsburgh, etc., R. Co., 104 Pa. St. 275; Marshall *v.* American Tel., etc., Co., 16 Pa. Super. Ct. 615; Griffin *v.* Pennsylvania Schuylkill Valley R. Co., 2 Del. Co. 425.

Texas.— Texas, etc., R. Co. *v.* Matthews, 60 Tex. 215.

Wisconsin.— Parks *v.* Wisconsin Cent. R. Co., 33 Wis. 413.

See 18 Cent. Dig. tit. "Eminent Domain," § 357.

Location of crops or trees.— Compensation has been allowed for injury to trees or crops growing outside the right of way taken by a railroad company. Haislip *v.* Wilmington, etc., R. Co., 102 N. C. 376, 8 S. E. 926; Griffin *v.* Pennsylvania Schuylkill Valley R. Co., 2 Del. Co. (Pa.) 425. So a telegraph or telephone company must compensate the owner for cutting his trees in running its line, whether they are planted by the roadside or on land adjoining, inclosed or uninclosed. McAntire *v.* Joplin Telephone Co., 75 Mo. App. 535; Marshall *v.* American Tel., etc., Co., 16 Pa. Super. Ct. 615.

Time of planting.— The rule is the same as to crops planted after the location of a railroad and before actual entry on the land. Gilmore *v.* Pittsburgh, etc., R. Co., 104 Pa. St. 275. So where, after a railroad has been located over land, the owner leases the land, and the lessee plants crops before bond is given by the company or notice when actual possession will be required, the lessee is entitled to compensation for the injury to his crops. Lafferty *v.* Schuylkill River East Side R. Co., 124 Pa. St. 297, 16 Atl. 869, 10 Am. St. Rep. 587, 3 L. R. A. 124.

Measure of damages.— Where a telegraph company has cut trees on the land, the measure of damages is the difference between the value of the property before and after the trees were cut. Marshall *v.* American Tel., etc., Co., 16 Pa. Super. Ct. 615, holding, however, that where a property is used for a summer residence, and young and growing trees are cut down, the damages are not to be measured by their value for commercial purposes.

Cost of removal.— Where a hedge is interfered with, and it can be removed without material injury, the owner is entitled to the cost of its removal. Shawnee County Com'rs *v.* Beckwith, 10 Kan. 603.

Future crops.— The measure of damages against a railway company which, as a naked trespasser upon inclosed land, so uses its possession as to prevent the making of crops is not the supposed value of the crops that might have been made, but the rental value of the land, as also the value of fences destroyed, or other specific injury directly inflicted. Houston, etc., R. Co. *v.* Adams, 63 Tex. 200.

Timber cut on other lands.— The estimate should not include the value of timber which has been cut by the railroad company from adjacent land belonging to the owner of that taken. Oregon, etc., R. Co. *v.* Barlow, 3 Oreg. 311.

56. Lafferty *v.* Schuylkill River East Side R. Co., 124 Pa. St. 297, 16 Atl. 869, 10 Am. St. Rep. 587, 3 L. R. A. 124; Telephone Tel. Co. *v.* Forke, 2 Tex. App. Civ. Cas. § 368; Seattle, etc., R. Co. *v.* Scheike, 3 Wash. 625, 29 Pac. 217, 30 Pac. 503.

Payment to lessor in unrecorded lease.— The fact that the value of the crops was paid to the lessor is no defense as against the claim of the lessee; nor is it a defense that as the lease was not of record the commissioners might treat the crops as belonging to the lessor in whom was the record title, where the lease was only for a year, since it was not required to be in writing, and consequently was not required to be recorded. Board of Levee Com'rs *v.* Johnson, 66 Miss. 248, 6 So. 199.

Timber lease.— Where timber land is taken by the state for forestry purposes under N. Y. Laws (1897), c. 220, the damage of one entitled to the timber thereon under a contract with the owner is the value of the timber on the stump, with interest on the same from the time of the appropriation. Turner *v.* State, 67 N. Y. App. Div. 393, 73 N. Y. Suppl. 372.

57. *Arkansas.*— Russell *v.* St. Louis, etc., R. Co., 71 Ark. 451, 75 S. W. 725.

Connecticut.— Brown *v.* Waterbury, 75 Conn. 727, 54 Atl. 1005.

Illinois.— See Illinois, etc., R. Co. *v.* Humiston, 208 Ill. 100, 69 N. E. 880.

Massachusetts.—White *v.* Foxborough, 151 Mass. 28, 23 N. E. 652; Murray *v.* Norfolk County, 149 Mass. 328, 21 N. E. 757; Hyde *v.* Middlesex County, 2 Gray 267.

Nebraska.— Burlington, etc., R. Co. *v.* White, 28 Nebr. 166, 44 N. W. 95.

New York.— Matter of Summit Ave., 84 N. Y. App. Div. 455, 82 N. Y. Suppl. 1027; Matter of New York, 39 N. Y. App. Div. 589, 57 N. Y. Suppl. 657.

Pennsylvania.— Perrysville, etc., Plank-Road Co. *v.* Thomas, 20 Pa. St. 91; Griffin *v.* Pennsylvania Schuylkill Valley R. Co., 2 Del. Co. 425.

Vermont.— Adams *v.* Derby, 73 Vt. 258, 50 Atl. 1063.

are a part of the realty, and their value cannot be considered except in connection with the realty.[58] If, however, they are wholly taken or destroyed, or partially injured by the taking of land, the resulting loss constitutes an element of damage.[59] If a building is wholly taken or destroyed, its market value is the

See 18 Cent. Dig. tit. "Eminent Domain," § 358.

A life-tenant is not entitled to recover the value of an improvement constructed by him. Williams *v.* Com., 168 Mass. 364, 47 N. E. 115.

Appurtenances.— Where the land is used for storing and handling coal, and its owner owns a coal office and an interest in a railroad track and scales, all situated on adjoining land which he does not own but over which he owns a right of way, all these conveniences being used by him in the coal business in connection with his land, the coal office, track, scales, and way, are such appurtenances to the land as should be considered in assessing the damages. Chicago, etc., R. Co. *v.* Ward, 128 Ill. 349, 18 N. E. 828, 21 N. E. 562.

As to fixtures the same rule applies as between vendor and vendee, that is, buildings, machinery, etc., which are so attached to the land as to become fixtures, must be paid for. Matter of New York, 39 N. Y. App. Div. 589, 57 N. Y. Suppl. 657. The value of the fixtures in a building on the land is to be considered so far as they enhance the market value of the land for any purpose for which it might be used. Allen *v.* Boston, 137 Mass. 319; Price *v.* Milwaukee, etc., R. Co., 27 Wis. 98.

In taking property already devoted to a public use, all things are appropriated which exist thereon and are adapted to the new use or purpose for which such property is taken, and must accordingly be included as an element in estimating the damages to be awarded. Ford *v.* Lincoln County Com'rs, 64 Me. 408 (flagstones, gravel, bridges, culverts, etc., on a way taken for a highway); Montgomery County *v.* Schuylkill Bridge Co., 110 Pa. St. 54, 20 Atl. 407 (toll-house and canal bridge used as an approach to a private toll-bridge). See also Central Bridge Corp. *v.* Lowell, 15 Gray (Mass.) 106.

Cost of improvement.— Where fences are taken, the measure of damages is not their cost, but their reasonable value at the time of the taking. Bland *v.* Hixenbaugh, 39 Iowa 532; Adams *v.* Derby, 73 Vt. 258, 50 Atl. 1063. Cost of fencing see *supra*, X, E, 12; X, E, 19, d, (III). It has been held, however, that where a levee belonging to the owner of the adjacent land is destroyed, the jury may consider, as bearing on the diminution in the market value, the reasonable cost of a new levee. Russell *v.* St. Louis Southwestern R. Co., 71 Ark. 451, 75 S. W. 725.

Depreciation in value.— Where a switch, chute, pit top, and other connections of a mine are not actually taken, but are rendered valueless for the purposes for which they were designed, the measure of damages is not their full value, but the amount of their depreciation in value. Chicago, etc., R. Co. *v.* McGrew, 104 Mo. 282, 15 S. W. 931.

The owner is entitled to what will compensate him for the appropriation of a part of an improvement, whether that sum be greater or less than the actual value of the part taken. Gear *v.* C. C. & D. R. Co., 39 Iowa 23.

58. *Massachusetts.*— Hartshorn *v.* Worcester County, 113 Mass. 111.

Minnesota.—Kuschke *v.* St. Paul, 45 Minn. 225, 47 N. W. 786.

Missouri.— Kansas City *v.* Morse, 105 Mo. 510, 16 S. W. 893.

Nebraska.— Burlington, etc., R. Co. *v.* White, 28 Nebr. 166, 44 N. W. 95.

Pennsylvania.— Finn *v.* Providence Gas, etc., Co., 99 Pa. St. 631.

59. Covington, etc., Bridge Co. *v.* Devoto, 8 Ohio S. & C. Pl. Dec. 640, 5 Ohio N. P. 330 (holding that where the building is situated partly on the land sought to be appropriated and partly on an adjoining lot, the question whether it can be divided upon the line between the two tracts without manifest injury is one for the jury); *Re* Oxford, etc., R. Co., 27 Beav. 571, 6 Jur. N. S. 478, 29 L. J. Ch. 245, 1 L. T. Rep. N. S. 153 (holding that where a railroad so passes through a farm as to separate the farm buildings from the arable land, so that the buildings cannot be conveniently used, it constitutes an injury to the farm buildings for which compensation should be made).

Building on land previously condemned.— Where in a condemnation for levee purposes the compensation has been paid, the owner is not entitled, in subsequent proceedings to condemn additional land, to compensation for injuries to houses which have been allowed by the levee commissioners to remain upon the land originally condemned. Yazoo, etc., Delta Levee Com'rs *v.* Brinkley, (Miss. 1896) 19 So. 296. So where part of a building is on the right of way sought to be condemned, it is improper in estimating the damages to it to make allowance for another part which had been previously condemned by another company, or for damages done the remainder of the building by the first taking. Missouri Pac. R. Co. *v.* Porter, 112 Mo. 361, 20 S. W. 568.

Statute forbidding the taking of buildings.—Where a statute forbids the court to confirm the report of commissioners if it takes away houses, the commissioners are not authorized to include in their valuation any houses found on the condemned land, but their valuation must be confined to the naked land. Burgess *v.* Clark, 35 N. C. 109. Although a statute prevents the taking of houses, yet if the owner builds a house on the property for the purpose of preventing the company from taking it, the company may still take it, and

extent to which it enhances the owner's compensation.[60] If the building is only injured, then the damages must be confined to the actual injury done to it.[61] The owner is not entitled to compensation for improvements placed on the land for the purpose of enhancing the damages to be recovered upon a subsequent condemnation of his property.[62]

(B) *Time of Erection.* Generally speaking it may be said that an owner is entitled to compensation for improvements placed on the land before it is appropriated to a public use, and that he is not entitled to compensation for improvements erected after that event;[63] but the particular point of time at which the land may be said to be appropriated within this rule varies in the different jurisdictions.[64]

will not be compelled to pay for the building. Shick *v.* Pennsylvania R. Co., 1 Pearson (Pa.) 262.

60. Chicago *v.* Lonergan, 196 Ill. 518, 63 N. E. 1018 (holding that the fact that the buildings were in good repair, and that the owner had spent a certain sum on them a few years previously, is a material circumstance to show the present value of the property); Dupuis *v.* Chicago, etc., R. Co., 115 Ill. 97, 3 N. E. 720 (holding that where there is a building on the property taken, the jury are to consider its value as of the present time for the purpose for which it was constructed and used); Jacksonville, etc., R. Co. *v.* Walsh, 106 Ill. 253 (holding that the cost of erecting such buildings as were on the premises is not an element of damages, unless it be shown that they would actually increase the value of the premises to the extent of their cost); Lafayette, etc., R. Co. *v.* Winslow, 66 Ill. 219 (holding that in assessing damages for a building taken, the value of the building as such is to be considered, not merely that of its materials).

61. Council Grove, etc., R. Co. *v.* Center, 42 Kan. 438, 22 Pac. 574; Patterson *v.* Boston, 20 Pick. (Mass.) 159, holding that where the front wall of a building was cut off for the purpose of widening a street, the erection of a new wall on the new line of the street is a proper element of damage.

Measure of damages.— Where, in taking land for a street, part of a building is taken, the measure of damages is the difference between the value of the building before the taking and the value of the remaining portion after the street is opened. *In re* Lexington Ave., 17 N. Y. Suppl. 872. See also Larkin *v.* Scranton City, 162 Pa. St. 289, 29 Atl. 910 (holding that the measure of damages is the difference between the market value of the whole property before the taking and the value of what remains after the taking); New York Fifth Nat. Bank *v.* New York El. R. Co., 28 Fed. 231 (holding that where an elevated railroad and station are erected in front of a banking house, the question is how much less that part of the building used for banking purposes is worth as a bank on account of the structure).

The cost of erecting a new building in the place of the one injured may be taken into consideration in determining the damages. Larkin *v.* Scranton City, 162 Pa. St. 289, 29 Atl. 910. *Contra*, Council Grove, etc., R. Co. *v.* Center, 42 Kan. 438, 22 Pac. 574.

62. Arkansas, etc., R. Co. *v.* St. Louis, etc., R. Co., 103 Fed. 747, holding that where one railroad company is seeking to condemn a crossing over the right of way of another, it is proper to show that defendant company had unnecessarily constructed switches and spur tracks for the purpose of increasing the damages.

63. Jones *v.* New Orleans, etc., R. Co., 70 Ala. 227; Price *v.* Weehawken Ferry Co., 31 N. J. Eq. 31 (both holding that the value of improvements subsequently made is not to be included in the assessed value); Cobb *v.* Boston, 109 Mass. 438 (so holding, although the owner has been induced by the condemning party to expend money on the land after the taking).

64. *Illinois.*— Chicago, etc., R. Co. *v.* Catholic Bishop, 119 Ill. 525, 10 N. E. 372, holding that a tenant who goes into possession under a lease executed after the proceedings are begun is not entitled to be reimbursed for expenses incurred in removing his improvements.

Kansas.— Briggs *v.* Labette County, 39 Kan. 90, 17 Pac. 331, holding that, although there is a statutory provision that highways shall be laid out along section lines, yet an owner who before the laying out of a highway erects improvements across the section line is entitled to compensation therefor.

Missouri.— *In re* Paseo, 78 Mo. App. 518, holding that, although by the charter of a city, title to condemned real estate remains in the owner until the damages are paid, yet the divestiture on payment relates to the date of the judgment confirming the verdict of the jury; and that special improvements made by a city between the date of the verdict and the date of the payment form no part of the value of the land in the assessment of damages, and that the tax bills therefor do not constitute a lien before the judgment of condemnation and cannot be recouped out of the damages.

New Jersey.— Jones *v.* Carragan, 36 N. J. L. 52, holding that where a street was laid out in accordance with a plat which it was optional for the city to adopt, and before the ordinance was passed opening the street, a landowner in good faith erecting buildings within its boundaries is entitled to compensation.

(c) *Removal.* The owner of land actually taken in the exercise of the power of eminent domain has no right to remove permanent improvements thereon,[65] in the absence of statute[66] or agreement[67] to the contrary. Accordingly the cost of removing the improvements is not an element of damage,[68] unless a

New York.— New York Cent., etc., R. Co. *v.* State, 37 N. Y. App. Div. 57, 55 N. Y. Suppl. 685 (holding that the entry by the state upon the site of a proposed dam, and the commencement of the work of constructing it, at a time when nothing has been done by the state to interfere with or control the possession of land by its owner, and no notice of appropriation has been served on him, does not constitute an appropriation of what may be the flow ground of the dam when constructed, although the flow line had been run some years before and intermittent efforts have meanwhile been made toward building it); Matter of New York, 24 N. Y. App. Div. 7, 49 N. Y. Suppl. 119 (holding that where a statute, while locating by metes and bounds the land to be taken for a park, leaves it to the discretion of the commissioners to determine whether all or what part thereof shall be so taken, no particular piece can be said to be taken until the commissioners have finally decided to take it, and the owner is entitled to compensation for buildings erected on it in the meantime); Matter of Public Parks, 53 Hun 280, 6 N. Y. Suppl. 750 (holding that no compensation need be paid for buildings erected on land after the passage of a statute providing that it shall be taken for a park).

Ohio.— Toledo *v.* Bayer, 5 Ohio S. & C. Pl. Dec. 87, 7 Ohio N. P. 324, holding that an owner of property within the lines of a proposed street cannot recover for improvements placed on it after the passage of an ordinance appropriating it for a street.

Oregon.— Portland *v.* Lee Sam, 7 Oreg. 397, holding that the owner of a building appealing from an award of damages to his property caused by the widening of a street may recover for improvements made by him on his building between the dates of the making and of the adoption of the report of the viewers, if such improvements are taken for the public use.

Pennsylvania.— *In re* Forbes St., 70 Pa. St. 125 (holding that compensation cannot be recovered for improvements made on the location of a street after the approval of the plan); Shick *v.* Pennsylvania R. Co., 1 Pearson 262 (holding that where land was taken by a railroad company, a bond filed to secure the payment of its value, an appraisement made, and afterward all the proceedings except the bond were set aside by the court, and the owner built houses on the property, the company, on subsequently taking it, need not pay for the improvements).

Texas.— Morris *v.* Coleman County, (Civ. App. 1894) 28 S. W. 380, holding that improvements placed upon the land by the owner after the order for condemnation should not be considered.

Vermont.— Lloyd *v.* Fair Haven, 67 Vt. 167, 31 Atl. 164, holding that where an owner, pending proceedings for widening a street and with notice of them, erects a building on the land to be condemned, its value will not be included in the compensation.

See 18 Cent. Dig. tit. "Eminent Domain," § 359 *et seq.*

If an improvement is commenced before the institution of condemnation proceedings, the owner is entitled to compensation for it, although it is not completed until afterward. *In re* Wall St., 17 Barb. (N. Y.) 617; Higgins *v.* Dublin Corp., 28 L. R. Ir. 484. See also Louisville Southern R. Co. *v.* Cogar, 15 Ky. L. Rep. 444.

Cost of change of plans.—Where the owner, after notice that a part of his lot is to be condemned, changes the plan of a building in course of erection, so as to leave out so much of it as was to be situated on the part condemned, he is entitled to be compensated for the expense occasioned thereby. *In re* New York, etc., Bridge, 18 N. Y. App. Div. 8, 45 N. Y. Suppl. 484.

Constitutional law.— A statute is unconstitutional which denies compensation for improvements on land taken for a street unless they were erected before the laying out or locating of the street (Moale *v.* Baltimore, 5 Md. 314, 61 Am. Dec. 276), or before the filing of the map or plan showing its location (Forster *v.* Scott, 136 N. Y. 577, 32 N. E. 976, 18 L. R. A. 543 [*reversing* 60 N. Y. Super. Ct. 313, 17 N. Y. Suppl. 479]; German-American Real Estate Title Guarantee Co. *v.* Meyers, 32 N. Y. App. Div. 41, 52 N. Y. Suppl. 449).

65. Kansas City *v.* Morse, 105 Mo. 510, 16 S. W. 893; Finn *v.* Providence Gas, etc., Co., 99 Pa. St. 631.

66. Covington, etc., Bridge Co. *v.* Devoto, 8 Ohio S. & C. Pl. Dec. 640, 5 Ohio N. P. 330, holding, under a statute which provides that an owner of a building situated partly on the land sought to be appropriated and partly on adjoining land may elect within ten days after the assessment to take the value of the building instead of taking the building, that such election is made in time if filed within ten days after the overruling of the motion for a new trial.

67. Kansas City *v.* Morse, 105 Mo. 510, 16 S. W. 893.

68. Sherwood *v.* St. Paul, etc., R. Co., 21 Minn. 122; Richardson *v.* Board of Levee Com'rs, 68 Miss. 539, 9 So. 351 (holding that where a levee is built over private lands, the removal of the houses to the protected side of the levee, being rendered necessary by an annual overflow expected, is not recoverable as damages for lands taken or injured); Kansas City *v.* Morse, 105 Mo. 510, 16 S. W. 893; Grugan *v.* Philadelphia, 158 Pa. St. 337, 27 Atl. 1000; Finn *v.* Providence Gas, etc., Co., 99 Pa. St. 631; Diamond Mills Emory Co. *v.* Philadelphia, 8 Pa. Dist. 30, 22 Pa. Co.

provision to the contrary effect is contained in a statute [69] or an agreement entered into by the parties.[70]

(II) *Improvements by Lessee.* A tenant whose leasehold interest is taken is entitled to compensation for improvements made by him during the term, if the lease gives him the right to remove them,[71] or if the lessor is to pay him for them;[72] otherwise not.[73] If the buildings on the premises are taken or injured the tenant is entitled to compensation.[74]

(III) *Improvements by Taker.* Where a corporation invested with the power of eminent domain enters upon land without the consent of the owner, express or implied, and places improvements thereon, and subsequently institutes proceedings to condemn the same land, the common-law rule that a structure erected by a tort feasor becomes a part of the land does not apply and the owner is not entitled to the value of the improvements thus wrongfully erected.[75] So

Ct. 9. *Contra,* Brown v. Worcester, 13 Gray (Mass.) 31.

69. Ford v. Lincoln County Com'rs, 64 Me. 408.

70. Foster v. Boston, 22 Pick. (Mass.) 33; Hannibal Bridge Co. v. Schaubacher, 57 Mo. 582. See also Seattle, etc., R. Co. v. Scheike, 3 Wash. 625, 29 Pac. 217, 30 Pac. 503. It has been held that the award should not include expenses incurred by the owner in removing a building from the land taken, although petitioner had promised to pay such expenses. Sherwood v. St. Paul, etc., R. Co., 21 Minn. 122.

71. Finney v. St. Louis, 39 Mo. 177. See also *In re* Park Com'rs, 1 N. Y. Suppl. 763 [*reversing* 1 N. Y. St. 742] (holding that where the lessee has erected buildings on the land which would be part of the realty if the tenants owned the fee, the measure of damages to the lessee is the value of the buildings, although the lease stipulates that the lessee may remove them at the end of the term); Seattle, etc., R. Co. v. Scheike, 3 Wash. 625, 29 Pac. 217, 30 Pac. 503.

72. Livingston v. Sulzer, 19 Hun (N. Y.) 375; McGoldrick v. Rex, 8 Can. Exch. 169, holding that the tenant is entitled to compensation for the lease and for his improvements, although his lease has expired, where there is a provision for a payment by the lessor for the improvements, and there is a covenant for renewal. See, however, McAllister v. Reel, 59 Mo. App. 70.

73. Corrigan v. Chicago, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212 (holding that if the lease provides that at its expiration the improvements should belong to the landlord, the measure of the tenant's compensation is the present value of the leasehold estate, subject to the rent, without including the value of such improvements); McAllister v. Reel, 59 Mo. App. 70.

74. Kersey v. Schuylkill River, etc., R. Co., 133 Pa. St. 234, 19 Atl. 553, 19 Am. St. Rep. 632, 7 L. R. A. 409; Reg. v. St. Luke Church, 7 Q. B. 148, 41 L. J. Q. B. 81, 25 L. T. Rep. N. S. 914, 20 Wkly. Rep. 209, holding that the lessee of a house which is injuriously affected by the raising of the grade of a street is entitled to compensation, although the special act contains no provision allowing it.

Repairs.— If the landlord is under no covenant to repair, and buildings are injured so as to require repairs, the tenant should be allowed the cost thereof. Gluck v. Baltimore, 81 Md. 315, 32 Atl. 515, 48 Am. St. Rep. 515; Fargo v. Browning, 45 N. Y. App. Div. 507, 61 N. Y. Suppl. 301.

Sublease.— Where the value of the lands was awarded to the landlord and the value of the buildings was according to the provisions of the lease awarded to the lessee, the award includes the total value of the property, and hence the lessee is entitled to no further allowance for damages and loss of rents and profits arising out of his subletting. *In re* Broadway Widening, 63 Barb. (N. Y.) 572.

75. *Arkansas.*— Newgass v. St. Louis, etc., R. Co., 54 Ark. 140, 15 S. W. 188.

California.— See San Francisco, etc., R. Co. v. Taylor, 86 Cal. 246, 24 Pac. 1027.

Florida.— Jacksonville, etc., R. Co. v. Adams, 28 Fla. 631, 10 So. 465, 14 L. R. A. 533.

Michigan.— Toledo, etc., R. Co. v. Dunlap, 47 Mich. 456, 11 N. W. 271; Morgan's Appeal, 39 Mich. 675.

Minnesota.— Greve v. First Div. St. Paul, etc., R. Co., 26 Minn. 66, 1 N. W. 816.

Mississippi.— Louisville, etc., R. Co. v. Dickson, 63 Miss. 380, 56 Am. Rep. 809.

Oregon.— Oregon R., etc., Co. v. Mosier, 14 Oreg. 519, 13 Pac. 300, 58 Am. Rep. 321.

Texas.— International Bridge, etc., Co. v. McLane, 8 Tex. Civ. App. 665, 28 S. W. 454; Davidson v. Houston, etc., R. Co., 3 Tex. App. Civ. Cas. § 400; Texas, etc., R. Co. v. Hays, 3 Tex. App. Civ. Cas. § 56.

Washington.— Seattle, etc., R. Co. v. Corbett, 22 Wash. 189, 60 Pac. 127; Bellingham Bay, etc., R. Co. v. Strand, 14 Wash. 144, 44 Pac. 140, 46 Pac. 238.

Wisconsin.— Lyon v. Green Bay, etc., R. Co., 42 Wis. 538.

See 18 Cent. Dig. tit. "Eminent Domain," § 361½.

Contra.— Van Size v. Long Island R. Co., 3 Hun (N. Y.) 613, 6 Thomps. & C. 298; Cleveland v. Slade, 4 Ohio Dec. (Reprint) 194, 1 Clev. L. Rep. 105.

Condemnation by different company.— The rule is different where the subsequent condemnation proceedings are instituted by another and different company (De Buol v. Freeport, etc., R. Co., 111 Ill. 499; Trimmer v. Pennsylvania, etc., R. Co., 55 N. J. L. 46,

where a company enters and erects improvements pending condemnation proceedings which are subsequently abandoned,[76] or where it has no positive knowledge as to the ownership of the land, and enters upon it with the intention of subsequently instituting condemnation proceedings,[77] or of subsequently purchasing the land,[78] the owner is not entitled, in proceedings for condemnation afterward commenced, to an award for the value of the improvements so constructed. With stronger reason the landowner is not entitled to the value of such improvements, if the company enters on his land with his permission;[79] and if the company enters with the consent of a person in possession claiming under color of title, one who afterward shows himself to be the paramount owner is not entitled to recover the value of the improvements placed on the land by the company.[80]

20. Deduction of Benefits[81] — a. Set Off Against Value of Part Taken. Many constitutions provide that private property shall not be taken for public use

25 Atl. 932. See also Cohen *v.* St. Louis, etc., R. Co., 34 Kan. 158, 8 Pac. 138, 55 Am. Rep. 242), unless the latter has succeeded to the rights of the former (Cochran *v.* Missouri, etc., R. Co., 94 Mo. App. 469, 68 S. W. 367; Dansville, etc., R. Co. *v.* Hammond, 77 Hun (N. Y.) 39, 28 N. Y. Suppl. 454. See also San Francisco, etc., R. Co. *v.* Taylor, 86 Cal. 246, 24 Pac. 1027).

Entry on public lands.— Where a railroad company builds its road over public land without authority, the subsequent patentee of the land is entitled only to the value of the land, exclusive of the improvements made by the company. Denver, etc., R. Co. *v.* Stancliff, 4 Utah 117, 7 Pac. 530.

Forcible entry.— If the wrongful entry is made forcibly against the consent of the owner and without any intent eventually to pay just compensation, the owner is entitled to the value of the improvement. Albion River R. Co. *v.* Hesser, 84 Cal. 435, 24 Pac. 288; U. S. *v.* Monterey County, 47 Cal. 515.

Ouster of company.—The rule stated in the text is the same whether the company has been ousted from its former possession or not. Jacksonville, etc., R. Co. *v.* Adams, 28 Fla. 631, 10 So. 465, 14 L. R. A. 533; Texas, etc., R. Co. *v.* Hays, 3 Tex. App. Civ. Cas. § 56.

76. California Pac. R. Co. *v.* Armstrong, 46 Cal. 85.

77. Albion River R. Co. *v.* Hesser, 84 Cal. 435, 24 Pac. 288; Chase *v.* Jemmett, 8 Utah 231, 30 Pac. 757, 16 L. R. A. 805.

78. *In re* Norwood, etc., R. Co., 47 Hun (N. Y.) 489; Chase *v.* Jemmett, 8 Utah 231, 30 Pac. 757, 16 L. R. A. 805.

Inability to purchase.— A like rule applies where the company enters upon land which it has failed to purchase owing to the great number of owners. Justice *v.* Nesquehoning Valley R. Co., 87 Pa. St. 28.

79. *California.*—California Southern R. Co. *v.* Southern Pac. R. Co., 67 Cal. 59, 7 Pac. 123. See also San Francisco, etc., R. Co. *v.* Taylor, 86 Cal. 246, 24 Pac. 1027.

Illinois.— Chicago, etc., R. Co. *v.* Vaughn, 206 Ill. 234, 69 N. E. 113.

Mississippi.—Sullivan *v.* Lafayette County, 58 Miss. 790.

Nebraska.— Omaha Bridge, etc., R. Co. *v.* Whitney, (1903) 94 N. W. 513.

New Jersey.— North Hudson County R. Co. *v.* Booraem, 28 N. J. Eq. 450.

United States.— U. S. *v.* Smith, 110 Fed. 338.

A mortgagor's consent, given at a time when the mortgagee has merely a lien on the land, is effective to shield a railroad company from being a trespasser as to any one. St. Johnsbury, etc., R. Co. *v.* Willard, 61 Vt. 134, 17 Atl. 38, 15 Am. St. Rep. 886, 21 L. R. A. 528; Aspinwall *v.* Chicago, etc., R. Co., 41 Wis. 474. Thus if the company enters upon and improves the land with the consent of the mortgagor, and afterward proceeds to condemn it, but fails to make the mortgagee a party, and after a foreclosure the company proceeds to condemn the interest of the purchaser at the foreclosure sale, the purchaser is not entitled to compensation for the improvements placed upon the land by the company. St. Louis, etc., R. Co. *v.* Nyce, 61 Kan. 394, 59 Pac. 1040, 48 L. R. A. 241 [*overruling* Briggs *v.* Chicago, etc., R. Co., 56 Kan. 526, 43 Pac. 1131]; Philadelphia, etc., R. Co. *v.* Bowman, 23 N. Y. App. Div. 170, 48 N. Y. Suppl. 901 [*affirmed* in 163 N. Y. 572, 57 N. E. 1122]; St. Johnsbury, etc., R. Co. *v.* Willard, *supra*.

Consent of life-tenant.— The rule is the same where the company enters with the permission of the life-tenant. Chicago, etc., R. Co. *v.* Goodwin, 111 Ill. 273, 53 Am. Rep. 622. See, however, Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456, 11 N. W. 271, holding that where land is subject to a right of dower, a railroad company cannot enter with license from the dowress alone.

Breach of agreement with owner.— Where by a verbal agreement a landowner gave a railroad company a free right of way over his land on condition that it would construct ditches to carry off the water, and upon the company's failing to construct sufficient ditches the owner revoked the agreement, and the company proceeded to condemn the land, the increase in the value of the land by the construction of the railroad is not to be considered. Texas, etc., R. Co. *v.* Sutor, 56 Tex. 496.

80. Ellis *v.* Rock Island, etc., R. Co., 125 Ill. 82, 17 N. E. 62; Cohen *v.* St. Louis, etc., R. Co., 34 Kan. 158, 8 Pac. 138, 55 Am. Rep. 242; Searl *v.* Lake County School Dist. No. 2, 133 U. S. 553, 10 S. Ct. 374, 33 L. ed. 740.

81. Benefits not accruing from improvement as reducing damages see *supra*, X, E, 17.

without just compensation being made to the owner, and contain no provision as to deducting benefits in case only a part of a tract is taken. As to whether, under such a provision, the legislature may authorize or the courts allow the benefits accruing to the residue from the improvement to be set off against the value of the part actually taken there is a conflict of authority. In many states this course is allowed.[82] In others the value of the part of the tract which is

Instructions as to benefits see *infra* XI, M, 10.

82. *California.*— California Pac. R. Co. *v.* Armstrong, 46 Cal. 85; San Francisco, etc., R. Co. *v.* Caldwell, 31 Cal. 367.

Colorado.— Colorado Cent. R. Co. *v.* Humphrey, 16 Colo. 34, 26 Pac. 165.

Connecticut.— Nichols *v.* Bridgeport, 23 Conn. 189, 60 Am. Dec. 636.

Indiana.— Pittsburgh, etc., R. Co. *v.* Wolcott, 162 Ind. 399, 69 N. E. 451; Fifer *v.* Ritter, 159 Ind. 8, 64 N. E. 463; Forsyth *v.* Wilcox, 143 Ind. 144, 41 N. E. 371; Goodwine *v.* Evans, 134 Ind. 262, 33 N. E. 1031; Hagaman *v.* Moore, 84 Ind. 496; Indiana Cent. R. Co. *v.* Hunter, 8 Ind. 74; McIntyre *v.* State, 5 Blackf. 384.

Louisiana.—Abney *v.* Texarkana, etc., R. Co., 105 La. 440, 29 So. 890; New Orleans Pac. R. Co. *v.* Gay, 31 La. Ann. 430; New Orleans, etc., R. Co. *v.* Lagarde, 10 La. Ann. 150; New Orleans Municipality No. 2 *v.* McDonough, 16 La. 533, 9 Rob. 408; Jefferson Police Jury *v.* D'Hemecourt, 7 Rob. 509.

Massachusetts.— Butchers' Slaughtering, etc., Assoc. *v.* Com., 169 Mass. 103, 47 N. E. 599; Clark *v.* Worcester, 125 Mass. 226; Williams *v.* Taunton, 125 Mass. 34; Whitney *v.* Boston, 98 Mass. 312; Whitman *v.* Boston, etc., R. Co., 7 Allen 313; Upton *v.* South Reading Branch R. Co., 8 Cush. 600; Meacham *v.* Fitchburg R. Co., 4 Cush. 291; Callender *v.* Marsh, 1 Pick. 418; Com. *v.* Middlesex County, 9 Mass. 388; Perley *v.* Chandler, 6 Mass. 454, 4 Am. Dec. 159; Com. *v.* Norfolk County, 5 Mass. 435; Com. *v.* Coombs, 2 Mass. 489.

Minnesota.— Homer *v.* Duluth, 70 Minn. 378, 73 N. W. 176; McKusick *v.* Stillwater, 44 Minn. 372, 46 N. W. 769; Arbrush *v.* Oakdale, 28 Minn. 61, 9 N. W. 30; Winona, etc., R. Co. *v.* Waldron, 11 Minn. 515, 83 Am. Dec. 100.

Missouri.— McElroy *v.* Kansas City, etc., Air Line R. Co., 172 Mo. 546, 72 S. W. 913; Kansas City *v.* Bacon, 157 Mo. 450, 57 S. W. 1045; St. Joseph *v.* Geiwitz, 148 Mo. 210, 49 S. W. 1000; St. Louis, etc., R. Co. *v.* Fowler, 142 Mo. 670, 44 S. W. 771; Lingo *v.* Burford, 112 Mo. 149, 20 S. W. 459; Ragan *v.* Kansas City, etc., R. Co., 111 Mo. 456, 20 S. W. 234; McReynolds *v.* Kansas City, etc., R. Co., 110 Mo. 484, 19 S. W. 824 [*affirming* 34 Mo. App. 581]; State *v.* Kansas, 89 Mo. 34, 14 S. W. 515; Jackson County *v.* Waldo, 85 Mo. 637; State *v.* St. Louis, 62 Mo. 244; Quincy, etc., R. Co. *v.* Ridge, 57 Mo. 599; Newby *v.* Platte County, 25 Mo. 258; Chicago, etc., R. Co. *v.* Vivian, 33 Mo. App. 583.

New York.— Genet *v.* Brooklyn, 99 N. Y. 296, 1 N. E. 777; Long Island R. Co. *v.* Bennett, 10 Hun 91; Betts *v.* Williamsburgh, 15 Barb. 255; Livingston *v.* New York, 8 Wend. 85, 22 Am. Dec. 622. See, however, Matter of Tuthill, 36 N. Y. App. Div. 492, 55 N. Y. Suppl. 657.

North Carolina.— See Lamb *v.* Elizabeth City, 131 N. C. 241, 42 S. E. 603, 132 N. C. 194, 43 S. E. 628.

Ohio.— Columbus, etc., R. Co. *v.* Simpson, 5 Ohio St. 251; Kramer *v.* Cleveland, etc., R. Co., 5 Ohio St. 140; Browne *v.* Cincinnati, 14 Ohio 541; Symonds *v.* Cincinnati, 14 Ohio 147, 45 Am. Dec. 529.

Pennsylvania.— Bigelow *v.* Pittsburg, 189 Pa. St. 455, 42 Atl. 110; Fisher *v.* Baden Gas Co., 138 Pa. St. 301, 22 Atl. 29; Baltimore, etc., R. Co. *v.* Springer, (1888) 13 Atl. 76; Pittsburgh, etc., R. Co. *v.* Robinson, 95 Pa. St. 426; Allegheny, etc., Turnpike Road Co. *v.* Brosi, 22 Pa. St. 29; Perrysville, etc., Plank-Road Co. *v.* Thomas, 20 Pa. St. 91; Lodge *v.* Frankford, etc., R. Co., 30 Leg. Int. 92; Clark *v.* City, 2 Wkly. Notes Cas. 396.

Rhode Island.— Central Land Co. *v.* Providence, 15 R. I. 246, 2 Atl. 553; Howard *v.* Providence, 6 R. I. 514; Deblois *v.* Barker, 4 R. I. 445; *In re* Dorrance St., 4 R. I. 230.

South Carolina.— Greenville, etc., R. Co. *v.* Partlow, 5 Rich. 428.

Vermont.— Livermore *v.* Jamaica, 23 Vt. 361.

United States.— Bauman *v.* Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. ed. 270, holding that congress has power to direct that when part of a parcel of land is appropriated for a highway in the District of Columbia, the tribunal vested with the duty of assessing the compensation, whether for the value of the part taken or for the injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits capable of present estimate and reasonable computation, accruing to the part not taken for the establishment of the highway.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 379, 385 *et seq.*

Constitutional changes.—The rule has since been changed in some of the above states by express provision of the constitution. See *infra*, note 86.

Special assessments.—A law requiring commissioners, after making a separate award of compensation for land taken or injured and an assessment for benefits for the cost of the improvement, to deduct from the assessment, as respects particular lots, the amount so awarded for lands condemned or injured, is not unconstitutional. Genet *v.* Brooklyn, 99 N. Y. 296, 1 N. E. 777; Koller *v.* La Crosse, 106 Wis. 369, 82 N. W. 341; Holton *v.* Milwaukee, 31 Wis. 27, where the statute was sustained as an exercise of the taxing power. *Contra*, McKusick *v.* Stillwater, 44 Minn. 372, 46 N. W. 769.

actually taken must be paid in cash, and no deduction can be made therefrom on account of benefits to the residue.[83] It has been held that where the statute makes no provision for deduction of benefits,[84] and *a fortiori* where it forbids their deduction,[85] they should not be taken into consideration. In some states the constitutions expressly provide that full compensation shall be made for the land taken, without any deduction on account of benefits accruing to the residue.[86]

83. *Alabama.*— Alabama, etc., R. Co. *v.* Burkett, 42 Ala. 83. See also *infra*, note 86.

District of Columbia.— District of Columbia *v.* Armes, 8 App. Cas. 393; Maryland, etc., R. Co. *v.* Hiller, 8 App. Cas. 289. See, however, Bauman *v.* Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. ed. 270.

Georgia.— Atlanta *v.* Central R., etc., Co., 53 Ga. 120; Augusta *v.* Marks, 50 Ga. 612; Savannah *v.* Hartridge, 37 Ga. 113; Jones *v.* Wills Valley R. Co., 30 Ga. 43.

Illinois.— Ginn *v.* Moultrie, etc., Drainage Dist., 188 Ill. 305, 58 N. E. 988; Metropolitan West Side El. R. Co. *v.* Springer, 171 Ill. 170, 49 N. E. 416; McReynolds *v.* Burlington, etc., R. Co., 106 Ill. 152; Hyslop *v.* Finch, 99 Ill. 171; Todd *v.* Kankakee, etc., R. Co., 78 Ill. 530; Carpenter *v.* Jennings, 77 Ill. 250. The rule in this state was formerly otherwise. Curry *v.* Mt. Sterling, 15 Ill. 320; Alton, etc., R. Co. *v.* Carpenter, 14 Ill. 190; State *v.* Evans, 3 Ill. 208.

Kentucky.— Covington *v.* Worthington, 88 Ky. 206, 10 S. W. 790, 11 S. W. 1038, 11 Ky. L. Rep. 141; Louisville, etc., R. Co. *v.* Glazebrook, 1 Bush 325; Robinson *v.* Robinson, 1 Duv. 162; Henderson, etc., R. Co. *v.* Dickerson, 17 B. Mon. 173, 66 Am. Dec. 148 [*citing* Sutton *v.* Louisville, 5 Dana 28]; Jacob *v.* Louisville, 9 Dana 114, 33 Am. Dec. 533; Rice *v.* Danville, etc., Turnpike Road Co., 7 Dana 81.

Maryland.— Moale *v.* Baltimore, 5 Md. 314, 61 Am. Dec. 276.

Michigan.— Tuller *v.* Detroit, 97 Mich. 597, 56 N. W. 1032.

Mississippi.— Natchez, etc., R. Co. *v.* Currie, 62 Miss. 506; Penrice *v.* Wallis, 37 Miss. 172; Isom *v.* Mississippi Cent. R. Co., 36 Miss. 300; Brown *v.* Beatty, 34 Miss. 227, 69 Am. Dec. 389.

Nebraska.— Omaha Southern R. Co. *v.* Todd, 39 Nebr. 818, 58 N. W. 289; Omaha *v.* Cochran, 30 Nebr. 637, 46 N. W. 920; Omaha *v.* Howell Lumber Co., 30 Nebr. 633, 46 N. W. 919; Fremont, etc., R. Co. *v.* Meeker, 28 Nebr. 94, 44 N. W. 79; Chicago, etc., R. Co. *v.* Wiebe, 25 Nebr. 542, 41 N. W. 297; Fremont, etc., R. Co. *v.* Ward, 11 Nebr. 597, 10 N. W. 524; Fremont, etc., R. Co. *v.* Lamb, 11 Nebr. 592, 10 N. W. 493; Fremont, etc., R. Co. *v.* Whalen, 11 Nebr. 585, 10 N. W. 491.

New Jersey.— Glazier *v.* New Jersey, etc., R. Co., 60 N. J. L. 353, 37 Atl. 614; Carson *v.* Coleman, 11 N. J. Eq. 106. This rule does not apply where the taking is by the state itself or by a public corporation. Randolph *v.* Union County, 63 N. J. L. 155, 41 Atl. 960; Loweree *v.* Newark, 38 N. J. L. 151.

Oklahoma.— Guthrie, etc., R. Co. *v.* Faulkner, 12 Okla. 532, 73 Pac. 290.

Tennessee.— Paducah, etc., R. Co. *v.* Stovall, 12 Heisk. 1; Memphis *v.* Bolton, 9 Heisk. 508; Woodfolk *v.* Nashville, etc., R. Co., 2 Swan 422.

Texas.— Travis County *v.* Trogdon, 88 Tex. 302, 31 S. W. 358; Dulaney *v.* Nolan County, 85 Tex. 225, 20 S. W. 70; Paris *v.* Mason, 37 Tex. 447; Buffalo Bayou, etc., R. Co. *v.* Ferris, 26 Tex. 588; McNamara *v.* Denison, etc., R. Co., (Civ. App. 1898) 45 S. W. 334; Lullamire *v.* Kaufman County, 3 Tex. App. Civ. Cas. § 325.

Virginia.— Mitchell *v.* Thornton, 21 Gratt. 164.

Wisconsin.— Robbins *v.* Milwaukee, etc., R. Co., 6 Wis. 636; Milwaukee, etc., R. Co. *v.* Eble, 3 Pinn. 334, 4 Chandl. 68.

England.— Senior *v.* Metropolitan R. Co., 2 H. & C. 258, 9 Jur. N. S. 802, 32 L. J. Exch. 225, 8 L. T. Rep. N. S. 544, 11 Wkly. Rep. 836.

See 18 Cent. Dig. tit. "Eminent Domain," § 378 *et seq.*

84. District of Columbia *v.* Prospect Hill Cemetery, 5 App. Cas. (D. C.) 497. *Contra*, Chesapeake, etc., Canal Co. *v.* Keys, 5 Fed. Cas. No. 2,649, 3 Cranch C. C. 599, *semble*.

85. *Arkansas.*— Little Rock, etc., R. Co. *v.* Allister, 68 Ark. 600, 60 S. W. 953.

Illinois.— Wilson *v.* Rockford, etc., R. Co., 59 Ill. 273.

Indiana.— Grand Rapids, etc., R. Co. *v.* Horn, 41 Ind. 479; White Water Valley R. Co. *v.* McClure, 29 Ind. 536; Evansville, etc., Straight Line R. Co. *v.* Cochran, 10 Ind. 560; Evansville, etc., Straight Line R. Co. *v.* Fitzpatrick, 10 Ind. 120; Newcastle, etc., R. Co. *v.* Brumback, 5 Ind. 543; McMahon *v.* Cincinnati, etc., Short-Line R. Co., 5 Ind. 413.

Louisiana.— Vicksburg, etc., R. Co. *v.* Calderwood, 15 La. Ann. 481.

New Jersey.— Swayze *v.* New Jersey Midland R. Co., 36 N. J. L. 295.

New York.— Saxton *v.* New York El. R. Co., 139 N. Y. 320, 34 N. E. 728; Bookman *v.* New York El. R. Co., 137 N. Y. 302, 33 N. E. 333; Bohm *v.* Metropolitan El. R. Co., 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344; Hill *v.* Mohawk, etc., R. Co., 7 N. Y. 152 [*affirming* 5 Den. 206]; Lewiston, etc., R. Co. *v.* Ayer, 27 N. Y. App. Div. 571, 50 N. Y. Suppl. 502; Matter of Forty-Eighth St., 19 N. Y. App. Div. 602, 46 N. Y. Suppl. 311; Matter of Brooklyn El. R. Co., 55 Hun 165, 8 N. Y. Suppl. 78; *In re* New York, etc., R. Co., 35 Hun 260; Matter of Kingsbridge Road, 34 Misc. 729, 70 N. Y. Suppl. 1029; Matter of State Reservation, 16 Abb. N. Cas. 159.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 386, 389.

86. *Alabama.*— Faust *v.* Huntsville, 83 Ala. 279, 3 So. 771.

b. Set Off Against Damage to Residue. Where a constitution contains no provision as to deducting benefits, but provides merely that private property shall not be taken for public use without compensation, it is competent for the legislature to provide that where only a part of a tract is taken for a public use the benefits accruing to the residue shall be set off against the damages thereto, or for the courts to allow such deduction.[87] Thus any enhancement in the market value of

Arkansas.—Cribbs *v.* Benedict, 64 Ark. 555, 44 S. W. 707.

California.— Beveridge *v.* Lewis, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083, 59 L. R. A. 581; Los Angeles, etc., R. Co. *v.* Rumpp, 104 Cal. 20, 37 Pac. 859; San Bernardino, etc., R. Co. *v.* Haven, 94 Cal. 489, 29 Pac. 875; San Jose, etc., R. Co. *v.* Mayne, 83 Cal. 566, 23 Pac. 522; Pacific Coast R. Co. *v.* Porter, 74 Cal. 261, 15 Pac. 774; Tehama County *v.* Bryan, 68 Cal. 57, 8 Pac. 673. This provision is limited to a right of way taken by a private corporation. Moran *v.* Farley, (Cal. 1889) 21 Pac. 1135; Moran *v.* Ross, 79 Cal. 549, 21 Pac. 958.

Iowa.— Haggard *v.* Algona Independent School Dist., 113 Iowa 486, 85 N. W. 777; Britton *v.* Des Moines, etc., R. Co., 59 Iowa 540, 13 N. W. 710; Bland *v.* Hixenbaugh, 39 Iowa 532; Frederick *v.* Shane, 32 Iowa 254; Israel *v.* Jewett, 29 Iowa 475; Deaton *v.* Polk County, 9 Iowa 594.

Kansas.— Chicago, etc., R. Co. *v.* Emery, 51 Kan. 16, 32 Pac. 631; Florence, etc., R. Co. *v.* Shepherd, 50 Kan. 438, 31 Pac. 1002; Chicago, etc., R. Co. *v.* Woodward, 47 Kan. 191, 27 Pac. 836; Interstate Consol. Rapid Transit, etc., R. Co. *v.* Simpson, 45 Kan. 714, 26 Pac. 393; Leroy, etc., R. Co. *v.* Ross, 40 Kan. 598, 20 Pac. 197, 2 L. R. A. 217. This provision applies only to canals, railroads, and other similar cases, in which some corporation takes a use or benefit in the proposed way, other than the use and benefit enjoyed by the public. It does not apply to the taking of land for a public road, since the road is not for the use of a corporation, but for the public itself. Trosper *v.* Saline County, 27 Kan. 391; Pottawatomie County Com'rs *v.* O'Sullivan, 17 Kan. 58.

Ohio.— Cincinnati, etc., R. Co. *v.* Cincinnati, 62 Ohio St. 465, 57 N. E. 229, 49 L. R. A. 566; Cincinnati, etc., R. Co. *v.* Longworth, 30 Ohio St. 108; Cleveland *v.* Wick, 18 Ohio St. 303; Giesy *v.* Cincinnati, etc., R. Co., 4 Ohio St. 308; Lorain St. R. Co. *v.* Sinning, 17 Ohio Cir. Ct. 649.

Washington.— Kaufman *v.* Tacoma, etc., R. Co., 11 Wash. 632, 40 Pac. 137. This provision is limited to cases where the land is taken by a private corporation. Jones *v.* Seattle, 23 Wash. 753, 63 Pac. 553; Lewis *v.* Seattle, 5 Wash. 741, 32 Pac. 794.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 386, 389.

87. *California.*—Moran *v.* Farley, (1889) 21 Pac. 1135; Moran *v.* Ross, 79 Cal. 549, 21 Pac. 958. It is otherwise provided by the constitution in case a right of way is taken by a private corporation. Moran *v.* Farley, *supra*; Moran *v.* Ross, *supra*.

Georgia.— Atlanta *v.* Central R., etc., Co., 53 Ga. 120; Augusta *v.* Marks, 50 Ga. 612; Jones *v.* Wills Valley R. Co., 30 Ga. 43.

Illinois.— Schroeder *v.* Joliet, 189 Ill. 48, 59 N. E. 550, 52 L. R. A. 634; Lyon *v.* Hammond, etc., R. Co., 167 Ill. 527, 47 N. E. 775; Osgood *v.* Chicago, 154 Ill. 194, 41 N. E. 40 [*affirming* 44 Ill. App. 532]; Lake Shore, etc., R. Co. *v.* Baltimore, etc., R. Co., 149 Ill. 272, 37 N. E. 91; Harwood *v.* Bloomington, 124 Ill. 48, 16 N. E. 91; Todd *v.* Kankakee, etc., R. Co., 78 Ill. 530; Wilson *v.* Rockford, etc., R. Co., 59 Ill. 273; Chicago *v.* Webb, 102 Ill. App. 232.

Kentucky.— Elizabethtown, etc., R. Co. *v.* Helm, 8 Bush 681; Louisville, etc., R. Co. *v.* Glazebrook, 1 Bush 325; Henderson, etc., R. Co. *v.* Dickerson, 17 B. Mon. 173, 66 Am. Dec. 148; Jacob *v.* Louisville, 9 Dana 114, 33 Am. Dec. 533.

Louisiana.— Vicksburg, etc., R. Co. *v.* Calderwood, 15 La. Ann. 481.

Missouri.— McElroy *v.* Kansas City, etc., Air Line R. Co., 172 Mo. 546, 72 S. W. 913.

Nebraska.— Omaha *v.* Howell Lumber Co., 30 Nebr. 633, 46 N. W. 919; Wagner *v.* Gage County, 3 Nebr. 237.

Ohio.— Cleveland, etc., R. Co. *v.* Ball, 5 Ohio St. 568; Ohio Southern R. Co. *v.* Rawlins, 4 Ohio S. & C. Pl. Dec. 483.

Oregon.— Oregon Cent. R. Co. *v.* Wait, 3 Oreg. 428.

Tennessee.— Paducah, etc., R. Co. *v.* Stovall, 12 Heisk. 1; Woodfolk *v.* Nashville, etc., R. Co., 2 Swan 422.

Texas.— Travis County *v.* Trogdon, 88 Tex. 302, 31 S. W. 358; Buffalo Bayou, etc., R. Co. *v.* Ferris, 26 Tex. 588; Worsham *v.* Gainesville, etc., R. Co., 3 Tex. App. Civ. Cas. § 425; Davidson *v.* Houston, etc., R. Co., 3 Tex. App. Civ. Cas. § 400; Southern Cotton Press, etc., Co. *v.* Galveston Wharf Co., 3 Tex. App. Civ. Cas. § 256; McDonald *v.* Texas, etc., R. Co., 1 Tex. Unrep. Cas. 191.

Virginia.— Mitchell *v.* Thornton, 21 Gratt. 164.

Wisconsin.— Chapman *v.* Oshkosh, etc., R. Co., 33 Wis. 629; Milwaukee, etc., R. Co. *v.* Eble, 3 Pinn. 334, 4 Chandl. 68.

See 18 Cent. Dig. tit. "Eminent Domain," § 380 *et seq.*

Contra.— New Orleans, etc., R. Co. *v.* Moye, 39 Miss. 374; Isom *v.* Mississippi Cent. R. Co., 36 Miss. 300 (*semble*); Brown *v.* Beatty, 34 Miss. 227, 69 Am. Dec. 389 (*semble*).

In other words, in estimating the damage done to the property not actually taken, the effect of the improvement on the whole property should be considered, and not merely a part of it. If one part of the property is damaged and another part specially benefited, so that the value of the whole is not diminished, there is no damage done. Shawneetown *v.* Mason, 82 Ill. 337, 25 Am. Rep. 321. See *supra*, X, E, 3.

This rule may be avoided by agreement. Thus where a landowner consents to the con-

abutting property caused by the construction of a public improvement in the street may properly be set off against the resulting damages to such property.[88]

c. Set Off Against Damage to Separate Tract. The benefit resulting to one lot or tract from an improvement cannot be set off in determining the compensation or damages due to the same owner for the taking or injuring of a separate and distinct although contiguous tract.[89] Thus the damage done to one piece of

struction by a railroad company of a bulkhead outside of its right of way, on condition that it shall be without cost or expense to him, the increased value of his land by reason of the bulkhead cannot be set off against the damages resulting from the taking of a portion of the land for the right of way. Harris *v.* Schuylkill River East Side R. Co., 141 Pa. St. 242, 21 Atl. 590, 23 Am. St. Rep. 278. So where a contract between a railroad company and an owner of land provided for the running of the railroad over the land, and that the owner was to be allowed and paid the value of the bridge abutments on his land, as well as for the land taken, damages to the land could be paid only in money, and not by setting off against them benefits to lands not taken. McElroy *v.* Kansas City, etc., Air Line R. Co., 172 Mo. 546, 72 S. W. 913.

Improvement to be considered as a whole. — Although a part of the improvement, standing alone, has resulted in damage to the property, yet if, when the improvement is taken into consideration, a benefit and not a loss has been the result, the owner is not entitled to recover damages, no part of the property having been actually taken. Wabash, etc., R. Co. *v.* McDougall, 126 Ill. 111, 18 N. E. 291, 9 Am. St. Rep. 539, 1 L. R. A. 207; Page *v.* Chicago, etc., R. Co., 70 Ill. 324; Chicago *v.* Webb, 102 Ill. App. 232; Lehigh Valley Coal Co. *v.* Chicago, 26 Fed. 415.

88. *Georgia.*— Guess *v.* Stone Mountain Granite, etc., Co., 72 Ga. 320. See, however, Davis *v.* East Tennessee, etc., R. Co., 87 Ga. 605, 13 S. E. 567.

Illinois.— Shawneetown *v.* Mason, 82 Ill. 337, 25 Am. Rep. 321.

Kentucky.— Jeffersonville, etc., R. Co. *v.* Esterle, 13 Bush 667.

Missouri.— Wolters *v.* St. Louis, 132 Mo. 1, 33 S. W. 441 (erection of bridge); Porter *v.* North Missouri R. Co., 33 Mo. 128.

New York.— Saxton *v.* New York El. R. Co., 139 N. Y. 320, 34 N. E. 728; Bischoff *v.* New York El. R. Co., 138 N. Y. 257, 33 N. E. 1073; Sperb *v.* Metropolitan El. R. Co., 137 N. Y. 596, 33 N. E. 319 [*reversing* 60 N. Y. Super. Ct. 347, 17 N. Y. Suppl. 469]; Sloane *v.* New York El. R. Co., 137 N. Y. 595, 33 N. E. 335 [*reversing* 63 Hun 300, 17 N. Y. Suppl. 769]; Sutro *v.* Manhattan R. Co., 137 N. Y. 592, 33 N. E. 334; Bookman *v.* New York El. R. Co., 137 N. Y. 302, 33 N. E. 333; Odell *v.* New York El. R. Co., 130 N. Y. 690, 29 N. E. 998; Auchincloss *v.* Metropolitan El. R. Co., 69 N. Y. App. Div. 63, 74 N. Y. Suppl. 534; Lazarus *v.* Metropolitan El. R. Co., 5 N. Y. App. Div. 398, 39 N. Y. Suppl. 294; Buek *v.* Metropolitan El. R. Co., 73 Hun 251, 25 N. Y. Suppl. 1048; Storck *v.* Metropolitan El. R. Co., 59 N. Y. Super. Ct. 588, 14 N. Y. Suppl. 311; Krumwiede *v.* Manhattan R. Co., 9 Misc. 552, 30 N. Y. Suppl. 400; Nette *v.* New York El. R. Co., 2 Misc. (N. Y.) 62, 20 N. Y. Suppl. 844; Betjeman *v.* New York El. R. Co., 1 Misc. 138, 20 N. Y. Suppl. 628; Steinmetz *v.* Metropolitan El. R. Co., 18 N. Y. Suppl. 209; Jones *v.* New York El. R. Co., 18 N. Y. Suppl. 134; Brush *v.* Manhattan R. Co., 17 N. Y. Suppl. 540 [*affirming* 13 N. Y. Suppl. 908, 26 Abb. N. Cas. 73]; Wiener *v.* New York El. R. Co., 16 N. Y. Suppl. 913; Purdy *v.* Manhattan El. R. Co., 13 N. Y. Suppl. 295.

West Virginia.— Guinn *v.* Ohio River R. Co., 46 W. Va. 151, 33 S. E. 87, 76 Am. St. Rep. 806.

See 18 Cent. Dig. tit. "Eminent Domain," § 382.

Where the grade of a street has been raised in the construction of an approach to a viaduct, the owner of abutting land cannot recover damages unless his property has been damaged more than it has been benefited. Springer *v.* Chicago, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609 [*affirming* 37 Ill. App. 206]; Elgin *v.* Eaton, 83 Ill. 535, 25 Am. Rep. 412. So any enhancement in the market value of abutting property by the location of a railroad in a street is a proper set-off against the damage resulting from the change of grade. Wolff *v.* Georgia Southern, etc., R. Co., 94 Ga. 555, 20 S. E. 484. *Compare* Eachus *v.* Los Angeles Consol. Electric R. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149.

Ownership of fee.— Where premises abutting on a street of which the fee is owned by the city are more valuable after an elevated railroad has been constructed than they would have been without it, the owner is not entitled to compensation for the easements of light, air, and access taken by the railroad. Krumwiede *v.* Manhattan R. Co., 9 Misc. (N. Y.) 552, 30 N. Y. Suppl. 400.

89. *Illinois.*— Pittsburg, etc., R. Co. *v.* Reich, 101 Ill. 157; Peoria, etc., R. Co. *v.* Laurie, 63 Ill. 264.

Indiana.— Vanblaricum *v.* State, 7 Blackf. 209; State *v.* Digby, 5 Blackf. 543; McIntire *v.* State, 5 Blackf. 384.

Iowa.—Koestenbader *v.* Pierce, 41 Iowa 204.

Massachusetts.— Dickenson *v.* Fitchburg, 13 Gray 546.

Missouri.— Farrar *v.* Midland Electric R. Co., 101 Mo. App. 140, 74 S. W. 500.

Pennsylvania.—Root's Case, 77 Pa. St. 276.

Texas.—Harrison *v.* Sulphur Springs, (Civ. App. 1902) 67 S. W. 515.

Washington.— See Lewis *v.* Seattle, 5 Wash. 741, 32 Pac. 794.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 383, 388.

See, however, Wilcox *v.* Meriden, 57 Conn. 120, 17 Atl. 366 (holding that where a city

land through which a railroad is run cannot be compensated by benefits accruing to another and separate piece of land through which it does not run, although both pieces belong to the same person.[90]

d. Set Off of Benefits From Another Improvement. The benefits which may be considered are those which are derived from the improvement for which the land is to be condemned, and not those derived from other improvements.[91]

e. Character of Benefits — (i) *In General.* The benefits which may be set off against the damages where part of a tract is taken in the exercise of the right of eminent domain are those accruing to the residue of the tract[92] from the construction of the improvement.[93] They must be actual and appreciable[94] and

charter directs the damages to owners of land taken for public purposes to be appraised, and all benefits to persons whose property is specially benefited to be assessed, and prescribes that if an assessment and appraisal are made in favor of and against the same person the difference shall be paid by the city or the person as the case may be, benefits accruing to owners of land in severalty may be deducted from the damages caused by taking the whole of the land owned jointly by them and used by them as a passway to their several lots); Lowerre *v.* New York, 46 Hun (N. Y.) 253 (holding that where the amounts awarded for the taking of different lots owned by the same person were aggregated, and the amounts assessed as benefits were aggregated, and a balance was struck, the irregularity in making the deduction did not entitle the owner to recover the awards without deducting the benefits assessed).

What constitutes separate tract.— Where a town has been laid out into blocks and streets for many years, and has always been so recognized and dealt with by the owners and people, the blocks should be treated as distinct tracts for the purpose of assessing damages done by a railroad running through any of them, although the plat of the town may not have been made according to the statute. Todd *v.* Kankakee, etc., R. Co., 78 Ill. 530. Where, however, a part of a farm has been temporarily leased as a separate holding but divided from the rest only by a surveyor's line, the owner cannot exclude such portion from consideration and treat it as a separate lot, so as to recover for the residue being cut off from the public road; but the farm is to be treated as a whole, and the benefit to one portion should be considered in connection with the disadvantage resulting to another. Baltimore, etc., R. Co. *v.* Springer, (Pa. 1888) 13 Atl. 76. See also *supra*, X, E, 19, c.

90. Todd *v.* Kankakee, etc., R. Co., 78 Ill. 530; St. Louis, etc., R. Co. *v.* Brown, 58 Ill. 61; Meacham *v.* Fitchburg R. Co., 4 Cush. (Mass.) 291; *In re* Brooklyn El. R. Co., 87 Hun (N. Y.) 104, 33 N. Y. Suppl. 974 [*distinguishing* Rich *v.* Manhattan R. Co., 19 N. Y. Suppl. 543]; St. Paul The Apostle Missionary Soc. *v.* New York El. R. Co., 12 Misc. (N. Y.) 359, 33 N. Y. Suppl. 648; Philadelphia, etc., R. Co. *v.* Gilson, 8 Watts (Pa.) 243; Baltimore, etc., R. Co. *v.* Springer, 21 Wkly. Notes Cas. (Pa.) 143; Harrisburg, etc., R. Co. *v.* Moore, 4 Wkly. Notes Cas. (Pa.) 532.

This rule does not apply in an action to restrain the operation of an elevated railroad in front of plaintiff's lots, all on the same street and within a few blocks of each other but not contiguous; and hence the benefits peculiar to one lot from the operation of the road may be offset against the damage to the others. Rich *v.* New York El. R. Co., 16 Daly (N. Y.) 518, 14 N. Y. Suppl. 167.

91. Weckler *v.* Chicago, 61 Ill. 142 (holding that where a person's property is condemned for the opening of an alley running east and west through a block, he should not be charged for benefits he may derive by widening an alley running north and south through the same block); Gile *v.* Stevens, 13 Gray (Mass.) 146 (holding that the benefit to a meadow below a mill-dam from a ditch dug at the time of the erection of the dam by its owner through his own land below the meadow cannot be set off against the injury to the meadow by the subsequent flowing occasioned by the dam); McKusick *v.* Stillwater, 44 Minn. 372, 46 N. W. 769; McElheny *v.* McKeesport, etc., Bridge Co., 153 Pa. St. 108, 25 Atl. 1021 (holding that in a proceeding to condemn land needed in changing the plan of a bridge, benefits caused by the original erection of the bridge, for which other land of the same person had been condemned, should not be considered).

92. Butchers' Slaughtering, etc., Assoc. *v.* Com., 169 Mass. 103, 47 N. E. 599, where it was said that benefits accruing to the business conducted by a landowner on premises through which a sewer is laid, as distinguished from benefits accruing to the land in view of its adaptability to that business, cannot be allowed.

93. State *v.* Evans, 3 Ill. 208, holding that the benefit which results to the land from the construction of a railroad is the question for consideration, and not that which results from its location.

94. Gile *v.* Stevens, 13 Gray (Mass.) 146; Richmond Traction Co. *v.* Murphy, 98 Va. 104, 34 S. E. 982.

Availability of benefit.— The reasonable cost of making practically available to the owner any special and particular benefit from the construction of a public sewer should be considered in determining the amount which is to be set off against the damages. Butchers' Slaughtering, etc., Assoc. *v.* Com., 163 Mass. 386, 40 N. E. 176. So where land is taken for a street, the owner may meet evidence offered by the city to show that he was benefited

not conjectural;[95] and they must be the direct and proximate result of the improvement, remote benefits not being taken into consideration.[96]

(II) *General and Special Benefits.* General benefits resulting to the owner in common with the public are not to be set off against the value of the property taken or the damage to that injured in making an improvement. That

because the burden of repairing the street was no longer upon him by showing what the fair cost of keeping the street in repair would be. Beale *v.* Boston, 166 Mass. 53, 43 N. E. 1029. And the fact that the construction of an elevated railroad in a street had caused property in the immediate vicinity of the terminal point of a surface railroad to increase in value by being applied to different uses than formerly is not sufficient to warrant a finding that the terminal property has itself increased in value, since the surface railroad company cannot devote it with profit to any other use. Sixth Ave. R. Co. *v.* Manhattan R. Co., 14 N. Y. Suppl. 97.

Highway over railroad.— Where a highway is laid out across the tracks of a railroad company, the company cannot be charged with any supposed benefits. Boston, etc., R. Co. *v.* Middlesex County, 1 Allen (Mass.) 324; Old Colony, etc., R. Co. *v.* Plymouth County, 14 Gray (Mass.) 155; St. Paul, etc., R. Co. *v.* Minneapolis, 35 Minn. 141, 27 N. W. 500; Morris, etc., R. Co. *v.* Orange, 63 N. J. L. 252, 43 Atl. 730, 47 Atl. 363.

95. Chicago *v.* Lonergan, 196 Ill. 518, 63 N. E. 1018; Roberts *v.* Brown County, 21 Kan. 247; Drury *v.* Midland R. Co., 127 Mass. 571 (holding that where a railroad company appropriates the exclusive use of a part of certain flats, thereby injuring the remaining part, the possibility that the company might be willing to allow spur tracks to be built on the remaining flats for the purpose of filling them or for business purposes is not to be taken into consideration); Brown *v.* Providence, etc., R. Co., 5 Gray (Mass.) 35 (holding that evidence that the residue of the land would be benefited by the location of a station on the land taken for a railroad is not admissible, where no act has been done by the company toward establishing a station); Penrice *v.* Wallis, 37 Miss. 172.

Future benefits.— While the jury may not charge the land for benefits to accrue in the future, yet they may allow a charge for the value of the present opportunity for future enhancement. Fifer *v.* Ritter, 159 Ind. 8, 64 N. E. 463. But improvements which a railroad company proposes to make in the future, unconnected with finishing the road, cannot found a claim of benefits. Pittsburg, etc., R. Co. *v.* Rose, 74 Pa. St. 362.

Elevating tracks.— In an action against a city for injuries caused by requiring the elevation of a railroad track, any danger to plaintiff and his family before the elevation of the track and any greater safety after that event is not speculative and may be considered in estimating the damages and benefits. Chicago *v.* Webb, 102 Ill. App. 232.

96. *Kansas.*— Roberts *v.* Brown County, 21 Kan. 247.

Massachusetts.— Childs *v.* New Haven, etc., Co., 133 Mass. 253, holding that evidence that the construction of the railroad would increase the demand for chestnut ties is not admissible, although there is chestnut timber on the land, such benefit being too remote.

New York.— Jefferson *v.* New York El. R. Co., 11 N. Y. Suppl. 488.

South Carolina.— Greenville, etc., R. Co. *v.* Partlow, 5 Rich. 428, holding that if an enhanced value is not owing to the construction of the road but to an accidental demand, the owner is not chargeable with it as an item of benefit.

Texas.— Anderson *v.* Wharton County, 27 Tex. Civ. App. 115, 65 S. W. 643, holding that an advantage to a farm owing to the building of a town because of a road and the establishment of a public gin at the town was too remote to afford a basis for a finding to the effect that there had been a benefit from the road.

Washington.— Seattle, etc., R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738, holding that it is not material that the market value of lands has increased in other counties where a railroad runs, if there is no offer to show that the increase is directly due to the building of the road.

See 18 Cent. Dig. tit. "Eminent Domain," § 392.

See, however, St. Louis, etc., R. Co. *v.* Knapp, etc., Co., 160 Mo. 396, 61 S. W. 300, holding that where land of an abutting owner was much lower than the grade of the street and of a railroad, a change in the level which would render useful surface crossings over the railroad is not so remote as to be excluded from consideration.

Previous enjoyment of benefit.— If the owner previously enjoyed the benefit, he is not chargeable with it, since it is not due to the improvement. Barrall *v.* Quick, 111 Ky. 22, 63 S. W. 33, 23 Ky. L. Rep. 421; Anderson *v.* Wharton County, 27 Tex. Civ. App. 115, 65 S. W. 643.

Proximate cause.— A rise in the value of property after the construction of a railroad will not be attributed exclusively to the beneficial effects of the road, if it appears that about the time of its construction property generally was beginning to recover from the depression caused by a financial panic. Morange *v.* New York El. R. Co., 74 Hun (N. Y.) 393, 26 N. Y. Suppl. 584. So where the rental value increased twenty per cent after the erection of the road and before the addition of improvements to the premises, the court properly refused to attribute to the improvements the increase of rental value after their addition. Brush *v.* Manhattan R. Co., 17 N. Y. Suppl. 540. And where the rents had been steadily decreasing until the operation

the benefits may be deducted, they must be special or local or such as result directly and peculiarly to the particular tract of which a part is taken.[97] Few general rules can be laid down for ascertaining whether or not a given benefit is general or special. The question must be determined largely by the circumstances of the particular case.[98] A benefit may be special and peculiar to a tract of land

of the railroad began, and they steadily increased afterward, notwithstanding the cinders, smoke, steam, and odors from the engines and the interference with light and the drippings of the railroad structure, a denial of damages was proper. Israel *v.* Metropolitan El R. Co., 10 Misc. (N. Y.) 722, 31 N. Y. Suppl. 816.

97. *Arkansas.*— Little Rock, etc., R. Co. *v.* Allister, 68 Ark. 600, 60 S. W. 953.

District of Columbia.—Clapp *v.* McFarland, 20 App. Cas. 224.

Illinois.— Chicago *v.* Lonergan, 196 Ill. 518, 63 N. E. 1018; Chicago *v.* Jackson, 196 Ill. 496, 63 N. E. 1013, 1135; Guyer *v.* Davenport, etc., R. Co., 196 Ill. 370, 63 N. E. 732; Braun *v.* Metropolitan West Side El. R. Co., 166 Ill. 434, 46 N. E. 974; Chicago, etc., R. Co. *v.* Blake, 116 Ill. 163, 4 N. E. 488; Peoria, etc., R. Co. *v.* Black, 58 Ill. 33; Herrmann *v.* East St. Louis, 58 Ill. App. 166; Geneva *v.* Peterson, 21 Ill. App. 454.

Kansas.— Roberts *v.* Brown County, 21 Kan. 247; Pottawatomie County Com'rs *v.* O'Sullivan, 17 Kan. 58.

Kentucky.— Holmes *v.* Louisville, etc., R. Co., 16 Ky. L. Rep. 318.

Maryland.— Lake Roland El. R. Co. *v.* Frick, 86 Md. 259, 37 Atl. 650.

Massachusetts.— Baker *v.* Boston El. R. Co., 183 Mass. 178, 66 N. E. 711; Cole *v.* Boston, 181 Mass. 374, 63 N. E. 1061; Parks *v.* Hampden County, 120 Mass. 395; Dickenson *v.* Fitchburg, 13 Gray 546; Upton *v.* South Reading Branch R. Co., 8 Cush. 600; Meacham *v.* Fitchburg R. Co., 4 Cush. 291.

Minnesota.— Homer *v.* Duluth, 70 Minn. 378, 73 N. W. 176; Arbrush *v.* Oakdale, 28 Minn. 61, 9 N. W. 30; Weir *v.* St. Paul, etc., R. Co., 18 Minn. 155; Carli *v.* Stillwater, etc., R. Co., 16 Minn. 260; Minnesota Cent. R. Co. *v.* McNamara, 13 Minn. 508; Winona, etc., R. Co. *v.* Waldron, 11 Minn. 513, 88 Am. Dec. 100.

Missouri.— Berkson *v.* Kansas City Cable R. Co., 144 Mo. 211, 45 S. W. 1119; St. Louis, etc., R. Co. *v.* Fowler, 142 Mo. 670, 44 S. W. 771; Bennett *v.* Woody, 137 Mo. 377, 38 S. W. 972; Hickman *v.* Kansas City, 120 Mo. 110, 25 S. W. 225, 41 Am. St. Rep. 684, 23 L. R. A. 658; St. Louis, etc., R. Co. *v.* Fowler, 113 Mo. 458, 20 S. W. 1069; Combs *v.* Smith, 78 Mo. 32; Tebo, etc., R. Co. *v.* Kingsberry, 61 Mo. 51; Hosher *v.* Kansas City, etc., R. Co., 60 Mo. 303; Mississippi River Bridge Co. *v.* Ring, 58 Mo. 491; Lee *v.* Tebo, etc., R. Co., 53 Mo. 178; St. Louis, etc., R. Co. *v.* Richardson, 45 Mo. 466; Lexington *v.* Long, 31 Mo. 369; Pacific R. Co. *v.* Chrystal, 25 Mo. 544; Louisiana, etc., Plankroad Co. *v.* Pickett, 25 Mo. 535; Newby *v.* Platte County, 25 Mo. 258.

Nebraska.— Omaha Southern R. Co. *v.* Todd, 39 Nebr. 818, 58 N. W. 289; Dayton *v.* Lincoln, 39 Nebr. 74, 57 N. W. 754; Fremont, etc., R. Co. *v.* Meeker, 28 Nebr. 94, 44 N. W. 79; Chicago, etc., R. Co. *v.* Wiebe, 25 Nebr. 542, 41 N. W. 297; Schaller *v.* Omaha, 23 Nebr. 325, 36 N. W. 533.

New Hampshire.— Adden *v.* White Mountains New Hampshire R. Co., 55 N. H. 413, 20 Am. Rep. 220; Carpenter *v.* Landaff, 42 N. H. 218; *In re* Mt. Washington Road Co., 35 N. H. 134.

New Jersey.— State *v.* Miller, 23 N. J. L. 383.

North Carolina.— Southport, etc., R. Co. *v.* Platt Land, 133 N. C. 266, 45 S. E. 589; Haislip *v.* Wilmington, etc., R. Co., 102 N. C. 376, 8 S. E. 926; Raleigh, etc., Air Line R. Co. *v.* Wicker, 74 N. C. 220; Asheville *v.* Johnston, 71 N. C. 398; Freedle *v.* North Carolina R. Co., 49 N. C. 89. This rule has been changed by statute in favor of the city of Asheville. Miller *v.* Asheville, 112 N. C. 759, 16 S. E. 762.

Ohio.— Little Miami R. Co. *v.* Collett, 6 Ohio St. 182; Cleveland, etc., R. Co. *v.* Ball, 5 Ohio St. 568; Matter of Cincinnati, etc., R. Co., 1 Ohio Dec. (Reprint) 269, 6 West. L. J. 350; Toledo Bending Co. *v.* Manufacturers' R. Co., 3 Ohio S. & C. Pl. Dec. 430, 2 Ohio N. P. 317.

Oklahoma.— Guthrie, etc., R. Co. *v.* Faulkner, 12 Okla. 532, 73 Pac. 290.

Pennsylvania.— Mahaffey *v.* Beech Creek R. Co., 163 Pa. St. 158, 29 Atl. 881; Long *v.* Harrisburg, etc., R. Co., 126 Pa. St. 143, 19 Atl. 39; Short *v.* Rochester, etc., R. Co., (1887) 8 Atl. 596; Pittsburgh, etc., R. Co. *v.* McCloskey, 110 Pa. St. 436, 1 Atl. 555; Pittsburgh, etc., R. Co. *v.* Robinson, 95 Pa. St. 426; Hornstein *v.* Atlantic, etc., R. Co., 51 Pa. St. 87.

Texas.— Haney *v.* Gulf, etc., R. Co., 3 Tex. App. Civ. Cas. § 278.

Virginia.— James River, etc., Co. *v.* Turner, 9 Leigh 313.

Wisconsin.— Neilson *v.* Chicago, etc., R. Co., 58 Wis. 516, 17 N. W. 310; Robbins *v.* Milwaukee, etc., R. Co., 6 Wis. 636; Milwaukee, etc., R. Co. *v.* Eble, 3 Pinn. 334, 4 Chandl. 68.

United States.— Chicago *v.* Le Moyne, 119 Fed. 662, 56 C. C. A. 278; Chicot County Bd. of Levee Inspectors *v.* Crittenden, 94 Fed. 613, 36 C. C. A. 418; *In re* Rugheimer, 36 Fed. 376.

See 18 Cent. Dig. tit. "Eminent Domain," § 390 *et seq.*

98. Butchers' Slaughtering, etc., Assoc. *v.* Com., 169 Mass. 103, 47 N. E. 599 (holding that where, on account of the location of a sewer through his land, the owner may with greater facility and less expense connect his drains with the sewer, it is a special benefit);

of which a part is taken, although it accrues to a number of tracts in the vicinity, where all the tracts occupy a peculiar situation with reference to the improve-

Paine *v.* Woods, 108 Mass. 160 (holding that in assessing damages for flowage caused by a dam, it is proper to consider the fact that ice will be formed upon the water, which may be sold as merchandise, without appreciably diminishing the water-power); Brower *v.* Merrill, 3 Pinn. (Wis.) 46, 3 Chandl. (Wis.) 46 (holding that the use one may have of a mill for grinding his grain or sawing his lumber, and the increased value of his lands in consequence of the town growing up around the mill, are not benefits which may be set off against the actual damages caused by flowing the lands). See also Frence *v.* Lowell, 117 Mass. 363.

It is for the jury to determine whether the land in question has been specially benefited. Kansas City *v.* Bacon, 147 Mo. 259, 48 S. W. 860; Gorgas *v.* Philadelphia, etc., R. Co., 144 Pa. St. 1, 22 Atl. 715; Pittsburgh, etc., R. Co. *v.* Robinson, 38 Leg. Int. (Pa.) 22; Houston, etc., R. Co. *v.* Postal Tel. Cable Co., 18 Tex. Civ. App. 502, 45 S. W. 179.

Increase in value.— In assessing the value of land taken by a railroad company, the commissioners or jury, in estimating the benefit or advantage to the owner, should take into consideration the speculative or salable increase in the value of the land attributable to the construction of the road. Greenville, etc., R. Co. *v.* Partlow, 5 Rich. (S. C.) 428. This can be done, however, only where the increase arises from some direct, special, and proximate cause, such as the draining of the land, or building bridges across streams running through the land, or making some other valuable improvement on or near the land, by means of which the owner will be enabled to enjoy his land with greater advantage; that is, the increased value must be founded upon something which affects the land itself directly and proximately; it must be founded upon something which increases the actual or useful value of the land, as well as the marketable or salable value thereof, and not such as increases merely the marketable or salable value alone. Increased value founded upon merely increased facilities for travel and transportation by the public in general is not the kind of increased value which may be taken into consideration in reducing the damages to be awarded the landowner. Roberts *v.* Brown County, 21 Kan. 247. See also *infra*, p. 773, note 1.

Highways.— When the land is taken for the laying out or widening of a way, there are two kinds of benefit which the remaining land may receive: (1) The special and direct benefit arising from its position on the way; and (2) the general benefit not arising from its location on the way, but from the facilities and advantages caused by the way. The direct and peculiar benefit may be considered, while the general benefit cannot be.

Connecticut.— Wilcox *v.* Meriden, 57 Conn. 120, 17 Atl. 366, holding that where the owner has been using the property taken for access to his business property and has been at expense to keep it in repair for such purpose, the fact that the city subsequently assumes to keep it in repair as a street, thus relieving him of that expense, is proper to be considered.

Kansas.— Trosper *v.* Saline County, 27 Kan. 391, holding that while an increased value of land founded merely upon increased facilities for travel and transportation by the public in general may not be taken into consideration, yet an increased value founded upon the fact that a highway is established directly upon a person's land, so that he can pass directly from the one to the other, and so that he can have free and unobstructed ingress to and egress from his land, is special to himself and should be deducted.

Massachusetts.— Hilbourne *v.* Suffolk County, 120 Mass. 393, 21 Am. Rep. 522.

Minnesota.—Whitely *v.* Mississippi Water-Power, etc., Co., 38 Minn. 523, 38 N. W. 753.

New Hampshire.— Whitcher *v.* Benton, 50 N. H. 25, holding that the fact that a highway gives facility of access to a sawmill belonging to the owner is not a special benefit.

Rhode Island.— Central Land Co. *v.* Providence, 15 R. I. 246, 2 Atl. 553, holding that the widening of a street is a special benefit to the property abutting on it.

Wisconsin.— Milwaukee, etc., R. Co. *v.* Eble, 3 Pinn. 334, 4 Chandl. 68, holding that if the construction of the road is of any special advantage to the owner, as if it makes any particular lot more salable than others, or drains some part of the land, or fertilizes it, or opens an avenue to him not common to others, a proper deduction may be made from the damages.

Railroads.— The fact that a railroad is a trunk line to Chicago is not such a benefit to the owner as should be considered in abatement of the damages (Laflin *v.* Chicago, etc., R. Co., 33 Fed. 415); nor is the fact that by the construction of a railroad a market is opened for the owner's coal and wood (Grafton, etc., R. Co. *v.* Foreman, 24 W. Va. 662). So it has been held that the location of a railroad station in the vicinity of the land is not a special benefit. Pochila *v.* Calvert, etc., R. Co., 31 Tex. Civ. App. 398, 72 S. W. 255. See, however, Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364, 18 N. W. 328; Shattuck *v.* Stoneham Branch R. Co., 6 Allen (Mass.) 115; Gorgas *v.* Philadelphia, etc., R. Co., 144 Pa. St. 1, 22 Atl. 715; Pittsburgh, etc., R. Co. *v.* Robinson, 38 Leg. Int. (Pa.) 22. Additional facilities for access furnished by the railroad may be a special benefit. Jeffersonville, etc., R. Co. *v.* Esterle, 13 Bush (Ky.) 667; Lewis *v.* New York, etc., R. Co., 25 Misc. (N. Y.) 13, 54 N. Y. Suppl. 434. So the increased shipping facilities may be set off. Jeffersonville, etc., R. Co. *v.* Esterle, *supra*; Guinn *v.* Ohio River R. Co., 46 W. Va. 151, 33 S. E. 87, 76 Am. St. Rep. 806, holding that increased wholesale trade

ment, by reason of which the benefit attaches.[99] To render a benefit special under such circumstances, however, the different tracts to which it accrues must occupy a peculiar situation with reference to the improvement. If the benefit attaches to all the lands in the neighborhood, without regard to their situation with reference to the improvement, it is general and cannot be deducted.[1]

(III) *With Reference to Time.* The benefits are to be assessed as of the time of the actual location of the improvement;[2] and only those benefits may be

consequent on the increased facility of shipment may be set off against loss of the local retail trade. Switching privileges also may constitute a special benefit. St. Louis, etc., R. Co. *v.* Fowler, 142 Mo. 670, 44 S. W. 771; St. Louis, etc., R. Co. *v.* St. Louis Union Stock Yards Co., 120 Mo. 541, 25 S. W. 399; Pittsburgh, etc., R. Co. *v.* Robinson, 95 Pa. St. 426.

99. *California.*— Beveridge *v.* Lewis, (1902) 67 Pac. 1040; California Pac. R. Co. *v.* Armstrong, 46 Cal. 85.

Illinois.— Metropolitan West Side El. R. Co. *v.* White, 166 Ill. 375, 46 N. E. 978; Metropolitan West Side El. R. Co. *v.* Clancy, 153 Ill. 270, 38 N. E. 557; Metropolitan West Side El. R. Co. *v.* Stickney, 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773.

Kentucky.— Henderson, etc., R. Co. *v.* Dickerson, 17 B. Mon. 178, 66 Am. Dec. 148.

Massachusetts.— Butchers' Slaughtering, etc., Assoc. *v.* Com., 169 Mass. 103, 47 N. E. 599; Hilbourne *v.* Suffolk County, 120 Mass. 393, 21 Am. Rep. 522; Allen *v.* Charlestown, 109 Mass. 243, the last two cases holding that a peculiar benefit may be allowed, although similar peculiar benefits have accrued to other lands on the same highway.

Pennsylvania.— Pittsburg Southern R. Co. *v.* Reed, 44 Leg. Int. 92.

Dissimilar benefits.— The fact that other lands on the street were benefited in other or different ways should not affect the claim to have the peculiar benefits set off. Whitney *v.* Boston, 98 Mass. 312.

Tracts of which no part is taken.— If the widening of a street is a special benefit to the property abutting on it, it is immaterial that landowners on the opposite side of the street are similarly benefited, although none of their lands is taken. Cross *v.* Plymouth County, 125 Mass. 557; Lewis *v.* Seattle, 5 Wash. 741, 32 Pac. 794.

1. Meacham *v.* Fitchburg R. Co., 4 Cush. (Mass.) 291; Packard *v.* Bergen Neck R. Co., 54 N. J. L. 229, 23 Atl. 722; Swanton *v.* Pierson, 37 N. J. L. 363; Williamson *v.* East Amwell, 28 N. J. L. 270; State *v.* Miller, 23 N. J. L. 383; Guthrie, etc., R. Co. *v.* Faulkner, 12 Okla. 532, 73 Pac. 290; Pochila *v.* Calvert, etc., R. Co., 31 Tex. Civ. App. 398, 72 S. W. 255.

General increase in value.— An increase in the value of the land not taken must be such as is not common to other lands in the vicinity, else it cannot be set off against the damages.

Illinois.— Du Pont *v.* Chicago Sanitary Dist., 203 Ill. 170, 67 N. E. 815.

Kansas.— Trosper *v.* Saline County, 27 Kan. 391; Tobie *v.* Brown County Com'rs, 20 Kan. 14.

Kentucky.— Elizabethtown, etc., R. Co. *v.* Tierney, 11 Ky. L. Rep. 526.

Ohio.— Martin *v.* Bond Hill, 7 Ohio Cir. Ct. 271, 4 Ohio Cir. Dec. 591.

Pennsylvania.— Shimer *v.* Easton R. Co., 205 Pa. St. 648, 55 Atl. 769; Harris *v.* Schuylkill River, etc., Co., 141 Pa. St. 242, 21 Atl. 590, 23 Am. St. Rep. 278; Pittsburgh, etc., R. Co. *v.* McCloskey, 110 Pa. St. 436, 1 Atl. 555.

Tennessee.— Mississippi R. Co. *v.* McDonald, 12 Heisk. 54; Paducah, etc., R. Co. *v.* Stovall, 12 Heisk. 1.

Texas.— Pochila *v.* Calvert, etc., R. Co., 31 Tex. Civ. App. 398, 72 S. W. 255; Eastern Texas R. Co. *v.* Eddings, 30 Tex. Civ. App. 170, 70 S. W. 98.

Contra, Saxton *v.* New York El. R. Co., 139 N. Y. 320, 34 N. E. 728; Sutro *v.* Metropolitan R. Co., 137 N. Y. 592, 33 N. E. 334; Becker *v.* Metropolitan El. R. Co., 131 N. Y. 509, 30 N. E. 499; Bohm *v.* Metropolitan El. R. Co., 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344; Huggins *v.* Manhattan R. Co., 1 Misc. (N. Y.) 110, 20 N. Y. Suppl. 648, all holding that in estimating benefits resulting from an elevated railway, not only those peculiar to the premises, but also those shared with neighboring property, should be considered.

2. Indiana Cent. R. Co. *v.* Hunter, 8 Ind. 74 (holding, in a suit against a railroad company for injury to land, that the value of the land, if referred to at all to determine the benefits conferred upon the owner by the location of the road, should be estimated as of the time of its location); Meacham *v.* Fitchburg R. Co., 4 Cush. (Mass.) 291; Whitaker *v.* Phœnixville, 141 Pa. St. 327, 21 Atl. 604 (holding accordingly that where, after the passage of an ordinance opening a street but before the street is opened, an owner sells all his land except such as is afterward taken for the street, the measure of his damages is the value of the land taken, and the advantage accruing from the opening of the street to the land previously conveyed cannot be taken into consideration.

Past benefits.— The inquiry in condemnation proceedings or in a suit to assess the fee damages for the erection of a railroad in a street is to be directed to an ascertainment of the net result to the property as of the time of the award; and it is the injury which the property then suffers, as offset by the benefits which it then enjoys, that is to determine the award. In other words, in condemnation proceedings or in the assessment of fee damage, no past bene-

considered which are permanent. Temporary benefit should not be deducted from the damages otherwise accruing.[3]

f. Proof of Benefits. The burden of proving the existence of special and peculiar benefits is on the party seeking to condemn the land.[4] The admissibility and sufficiency of the evidence on the question of benefits are governed by the general rules of evidence in civil cases.[5]

fit is allowable, except such as is at present operative. And in considering these questions it is always important to bear in mind the distinction between the elements necessary where the action is brought to recover past damages, and where proceedings are brought in condemnation. In the former, any benefits accruing to the property, covering the same period for which damages are sought to be recovered, should be considered. But, where condemnation proceedings are brought, not one day of past damages can be added to the condemnation damages before commissioners, or to the fee damage in a suit. The assessment of fee damage is *eo instanti* as of the date of the award. In proceedings to condemn, the action has reference to the property as it stands, taking the damage of the day, and the benefit of the day, from the railroad as it stands on that day. *In re* New York El. R. Co., 76 Hun (N. Y.) 384, 28 N. Y. Suppl. 110. See also Hynes *v.* Manhattan R. Co., 54 N. Y. App. Div. 256, 66 N. Y. Suppl. 510. So in an action to recover past damages to the rental value and to restrain the operation of the road in front of plaintiff's premises, the benefits will not be charged entirely against past damages, but will also be considered in determining the present fee damage. Krumwiede *v.* Manhattan R. Co., 9 Misc. (N. Y.) 552, 30 N. Y. Suppl. 400.

3. Minnesota Valley R. Co. *v.* Doran, 17 Minn. 188 (holding that the fact that by reason of the location of a railroad the owner of the land has been able to sell at a profit large quantities of wood and ties to the company is not a benefit that can be offset against the damages for taking the land); Sloan *v.* New York El. R. Co., 63 Hun (N. Y.) 300, 17 N. Y. Suppl. 769; Reading, etc., R. Co. *v.* Balthaser, 119 Pa. St. 472, 13 Atl. 294 (holding that evidence that freight rates have been lowered since the opening of the railroad is not admissible, unless accompanied by proof that the reduced rates will be permanent).

4. Bennett *v.* Woody, 137 Mo. 377, 38 S. W. 972; State *v.* Blauvelt, 34 N. J. L. 261; *In re* New York, 167 N. Y. 627, 60 N. E. 1116 [*affirming* 59 N. Y. App. Div. 603, 69 N. Y. Suppl. 742]; Herold *v.* Manhattan R. Co., 59 N. Y. Super. Ct. 564, 13 N. Y. Suppl. 610; Pochila *v.* Calvert, etc., R. Co., 31 Tex. Civ. App. 398, 72 S. W. 255.

Shifting of burden.— Where it is shown that since the making of the improvement the value of all the property in the neighborhood has increased, the owner must, in order to avoid the effect of such evidence, show that the increase as to his property is attributable to causes other than the benefits accruing from the improvement. McCarty *v.* Chicago, etc., R. Co., 34 Ill. App. 273.

Presumption of deduction.— Where land is appropriated for a canal, the presumption is that all the direct benefits to the owner were taken into consideration in assessing the damages; and if there is a direct benefit to the owner by reason of the construction of an embankment which protects his land from overflow, it will be presumed, after the time for instituting an action has been barred by limitation, that the owner received as part of the consideration for the right of way the benefit this secured to his land, and such benefit cannot be taken away from him by destroying the embankment. Burk *v.* Simonson, 104 Ind. 173, 2 N. E. 309, 3 N. E. 826, 54 Am. Rep. 304.

5. Cushing *v.* Nantasket Beach R. Co., 143 Mass. 77, 9 N. E. 22 (holding that a printed document of the United States senate is not admissible for the purpose of showing, by a report contained in it of a United States engineer who made a survey of a railroad, that the building of the road is a benefit to the land of petitioner); Chicago, etc., R. Co. *v.* Williams, 8 Ohio Dec. (Reprint) 736. 9 Cinc. L. Bul. 253 (holding that any facts tending to show the present condition of the residue and that it will necessarily receive special local benefits are admissible in evidence); Reading, etc., R. Co. *v.* Balthaser, 126 Pa. St. 1, 17 Atl. 518 (holding that although it is proper to inquire whether a railroad is of advantage to a quarry owner, evidence that the market for the products of the quarry had been in previous years on an existing transportation line is not admissible; but that if such evidence is admitted the railroad company should be permitted to show that freights on that line have been reduced in consequence of the building of its own road).

The courts may take judicial notice that the elevated railroad in New York city increases the traffic and business in the wide avenues occupied by it. Bookman *v.* New York El. R. Co., 137 N. Y. 302, 33 N. E. 333.

The mere opinions of witnesses that the construction of the improvement would benefit the owner are not sufficient to prove that fact, in the absence of evidence of facts in support thereof. Miller *v.* Beaver, 37 Minn. 203, 33 N. W. 559; Hook *v.* Chicago, etc., R. Co., 133 Mo. 313, 34 S. W. 549; Anderson *v.* Wharton County, 27 Tex. Civ. App. 115, 65 S. W. 643, holding that testimony that the land has been enhanced in value is not sufficient to justify a deduction for benefits, if there is no evidence of the amount of the increase.

F. Payment of Compensation — 1. Prepayment and Security For Payment — a. Introductory Statement. The question of paying or securing the payment of damages in condemnation proceedings is regulated entirely by constitutional and statutory provisions. In many jurisdictions these provisions have been changed from time to time. Moreover statutes are frequently found in the same jurisdiction prescribing different rules for expropriations by different classes of persons or corporations, the net result being a chaotic mass of decisions from which it is very difficult to deduce any settled principles. Inasmuch as the investigator has easy access to the statutes of his own state, it has been thought best to group the decisions with reference to the constitutional and statutory provisions under which they were decided, and show, as far as this may be done, the relation of these provisions to the conclusions reached.[1]

b. Where Property Is Taken — (i) *By State or Municipal Corporation.* In the absence of any constitutional requirement it is not necessary for a state or municipal subdivision of the state to pay for private property taken for a public use in advance of the taking, if provision is made for its payment and a proper tribunal constituted so that the landowner may make his claim and receive damages,[2] and the same is the case where the constitution, although requiring prepayment, excepts from its operation a state or municipal corporation,[3] or where the constitution or statutes require compensation to be first paid or secured.[4] It is sufficient that an adequate and safe fund is provided from which payment is to

1. See *infra*, X, F, 1, b *et seq.* And see, generally, Payment.

2. *Kansas.*— Buckwalter *v.* Neosho County School Dist. No. 42, 65 Kan. 603, 70 Pac. 605; State *v.* Spencer, 53 Kan. 655, 37 Pac. 174; Kent *v.* Labette County, 42 Kan. 534, 22 Pac. 610; Hughes *v.* Milligan, 42 Kan. 396, 22 Pac. 313.

New Jersey.— State *v.* Heppenheimer, 54 N. J. L. 268, 23 Atl. 664; Wheeler *v.* Essex Public Road Bd., 39 N. J. L. 291; Loweree *v.* Newark, 38 N. J. L. 151.

New York.— People *v.* Adirondack R. Co., 160 N. Y. 225, 54 N. E. 689; *In re* New York, 99 N. Y. 569, 2 N. E. 642; Matter of Gilroy, 32 N. Y. App. Div. 216, 52 N. Y. Suppl. 990; Baker *v.* Johnston, 2 Hill 342; Rogers *v.* Bradshaw, 20 Johns. 735.

Ohio.— Fogarty *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 753, 7 Ohio N. P. 100.

Pennsylvania.— Delaware County's Appeal, 119 Pa. St. 159, 13 Atl. 62; *In re* Sedgeley Ave., 88 Pa. St. 509; McClinton *v.* Pittsburg, etc., R. Co., 66 Pa. St. 404; Com. *v.* Pittsburg, etc., R. Co., 58 Pa. St. 26; Keene *v.* Bristol, 26 Pa. St. 46; *In re* Yost, 17 Pa. St. 524; Kensington *v.* Wood, 10 Pa. St. 93, 49 Am. Dec. 582; *In re* Sharett's Road, 8 Pa. St. 89; Pittsburgh *v.* Scott, 1 Pa. St. 309; Bromley *v.* Philadelphia, 8 Pa. Co. Ct. 600; Hatermehl *v.* Dickerson, 8 Phila. 282.

Texas.— Smith *v.* Taylor, 34 Tex. 589.

Virginia.— Atty.-Gen. *v.* Turpin, 3 Hen. & M. 548.

Wisconsin.— Brock *v.* Hishen, 40 Wis. 674; Powers *v.* Bears, 12 Wis. 213, 78 Am. Dec. 733.

United States.— Adirondack R. Co. *v.* New York, 176 U. S. 335, 20 S. Ct. 460, 44 L. ed. 492 [*affirming* 160 N. Y. 225, 54 N. E. 689]; Sweet *v.* Rechel, 159 U. S. 380, 16 S. Ct. 43, 40 L. ed. 188.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 198, 199.

Taking by supervisor.— Thus the entering upon and taking of the property of another by a supervisor as contemplated by the statute is a taking by the state, for which damages need not be first assessed and tendered. McOsker *v.* Burrell, 55 Ind. 425.

Taking by United States.— Where property is taken by the United States prepayment is not necessary. Great Falls Mfg. Co. *v.* Garland, 25 Fed. 521.

Taking by municipal corporation distinguished from taking by private corporation.— There is a broad distinction between the taking of private property for public use by a town or municipal corporation and the taking of it by a private corporation, the responsibility of which may be very uncertain. Where the property is taken for public use by a town or municipal corporation which is made liable to the owner for any damages sustained by reason thereof, the taxable property of such town or municipality constitutes a pledge or fund to which such owner may resort for payment in the manner so prescribed by the statute with absolute safety and hence we must hold that the providing of such a method of enforcing payment in such a case, and out of such a pledge or fund, is the making of just compensation for the property taken within the meaning of the constitution. Smeaton *v.* Martin, 57 Wis. 364, 15 N. W. 403.

3. Nelson *v.* Fleming, 56 Ind. 310; Jeffersonville, etc., R. Co. *v.* Daugherty, 40 Ind. 33; Dronberger *v.* Reed, 11 Ind. 420; Smith *v.* McAdam, 3 Mich. 506; Cherry *v.* Lane County, 25 Oreg. 487, 36 Pac. 531; Kendall *v.* Post, 8 Oreg. 141.

4. People *v.* Michigan Southern R. Co., 3 Mich. 496; State Park *v.* Henry, 38 Minn.

be made, as for instance making the amount payable a charge upon the public treasury either of the state or some municipal subdivision thereof,[5] which is considered equivalent to actual compensation.[6] As was said by an eminent text-writer, the property of the municipality or of the state is a fund to which the landowner can resort without risk of loss.[7] So it has been held that the power of taxation given a municipality is ordinarily adequate security.[8] Nevertheless it is well settled that where the constitution expressly requires prepayment and makes no exception in favor of municipal corporations, prepayment by such corporations is as much necessary as in the case of private corporations or individuals,[9] and the same is the case where prepayment is expressly required by statute.[10] An award of damages or a judgment therefor is not a compliance with these provisions.[11]

(II) *By Private Corporations or Individuals*—(A) *Under Constitutional or Statutory Provisions Expressly Requiring Prepayment.* Whenever payment of compensation before taking private property for public use is expressly required by constitutional or statutory provisions, payment or its equivalent, tender of payment, is a condition precedent to the taking;[12] and where the constitution expressly requires prepayment it is of course beyond the power of

266, 36 N. W. 874; State *v.* Bruggerman, 31 Minn. 493, 18 N. W. 454; State *v.* Messenger, 27 Minn. 119, 6 N. W. 457. *Compare* Ryan *v.* Cincinnati, 1 Ohio Cir. Ct. 558, 1 Ohio Cir. Dec. 311.

5. State *v.* Messenger, 27 Minn. 119, 6 N. W. 457; Shippensburg Borough's Water Case, 21 Pa. Co. Ct. 89; Brock *v.* Hishen, 40 Wis. 674; Powers *v.* Bears, 12 Wis. 213, 78 Am. Dec. 733.

Necessity of making provision for payment. — Before a landowner can be required to surrender his land to a municipal corporation for public use, his damages must be ascertained and proper provision made for their payment (Hogsett *v.* Harlan County, (Nebr. 1903) 97 N. W. 316; Lewis *v.* Lincoln, 55 Nebr. 1, 75 N. W. 154; Propst *v.* Cast County, 51 Nebr. 736, 71 N. W. 748; Livingston *v.* Johnson County, 42 Nebr. 277, 60 N. W. 555; Zimmerman *v.* Kearney County, 33 Nebr. 620, 50 N. W. 1126), either by appropriating money from the proper fund for that purpose or levying sufficient taxes to pay the damages upon which a warrant may be drawn (Livingston *v.* Johnson County, 42 Nebr. 277, 60 N. W. 555; Zimmerman *v.* Kearney County, 33 Nebr. 620, 50 N. W. 1126).

6. Brock *v.* Hishen, 40 Wis. 674.

7. Cooley Const. Lim. (7th ed.) 814.

Where the property of a county is made liable to assessment by the statute authorizing the taking, an adequate security is furnished. *In re* Yost, 17 Pa. St. 524.

8. Keene *v.* Bristol, 26 Pa. St. 46; Bromley *v.* Philadelphia, 8 Pa. Co. Ct. 600.

No bond by the municipality is necessary. Bromley *v.* Philadelphia, 8 Pa. Co. Ct. 600.

A provision for the issue of city bonds to pay damages for property taken amply protects the property-owner whose land is taken. Matter of Gilroy, 32 N. Y. App. Div. 216, 52 N. Y. Suppl. 990.

9. *California.*— Steinhart *v.* Mendocino County, 137 Cal. 575, 70 Pac. 629, 92 Am. St. Rep. 183, 59 L. R. A. 404; Neale *v.* San Diego County Super. Ct., 77 Cal. 28, 18 Pac. 790; San Mateo Waterworks *v.* Sharpstein, 50 Cal. 284; Johnson *v.* Alameda County, 14 Cal. 106; San Francisco *v.* Scott, 4 Cal. 114.

Georgia.— Butler *v.* Thomasville, 74 Ga. 570; Rome *v.* Perkins, 30 Ga. 154.

Kentucky.— Carrico *v.* Colvin, 92 Ky. 342, 17 S. W. 854, 13 Ky. L. Rep. 603; Covington *v.* Worthington, 88 Ky. 206, 10 S. W. 790, 11 S. W. 1038, 11 Ky. L. Rep. 141 [*overruling* Gashweller *v.* McIlvoy, 1 A. K. Marsh. 84].

Louisiana.— State *v.* Sommerville, 104 La. 74, 28 So. 977; *In re* Municipality No. 2, 7 La. Ann. 72.

Maryland.— Steuart *v.* Baltimore, 7 Md. 500; State *v.* Graves, 19 Md. 351, 81 Am. Dec. 639.

Mississippi.— Cameron *v.* Washington County, 47 Miss. 264.

North Dakota.— Martin *v.* Tyler, 4 N. D. 278, 60 N. W. 392, 25 L. R. A. 838.

Washington.— Askam *v.* King County, 9 Wash. 1, 36 Pac. 1097; Lewis *v.* Seattle, 5 Wash. 741, 32 Pac. 794.

See 18 Cent. Dig. tit. "Eminent Domain," § 198.

10. Lafayette *v.* Bush, 19 Ind. 326; *In re* New Orleans, 4 Rob. (La.) 357. See also Phillips *v.* South Park Com'rs, 119 Ill. 626, 10 N. E. 230; Norton *v.* Studley, 17 Ill. 556; Phillips *v.* Thompson, 1 Johns. Ch. (N. Y.) 131; *In re* Northern Liberties, 4 Yeates (Pa.) 133.

11. Moody *v.* Jacksonville, etc., R. Co., 20 Fla. 597.

A temporary occupation for the purpose of making surveys and taking other preliminary steps to apply the property to public use is not within the constitutional prohibition. Steuart *v.* Baltimore, 7 Md. 500.

12. *Alabama.*— Southern R. Co. *v.* Birmingham, etc., R. Co., 130 Ala. 660, 30 So. 509; Jones *v.* New Orleans, etc., R. Co., 70 Ala. 277.

California.— Lux *v.* Haggin, (1884) 4 Pac. 919; Gillan *v.* Hutchinson, 16 Cal. 153; Bensley *v.* Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575.

Connecticut.— New Haven *v.* New York, etc., R. Co., 72 Conn. 255, 44 Atl. 31.

the legislature to authorize a taking without prepayment, and any statute assuming to do so is void.[13] Under provisions of this character, the giving of security is insufficient.[14] So a judgment fixing the amount of damages and ordering its pay-

Georgia.— Georgia Southern R. Co. *v.* Ray, 84 Ga. 376, 11 S. E. 352; Powers *v.* Armstrong, 19 Ga. 427.

Illinois.— People *v.* Williams, 51 Ill. 63; Meeker *v.* Chicago, 96 Ill. App. 23.

Indiana.— Lake Erie, etc., R. Co. *v.* Kinsey, 87 Ind. 514; Cox *v.* Louisville, etc., R. Co., 48 Ind. 178; Graham *v.* Connersville, etc., Co., 36 Ind. 463, 10 Am. Rep. 56; Graham *v.* Columbus, etc., R. Co., 27 Ind. 260, 89 Am. Dec. 498.

Kentucky.— Carrico *v.* Colvin, 92 Ky. 342, 17 S. W. 854, 13 Ky. L. Rep. 603; Covington Short Route Transfer Co. *v.* Piel, 87 Ky. 267, 8 S. W. 449, 10 Ky. L. Rep. 146; Cave *v.* Calmes, 3 A. K. Marsh. 36.

Louisiana.— State *v.* Sommerville, 104 La. 74, 28 So. 977; *In re* New Orleans, 4 Rob. 357.

Maine.— Storer *v.* Hobbs, 52 Me. 144.

Maryland.— State *v.* Consolidation Coal Co., 46 Md. 1; State *v.* Graves, 19 Md. 351, 81 Am. Dec. 639; Western Maryland R. Co. *v.* Owings, 15 Md. 199, 74 Am. Dec. 563.

Mississippi.— Pearson *v.* Johnson, 54 Miss. 259; Thompson *v.* Grand Gulf R., etc., Co., 4 Miss. 240, 34 Am. Dec. 81; Stewart *v.* Raymond R. Co., 7 Sm. & M. 568.

Missouri.—State *v.* Lubke, 15 Mo. App. 152.

New Jersey.—Wheeler *v.* Essex Public Road Bd., 39 N. J. L. 291; Pratt *v.* Roseland R. Co., 50 N. J. Eq. 150, 24 Atl. 1027; Johnson *v.* Baltimore, etc., R. Co., 45 N. J. Eq. 454, 17 Atl. 574; Redman *v.* Philadelphia, etc., R. Co., 33 N. J. Eq. 165; Ross *v.* Elizabeth Town, etc., R. Co., 2 N. J. Eq. 422.

New York.— Jamaica, etc., Plank Road Co. *v.* New York, etc., R. Co., 25 Hun 585; Blodgett *v.* Utica, etc., R. Co., 64 Barb. 580.

Oregon.— Fanning *v.* Gilliland, 37 Oreg. 369, 61 Pac. 636, 62 Pac. 209, 82 Am. St. Rep. 758; Oregonian R. Co. *v.* Hill, 9 Oreg. 377.

Pennsylvania.— *In re* Northern Liberties, 4 Yeates 133.

Texas.— Paris *v.* Mason, 37 Tex. 447.

Utah.— Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

Vermont.— McAulay *v.* Western Vermont R. Co., 33 Vt. 311, 78 Am. Dec. 627; Stacey *v.* Vermont Cent. R. Co., 27 Vt. 39.

United States.— Bonaparte *v.* Camden, etc., R. Co., 3 Fed. Cas. No. 1,617, Baldw. 205.

England.— Rangeley *v.* Midland R. Co., L. R. 3 Ch. 306, 37 L. J. Ch. 313, 18 L. T. Rep. N. S. 69, 16 Wkly. Rep. 547; Ramsden *v.* Manchester, etc., R. Co., 1 Exch. 723, 12 Jur. 293, 5 R. & Can. Cas. 552; Williams *v.* Llanelly R. Co., 19 L. T. Rep. N. S. 310; Jones *v.* Great Western R. Co., 1 R. & Can. Cas. 684; Hyde *v.* Great Western R. Co., 1 R. & Can. Cas. 277.

See 18 Cent. Dig. tit. "Eminent Domain," § 188 *et seq.*

Purpose of provisions.— A constitutional provision that compensation shall first be made cannot be satisfied by such action of the courts as will allow a person's property against his will to be first taken and himself turned over to such vexatious litigation to obtain compensation as he may afterward meet. Graham *v.* Columbus, etc., R. Co., 27 Ind. 260, 89 Am. Dec. 498.

An agreement by the owner with the condemning company to refer the question of damages to arbitrators does not affect the rule that damages must be paid before possession is taken, when this is expressly required by the constitution. Stewart *v.* Raymond R. Co., 7 Sm. & M. (Miss.) 568.

Where the charter of a railroad company contains the condition that compensation must precede appropriation the corporation acquires no right to appropriate the lands until compensation is first made, either by payment or tender. Metler *v.* Easton, etc., R. Co., 37 N. J. L. 222; Starr *v.* Camden, etc., R. Co., 24 N. J. L. 592; Morris, etc., R. Co. *v.* Hudson Tunnel R. Co., 25 N. J. Eq. 384; Mettler *v.* Easton, etc., R. Co., 25 N. J. Eq. 214.

The Connecticut flowage act provides that unless the damages are paid before the land is flooded, the proceedings shall be of no effect. While the proceedings were pending, the owner requested the company to flood the land that the effect might be seen. This the company did, and then refused to draw the water off, although requested to do so. It was held that this was a matter between the parties outside the proceedings, and that it did not vitiate them. Hartford Manilla Co. *v.* Olcott, 52 Conn. 452.

13. Weaver *v.* Mississippi, etc., Boom Co., 30 Minn. 477, 16 N. W. 269; Hursh *v.* First Div. St. Paul, etc., R. Co., 17 Minn. 439; Starr *v.* Camden, etc., R. Co., 24 N. J. L. 592; Redman *v.* Philadelphia, etc., R. Co., 33 N. J. Eq. 165; Doughty *v.* Somerville, etc., R. Co., 7 N. J. Eq. 51; Oregonian R. Co. *v.* Hill, 9 Oreg. 377.

14. *California.*— Vilhac *v.* Stockton, etc., R. Co., 53 Cal. 208; Sanborn *v.* Belden, 51 Cal. 266. But see Fox *v.* Western Pac. R. Co., 31 Cal. 538.

Iowa.— Burns *v.* Chicago, etc., R. Co., 110 Iowa 385, 81 N. W. 794; White *v.* Wabash, etc., R. Co., 64 Iowa 281, 20 N. W. 436.

Kentucky.— Carrico *v.* Colvin, 92 Ky. 342, 17 S. W. 854, 13 Ky. L. Rep. 603.

Louisiana.— State *v.* Sommerville, 104 La. 74, 28 So. 977.

New Jersey.— Metler *v.* Easton, etc., R. Co., 37 N. J. L. 222; Starr *v.* Camden, etc., R. Co., 24 N. J. L. 592; Redman *v.* Philadelphia, etc., R. Co., 33 N. J. Eq. 165.

North Dakota.— Martin *v.* Tyler, 4 N. D. 278, 60 N. W. 392, 25 L. R. A. 838.

See 18 Cent. Dig. tit. "Eminent Domain," § 188 *et seq.*

Illustrations.—An undertaking to pay damages that may be ascertained is insufficient

ment does not satisfy the constitutional requirement,[15] nor does the deposit in court of the amount awarded by the judgment if a supersedeas bond is given.[16] A limitation, however, has been recognized in cases of public emergencies.[17] It has also been held that the constitutional provision requiring payment before taking is not violated by a temporary occupation to make surveys and take other preliminary steps for the actual application of the property to the use of the public,[18] and that statutes authorizing the taking of these steps preliminary to payment are valid.[19]

(B) *Under Constitutional or Statutory Provisions Not Expressly Requiring Prepayment.* According to the weight of authority if the constitution or statutes do not expressly require it, actual payment or tender before taking is unnecessary, and it will be sufficient if a certain and adequate remedy is provided by which the owner can obtain compensation without any unreasonable delay.[20] According to this view the usual constitutional provision that private property shall not be taken for a public use without just compensation does not require that compensation shall be actually paid in advance of the occupancy of the land to be taken,[21]

(Vilhac *v.* Stockton, etc., R. Co., 53 Cal. 208), and so is an order drawn by drain commissioners upon a drainage fund (Martin *v.* Tyler, 4 N. D. 278, 60 N. W. 392, 25 L. R. A. 838).

15. Carrico *v.* Colvin, 92 Ky. 342, 17 S. W. 854, 13 Ky. L. Rep. 603.

Judgment is not compensation within the meaning of the constitutional provision requiring prepayment. It is but a security for compensation which may or may not prove productive. Thompson *v.* Grand Gulf R., etc., Co., 3 How. (Miss.) 240, 34 Am. Dec. 81.

16. Missouri, etc., R. Co. *v.* Chenault, 24 Tex. Civ. App. 481, 60 S. W. 55; Crary *v.* Port Arthur Channel, etc., Co., (Tex. Civ. App. 1898) 45 S. W. 842.

17. As for example in the case of such calamities as fire, flood, war, pestilence, and famine, in which case it is said that the property may be taken and applied to public use without just compensation being first made therefor, upon the principle of imperative necessity for the public protection; but in order to justify such appropriation the necessity must be apparently present and the apprehended danger must be so imminent and impending as not to admit of the delay incident to legal proceedings for the condemnation of the property. Penrice *v.* Wallis, 37 Miss. 172.

18. Walther *v.* Warner, 25 Mo. 277.

19. Fox *v.* Western Pac. R. Co., 31 Cal. 538; State *v.* Seymour, 35 N. J. L. 47.

20. *Arkansas.*— Cairo, etc., R. Co. *v.* Turner, 31 Ark. 494, 25 Am. Rep. 564.

Illinois.— Johnson *v.* Joliet, etc., R. Co., 23 Ill. 202.

Indiana.— Prather *v.* Western Union Tel. Co., 89 Ind. 501; Lafayette *v.* Spencer, 14 Ind. 399; Snyder *v.* Rockport, 6 Ind. 237; Rubottom *v.* McClure, 4 Blackf. 505.

New York.— Chapman *v.* Gates, 54 N. Y. 132; Smith *v.* Helmer, 7 Barb. 416; Dusenbury *v.* Mutual Union Tel. Co., 64 How. Pr. 206; Bloodgood *v.* Mohawk, etc., R. Co., 18 Wend. 9, 31 Am. Dec. 313 [*reversing* 14 Wend. 51]; Case *v.* Thompson, 6 Wend. 634; Rogers *v.* Bradshaw, 20 Johns. 735.

North Carolina.— Carolina Cent. R. Co. *v.* McCaskill, 94 N. C. 746; State *v.* McIver, 88 N. C. 686; Raleigh, etc., R. Co. *v.* Davis, 19 N. C. 451.

Ohio.— Willyard *v.* Hamilton, 7 Ohio, Pt. II, 111, 30 Am. Dec. 195; Bates *v.* Cooper, 5 Ohio 115; Cooper *v.* Williams, 4 Ohio 253, 22 Am. Dec. 745; Mercer *v.* McWilliams, Wright 132.

Pennsylvania.— Com. *v.* Pittsburg, etc., R. Co., 58 Pa. St. 26.

Tennessee.— White *v.* Nashville, etc., R. Co., 7 Heisk. 518; Anderson *v.* Turbeville, 6 Coldw. 150.

Vermont.— Vermont Cent. R. Co. *v.* Baxter, 22 Vt. 365.

West Virginia.— Keystone Bridge Co. *v.* Summers, 13 W. Va. 476.

United States.— Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 10 S. Ct. 965, 34 L. ed. 295; Benedict *v.* New York City, 98 Fed. 789, 39 C. C. A. 290.

See 18 Cent. Dig. tit. "Eminent Domain," § 188 *et seq.*

Exclusive temporary occupation.— A constitutional provision against taking private property for public use without just compensation does not prevent the legislature from authorizing an exclusive occupation temporarily of real estate, belonging to an individual without previous compensation, as a proceeding incipient to the acquisition of a title or of an easement for public use. Cushman *v.* Smith, 34 Me. 247.

Statute providing for suspension of payment.— A statute providing that payment of damages may be suspended until the land for which they are assessed is taken for a street is permissive and not mandatory. Kimball *v.* Rockland, 71 Me. 137.

21. Saunders *v.* Memphis, etc., R. Co., 101 Tenn. 206, 47 S. W. 155; Simms *v.* Memphis, etc., R. Co., 12 Heisk. (Tenn.) 621; Sweet *v.* Rechel, 159 U. S. 380, 16 S. Ct. 43, 40 L. ed. 188; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 10 S. Ct. 965, 34 L. ed. 295.

The rule in Wisconsin is contrary to that stated in the text. While the constitution merely provides that private property shall

and does not prohibit the legislature from authorizing a taking in advance of payment.[22]

(c) *Under Constitutional Provisions Requiring Prepayment or Payment Into Court For Owner.* Where constitutional[23] or statutory provisions[24] require prepayment or payment into court for the owner before taking property under the law of eminent domain, such prepayment to the owner or payment into court for him of the amount of compensation due for the property is a condition precedent to the taking, and a statute which contravenes a constitutional provision of this character to the contrary is void.[25] According to the weight of authority the mere giving of security is insufficient,[26] since security negatives payment.[27] Compensation, it has been held, is not made to the owner by paying into court a sum of money before the damage has been judicially determined and before he is entitled to take the money.[28] After the amount awarded has been paid into

not be taken for public use without just compensation and is silent on the question of prepayment or the giving of security before taking, it is nevertheless held, at least in the case of private corporations or individuals seeking to condemn, that just compensation must be first made for the property sought to be condemned (Sherman *v.* Milwaukee, etc., R. Co., 40 Wis. 645; Bigelow *v.* West Wisconsin R. Co., 27 Wis. 478; Kennedy *v.* Milwaukee, etc., R. Co., 22 Wis. 581; Milwaukee, etc., R. Co. *v.* Eble, 3 Pinn. 334, 4 Chandl. 68. And see Shepardson *v.* Milwaukee, etc., R. Co., 6 Wis. 605; Pratt *v.* Brown, 3 Wis. 603; Thien *v.* Voegtlander, 3 Wis. 461); and a statute allowing a railroad company to take possession of the land before making compensation is void (Kennedy *v.* Milwaukee, etc., R. Co., 22 Wis. 581). This rule requires a private corporation to tender in money the ascertained damages or compensation with expenses, if any, to the owner, and on his refusal to receive it to deposit it with some proper person to be kept for the owner until he should apply for it. Stolze *v.* Milwaukee, etc., R. Co., 104 Wis. 47, 80 N. W. 68; Bohlman *v.* Green Bay, etc., R. Co., 30 Wis. 105; Powers *v.* Bears, 12 Wis. 213, 78 Am. Dec. 733; Davis *v.* La Crosse, etc., R. Co., 12 Wis. 16. It is to be noted that many of these decisions are cases of condemnation by railroad companies and that charters of some of them seem to require payment as a condition precedent to the taking, but inasmuch as one of them expresly decides that a statute authorizing a taking before payment would be unconstitutional, it is apprehended that these statutes add nothing to the force and effect of the constitutional provision.

Order for deposit in bank.— An order confirming the appraisal of damages where property is taken by a railroad company which, instead of directing compensation to be paid to the party claiming to own the land, directs it to be deposited in bank subject to the order of the court, is not repugnant to a constitutional prohibition, against taking private property for public use without just compensation. *In re* New York Cent., etc., R. Co., 60 N. Y. 116.

22. Townsend *v.* Chicago, etc., R. Co., 91 Ill. 545; Hankins *v.* Lawrence, 8 Blackf. (Ind.) 266; Orr *v.* Quimby, 54 N. H. 590; Kough *v.* Darcey, 11 N. J. L. 237; Lehigh Valley R. Co. *v.* McFarlan, 31 N. J. Eq. 706.

23. State *v.* Lubke, 15 Mo. App. 152; Martin *v.* Tyler, 4 N. D. 278, 60 N. W. 392, 25 L. R. A. 838; State *v.* King County Super. Ct., 26 Wash. 278, 66 Pac. 385. And see Provolt *v.* Chicago, etc., R. Co., 57 Mo. 256.

24. Postal Tel. Cable Co. *v.* Southern R. Co., 89 Fed. 190.

25. Steinhart *v.* Mendocino County Super. Ct., 137 Cal. 575, 70 Pac. 629, 92 Am. St. Rep. 183.

The rule in Colorado, owing perhaps to a slight difference in the wording of the provision, is different. It is there held that a provision that until compensation shall be paid to the owner or into court for him the property shall not be needlessly disturbed does not prohibit the court from making an order permitting the petitioner in condemnation proceedings to pay into court such amount as would be sufficient to compensate the owner before entering on the lands pending such proceedings, especially as a statute of that state clearly contemplates that such order may be made. McClain *v.* People, 9 Colo. 190, 11 Pac. 85; San Luis Land, etc., Co. *v.* Kenilworth Canal Co., 3 Colo. App. 244, 32 Pac. 860. And see Denver, etc., R. Co. *v.* Lamborn, 9 Colo. 119, 10 Pac. 797; Denver, etc., R. Co. *v.* Lamborn, 8 Colo. 380, 8 Pac. 582.

26. Sanborn *v.* Belden, 51 Cal. 266; California Pac. R. Co. *v.* Central Pac. R. Co., 47 Cal. 528; Davis *v.* San Lorenzo R. Co., 47 Cal. 517; Martin *v.* Tyler, 4 N. D. 278, 60 N. W. 392, 25 L. R. A. 838.

27. Martin *v.* Tyler, 4 N. D. 278, 60 N. W. 392, 25 L. R. A. 838.

28. Steinhart *v.* Mendocino County Super. Ct., 137 Cal. 575, 70 Pac. 629, 92 Am. St. Rep. 183.

The words, "or into court for the owner," used in the constitution, mean that if the owner refuses to accept the award the money shall be paid to the legislature for the administration of justice in that particular condemnation proceeding. Shively *v.* Lankford, 174 Mo. 535, 74 S. W. 835.

Payment before entry of the judgment is not available error where the exact amount of damages awarded was paid. The judgment is not void because payment or deposit was

court, it should on application of the landowner direct payment thereof to him.[29]

(D) *Under Constitutional or Statutory Provisions Requiring Prepayment or Security.* Where the constitutional or statutory provisions require payment or security before taking private property for public use prepayment or security is a condition precedent to the taking,[30] and statutes which authorize entry before prepayment or security where the constitution requires it are void.[31] A constitutional requirement that security be given is complied with when a bond is accepted by the owner,[32] or when it has been approved by the court and filed for the owner's use.[33] Approval of the bond is, however, necessary.[34] An approval of the bond involves an adjudication that everything has been done to entitle the company to have the bond filed.[35] Although the sureties become insolvent, the court has no power to require additional security,[36] nor is it any ground to enjoin a continuance in possession.[37] Whatever the form of the security is, no conditions

made before it became due or payable. Madera County *v.* Raymond Granite Co., 139 Cal. 128, 72 Pac. 915.

29. State *v.* Lubke, 15 Mo. App. 152.

30. *Georgia.*— Doe *v.* Georgia R., etc., Co., 1 Ga. 524.

Iowa.— Henry *v.* Dubuque, etc., R. Co., 10 Iowa 540.

Maine.— Davis *v.* Russell, 47 Me. 443.

Minnesota.— Mathews *v.* St. Paul, etc., R. Co., 18 Minn. 434; Weaver *v.* Mississippi, etc., Boom Co., 30 Minn. 477, 16 N. W. 269.

New York.— People *v.* Law, 34 Barb. 494.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Cooper, 105 Pa. St. 239; Gilmore *v.* Pittsburgh, etc., R. Co., 104 Pa. St. 275; McClinton *v.* Pittsburg, etc., R. Co., 66 Pa. St. 404; Heise *v.* Pennsylvania R. Co., 62 Pa. St. 67; Easton's Appeal, 47 Pa. St. 255; Brown *v.* Powell, 25 Pa. St. 229; Philadelphia, etc., R. Co. *v.* Lawrence, 10 Phila. 604; Large *v.* Philadelphia, 3 Phila. 382; Martin *v.* Pittsburgh, etc., R. Co., 28 Pittsb. Leg. J. 156; Philadelphia, etc., R. Co.'s Appeal, 1 Montg. Co. Rep. 129.

Under the constitution of Kentucky, the condemning party has his election whether he shall pay compensation or give security therefor before the taking. Waller *v.* Martin, 17 B. Mon. 181.

A turnpike or plank-road company, their contractors or agents who enter upon the lands of a person, for the purpose of constructing their road, without having the damages previously assessed, tendered, or paid, or secured in the mode provided by the acts of assembly regulating such companies, are trespassers and may be sued as such. Brown *v.* Powell, 25 Pa. St. 229.

Enjoining entry before giving security.— Where the constitution prohibits a taking before payment or giving security, the company may be enjoined upon entry before payment or giving security. Colgan *v.* Allegheny Valley R. Co., 3 Pittsb. (Pa.) 394. And see *infra*, XII, B, 2.

Where party not entitled to compensation. — Where appraisers impaneled to assess the damages in the establishment of a public road report that a certain person is not entitled to any compensation, the county court may make an order establishing the road without compensation being first made or secured to the owner of the property taken by it for public use. McCrory *v.* Griswold, 7 Iowa 248.

31. Weaver *v.* Mississippi, etc., Boom Co., 30 Minn. 477, 16 N. W. 269; Mathews *v.* St. Paul, etc., R. Co., 18 Minn. 434.

32. Welsh *v.* New Castle Northern R. Co., 6 Pa. Co. Ct. 56.

33. Welsh *v.* New Castle Northern R. Co., 6 Pa. Co. Ct. 56.

A bond given for security is not insufficient because it is for a fixed sum, provided the sum is sufficient to cover the damages (Twelfth-St. Market Co. *v.* Philadelphia, etc., R. Co., 142 Pa. St. 580, 21 Atl. 902, 989); and if it contains mere informal defects in its execution, objections must be made at the time of presentation for approval or they will be waived (Myers *v.* Delaware, etc., R. Co., 3 Kulp (Pa.) 347).

Authority for the company to file the bond is to be presumed in the first instance from its execution and presentation for approval. After the corporation proceeds under it to take the land they will be estopped from denying the authority under which it was filed. Myers *v.* Delaware, etc., R. Co., 3 Kulp (Pa.) 347.

34. Myers *v.* Delaware, etc., R. Co., 3 Kulp (Pa.) 347.

Entry before approval of bond is a trespass. Dimmick *v.* Brodhead, 75 Pa. St. 464.

35. Wadhams *v.* Lackawanna, etc., R. Co., 42 Pa. St. 303.

36. Welsh *v.* New Castle Northern R. Co., 6 Pa. Co. Ct. 56. There is nothing in the constitution which makes the company's right to the property conditional on security being adequate for all future time or until the compensation shall in fact be paid. Wallace *v.* New Castle Northern R. Co., 138 Pa. St. 168, 22 Atl. 95.

37. Wallace *v.* New Castle Northern R. Co., 138 Pa. St. 168, 22 Atl. 95. See also Pell *v.* Northampton, etc., R. Co., L. R. 2 Ch. 100, 36 L. J. Ch. 319, 15 L. T. Rep. N. S. 169, 15 Wkly. Rep. 27, holding that default in payment of bond is not a ground for injunction against continuance in possession.

can be attached by the party giving it.[38] A bond filed by a railroad company in locating its road is a security for all damages that may accrue from the construction also. Both are but one injury and a bond filed for one is a security for all.[39]

(E) *Under Constitutional or Statutory Provisions Requiring Prepayment or Deposit of Money.* Where the constitution or statutes provide that payment of damages or a deposit of money shall precede a taking of private property for public use, such payment or deposit is a condition precedent to a taking,[40] and a statute which contravenes a constitutional provision of this character is of course void and inoperative.[41] It has been held, however, that the provisions do not prohibit the right of entry in advance of making payment or deposit merely for the purpose of making an examination and survey necessary to the proper exercise of the right of eminent domain.[42] A payment of the amount awarded to the county clerk satisfies the constitutional requirements.[43] If a statute designates the time within which the deposit shall be made, non-compliance with the statute, unless waived by the landowner, renders the proceedings of no force and effect.[44] If no time is fixed by statute it is sufficient if the deposit is made within a reasonable time after assessment.[45]

c. Where Property Is Damaged. Where the land of a party is not entered upon or actually taken, but is injuriously affected by the exercise of the power of eminent domain, it is not unlawful for the corporation to construct and operate the improvement which causes the injury before the amount of the compensation is ascertained, paid, deposited, or secured.[46] The word "taking" it has been

38. Kanne *v.* Minneapolis, etc., R. Co., 30 Minn. 423, 15 N. W. 871, holding further that it is immaterial whether the agent giving the security had authority to impose conditions.

39. Wadhams *v.* Lackawanna, etc., R. Co., 42 Pa. St. 303.

40. Chicago, etc., R. Co. *v.* Watkins, 43 Kan. 50, 22 Pac. 985; St. Joseph, etc., R. Co. *v.* Callender, 13 Kan. 496; Missouri, etc., R. Co. *v.* Ward, 10 Kan. 352; Schaaf *v.* Cleveland, etc., R. Co., 66 Ohio St. 215, 64 N. E. 145; Zimmerman *v.* Canfield, 42 Ohio St. 463; Leonard *v.* Cassidy, 8 Ohio Cir. Ct. 529, 4 Ohio Cir. Dec. 480; Smith *v.* McKee, 3 Ohio Dec. (Reprint) 578; Gulf, etc., R. Co. *v.* Donahoo, 59 Tex. 128; Eidemiller *v.* Wyandotte City, 8 Fed. Cas. No. 4,313, 2 Dill. 376.

Appeal by the landowner from the assessment of his damages, or a recovery on the appeal for the amount thereof, does not change the rule that full compensation must be first made in money or secured by a deposit before there can be any appropriation. St. Joseph, etc., R. Co. *v.* Callender, 13 Kan. 496.

Condemnation subsequent to taking.— If a company builds its road over a person's land without prepayment or deposit as required by the constitution, it is a trespasser and liable for such, notwithstanding a subsequent condemnation of a right of way and deposit of money. Missouri, etc., R. Co. *v.* Ward, 10 Kan. 352.

41. Beck *v.* Medina County, 9 Ohio Dec. (Reprint) 108, 11 Cinc. L. Bul. 18.

42. Ward *v.* Toledo, etc., R. Co., 1 Ohio Dec. (Reprint) 553, 10 West. L. J. 365.

43. Ackerman *v.* Huff, 71 Tex. 317, 9 S. W. 236.

A statute authorizing a railway company pending an appeal in condemnation proceedings brought by it to take possession of the land upon paying costs and depositing in court the damages awarded and giving bond is not in violation of the constitutional provision inhibiting the taking of private property for public use without due compensation made therefor. Davidson *v.* Texas, etc., R. Co., 29 Tex. Civ. App. 54, 67 S. W. 1093, Tex. Gen. Laws (1899), p. 105; Tex. Const. art. 1, § 17.

44. Cincinnati *v.* Hosea, 19 Ohio Cir. Ct. 744, 10 Ohio Cir. Dec. 618.

When time begins to run.— Under a statute providing that the corporation must pay for lands appropriated for any purpose within six months after the assessment of compensation, or that its right shall thereupon determine, time commences to run from the date of the judgment or order of the court directing the assessment to be paid and not from the date of the rendition of the verdict. Ryan *v.* Hoffman, 26 Ohio St. 109.

45. Hawley *v.* Harrall, 19 Conn. 142.

46. *Illinois.*—Peoria, etc., R. Co. *v.* Scharts, 84 Ill. 135; Patterson *v.* Chicago, etc., R. Co., 75 Ill. 588; Stetson *v.* Chicago, 75 Ill. 74; Hoag *v.* Switzer, 61 Ill. 294; Parker *v.* Chicago Catholic Bishop, 41 Ill. App. 74.

Indiana.— Delphi *v.* Evans, 36 Ind. 90, 10 Am. Rep. 12; Lafayette *v.* Bush, 19 Ind. 326; Macy *v.* Indianapolis, 17 Ind. 267.

Louisiana.— McMahon *v.* St. Louis, etc., R. Co., 41 La. Ann. 827, 6 So. 640.

Maryland.— Garrett *v.* Lake Roland El. R. Co., 79 Md. 277, 29 Atl. 830, 24 L. R. A. 396.

New Hampshire.— Lebanon *v.* Olcott, 1 N. H. 339.

New York.— Nutting *v.* Kings County El. R. Co., 48 Hun 348, 1 N. Y. Suppl. 383; Waddell *v.* New York, 8 Barb. 95.

Pennsylvania.— Strasburgh *v.* Bachman, (1888) 14 Atl. 148; Koch *v.* Williamsport Water Co., 65 Pa. St. 288; Woodward *v.*

held should be construed to mean an actual taking in the physical sense of the word.[47]

d. Waiver of Prepayment or Security. The provision that the compensation must be paid, tendered, or secured before possession of the land can be taken is designed for the protection of the landowner, and the requirement may be waived by him,[48] and this may be done by parol.[49] What will constitute a waiver depends measurably upon the circumstances of each case;[50] and notwithstanding the

Webb, 65 Pa. St. 254; Spangler, etc., Canal Co.'s Appeal, 64 Pa. St. 387; Canal Co. *v.* Shimp, 2 Leg. Gaz. 181. *Compare* Riddle *v.* Delaware County Com'rs, 3 Pa. Co. Ct. 605.

Texas.— Rische *v.* Texas Transp. Co., 27 Tex. Civ. App. 33, 66 S. W. 324 [*criticizing* Gulf, etc., R. Co. *v.* Fuller, 63 Tex. 467].

West Virginia.— Spencer *v.* Point Pleasant, etc., R. Co., 23 W. Va. 406.

England.— Hutton *v.* London, etc., R. Co., 7 Hare 259, 13 Jur. 486, 18 L. J. Ch. 345, 27 Eng. Ch. 259.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 191, 192.

Contra.— Ryan *v.* Cincinnati, 1 Ohio Cir. Ct. 558, 1 Ohio Cir. Dec. 311.

Where the constitution declares that private property shall not be "taken or damaged" until compensation shall be paid the owner or into court for him, compensation for damages to property not taken must be paid to the owner or into court for him for damaging property. Lewis *v.* Seattle, 5 Wash. 741, 32 Pac. 794; McElroy *v.* Kansas City, 21 Fed. 257. *Contra*, Lorie *v.* North Chicago City R. Co., 32 Fed. 270.

Limitation of rule.— Where the injury amounts to a total destruction of the value of the property, it is equivalent to an actual taking, and the compensation must be first paid. Ward *v.* Ohio River R. Co., 35 W. Va. 481, 14 S. E. 142.

47. Rische *v.* Texas Transp. Co., 27 Tex. Civ. App. 33, 66 S. W. 324.

48. *Georgia.*— Rome *v.* Perkins, 30 Ga. 154.

Kansas.— Williams *v.* Hutchinson, etc., R. Co., 62 Kan. 412, 63 Pac. 430, 84 Am. St. Rep. 408; Wichita, etc., R. Co. *v.* Fecheimer, 36 Kan. 45, 12 Pac. 362.

Mississippi.— Pearson *v.* Johnson, 54 Miss. 259.

New Hampshire.— Uncanoonuck Road Co. *v.* Orr, 67 N. H. 541, 41 Atl. 665; Smart *v.* Portsmouth, etc., R. Co., 20 N. H. 233.

Tennessee.— Woolard *v.* Nashville, 108 Tenn. 353, 67 S. W. 801.

Texas.— Gulf, etc., R. Co. *v.* Donahoo, 59 Tex. 128.

Vermont.— McAulay *v.* Western Vermont R. Co., 33 Vt. 311, 78 Am. Dec. 627.

Washington.— Lewis *v.* Seattle, 5 Wash. 741, 32 Pac. 794.

United States.— Northern Pac. R. Co. *v.* Barnesville, etc., R. Co., 4 Fed. 298, 2 McCrary 203.

49. Harrison, etc., Turnpike Co. *v.* Roberts, 33 Ind. 246; McAulay *v.* Western Vermont R. Co., 33 Vt. 311, 78 Am. Dec. 627.

50. **Acts amounting to waiver.**— Prepayment is waived by the following acts: Acquiescence in appropriation of the property before payment (Woolard *v.* Nashville, 108 Tenn. 353, 67 S. W. 801; Lewis *v.* Seattle, 5 Wash. 741, 32 Pac. 794; McAulay *v.* Western Vermont R. Co., 33 Vt. 311, 78 Am. Dec. 627. But see Leber *v.* Minneapolis, etc., R. Co., 29 Minn. 256, 13 N. W. 31); or acquiescence in the use of the property for the purposes for which it is sought to be acquired (Kaufman *v.* Tacoma, etc., R. Co., 11 Wash. 632, 40 Pac. 137; Northern Pac. R. Co. *v.* Barnesville, etc., R. Co., 4 Fed. 298, 2 McCrary 203), by bringing suit to recover the value of the property taken (Wichita, etc., R. Co. *v.* Fecheimer, 36 Kan. 45, 12 Pac. 362; Gulf, etc., R. Co. *v.* Donahoo, 59 Tex. 128) by agreement that damages shall be subsequently ascertained and paid (Knapp *v.* McAulay, 39 Vt. 275), and by an agreement to sell and convey (Baltimore, etc., R. Co. *v.* Highland, 48 Ind. 381).

What is not a waiver.— Where a railroad company enters upon land under color of a proceeding in the probate court to appropriate the same, without first making compensation in money or securing it by a deposit of money, and constructs thereon a railroad track and commences to run its cars along the same, after which the owner obtains a reversal of the proceeding and commences an action to recover possession of the land, the mere fact of delay without proof of knowledge of or acquiescence in the acts of the company will not estop the owner from maintaining such action. Bothe *v.* Dayton, etc., R. Co., 37 Ohio St. 147. So where a railroad company enters on land with the owner's consent, and proceeds to condemn it, the abandonment by the lessee who is not a party to the condemnation proceedings of his intention to enjoin the appropriation by the railroad company does not amount to a consent that the company may enter and appropriate the same before assessment and payment of the damages, if he at the time of the abandonment informed the attorney of the railroad company of his intention to bring an action for damages for the trespass. Capers *v.* Augusta, etc., R. Co., 76 Ga. 90. And a direction by a mortgagee to the mortgagor to get all the damages possible from the railroad company for crossing the mortgaged land does not amount to a waiver by the mortgagee of compensation as a condition precedent to entry. Snyder *v.* Chicago, etc., R. Co., 112 Mo. 527, 20 S. W. 885. It has also been held that if a judgment for damages is not paid, and it appears that pending the appeal the railroad company entered upon his land and constructed its road, and it does not appear that the landowner had any actual knowledge of such entry and occupation

waiver the condemning party is nevertheless liable to an action by the owner for the damages which have been awarded him.[51]

2. MEDIUM OF PAYMENT. The great weight of authority is to the effect that payment for property taken under the power of eminent domain must be made in money.[52] The owner cannot be required to accept in payment either in whole or in part the performance of certain acts by the other party,[53] such as fencing the road, making crossings,[54] building wagon bridges,[55] or giving the owner a release of part of the right of way or a license to use the right of way.[56] Nor can the owner be required to accept in payment other lands[57] or a grant of a right of way over adjoining land.[58] Neither can he be required to accept scrip in payment.[59]

3. TENDER OF PAYMENT. A tender to the owner of money and a refusal by him to accept it are equivalent to payment;[60] and the condemning party is relieved

or in any manner consented thereto, a judgment in favor of the landowner in an action of ejectment for the recovery of possession will not be reversed. Central Branch Union Pac. R. Co. *v.* Atchison, etc., R. Co., 28 Kan. 453; St. Joseph, etc., R. Co. *v.* Callender, 13 Kan. 496.

When prepayment has been waived, and the railroad company or other corporation, relying on the waiver, proceeds to complete its work, and expends large sums of money on the land so appropriated, the owner will be estopped to reclaim the land or to maintain ejectment for it. Williams *v.* Hutchinson, etc., R. Co., 62 Kan. 412, 63 Pac. 430, 84 Am. St. Rep. 408.

51. Smart *v.* Portsmouth, etc., R. Co., 20 N. H. 233.

52. *Colorado.*— Burlington, etc., R. Co. *v.* Schweikart, 10 Colo. 178, 14 Pac. 329.

Georgia.— Atlanta *v.* Central R., etc., Co., 53 Ga. 120; Augusta *v.* Marks, 50 Ga. 612; Jones *v.* Wills Valley R. Co., 30 Ga. 43.

Illinois.—Hyslop *v.* Finch, 99 Ill. 171; Carpenter *v.* Jennings, 77 Ill. 250; Chicago, etc., R. Co. *v.* Melville, 66 Ill. 329; Weckler *v.* Chicago, 61 Ill. 142.

Indiana.— Lucas *v.* Hawkins, 8 Blackf. 337.

Kentucky.— Rice *v.* Danville, etc., Turnpike Road Co., 7 Dana 81.

Louisiana.— New Orleans Pac. R. Co. *v.* Murrell, 34 La. Ann. 536.

Massachusetts.— Com. *v.* Peters, 2 Mass. 125.

Michigan.— Toledo, etc., R. Co. *v.* Munson, 57 Mich. 42, 23 N. W. 455.

Mississippi.— Brown *v.* Beatty, 34 Miss. 227, 69 Am. Dec. 389.

Missouri.— Chicago, etc., R. Co. *v.* McGrew, 104 Mo. 282, 15 S. W. 931.

New Jersey.— Butler *v.* Ravine Road Sewer Com'rs, 39 N. J. L. 665; Carson *v.* Coleman, 11 N. J. Eq. 106.

New York.— People *v.* Brooklyn, 6 Barb. 209.

North Dakota.— Martin *v.* Tyler, 4 N. D. 278, 60 N. W. 392, 25 L. R. A. 838.

Ohio.— Youngstown *v.* Moore, 30 Ohio St. 133; Kramer *v.* Cleveland, etc., R. Co., 1 Ohio Dec. (Reprint) 474, 10 West. L. J. 138; *In re* Cincinnati, etc., R. Co., 1 Ohio Dec. (Reprint) 269, 6 West. L. J. 350.

Tennessee.— Paducah, etc., R. Co. *v.* Stovall, 12 Heisk. 1.

Texas.— Dulaney *v.* Nolan County, 85 Tex. 225, 20 S. W. 70; Southern Cotton Press, etc., Co. *v.* Galveston Wharf Co., 3 Tex. App. Civ. Cas. § 256.

West Virginia.— Chesapeake, etc., R. Co. *v.* Halstead, 7 W. Va. 301.

United States.— Vanhorne *v.* Dorrance, 28 Fed. Cas. No. 16,857, 2 Dall. 304.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 437, 438.

Payment in gold.— In a proceeding to condemn land for a public use, if the court finds generally the value of the land taken in dollars and cents, without saying that the estimated value is in gold coin, it cannot render a judgment in gold coin. North Pac. R. Co. *v.* Reynolds, 50 Cal. 280.

In proceedings in Indiana to open a highway compensation for inconveniences and additional fences need not be in money, but may be by benefits conferred on the owner by the road. Fifer *v.* Ritter, 159 Ind. 8, 64 N. E. 463.

53. Chesapeake, etc., R. Co. *v.* Patton, 6 W. Va. 147.

The grant by a city of a right to extend tracks through designated streets cannot be construed into an intended indemnification for the property afterward expropriated by the levee board of the city. New Orleans, etc., R. Co. *v.* Orleans Levee Dist., 48 La. Ann. 1098, 20 So. 678.

54. Chicago, etc., R. Co. *v.* Melville, 66 Ill. 329; New Orleans Pac. R. Co. *v.* Murrell, 34 La. Ann. 536; Chesapeake, etc., R. Co. *v.* Patton, 6 W. Va. 147.

55. Toledo, etc., R. Co. *v.* Munson, 57 Mich. 42, 23 N. W. 455.

56. Chicago, etc., R. Co. *v.* McGrew, 104 Mo. 282, 15 S. W. 931.

57. McArthur *v.* Kelly, 5 Ohio 139.

58. Burlington, etc., R. Co. *v.* Schweikart, 10 Colo. 178, 14 Pac. 329.

59. State *v.* Beackmo, 8 Blackf. (Ind.) 246.

60. Oliver *v.* Union Point, etc., R. Co., 83 Ga. 257, 9 S. E. 1086; Aurora, etc., R. Co. *v.* Miller, 56 Ind. 88; Chicago, etc., R. Co. *v.* Pattison, 26 Ind. App. 295, 59 N. E. 688; St. Louis, etc., R. Co. *v.* Clark, 119 Mo. 357, 24 S. W. 157; Doughty *v.* Somerville, etc., R.

from any further obligation except to keep the money in readiness to be paid on demand.[61] It seems that a tender and its acceptance before appeal taken will not necessarily preclude the condemning party from having the damages reduced on appeal.[62]

4. Effect of Payment or Security or Making Deposit — a. In General. On payment of the amount awarded to the owner, or into court for him, in pursuance of the constitutional or statutory provisions making this a prerequisite to a taking, the condemning company may enter upon the land and proceed with its work of construction.[63] So where the constitutional and statutory provisions authorize the taking of possession under condemnation proceedings on giving security[64] or making a deposit,[65] the party condemning is entitled to take possession of the property; and the owner cannot maintain trespass.[66] After the receipt of the amount awarded the owner is estopped to claim that the condemnation proceedings were irregular,[67] and he will be held to have waived his right to a trial

Co., 22 N. J. L. 495; Johnson *v.* Baltimore, etc., R. Co., 45 N. J. Eq. 454, 17 Atl. 574; Mercer, etc., R. Co. *v.* Delaware, etc., R. Co., 26 N. J. Eq. 464.

Reason for rule.—Compensation is not made in fact in such case because the person entitled to it will not accept it. But it is in law. It is the owner's fault that it is not made in fact and he cannot therefore be heard to urge his own wrong for the purpose of defeating the rights of the condemning party. Redmund *v.* Philadelphia, etc., R. Co., 33 N. J. Eq. 165.

The mere offer to pay the money at some other time, or an offer coupled with a condition, or an offer of a check or certificate of deposit, is not a good tender. Chicago, etc., R. Co. *v.* Pattison, 26 Ind. App. 295, 59 N. E. 688.

Warrants drawn on city treasury.— Where the statute provides that as soon as the appropriation to pay the damages shall be in the city treasury, subject to the warrants in favor of the owners of condemned property, and the warrants are drawn and ready for delivery, the property shall be deemed appropriated, and not otherwise, a tender is to be deemed as made when the appropriation is made, the full amount is in the city treasury and the warrants are drawn and ready for delivery. Gaston *v.* Portland, 41 Oreg. 373, 69 Pac. 34, 445.

A tender to the owner's attorney is sufficient. Evans *v.* Haefner, 29 Mo. 141; Dyckman *v.* New York, 7 Barb. (N. Y.) 498; National Docks, etc., R. Co. *v.* Pennsylvania R. Co., 54 N. J. Eq. 142, 33 Atl. 860.

Interest.— Where the tender was made two days after the filing of the commissioners' report, it is immaterial that it did not include interest. Scott *v.* St. Paul, etc., R. Co., 21 Minn. 322.

61. Scott *v.* St. Paul, etc., R. Co., 21 Minn. 322; St. Louis, etc., R. Co. *v.* Clark, 119 Mo. 357, 24 S. W. 157.

The money may be deposited with some proper officer or person to be held for the owner until legal settlement or until his readiness to accept it. Powers *v.* Bears, 12 Wis. 213, 78 Am. Dec. 733.

62. Chicago, etc., R. Co. *v.* Phelps, 125 Ill. 482, 17 N. E. 769; Indianapolis, etc., R. Co. *v.* Brower, 12 Ind. 374; St. Louis, etc., R. Co. *v.* Clark, 119 Mo. 357, 24 S. W. 157.

63. St. Louis, etc., R. Co. *v.* Fowler, 113 Mo. 459, 20 S. W. 1069; Rethan *v.* St. Louis, etc., R. Co., 113 Mo. 132, 20 S. W. 892; State *v.* Dickson, 3 Mo. App. 464; Schuler *v.* Northern Liberties, etc., Co., 3 Whart. (Pa.) 555.

64. Johnstown's Petition, 5 Pa. Super. Ct. 65. See also Pennsylvania R. Co. *v.* Jones, 2 Pa. Dist. 759; Salt Lake City Water, etc., Power Co. *v.* Salt Lake City, 24 Utah 282, 67 Pac. 791.

On approval of a bond giving security the right to possession becomes absolute. Wallace *v.* New Castle Northern R. Co., 138 Pa. St. 168, 22 Atl. 95; Dimmick *v.* Brodhead, 75 Pa. St. 464; Welsh *v.* New Castle Northern R. Co., 6 Pa. Co. Ct. 56.

65. Hawley *v.* Harrall, 19 Conn. 142; State *v.* Baker, 20 Fla. 616. See also *Ex p.* Reynolds, 52 Ark. 330, 12 S. W. 570.

Statute authorizing the continuance in possession on making deposit.— It seems that a statute which provides that in any stage of a proceeding for the condemnation of real property the court may authorize plaintiff if in possession to continue in possession, and may stay all action or proceedings against him on account thereof, on his giving security or depositing such sum as the court may direct, is constitutional. Matter of St. Lawrence, etc., R. Co., 66 Hun (N. Y.) 306, 21 N. Y. Suppl. 131.

66. Burns *v.* Dodge, 9 Wis. 458. The payment of the judgment in a condemnation proceeding bars the right of the owner to maintain an action based on the proper use of the easement and operates as a dedication with all its incidents. Hartlot Paper Co. *v.* State, 47 N. Y. App. Div. 196, 62 N. Y. Suppl. 205.

67. *Connecticut.*— Whittlesey *v.* Hartford, etc., R. Co., 23 Conn. 421.

Illinois.— Poole *v.* Breese, 114 Ill. 594, 3 N. E. 714.

Iowa.— Marling *v.* Burlington, etc., R. Co., 67 Iowa 331, 25 N. W. 268.

Kansas.— Williams *v.* Hutchinson, etc., R. Co., 62 Kan. 412, 63 Pac. 430, 84 Am. St. Rep. 408; Corwin *v.* St. Louis, etc., R. Co., 51 Kan. 451, 33 Pac. 99.

of objections to the award which were pending when he accepted the payment.[68] Whether or not such acceptance will be deemed a waiver of the right of appeal is an open question,[69] although it would seem that the condemning party does not lose its right of appeal by paying the award and taking possession of the condemned property.[70] The owner is not precluded by accepting payment of the award from compelling the railroad company to comply with the statutory provision as to constructing a crossing.[71] The owner cannot retain the amount paid, if the proceedings are afterward adjudged void *ab initio*.[72]

b. When Title or Easement Passes. It is a rule of universal application that title does not pass out of the owner and vest in the condemning party until payment of compensation for the property taken, where payment before taking is expressly required by the constitution,[73] or where the constitution requires as a prerequisite to the taking that payment shall be made to the owner or into court for him,[74] or where the charter of the condemning company or general statutes relating to eminent domain contains the express provision that title shall remain in the owner until compensation is paid.[75] So under constitutions which contain no express requirement that payment shall precede taking but prohibit the taking of private property for public use without just compensation, title does not pass before payment,[76] except where the statute expressly provides that title shall pass

Wisconsin.— Stolze *v.* Milwaukee, etc., R. Co., 113 Wis. 44, 88 N. W. 919, 90 Am. St. Rep. 833.

68. Ft. Worth Ice Co. *v.* Chicago, etc., R. Co., 11 Tex. Civ. App. 600, 33 S. W. 159; Twombly *v.* Chicago, etc., R. Co., (Tex. Civ. App. 1895) 31 S. W. 81.

69. In Iowa, Kansas, and Maryland such acceptance constitutes a waiver of the right to appeal (Mississippi, etc., R. Co. *v.* Byington, 14 Iowa 572; Fitzgerald *v.* Chicago, etc., R. Co., 48 Kan. 537, 29 Pac. 703; Steuart *v.* Baltimore, 7 Md. 500), while in Missouri, New Hampshire, and Wisconsin the contrary view is taken, the amount received being considered only as a payment *pro tanto* (St. Louis, etc., R. Co. *v.* Clark, 119 Mo. 357, 24 S. W. 157; Low *v.* Concord R. Co., 63 N. H. 557, 3 Atl. 739; Weyer *v.* Milwaukee, etc., R. Co., 57 Wis. 329, 15 N. W. 481).

70. Chicago, etc., R. Co. *v.* Phelps, 125 Ill. 482, 17 N. E. 769; Fort St. Union Depot Co. *v.* Peninsular Stove Co., 103 Mich. 637, 61 N. W. 1007; Fort St. Union Depot Co. *v.* Backus, 92 Mich. 33, 52 N. W. 790. And the same rule has been held to apply in case of a tender (Indianapolis, etc., R. Co. *v.* Brower, 12 Ind. 374), although the contrary view has also been sustained (Missouri Pac. R. Co. *v.* Gruendel, 3 Kan. App. 53, 44 Pac. 439).

71. Jones *v.* Seligman, 81 N. Y. 190.

72. Gallatin *v.* Loucks, 21 Barb. (N. Y.) 578.

73. Terre Haute, etc., R. Co. *v.* Crawford, 100 Ind. 550; Lake Erie, etc., R. Co. *v.* Kinsay, 87 Ind. 514; State *v.* Graves, 19 Md. 357; Stewart *v.* Raymond R. Co., 7 Sm. & M. (Miss.) 568.

Title or right acquired generally see *infra*, XIII.

Where an appeal is taken from the award of appraisers, payment to the clerk of the damages awarded operates only as a license to the railroad company to take possession of the lands so appropriated. The title thereto does not vest in the company until it has fully paid the damages finally assessed and adjudged in favor of the owner upon the final determination of the appeal. Terre Haute, etc., R. Co. *v.* Crawford, 100 Ind. 550; Lake Erie, etc., R. Co. *v.* Kinsey, 87 Ind. 514.

74. Green *v.* Missouri Pac. R. Co., 82 Mo. 653; Provolt *v.* Chicago, etc., R. Co., 57 Mo. 261; Walther *v.* Warran, 25 Mo. 277. *Compare* Semple *v.* Cleveland, etc., R. Co., 172 Pa. St. 369, 33 Atl. 564, holding that while ordinarily the legal effect of the approval of a bond given by a railroad company in condemnation proceedings is to pass the title to the land or easement to which it relates, this effect does not necessarily follow where the entry of the railroad company is in clear violation of the covenants contained in a written contract with the landowner. See also Bensley *v.* Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575; California Southern, etc., R. Co. *v.* Colton Co., (Cal. 1894) 2 Pac. 38.

Effect of appeal.— The payment into court by plaintiff in condemnation proceedings of the sum assessed as damages does not vest in him the title or easement awarded when defendants have appealed on other grounds than the insufficiency of the damages assessed; such a deposit being merely a tender which is not accepted. Pool *v.* Butler, 141 Cal. 46, 74 Pac. 444.

75. White *v.* Nashville, etc., R. Co., 7 Heisk. (Tenn.) 518; Southern R. Co. *v.* Gregg, 101 Va. 308, 43 S. E. 570; Jones *v.* Miller, (Va. 1882) 23 S. E. 35.

76. Rubbottom *v.* McClure, 4 Blackf. (Ind.) 505; Nichols *v.* Somerset, etc., R. Co., 43 Me. 356; Cushman *v.* Smith, 34 Me. 247; People *v.* Adirondack R. Co., 25 Misc. (N. Y.) 84, 54 N. Y. Suppl. 682; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 10 S. Ct. 965, 34 L. ed. 295; Kennedy *v.* Indianapolis, 103 U. S. 599, 26 L. ed. 550; Johnson *v.* U. S., 31 Ct. Cl. 262.

before compensation and makes adequate and certain provision for such compensation.[77] Where the award has been paid and accepted, title,[78] or an easement, as the case may be,[79] vests in the condemning party.

5. Effect of Failure to Pay or Deposit Damages. If a statute prescribes the time within which payment must be made after final judgment, a non-compliance therewith entitles defendant to have the entire proceedings annulled and vacated,[80] and it has been held that failure to pay or deposit damages, costs, etc., awarded in condemnation proceedings within a certain time after confirmation of the report as provided by statute operates as an abandonment of the proceedings and prevents the acquisition of any rights in the land sought to be condemned.[81]

6. Presumption of Payment. Payment may be presumed from lapse of time,[82] or from the acts of the parties;[83] but the presumption so arising may be rebutted.[84]

G. By and to Whom Compensation Made — 1. Persons Liable — a. In General. The person or corporation causing the land to be condemned or the work to be done is primarily liable for injuries caused by the exercise of the power of eminent domain,[85] although the work or taking is actually done by another.[86] According to the weight of authority, a corporation occupying the streets of a city with the city's consent is primarily liable for the injury caused to the abutting owners, and not the city itself.[87] Nevertheless, a different rule

Constitutional clauses of this character prevent the acquisition of any title to the land or any permanent appropriation if without actual payment or tender of a just compensation for it. Cushman *v.* Smith, 34 Me. 247.

77. Sweet *v.* Rechel, 159 U. S. 380, 16 S. Ct. 43, 40 L. ed. 188.

78. Reese *v.* Chicago, 38 Ill. 322.

79. Atchison, etc., R. Co. *v.* Wilson, 66 Kan. 233, 69 Pac. 342; Phipps *v.* Kansas City, etc., R. Co., 58 Kan. 142, 48 Pac. 573; Blackshire *v.* Atchison, etc., R. Co., 13 Kan. 514.

80. Glenn County *v.* Jackson, 129 Cal. 404, 62 Pac. 66; Florida Cent., etc., R. Co. *v.* Bear, 43 Fla. 319, 31 So. 287.

Where in proceedings to open a road the commissioners direct that the landowner be paid in certain payments at certain times the amount awarded him as compensation for the land taken, and that the road be not taken until the payments are made, a failure to make the payments as directed terminates the right to open the road. Lowmiller *v.* Fouser, 52 Ohio St. 123, 39 N. E. 419.

81. Derby *v.* Gage, 60 Mich. 1, 26 N. W. 820. See *infra*, XI, O.

82. Blair *v.* Kiger, 111 Ind. 193, 12 N. E. 293.

83. State *v.* Prine, 25 Iowa 231.

84. Niagara Falls *v.* New York Cent., etc., R. Co., 41 N. Y. App. Div. 93, 58 N. Y. Suppl. 619.

85. Charles *v.* Monson, etc., Mfg. Co., 17 Pick. (Mass.) 70 (holding a former mill-owner liable for damages caused while he was owner and occupant, although he had ceased to be such at the time the complaint was filed); Dickerman *v.* Duluth, 88 Minn. 288, 92 N. W. 1119; Lycoming Gas, etc., Co. *v.* Moyer, 99 Pa. St. 615.

One deriving a benefit from the condemnation is not liable for damages caused thereby if he did not cause the taking. Nelson *v.* Butterfield, 21 Me. 220.

A mortgagee in possession is considered the owner of a dam, under a Maine statute, for the purpose of paying the yearly damage caused by such dam. Lowell *v.* Shaw, 15 Me. 242.

A corporation operating under two names cannot escape liability when sued for damages under one name by showing that the appropriation was made under the other name. De Lissa *v.* Missouri Pac. R. Co., 36 Mo. App. 706.

The government, and not a railroad company, is liable for compensation for Indian lands taken for a railroad under an act of congress. Grinter *v.* Kansas Pac. R. Co., 23 Kan. 642.

But a state is not bound to compensate a railroad company for taking under its right of eminent domain lands which the railroad company had inchoately condemned by filing its map and giving notice to the occupant. People *v.* Adirondack R. Co., 160 N. Y. 225, 54 N. E. 689 [*affirmed* in 176 U. S. 335, 20 S. Ct. 460, 44 L. ed. 492].

A constitutional provision requiring corporations vested with the power of eminent domain to make compensation, etc., applies as well to corporations existing at the time of its adoption as to those created afterward. Patent *v.* Philadelphia, etc., R. Co., 17 Phila. (Pa.) 291.

86. Hinde *v.* Wabash Nav. Co., 15 Ill. 72; Lesher *v.* Wabash Nav. Co., 14 Ill. 85, 56 Am. Dec. 494; Brady *v.* Kansas City Cable R. Co., 111 Mo. 329, 19 S. W. 953; Vermont Cent. R. Co. *v.* Baxter, 22 Vt. 365.

87. *Colorado.*— Denver *v.* Bayer, 7 Colo. 113, 2 Pac. 6.

Connecticut.— Burritt *v.* New Haven, 42 Conn. 174.

Kansas.— Hedrick *v.* Olathe, 30 Kan. 348, 1 Pac. 118.

Maine.— Draper *v.* Orono, 11 Me. 422.

New York.— Welde *v.* New York, etc., R. Co., 168 N. Y. 597, 61 N. E. 554.

Washington.— Kaufman *v.* Tacoma, etc., R. Co., 11 Wash. 632, 40 Pac. 137; Silsby *v.* Tacoma, etc., R. Co., 6 Wash. 295, 32 Pac.

is recognized in some jurisdictions where it is held that the liability rests upon the city.[88]

b. Corporation Succeeding to Right of Condemning Corporation. If a corporation, succeeding to the property, rights, and franchises of an older corporation, enters upon land appropriated by its predecessor and continuously uses the same to the exclusion of the landowner, it will be deemed to have adopted the original appropriation, and it becomes liable to pay the compensation which has been awarded against the former company;[89] and it cannot escape that liability by afterward abandoning the land.[90] And the same rule applies where the company appropriating the land is reorganized and forms a new company.[91] It is otherwise, however, if the succeeding corporation does not succeed to the rights and franchises of the original company,[92] as where it merely takes possession under a lease.[93] Nor is the succeeding company liable for damages caused by the original corporation, but for which it was not liable.[94]

c. Municipal Corporation. The payment of the compensation for private property taken by municipal corporations for public use is controlled by the state, which according to the well-settled doctrine may either make the payment itself

1067; Hatch *v.* Tacoma, etc., R. Co., 6 Wash. 1, 32 Pac. 1063.

See 18 Cent. Dig. tit. "Eminent Domain," § 322.

88. Bentley *v.* Atlanta, 92 Ga. 623, 18 S. E. 1013; Stack *v.* East St. Louis, 85 Ill. 377, 28 Am. Rep. 619; Pekin *v.* Brereton, 67 Ill. 477, 16 Am. Rep. 629; Dickerman *v.* Duluth, 88 Minn. 288, 92 N. W. 1119.

89. *Arkansas.*— Organ *v.* Memphis, etc., R. Co., 51 Ark. 235, 11 S. W. 96.

Indiana.— Chicago, etc., R. Co. *v.* Galey, 141 Ind. 360, 39 N. E. 925; New York, etc., R. Co. *v.* Hammond, 132 Ind. 475, 32 N. E. 83; Lake Erie, etc., R. Co. *v.* Griffin, 107 Ind. 464, 8 N. E. 451.

Iowa.— Hartley *v.* Keokuk, etc., R. Co., 85 Iowa 455, 52 N. W. 352.

Kansas.— Ft. Scott, etc., R. Co. *v.* Fox, 42 Kan. 490, 22 Pac. 583.

Massachusetts.— Drury *v.* Midland R. Co., 127 Mass. 571.

Mississippi.— Williams *v.* New Orleans, etc., R. Co., 60 Miss. 689.

North Carolina.— Hendrick *v.* Carolina Cent. R. Co., 101 N. C. 617, 8 S. E. 236.

Pennsylvania.— Martin *v.* Pittsburg R. Co., 28 Pittsb. Leg. J. 316.

Texas.— Rio Grande, etc., R. Co. *v.* Ortiz, 75 Tex. 602, 12 S. W. 1129.

Vermont.— Wead *v.* St. Johnsbury, etc., R. Co., 64 Vt. 52, 24 Atl. 361. And see Sennott *v.* St. Johnsbury, etc., R. Co., 59 Vt. 226, 9 Atl. 554.

Wisconsin.— Pfeifer *v.* Sheboygan, etc., R. Co., 18 Wis. 155, 86 Am. Dec. 751. But see Gilman *v.* Sheboygan, etc., R. Co., 37 Wis. 317.

United States.— Kaukauna Water-Power Co. *v.* Green Bay, etc., Canal Co., 142 U. S. 254, 12 S. Ct. 173, 35 L. ed. 1004 [*affirming* 70 Wis. 635, 35 N. W. 529, 36 N. W. 828].

See 18 Cent. Dig. tit. "Eminent Domain," § 323.

But see Louisville, etc., R. Co. *v.* Zachritz, 13 Ky. L. Rep. 141, holding that a purchaser of a railroad is not liable for damages caused to an abutter by the construction and operation of the road in a street before the purchase.

A party purchasing a mill and dam across a stream is liable for the value of the land overflowed and appropriated, by reason of the erection of the dam by the grantor. Sutliff *v.* Johnson, 17 Nebr. 575, 24 N. W. 217; Ray *v.* Atchison, etc., R. Co., 4 Nebr. 439.

A railroad company cannot show in defense to an action for damages for its occupation that another railroad company had made payments to the owner for damages to the same land, without showing further that it is itself the assignee of such other company. Tucker *v.* Chicago, etc., R. Co., 91 Wis. 576, 65 N. W. 515.

But proof that the husband of plaintiff had been paid for the land by a company under which defendant claimed by mesne conveyances and that the husband was the authorized agent of his wife is admissible in defense. Ragan *v.* Kansas City, etc., R. Co., 111 Mo. 456, 20 S. W. 234.

A transferee of railroad property from a state, which has made ample provision for compensation, is not liable for damages for land originally taken. People *v.* Michigan Southern R. Co., 3 Mich. 496.

Where the original company has given a bond for security a purchaser of the railroad under foreclosure proceedings is not liable for the payment of damages, but the owner of the land is thrown back upon his bond for such damages. Fries *v.* Southern Pennsylvania R., etc., Co., 85 Pa. St. 73.

90. Lake Erie, etc., R. Co. *v.* Griffin, 107 Ind. 464, 8 N. E. 451.

91. Lake Erie R. Co. *v.* Griffin, 92 Ind. 487.

92. Heard *v.* Talbot, 7 Gray (Mass.) 113.

93. Atchison, etc., R. Co. *v.* Lenz, 35 Ill. App. 330; Louisville Southern R. Co. *v.* Cogar, 15 Ky. L. Rep. 444.

94. Delaware Div. Canal Co. *v.* McKeen, 52 Pa. St. 117, holding that a purchaser from the state is not liable for damages caused by the state and for which it was not liable.

or direct it to be paid by the county, city, borough, or town which appropriates the property.[95]

d. Joint Liability. A joint liability for compensation may rest upon two or more corporations operating jointly,[96] or upon a vendee or lessee and the original owner or lessor.[97]

2. Persons Entitled — a. Owners — (i) *In General.* Compensation in general must be paid to the person who owned the property at the time it was taken or injured,[98] and in general he is not bound to prove his title, since the condemn-

95. *Massachusetts.*—Middleborough *v.* New York, etc., R. Co., 179 Mass. 520, 61 N. E. 107.

Michigan.— People *v.* Lowell Tp., 9 Mich. 144.

Nebraska.— Omaha *v.* State, (1903) 94 N. W. 979.

Pennsylvania.— *In re* Parkesburg, 124 Pa. St. 511, 17 Atl. 27; Chester County *v.* Brower, 117 Pa. St. 647, 12 Atl. 577, 2 Am. St. Rep. 713; Brower *v.* Chester County, 1 Pa. Co. Ct. 1; *In re* East Walnut St., 10 Lanc. Bar 209.

Washington.— Lewis County *v.* Schobey, 31 Wash. 357, 71 Pac. 1029; Brown *v.* Pierce County, 28 Wash. 345, 68 Pac. 872.

See 18 Cent. Dig. tit. "Eminent Domain," § 321.

And see Dallas *v.* Miller, 7 Tex. Civ. App. 503, 27 S. W. 498.

If the land is in one county when the condemnation proceedings were terminated, but was afterward, and before the damages were paid, included within the limits of a new county, the original county is liable for the payment. Woodman *v.* Somerset County, 25 Me. 300.

Where a town way, laid out by the selectmen is not approved and allowed by the town, but is afterward located and established, its character is not thereby changed to a county road, so that the payment of the damages is transferred from the town to the county. Goodwin *v.* Hallowell, 12 Me. 271.

Under the present constitution of Pennsylvania a township opening a road is not liable to the owner of adjoining land, since the township does not take the land for the highway, and does not possess the right of eminent domain, but merely opens the road after it has been laid out by the court of quarter sessions. Wagner *v.* Salzburg Tp., 132 Pa. St. 636, 19 Atl. 294.

96. Kansas City, etc., R. Co. *v.* Fisher, 53 Kan. 512, 36 Pac. 1004 (holding this to be true, although one of them is a foreign corporation); Grand Junction R., etc., Co. *v.* Middlesex County Com'rs, 14 Gray (Mass.) 553; Kane *v.* Metropolitan El. R. Co., 15 Daly (N. Y.) 294, 6 N. Y. Suppl. 526. And see Dows *v.* Congdon, 16 How. Pr. (N. Y.) 571.

97. Stickley *v.* Chesapeake, etc., R. Co., 93 Ky. 323, 20 S. W. 261, 14 Ky. L. Rep. 417; Little Miami R. Co. *v.* Hambleton, 40 Ohio St. 496.

98. Brooks *v.* Collins, 11 Bush (Ky.) 622; Keller's Appeal, 2 Walk. (Pa.) 32; Powers *v.* Bears, 12 Wis. 213, 78 Am. Dec. 733; Convers *v.* Atchison, etc., R. Co., 142 U. S. 671, 12 S. Ct. 351, 35 L. ed. 1153.

If the owner waives his right no one else can take advantage of the omission to compensate him. Haskell *v.* New Bedford, 108 Mass. 208.

If a mistake is made in the proceedings as to the real owner, the court may direct the damages to be paid to the proper party on proof of the fact. Boyd *v.* Negley, 40 Pa. St. 377.

The state.—Where the statute requires that a railroad company shall make compensation to all persons whose lands are taken for the construction of the road, the state has the same right to compensation as an individual, although it is not specifically mentioned in the statute. Com. *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 25.

Unknown owners.— Under a New York statute, where the commissioners cannot determine to whom the award should be made, they should make a substantial award to the "unknown owner," instead of making a nominal award to a claimant whose right is doubtful (Matter of Public Parks, 53 Hun 280, 6 N. Y. Suppl. 750; Matter of East One Hundred and Thirty-Fifth St., 36 Misc. 427, 73 N. Y. Suppl. 727; *In re* Fulton Ave., 72 N. Y. Suppl. 37; *In re* William, etc., Sts., 19 Wend. 678), and if one of them is afterward ascertained he is entitled to the award, whether he owns an absolute fee or a fee subject to a public easement (*In re* Public Parks, 73 N. Y. 560 [*reversing* 6 Hun 486]). But if the report shows that an award of the full value to unknown owners was intended for the benefit of all parties in interest, the owner of the fee is not entitled to the whole award; one in whom there is a perpetual easement is entitled to the value of such easement (*In re* New York City, 158 N. Y. 721, 53 N. E. 1123 [*affirming* 27 N. Y. App. Div. 265, 50 N. Y. Suppl. 621]; *In re* Eleventh Ave., 81 N. Y. 436). This statute, however, does not extend to the dower of a widow of which the commissioners were aware, because the executor and heirs of the estate are in dispute as to their respective rights; as the dower estate is not involved the damages to it should be separately estimated. *In re* William, etc., Sts., 19 Wend. (N. Y.) 678.

Where money has been paid into court under the English Lands Clauses Act, one claiming to be entitled to it absolutely may upon proper application to the court obtain an order for its payment as he may show title. *In re* King, L. R. 16 Eq. 521. 29 L. T. Rep. N. S. 288, 21 Wkly. Rep. 881; Galliers *v.*

ing party by beginning the proceeding against him admits his ownership.[99] But the word "owner" in this connection will be held to include any person having an interest in the land, and who sustains loss or damage at the time of the taking,[1] as a tenant in common,[2] the holder of a possessory title under some circumstances,[3]

Metropolitan R. Co., L. R. 11 Eq. 410, 40 L. J. Ch. 544, 19 Wkly. Rep. 795; Melling *v.* Bird, 17 Jur. 155, 22 L. J. Ch. 599, 1 Wkly. Rep. 219; *In re* Chelsea Waterworks Co., 56 L. J. Ch. 640, 56 L. T. Rep. N. S. 421; *Re* Jones, 39 L. J. Ch. 190, 18 Wkly. Rep. 312.

99. St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144. And see *infra*, XI, K, 1, b.

The production of a deed to the land, in which he is named as grantee, is *prima facie* evidence of his title. Whitman *v.* Boston, etc., R. Co., 3 Allen (Mass.) 133.

Furnishing abstract of title.— Under some statutes one claiming the award cannot recover it without furnishing an abstract of title (Coles *v.* Stillwater, 64 Minn. 105, 66 N. W. 138); but this does not apply to one who is only an equitable owner and who is compelled to resort to a court of equity to establish his legal title (Kluender *v.* Milwaukee, 57 Wis. 636, 15 N. W. 805).

1. *Maryland.*— Baltimore, etc., R. Co. *v.* Thompson, 10 Md. 76.

Massachusetts.— Ellis *v.* Welch, 6 Mass. 246, 4 Am. Dec. 122.

New Hampshire.— Schoff *v.* Upper Connecticut River, etc., Imp. Co., 57 N. H. 110.

New Jersey.— State *v.* Easton, etc., Co., 36 N. J. L. 181; Columbia, etc., Bridge Co. *v.* Geise, 34 N. J. L. 268.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Lawrence, 10 Phila. 604.

South Carolina.— Georgia, etc., R. Co. *v.* Scott, 38 S. C. 34, 16 S. E. 185, 839.

Tennessee.— East Tennessee, etc., R. Co. *v.* Love, 3 Head 64.

England.— Lister *v.* Lobley, 7 A. & E. 124, 2 H. & W. 122, 6 L. J. K. B. 200, 34 E. C. L. 86; *Ex p.* Cooper, 3 Dr. & Sm. 312, 11 Jur. N. S. 103, 34 L. J. Ch. 373, 11 L. T. Rep. N. S. 661, 13 Wkly. Rep. 364. See Matter of Perk, 7 R. & Can. Cas. 705, 1 Smale & G. 545, 2 Wkly. Rep. 24.

See 18 Cent. Dig. tit. "Eminent Domain," § 403.

Amount recoverable.— Where plaintiff in an action for the value of land taken by a railroad for a right of way through his farm did not own the land at the time entry was made by the railroad he is entitled to nothing for the incidental injury to the farm by reason of the right of way; his measure of damage being simply the value of the ground taken. Whitecotton *v.* St. Louis R. Co., 104 Mo. App. 65, 78 S. W. 318.

Under N. Y. Code, § 3358, all persons having any estate, interest, or easement in the property taken, or any lien, charge, or encumbrance thereon, are deemed owners. Pecksport Connecting R. Co. *v.* West, 20 N. Y. App. Div. 636, 47 N. Y. Suppl. 230.

The owner of an interest created after the proceedings are commenced, and with notice of the same, is not entitled to compensation. *In re* Marylebone Imp. Act, L. R. 12 Eq. 389, 40 L. J. Ch. 697, 25 L. T. Rep. N. S. 149, 19 Wkly. Rep. 1047. See *In re* London, 1 Sim. & St. 268, 1 Eng. Ch. 268.

Tenant in tail.— Under the English Lands Clauses Act an order will not be made to pay out the money in court for land taken to a tenant in tail unless a disentailing deed has been executed (*In re* Butler, L. R. 16 Eq. 479; *Re* Norcop, 31 L. T. Rep. N. S. 85; *In re* Limerick, etc., R. Co., 10 Ir. Eq. 66; *In re* Great Southern, etc., R. Co., 9 Ir. Eq. 482), except in cases of small sums of money (*Re* Watson, 10 Jur. N. S. 1011). But see Nottley *v.* Palmer, 11 Jur. N. S. 968, 13 L. T. Rep. N. S. 647, 14 Wkly. Rep. 170; Sowry *v.* Sowry, 6 Jur. N. S. 337, 8 Wkly. Rep. 339. In the following cases it was held that a disentailing deed was not necessary. *In re* South-Eastern R. Co., 30 Beav. 215, 7 Jur. N. S. 890, 30 L. J. Ch. 602, 9 Wkly. Rep. 404; *In re* Holden, 1 Hem. & M. 445, 10 Jur. N. S. 308; *Ex p.* Mounsell, Ir. R. 2 Eq. 32.

2. Hill *v.* Glendon, etc., Min., etc., Co., 113 N. C. 259, 18 S. E. 171; Galveston, etc., R. Co. *v.* Pfeuffer, 56 Tex. 66; Tucker *v.* Chicago, etc., R. Co., 91 Wis. 576, 65 N. W. 515.

If one tenant in common receives the whole amount of the damages, his cotenant may maintain an action of assumpsit for money had and received against him to recover his share. Brinckerhoff *v.* Wemple, 1 Wend. (N. Y.) 470.

Where the land is partitioned pending condemnation proceedings those tenants in common whose allotments are not affected by the improvement are not entitled to any portion of the compensation. Virginia-Carolina R. Co. *v.* Bookers, 99 Va. 633, 39 S. E. 591.

A tenant by entirety has been held entitled to recover the whole compensation. Hutchinson *v.* Parkersburg, 25 W. Va. 226.

3. Andrew *v.* Nantasket Beach R. Co., 152 Mass. 506, 25 N. E. 966 (holding that a possessory title, founded on undisputed occupation for a considerable number of years, is sufficient to sustain a claim for the damages, although an occupation for twenty years is not shown); Yakima County *v.* Tullar, 3 Wash. Terr. 393, 17 Pac. 885.

Citizens of the Cherokee nation and their assigns have the right to perpetual occupancy, and are therefore entitled to the compensation for lands taken under the right of eminent domain. Payne *v.* Kansas, etc., R. Co., 46 Fed. 546.

Since the act of congress of 1852, giving railroad companies rights of way over public lands, embraces only vacant lands, one in actual possession of such land, although with no other title or right than that of bare occupancy, is still entitled to recover compensation for the land if taken from him (California Northern R. Co. *v.* Gould, 21 Cal. 254;

or the owner of the equitable title,[4] although he may be required to account for it to the proper *cestuis que trustent*.[5] But it does not include a trespasser[6] nor a tenant by sufferance,[7] or from month to month,[8] nor a mere licensee.[9]

(II) *APPORTIONMENT.* Where there are several owners having separate interests in the property taken or damaged the compensation should be apportioned among them according to their respective interests.[10] If the commissioners are unable to apportion the damages, they may award them in gross, and leave the apportionment to the court.[11]

b. Lessor and Lessee. Compensation for condemned leased property should be apportioned between the lessor and lessee according to their respective interests,[12]

Burlington, etc., R. Co. *v.* Johnson, 38 Kan. 142, 16 Pac. 125), especially one who is in actual possession as a preëmption settler and who has made improvements on the land (Ellisworth, etc., R. Co. *v.* Gates, 41 Kan. 574, 21 Pac. 632; Burlington, etc., R. Co. *v.* Johnson, 38 Kan. 142, 16 Pac. 125; Reidt *v.* Spokane Falls, etc., R. Co., 6 Wash. 623, 34 Pac. 150; Enoch *v.* Spokane Falls, etc., R. Co., 6 Wash. 393, 33 Pac. 966; Spokane Falls, etc., R. Co. *v.* Ziegler, 167 U. S. 65, 17 S. Ct. 728, 42 L. ed. 79). However, it has been held that he is not entitled to consequential damages (Hastings, etc., R. Co. *v.* Ingalls, 15 Nebr. 123, 16 N. W. 762), but only to the extent of his improvements (Knoth *v.* Barclay, 8 Colo. 300, 6 Pac. 924).

4. Crane *v.* Elizabeth, 36 N. J. Eq. 339; Follett *v.* Brooklyn El. R. Co., 91 Hun (N. Y.) 296, 36 N. Y. Suppl. 200; Kluender *v.* Milwaukee, 57 Wis. 636, 15 N. W. 805.

The equitable owner may maintain a suit for the compensation by joining the whole of the legal title as a party. Hastings, etc., R. Co. *v.* Ingalls, 15 Nebr. 126, 16 N. W. 762.

An owner of secret equities, however, cannot recover compensation from the condemning company if he allows the time for appeal to expire and the condemnation money deposited to be paid out without notice to the company of his claim. Phipps *v.* Kansas, etc., R. Co., 58 Kan. 142, 48 Pac. 573.

5. Crane *v.* Elizabeth, 36 N. J. Eq. 339, holding that if the equitable owner is not entitled to receive the whole, a court of equity will distribute it properly, if timely application is made.

6. Rooney *v.* Sacramento Valley R. Co., 6 Cal. 638; Norris *v.* Pueblo, 12 Colo. App. 290, 55 Pac. 747; Rosa *v.* Missouri, etc., R. Co., 18 Kan. 124.

7. Patten *v.* New York El. R. Co., 3 Abb. N. Cas. (N. Y.) 306; Shaaber *v.* Reading, 150 Pa. St. 402, 24 Atl. 692.

8. *In re* Evergreen St., 1 Dauph. Co. Rep. (Pa.) 68.

9. Monatiquot River Mills *v.* Com., 164 Mass. 227, 41 N. E. 280 (holding that a license or permission from the state to use certain waters, no rights of property being conferred, does not entitle the holder to compensation when such waters are appropriated for public use); Clapp *v.* Boston, 133 Mass. 367.

10. Law *v.* Chicago Sanitary Dist., 197 Ill. 523, 64 N. E. 536; Rimback *v.* Essex County Park Commission, 62 N. J. L. 494, 41 Atl. 699; Ross *v.* Adams, 28 N. J. L. 160; Baker *v.* New York, 31 N. Y. App. Div. 112, 52 N. Y. Suppl. 533; *In re* St. Nicholas Terrace, 76 Hun (N. Y.) 209, 27 N. Y. Suppl. 765 [*affirmed* in 143 N. Y. 621, 37 N. E. 635]; Wiggin *v.* New York, 9 Paige (N. Y.) 16; Miller *v.* Asheville, 112 N. C. 759, 16 S. E. 762.

11. Cincinnati, etc., R. Co. *v.* Bay City, etc., R. Co., 106 Mich. 473, 64 N. W. 471.

Where a gross sum is awarded for land owned by a number of persons jointly, the court may confirm the report in part, and then send it back to the commissioners to apportion the award between the various owners. Matter of Daly, 88 Hun (N. Y.) 188, 34 N. Y. Suppl. 414.

12. *Illinois.*—Booker *v.* Vanice, etc., R. Co., 101 Ill. 333; Chicago *v.* Garrity, 7 Ill. App. 474.

Maryland.— Pitts *v.* Baltimore, 73 Md. 326, 21 Atl. 52; Baltimore, etc., R. Co. *v.* Thompson, 10 Md. 76, also holding that the lessee's interest cannot be affected by a subsequent agreement between his lessor and the condemning company without his assent.

Missouri.— Biddle *v.* Hussman, 23 Mo. 597.

New York.— Matter of Daly, 29 N. Y. App. Div. 286, 51 N. Y. Suppl. 576; *In re* New York, etc., Bridge, 4 N. Y. Suppl. 222; *In re* Broadway Widening, 63 Barb. 572.

Pennsylvania.— Dyer *v.* Wightman, 66 Pa. St. 425.

United States.— Kohl *v.* U. S., 91 U. S. 367, 23 L. ed. 449; U. S. *v.* Inlots, 26 Fed. Cas. No. 15,441*a*.

See 18 Cent. Dig. tit. "Eminent Domain," § 421.

Where the lease provides that all buildings erected by the lessee shall be paid for by the lessor at the end of the term, the lessee is entitled to the value of the buildings and the lessor to the value of the property, independent of the buildings. Livingston *v.* Sulzer, 19 Hun (N. Y.) 375.

The amount awarded a tenant for his lease-hold should not be deducted from the value in damages awarded to the owner of the fee in remainder. Yazoo, etc., Delta *v.* Nelms, 82 Miss. 416, 34 So. 149.

Where the lessee is not made a party.— Damages should not include the injury to the lease-hold estate (Little Rock, etc., R. Co. *v.* Allister, 62 Ark. 1, 34 S. W. 82) but he may afterward recover his damages in a

the lessor being entitled to compensation for injuries to his reversion,[13] and the lessee for injuries to his leasehold interests,[14] unless he takes his lease while

separate action (Van Buren *v.* Fishkill Water-Works Co., 50 Hun (N. Y.) 448, 3 N. Y. Suppl. 336).

13. *Illinois.*— Schreiber *v.* Chicago, etc., R. Co., 115 Ill. 340, 3 N. E. 427; Indianapolis, etc., R. Co. *v.* McLaughlin, 77 Ill. 275.

Mississippi.— Board of Levee Com'rs *v.* Johnson, 66 Miss. 248, 6 So. 199.

Missouri.— Biddle *v.* Hussman, 23 Mo. 597.

New York.— Livingston *v.* Sulzer, 19 Hun 375.

Pennsylvania.— Dyer *v.* Wightman, 66 Pa. St. 425; Fitzpatrick *v.* Pennsylvania R. Co., 10 Phila. 141.

West Virginia.— Fox *v.* Baltimore, etc., R. Co., 34 W. Va. 466, 12 S. E. 757.

Thus an owner is entitled to damages for injuries to easements appurtenant to real property caused by the erection, maintenance, and operation of an elevated railroad, even for a time during which the premises were leased by him to tenants and were in the latter's possession, where the rental value is depreciated by the erection and use of such railroad. Kernochan *v.* Manhattan R. Co., 161 N. Y. 339, 55 N. E. 906 [*affirming* 17 N. Y. App. Div. 634, 45 N. Y. Suppl. 1143]; Sterry *v.* New York El. R. Co., 129 N. Y. 619, 29 N. E. 68 [*affirming* 14 N. Y. Suppl. 958]; Mortimer *v.* Manhattan R. Co., 129 N. Y. 81, 29 N. E. 5 [*affirming* 59 N. Y. Super. Ct. 579, 14 N. Y. Suppl. 952; 57 N. Y. Super. Ct. 509, 8 N. Y. Suppl. 536]; Alger *v.* Alger, 60 N. Y. Super. Ct. 1, 15 N. Y. Suppl. 960; Werfelman *v.* Manhattan R. Co., 16 Daly (N. Y.) 355, 11 N. Y. Suppl. 66 [*reversed* on other grounds in 134 N. Y. 613, 31 N. E. 629]; Hine *v.* New York El. R. Co., 8 Misc. (N. Y.) 18, 28 N. Y. Suppl. 66; Barrett *v.* Manhattan R. Co., 18 N. Y. Suppl. 71; Mortimer *v.* Metropolitan El. R. Co., 18 N. Y. Suppl. 2 [*affirmed* in 137 N. Y. 546, 33 N. E. 337]; Nooney *v.* New York El. R. Co., 17 N. Y. Suppl. 111; Kane *v.* Manhattan R. Co., 17 N. Y. Suppl. 109; Suarez *v.* Manhattan R. Co., 15 N. Y. Suppl. 222, 224; Ottinger *v.* New York El. R. Co., 15 N. Y. Suppl. 18; Korn *v.* New York El. R. Co., 15 N. Y. Suppl. 10; Johnston *v.* Manhattan R. Co., 14 N. Y. Suppl. 897; Cornell *v.* New York El. R. Co., 13 N. Y. Suppl. 511; Hine *v.* New York El. R. Co., 13 N. Y. Suppl. 510 [*affirmed* in 128 N. Y. 571, 29 N. E. 69]; Conkling *v.* Manhattan R. Co., 12 N. Y. Suppl. 846; Mulford *v.* Metropolitan El. R. Co., 12 N. Y. Suppl. 929. See also Bischoff *v.* New York El. R. Co., 138 N. Y. 257, 33 N. E. 1073, holding that the fact that one purchasing land abutting on a street occupied by an elevated railroad takes the land subject to an outstanding lease will not preclude him, after the lease expires, from recovering past damages for the years the lease had to run.

Where rent is deducted from the lessor's damages for the time the lease has to run, and has been awarded to the lessee, in equity it belongs to the lessor, and should have been awarded to the lessor. Fitzpatrick *v.* Pennsylvania R. Co., 10 Phila. (Pa.) 141.

One entitled to ground-rent out of a tract of land is not an owner to whom damages can be awarded for the condemnation of land, but he must seek his remedy in equity to have a portion of the damages decreed as a fund to answer for the accruing rents. Workman *v.* Mifflin, 30 Pa. St. 362 [*affirming* 2 Phila. 355]; Voegtly *v.* Pittsburg, etc., R. Co., 2 Grant (Pa.) 243; Williams *v.* Philadelphia, etc., R. Co., 22 Leg. Int. (Pa.) 29.

A waiver by the lessor of his right to damages operates to the benefit of the condemning corporation, and not to that of the lessee. Burbridge *v.* New Albany, etc., R. Co., 9 Ind. 546.

14. *Illinois.*— Schreiber *v.* Chicago, etc., R. Co., 115 Ill. 340, 3 N. E. 427; Chicago *v.* Garrity, 7 Ill. App. 474.

Indiana.— Burbridge *v.* New Albany, etc., R. Co., 9 Ind. 546.

Maryland.— See Gluck *v.* Baltimore, 81 Md., 315, 32 Atl. 515, 48 Am. St. Rep. 515.

Massachusetts.— Pegler *v.* Hyde Park, 176 Mass. 101, 57 N. E. 327; Patterson *v.* Boston, 20 Pick. 159.

Mississippi.— Board of Levee Com'rs *v.* Johnson, 66 Miss. 248, 6 So. 199.

Missouri.— Finney *v.* St. Louis, 39 Mo. 177, holding that where under the terms of the lease the lessee had the right of removing the buildings erected by him after the expiration of the lease, and he continued to occupy the premises after his term had expired, he was entitled to the value assessed upon the buildings taken by the city for the purpose of making a street.

New York.— *In re* New York Cent. R. Co., 49 N. Y. 414 [*reversing* 49 Barb. 501]; Van Buren *v.* Fishkill Water-Works Co., 50 Hun 448, 3 N. Y. Suppl. 336; Livingston *v.* Sulzer, 19 Hun 375.

Ohio.— Foote *v.* Cincinnati, 11 Ohio 408, 38 Am. Dec. 737.

Pennsylvania.—Justice *v.* Philadelphia, 169 Pa. St. 503, 32 Atl. 592 (holding that a lessee is not precluded from recovering compensation for injuries caused in widening a street by the fact that the lease was made after the passage of the ordinance directing the street to be widened); Lafferty *v.* Schuylkill River East Side R. Co., 124 Pa. St. 297, 16 Atl. 869, 10 Am. St. Rep. 587, 3 L. R. A. 124 (holding that damages for injury to crops may be recovered by a lessee and the condemning company cannot avoid its liability by payment of damages to the lessor after the lessee has taken possession and planted the crop); Philadelphia, etc., R. Co. *v.* Getz, 113 Pa. St. 214, 6 Atl. 356; Pennsylvania R. Co. *v.* Eby, 107 Pa. St. 166; Dyer *v.* Wightman, 66 Pa. St. 425; Brown *v.* Powell, 25 Pa. St. 229; Wood's Estate, 8 Pa. Dist. 153; Getz *v.* Philadelphia, etc., R. Co., 15 Wkly. Notes Cas. 357; Philadelphia, etc., R. Co. *v.*

the proceedings for condemnation are pending.[15] But a lessee of land which is subject to recurring injuries from overflows and damages to crops occasioned by lawful and permanent causes existing when he leased the land is a volunteer,

Lawrence, 10 Phila. 604; Fitzpatrick *v.* Pennsylvania R. Co., 10 Phila. 141; Matter of Water St., 7 Phila. 457; Mine Hill, etc., R. Co. *v.* Zerbe, 2 Walk. 409.

Rhode Island.— Gilligan *v.* Providence, 11 R. I. 258, holding that a tenant for years is an owner within the statute giving compensation to abutting owners for damages caused by change of grade or highways.

Texas.— Telephone Tel. Co. *v.* Forke, 2 Tex. App. Civ. Cas. § 365, holding the lessee entitled to damages done to crops.

Virginia.— Alexandria, etc., R. Co. *v.* Faunce, 31 Gratt. 761, holding that where a fishery is injured by the laying out of a railroad, the assessment and payment into court of the damages to the fishery do not preclude the lessee of the fishery from recovering whatever injury is caused to him as lessee.

Washington.— Seattle, etc., R. Co. *v.* Scheike, 3 Wash. 625, 29 Pac. 217, 30 Pac. 503.

United States.— Kohl *v.* U. S., 91 U. S. 367, 23 L. ed. 449; U. S. *v.* Inlots, 26 Fed. Cas. No. 15,441*a*.

England.— See Reg. *v.* Great Northern R. Co., 2 Q. B. D. 151, 46 L. J. Q. B. 4, 35 L. T. Rep. N. S. 551, 25 Wkly. Rep. 41; Cranwell *v.* London, L. R. 5 Exch. 284, 39 L. J. Exch. 193, 22 L. T. Rep. N. S. 760; Bogg *v.* Midland R. Co., L. R. 4 Eq. 310, 36 L. J. Ch. 440, 16 L. T. Rep. N. S. 113; *Ex p.* Farlow, 2 B. & Ad. 341, 9 L. J. K. B. O. S. 255, 22 E. C. L. 147; Sweetman *v.* Metropolitan R. Co., 1 H. & M. 543, 10 L. T. Rep. N. S. 156, 12 Wkly. Rep. 304.

See 18 Cent. Dig. tit. "Eminent Domain," § 421.

Renewal and holding over.— Lessees of land for years with covenant for renewal have such an interest in the land as will bring them within the jurisdiction of a court authorized to fix the compensation a railroad shall pay to "owners." North Pennsylvania R. Co. *v.* Davis, 26 Pa. St. 238. However, a renewal of the lease or a holding over does not give the lessee any new right to compensation unless his lease contains a covenant for renewal. Schreiber *v.* Chicago, etc., R. Co., 115 Ill. 340, 3 N. E. 427; Witmark *v.* New York El. R. Co., 149 N. Y. 393, 44 N. E. 78 [*affirming* 76 Hun 302, 27 N. Y. Suppl. 777]; Pittsburgh Junction R. Co. *v.* McCutcheon, 18 Wkly. Notes Cas. (Pa.) 527. See also Matter of New York, 62 N. Y. App. Div. 271, 70 N. Y. Suppl. 1127 [*affirmed* in 168 N. Y. 254, 61 N. E. 249], holding that where the lessee fails to exercise his right to renew, his holding over does not entitle him to share in the damages for the taking of the fee. But a lessee holding over by sufferance after a notice to quit has no interest in the leasehold on which he can recover compensation for an injury thereto, nor can it be said that there is such a strong probability of renewal of the lease as to give him an interest, where nothing has been said or done by the lessor after notice to quit which could give rise to any expectancy of renewal. Shaaber *v.* Reading City, 150 Pa. St. 402, 24 Atl. 692; *Ex p.* Merrett, 2 L. T. Rep. N. S. 471.

Expiration of the lease before possession taken does not bar one who was lessee at the time of the institution of the proceedings from receiving his part of the compensation. Schreiber *v.* Chicago, etc., R. Co., 115 Ill. 340, 3 N. E. 427; Edmands *v.* Boston, 108 Mass. 535; Cleveland *v.* Cuyahoga Agricultural Soc., 41 Ohio St. 600. But if the tenant enjoys the property for the entire term before the compensation is paid, he is not entitled to compensation. Schreiber *v.* Chicago, etc., R. Co., *supra*.

Sublease.— The fact that the tenant has sublet the premises and that his subtenants are in possession will not bar his right to compensation (Kearney *v.* Metropolitan El. R. Co., 129 N. Y. 76, 29 N. E. 70 [*affirming* 59 N. Y. Super. Ct. 563, 13 N. Y. Suppl. 008]), although the sublease was made after the commencement of the proceedings (Witman *v.* Reading, 191 Pa. St. 134, 43 Atl. 140). Where the lease provides that it shall terminate if the property is taken for railroad uses but that nothing therein contained should affect the right of the parties to claim damages from the railroad company, the sublessee is not barred from claiming damages for injury to his leasehold. Boteler *v.* Philadelphia, etc., R. Co., 164 Pa. St. 397, 30 Atl. 303.

A release by a tenant to his landlord of all his interests in the street on which the demised premises are situated, and in any easement appurtenant thereto, which was assigned or transferred by the lease, or which the tenant had or owned, or which was taken or appropriated by an elevated railroad, is not an attempt to separate an easement appurtenant to the demised premises from the demise itself, but is a release of any right of compensation on the part of the tenant for an invasion of his interests. Macy *v.* Metropolitan El. R. Co., 59 Hun (N. Y.) 365, 12 N. Y. Suppl. 804.

15. Davis *v.* Titusville, etc., R. Co., 114 Pa. St. 308, 6 Atl. 736; Chicago *v.* Messler, 38 Fed. 302, holding that the lessee's interest is terminated by the proceedings. *Compare* Justice *v.* Philadelphia, 169 Pa. St. 503, 32 Atl. 592. It has been held, however, that where during the construction of a railroad the lease expires, and the lessee takes a new lease, it constitutes a continuation of the old one, so that the lessee's title dates back to the date of the original lease. Kearney *v.* Metropolitan El. R. Co., 129 N. Y. 76, 29 N. E. 70 [*affirming* 59 N. Y. Super. Ct. 563, 13 N. Y. Suppl. 608]. *Compare* Crimmins *v.* Metropolitan El. R. Co., 89 Hun (N. Y.) 613, 35 N. Y. Suppl. 412.

taking it subject to such damages and with no right of action to recover therefor.[16] If the lessee's interest only is injured the lessor is entitled to no part of the compensation;[17] and if one assessment of damages is made, and that is in favor of the lessor, the lessee may recover from the lessor his proportionate share of the damages, after deducting his *pro rata* share of the expenses,[18] unless he is barred by his own acts.[19]

e. Life-Tenant and Remainder-Man. Where a life-estate is vested in one and the fee in another compensation must be made to both in proportion to the damage suffered by their respective interests;[20] the tenant for life being entitled to compensation for injury to his interest,[21] without the intervention of the trustee for the fee in remainder;[22] and the reversioner or remainder-man to the extent to which the value of the remainder or reversion has been depreciated.[23] If the

16. Illinois Cent. R. Co. *v.* Ferrell, 108 Ill. App. 659.

17. Carli *v.* Union Depot, etc., Co., 32 Minn. 101, 20 N. W. 89 (holding that an abutting owner is not entitled to damages not permanently affecting the freehold during the time the property is in the possession of his tenants); Fargo *v.* Browning, 45 N. Y. App. Div. 507, 61 N. Y. Suppl. 301.

18. Harris *v.* Howes, 75 Me. 436; McAllister *v.* Reel, 53 Mo. App. 81; Matter of New York, 62 N. Y. App. Div. 271, 70 N. Y. Suppl. 1127 [*affirmed* in 168 N. Y. 254, 61 N. E. 249]; Coutant *v.* Catlin, 2 Sandf. Ch. (N. Y.) 485.

The allowance to a lessee may be charged upon the sum fixed for the rights of the owner of the fee, where the owner has received the rent in advance or the value of his right has been fixed by reference to the present actual value of the lease. *In re* Morgan R., etc., Co., 32 La. Ann. 371.

19. Uhland Club *v.* Schupbach, 168 Mass. 430, 47 N. E. 113, holding that where an owner conveys land for an agreed price to a condemning corporation while condemnation proceedings are pending, he is not liable for any part of that price to a tenant who had made no claim against the corporation for being deprived of his rights under the lease.

20. *Illinois.*— Horney *v.* Coldbrook, 65 Ill. App. 477.

Maryland.— Tide Water Canal Co. *v.* Archer, 9 Gill & J. 479.

New York.— Brooklyn *v.* Seaman, 30 Misc. 507, 62 N. Y. Suppl. 601; Cogan *v.* McCabe, 23 Misc. 739, 52 N. Y. Suppl. 48.

North Carolina.— Joyner *v.* Conyers, 59 N. C. 78.

Pennsylvania.— Harrisburg *v.* Crangle, 3 Watts & S. 460.

South Carolina.— Cureton *v.* South Bound R. Co., 59 S. C. 371, 37 S. E. 914.

England.— See *In re* Wootton, L. R. 1 Eq. 589, 35 L. J. Ch. 305, 14 L. T. Rep. N. S. 125, 14 Wkly. Rep. 469; *In re* Wilkes, 16 Ch. D. 597, 50 L. J. Ch. 199; *In re* Money, 2 Dr. & Sm. 94, 31 L. J. Ch. 496, 10 Wkly. Rep. 399; *Re* North, 19 L. T. Rep. N. S. 43.

See 18 Cent. Dig. tit. "Eminent Domain," § 406.

21. *Indiana.*— Burbridge *v.* New Albany, etc., R. Co., 9 Ind. 546.

Massachusetts.— Howe *v.* Ray, 110 Mass. 298.

Missouri.— Kansas City, etc., R. Co. *v.* Weaver, 86 Mo. 473.

North Carolina.— Miller *v.* Asheville, 112 N. C. 769, 16 S. E. 765.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Bentley, 88 Pa. St. 178; Passmore *v.* Philadelphia, etc., R. Co., 9 Phila. 579.

Rhode Island.— Gilligan *v.* Providence, 11 R. I. 258.

West Virginia.— Diehl *v.* Cotts, 48 W. Va. 255, 37 S. E. 546, holding the life-tenant entitled only to interest on money received from a condemnation of part of the land.

England.— See *In re* Mette, L. R. 7 Eq. 72, 38 L. J. Ch. 445; Jeffreys *v.* Conner, 28 Beav. 328; Stone *v.* Yeovil, 2 C. P. D. 99, 46 L. J. C. P. 137, 36 L. T. Rep. N. S. 279, 25 Wkly. Rep. 240; *Re* Wrey, 11 Jur. N. S. 296, 12 L. T. Rep. N. S. 171, 13 Wkly. Rep. 543; *In re* Hungerford, 1 Jur. N. S. 845, 1 Kay & J. 413; *Re* Griffith, 49 L. T. Rep. N. S. 161; *Re* Allason, 36 L. T. Rep. N. S. 653; *In re* Oxford, etc., R. Co., 1 Wkly. Rep. 14.

See 18 Cent. Dig. tit. "Eminent Domain," § 406.

Right of dower in proceeds of land condemned see DOWER, 14 Cyc. 900, 930, 931.

A tenant for life can claim only that benefit from compensation money in respect of lands to which he is legally entitled, and any additional compensation money must inure to the benefit of the estate. *Re* Marlborough, 13 Jur. 738; *In re* Wilson, 9 Jur. N. S. 1043, 32 L. J. Ch. 191, 7 L. T. Rep. N. S. 772, 11 Wkly. Rep. 294.

22. Knapp *v.* New York El. R. Co., 4 Misc. (N. Y.) 408, 24 N. Y. Suppl. 324 [*distinguishing* Bach *v.* New York El. R. Co., 60 Hun (N. Y.) 128, 14 N. Y. Suppl. 620]; Passmore *v.* Philadelphia, etc., R. Co., 9 Phila. (Pa.) 579.

23. *Arkansas.*— Little Rock, etc., R. Co. *v.* Allister, 68 Ark. 600, 60 S. W. 953; Bentonville R. Co. *v.* Baker, 45 Ark. 252.

Illinois.— Indiana, etc., R. Co. *v.* Conness, 184 Ill. 178, 56 N. E. 402.

New York.—Cogan *v.* McCabe, 23 Misc. 739, 52 N. Y. Suppl. 48.

North Carolina.— Miller *v.* Asheville, 112 N. C. 769, 16 S. E. 765; Joyner *v.* Conyers, 59 N. C. 78.

compensation is only for the injury to the life-estate, the remainder-man is not entitled to any part of it.[24]

d. Mortgagor and Mortgagee. The mortgagee usually is to be first paid out of the money awarded, the mortgagor being entitled to the residue;[25] and the same rule applies to an assignee or grantee of the mortgage.[26] By some courts this is placed upon the ground that the mortgagee has an equitable lien on the award to the extent of the mortgage debt,[27] or to the extent of the deficiency, in case there has been a foreclosure sale of the land covered by the mortgage but which has not been condemned.[28] In other cases the award is deemed a substitute

South Carolina.— Cureton *v.* South Bound R. Co., 59 S. C. 371, 37 S. E. 914.

See 18 Cent. Dig. tit. "Eminent Domain," § 406.

24. Trimmier *v.* Darden, 61 S. C. 220, 39 S. E. 373. And see *Re* Steward, 1 Drew. 636, 1 Wkly. Rep. 489.

25. *Illinois.*— South Park Com'rs *v.* Todd, 112 Ill. 379.

Mississippi.— Miller *v.* Board of Mississippi Levee Com'rs, 78 Miss. 201, 28 So. 834, 877.

New Jersey.— Platt *v.* Bright, 29 N. J. Eq. 128.

New York.— Auburn Bank *v.* Roberts, 44 N. Y. 192 [*affirming* 45 Barb. 407]; Home Ins. Co. *v.* Smith, 28 Hun 296; *In re* John, etc., Sts., 19 Wend. 659.

Pennsylvania.— State Line R. Co. *v.* Playford, (1888) 14 Atl. 355; Keller's Appeal, 2 Walk. 32.

United States.— Chicago *v.* Tebbetts, 104 U. S. 120, 26 L. ed. 655.

England.— Martin *v.* London, etc., R. Co., 13 L. T. Rep. N. S. 355, 14 Wkly. Rep. 24.

See 18 Cent. Dig. tit. "Eminent Domain," § 417.

Where the mortgage debt exceeds the compensation awarded, the mortgagee is entitled to the whole of it, especially if the mortgagor be insolvent. Pile *v.* Pile, 3 Ch. D. 36, 45 L. J. Ch. 841, 35 L. T. Rep. N. S. 18, 24 Wkly. Rep. 1003. See also King *v.* Midland R. Co., 17 Wkly. Rep. 113.

It is no defense to a mortgagee's claim for payment of the amount due on his mortgage debt that the award was made to the mortgagor. Board of Levee Com'rs *v.* Wilborn, 74 Miss. 396, 20 So. 861; Engelhardt *v.* Brooklyn, 3 Misc. (N. Y.) 30, 21 N. Y. Suppl. 777.

But where the mortgage debt has not matured, it has been held that the mortgagee is not entitled to compensation for the impairment of his security by condemnation of part of the mortgaged land. Aggs *v.* Shackelford County, 85 Tex. 145, 19 S. W. 1085.

A second mortgagee satisfying the lien of a first mortgage by paying it is not entitled to be subrogated to the rights of the first mortgagee so as to claim compensation for any interest he might have acquired under the first mortgage had he taken an assignment of it. *In re* New York, 30 Misc. (N. Y.) 295, 62 N. Y. Suppl. 379.

Where land was leased for its full value, the mortgagee of the leasehold cannot claim any portion of the award as representing the value of the leasehold interest. Hudson County *v.* Emmerich, 57 N. J. Eq. 535, 42 Atl. 107.

Under Greater New York Charter, § 980, relating to condemnation of lands for parks, the mortgagee has a right to have his interest paid for directly by the city, and he cannot foreclose his mortgage. Hill *v.* Wine, 35 N. Y. App. Div. 520, 54 N. Y. Suppl. 892.

26. Wood *v.* Westborough, 140 Mass. 403, 5 N. E. 613; Youngs *v.* Stoddard, 27 N. Y. App. Div. 162, 50 N. Y. Suppl. 475; Keller's Appeal, 2 Walk. (Pa.) 32.

But if the assignee does not intervene in the condemnation proceedings, nor present his claim for the award until the money is paid over to the owner by the county treasurer with whom it was deposited, he cannot recover the amount of his mortgage debt from the treasurer and the sureties on his bond. Armstrong *v.* Moore, 1 Kan. App. 450, 40 Pac. 834.

As to right to compensation of a purchaser at a foreclosure sale see *infra*, X, G, 2, e, (III).

27. Lumbermen's Ins. Co. *v.* St. Paul, 77 Minn. 410, 80 N. W. 357; Engelhardt *v.* Brooklyn, 3 Misc. (N. Y.) 30, 21 N. Y. Suppl. 777 [*affirming* 19 N. Y. Suppl. 173]; Adams *v.* St. Johnsbury, etc., R. Co., 57 Vt. 240.

Lien on property.— Under the English Lands Clauses Act, although a mortgagee has no claim for the money deposited in court upon the condemning company taking possession, yet in default of payment he still has a lien on the property and is entitled to an assignment of it. Martin *v.* London, etc., R. Co., L. R. 1 Ch. 501, 12 Jur. N. S. 775, 35 L. J. Ch. 795, 14 L. T. Rep. N. S. 814, 14 Wkly. Rep. 880.

28. Boutelle *v.* Minneapolis, 59 Minn. 493, 61 N. W. 554; Gray *v.* Case, 51 N. J. Eq. 426, 26 Atl. 805; Magee *v.* Brooklyn, 144 N. Y. 265, 39 N. E. 87; *In re* Rochester, 136 N. Y. 83, 32 N. E. 702, 19 L. R. A. 161; Utter *v.* Richmond, 112 N. Y. 610, 20 N. E. 554; Delap *v.* Brooklyn, 3 Misc. (N. Y.) 22, 22 N. Y. Suppl. 179.

A payment of a portion of the deficiency by the mortgagor after foreclosure, in consideration of an agreement by the mortgagee not to take a personal judgment, does not affect the mortgagee's right to his equitable lien on the award to satisfy the balance of the deficiency. Utter *v.* Richmond, 112 N. Y. 610, 20 N. E. 554.

for so much of the mortgaged property as is appropriated for public use,[29] and the award becomes a collateral security for the payment of the mortgage debt.[30] Notwithstanding the weight of authority supports the doctrine stated, there are authorities to the effect that the mortgagor may recover the full amount of the compensation without regard to the mortgagee; the latter having his remedy against the mortgagor;[31] although this would seem in some instances at least to depend upon the question whether the mortgagor or the mortgagee is in possession,[32] and in others, whether or not the mortgagee is made a party.[33] The claim of a mortgagee to the award is paramount to that of a creditor of the mortgagor,[34] although he be a judgment creditor.[35]

e. Vendor and Purchaser — (i) *In General.* Damages for the taking of land or for the injury to land not taken belong to the one who owns the land at the time of the taking or injury, and they do not pass to a subsequent grantee

29. *Illinois.*— Stopp *v.* Wilt, 177 Ill. 620, 52 N. E. 1028 [*affirming* 76 Ill. App. 531]; Calumet River R. Co. *v.* Brown, 136 Ill. 322, 26 N. E. 501, 12 L. R. A. 84.

Indiana.— Sherwood *v.* Lafayette, 109 Ind. 411, 10 N. E. 89, 58 Am. St. Rep. 414.

Minnesota.— Moritz *v.* St. Paul, 52 Minn. 409, 54 N. W. 370.

Missouri.— Thompson *v.* Chicago, etc., R. Co., 110 Mo. 147, 19 S. W. 77.

New Jersey.— Packard *v.* Bergen Neck R. Co., 48 N. J. Eq. 281, 22 Atl. 227.

New York.— Magee *v.* Brooklyn, 144 N. Y. 265, 39 N. E. 87; Youngs *v.* Stoddard, 27 N. Y. App. Div. 162, 50 N. Y. Suppl. 475; Burkard *v.* Brooklyn, 6 Misc. 431, 26 N. Y. Suppl. 1112; Engelhardt *v.* Brooklyn, 19 N. Y. Suppl. 173; Astor *v.* Hoyt, 5 Wend. 603.

Washington.— Yakima Water, etc., Co. *v.* Hathaway, 18 Wash. 377, 51 Pac. 471.

See 18 Cent. Dig. tit. "Eminent Domain," § 418.

A mortgage excluding so much of the land as had been appropriated, and restricting the conveyance to such parts of the land as were not taken, does not pass the award for the portions taken. Kuhlman *v.* Brooklyn, 6 Misc. (N. Y.) 429, 27 N. Y. Suppl. 126.

30. Boutelle *v.* Minneapolis City, 59 Minn. 493, 61 N. W. 554.

31. Whiting *v.* New Haven, 45 Conn. 303; Read *v.* Cambridge, 126 Mass. 427; Breed *v.* Eastern R. Co., 5 Gray (Mass.) 470 note; Sherwood *v.* New York, 11 Abb. Pr. (N. Y.) 347. See also Thompson *v.* Chicago, etc., R. Co., 110 Mo. 147, 19 S. W. 77.

In the absence of proof that the particular property condemned is subject to a mortgage, the payment will be decreed to the owner. Postal Tel. Cable Co. *v.* Louisville, etc., R. Co., 43 La. Ann. 522, 9 So. 119.

A mortgagee cannot complain of an order directing a payment of the damages to the mortgagor, coupled with a requirement that he should restore the premises to their former value. Stopp *v.* Wilt, 177 Ill. 620, 52 N. E. 1028 [*affirming* 76 Ill. App. 531].

32. **A mortgagor in possession** is entitled to the damages. Rand *v.* Ft. Scott, etc., R. Co., 50 Kan. 114, 31 Pac. 683; Gurnsey *v.* Edwards, 26 N. H. 224; Parish *v.* Gilmanton, 11 N. H. 293.

A mortgagee out of possession is not entitled to recover compensation for property injured but not taken, especially where the mortgagor settles with the condemning company. Knoll *v.* New York, etc., R. Co., 121 Pa. St. 467, 15 Atl. 571, 1 L. R. A. 366. See, however, Wilson *v.* European, etc., R. Co., 67 Me. 358, holding that where no notice is given to a mortgagee out of possession whose mortgage is recorded, and the damages are awarded and paid to the mortgagor, the mortgagee may recover them in an action of trespass against the condemning party.

33. Schermerhorn *v.* Peck, 43 Kan. 667, 23 Pac. 1043; Wood *v.* Westborough, 140 Mass. 403, 5 N. E. 613; Bennett *v.* Minneapolis, etc., R. Co., 42 Minn. 245, 44 N. W. 10; Bright *v.* Platt, 32 N. J. Eq. 362. See Wilson *v.* European, etc., R. Co., 67 Me. 358.

Where by mistake a mortgagee is not made a party defendant to condemnation proceedings, and the railroad company instituting the proceedings does not discover the existence of the mortgage until after the termination of the proceedings, the construction of its road and payment of the compensation to the county treasurer for the benefit of the owner, the company may by its bill in equity restrain the payment of the compensation to the mortgagor, and have it applied on the mortgage debt. Calumet River R. Co. *v.* Brown, 136 Ill. 322, 26 N. E. 501, 12 L. R. A. 84.

The mortgagee may waive the omission to make him a party, where the damages assessed are paid to the sheriff, and assert his claim to the fund. Sawyer *v.* Landers, 56 Iowa 422, 9 N. W. 341.

34. Sawyer *v.* Landers, 56 Iowa 422, 9 N. W. 341; Wood *v.* Westborough, 140 Mass. 403, 5 N. E. 613.

35. Sawyer *v.* Landers, 56 Iowa 422, 9 N. W. 341; Brooks *v.* Hubbard, 73 Vt. 122, 50 Atl. 802; Dunlop *v.* York Tp., 16 Grant Ch. (U. C.) 216.

The mortgagor may maintain a bill for the distribution of a fund paid to the county treasurer, if the payment of it to the mortgagee is resisted by a subsequent judgment creditor of the mortgagor. Keller *v.* Bading, 169 Ill. 152, 48 N. E. 436, 61 Am. St. Rep. 159 [*affirming* 64 Ill. App. 198].

of the land,[36] except by a provision to that effect in the deed,[37] or by assignment,[38]

36. *Alabama.*— Hood *v.* Southern R. Co., 133 Ala. 374, 31 So. 937; Evans *v.* Savannah, etc., R. Co., 90 Ala. 54, 7 So. 758.

Colorado.— Pueblo *v.* Shurr Invest. Co., 28 Colo. 524, 67 Pac. 162.

District of Columbia.— Dixon *v.* Baltimore, etc., R. Co., 1 Mackey 78.

Georgia.— Green *v.* South-Bound R. Co., 112 Ga. 849, 38 S. E. 81; McLendon *v.* Atlanta, etc., R. Co., 54 Ga. 293.

Illinois.— Chandler *v.* Morey, 195 Ill. 596, 63 N. E. 512 [*affirming* 96 Ill. App. 278]; Wabash, etc., R. Co. *v.* McDougal, 118 Ill. 229, 8 N. E. 678; Chicago, etc., R. Co. *v.* Loeb, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341; Toledo, etc., R. Co. *v.* Morgan, 72 Ill. 155.

Indiana.— Indiana, etc., R. Co. *v.* Allen, 100 Ind. 409 [*affirmed* in 113 Ind. 308, 15 N. E. 451, 3 Am. St. Rep. 650]; Ingalls *v.* Byers, 94 Ind. 134.

Iowa.— Flickinger *v.* Omaha Bridge, etc., Co., 98 Iowa 358, 67 N. W. 372; Jolly *v.* Des Moines Northwestern R. Co., 72 Iowa 759, 33 N. W. 668; Pratt *v.* Des Moines Northwestern R. Co., 72 Iowa 249, 33 N. W. 666.

Maine.— Sargent *v.* Machias, 65 Me. 591; Neal *v.* Knox, etc., R. Co., 61 Me. 298.

Massachusetts.— Patten *v.* Fitz, 138 Mass. 456; Darling *v.* Blackstone Mfg. Co., 16 Gray 187; Walker *v.* Oxford Woollen Mfg. Co., 10 Metc. 203. And see Charles *v.* Monson, etc., Mfg. Co., 17 Pick. 70.

Mississippi.—Miller *v.* Board of Mississippi Levee Com'rs, 78 Miss. 201, 28 So. 834, 877.

Missouri.— Keith *v.* Bingham, 100 Mo. 300, 13 S. W. 683.

Nebraska.— Chicago, etc., R. Co. *v.* Englehart, 57 Nebr. 444, 77 N. W. 1092.

New York.— Porter *v.* Metropolitan R. Co., 120 N. Y. 284, 24 N. E. 454; Spears *v.* New York, 87 N. Y. 359; Western Union Tel. Co. *v.* Shepard, 72 N. Y. App. Div. 108, 76 N. Y. Suppl. 247; Skelly *v.* Metropolitan El. R. Co., 1 N. Y. App. Div. 51, 37 N. Y. Suppl. 7; Matter of Thompson, 89 Hun 32, 35 N. Y. Suppl. 6.

Ohio.— Hatry *v.* Painesville, etc., R. Co., 1 Ohio Cir. Ct. 426, 1 Ohio Cir. Dec. 238.

Pennsylvania.— Tenbrooke *v.* Jahke, 77 Pa. St. 392; McFadden *v.* Johnson, 72 Pa. St. 335, 13 Am. Rep. 681; Zimmerman *v.* Union Canal Co., 1 Watts & S. 346; Schuylkill, etc., Nav. Co. *v.* Decker, 2 Watts 343; Arthur *v.* Pennsylvania R. Co., 27 Leg. Int. 237; *Ex p.* Broomal, 1 Del. Co. 79; Keller's Appeal, 29 Pittsb. Leg. J. 316.

South Carolina.— Lewis *v.* Wilmington, etc., R. Co., 11 Rich. 91.

Tennessee.— Smith *v.* Nashville, etc., R. Co., 88 Tenn. 611, 13 S. W. 128; Paducah, etc., R. Co. *v.* Stovall, 12 Heisk. 1.

Texas.— Central R. Co. *v.* Merkel, 32 Tex. 723.

Virginia.— Robinson *v.* Crenshaw, 84 Va. 348, 5 S. E. 222.

West Virginia.— Summers *v.* Kanawha, 26 W. Va. 159.

Wisconsin.— Walton *v.* Green Bay, etc., R. Co., 70 Wis. 414, 36 N. W. 10; Milwaukee, etc., R. Co. *v.* Strange, 63 Wis. 178, 23 N. W. 432.

United States.— Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873; Maffet *v.* Quine, 93 Fed. 347; Paine Lumber Co. *v.* U. S., 55 Fed. 854 [*disapproving* Sweaney *v.* U. S., 62 Wis. 396, 22 N. W. 609].

See 18 Cent. Dig. tit. "Eminent Domain," §§ 407, 408.

If the company settles with a subsequent purchaser the vendor may recover the amount from him. Neal *v.* Knox, etc., R. Co., 61 Me. 298; McFadden *v.* Johnson, 72 Pa. St. 335, 13 Am. Rep. 681.

It is immaterial whether or not the right of way or other use for which the land was appropriated or injured is mentioned in the deed (Hatry *v.* Painesville, etc., R. Co., 1 Ohio Cir. Ct. 426, 1 Ohio Cir. Dec. 238), whether the land was taken with or without the consent of the grantor (Milwaukee, etc., R. Co. *v.* Strange, 63 Wis. 178, 23 N. W. 432; Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873; Maffet *v.* Quine, 93 Fed. 347); whether the deed is a warranty or a quitclaim (Magee *v.* Brooklyn, 144 N. Y. 265, 39 N. E. 87; Simms *v.* Brooklyn, 87 Hun (N. Y.) 35, 33 N. Y. Suppl. 859 [*distinguishing* Engelhardt *v.* Brooklyn, 19 N. Y. Suppl. 173]; Walton *v.* Green Bay, etc., R. Co., 70 Wis. 414, 36 N. W. 10; Roberts *v.* Northern Pac. R. Co., *supra*; or whether the conveyance is made before the award is paid; although if the vendee enforces payment of the award by action, the grantor must contribute to the expense thereof (Warrell *v.* Wheeling, etc., R. Co., 130 Pa. St. 600, 18 Atl. 1014).

A reservation in the grantor's deed of his right to past damages entitles him thereto after a conveyance. Sperb *v.* Metropolitan El. R. Co., 61 Hun (N. Y.) 539, 16 N. Y. Suppl. 232. But such a reservation does not amount to an assignment to the grantor of the grantee's claim for damages accruing during the grantee's ownership. Oehler *v.* New York El. R. Co., 4 N. Y. App. Div. 152, 38 N. Y. Suppl. 1047.

37. Indiana, etc., R. Co. *v.* Allen, 100 Ind. 409 [*affirmed* in 113 Ind. 308, 15 N. E. 451, 3 Am. St. Rep. 650]; Chicago, etc., R. Co. *v.* Engelhart, 57 Nebr. 444, 77 N. W. 1092; Magee *v.* Brooklyn, 144 N. Y. 265, 39 N. E. 87.

The grantee takes the land subject to the burden placed upon it and the claim for damages is a chose in action which will not pass except by the express terms of the deed. Smith *v.* Nashville, etc., R. Co., 88 Tenn. 611, 13 S. W. 128.

38. Frey *v.* Duluth, etc., R. Co., 91 Wis. 309, 64 N. W. 1038; Chicago *v.* Tebbetts, 104 U. S. 120, 26 L. ed. 655.

or unless the entry or taking was wrongful.[39] But damages accruing after a conveyance should be paid to the grantee,[40] unless reserved to the grantor,[41] or unless the damages are of such a character that they were necessarily taken into consideration in making the award in the proceedings to condemn.[42]

(II) *Conveyance Pending Proceedings.* In general where property is conveyed during condemnation proceedings and before possession is taken, the person entitled to the compensation is the one who owns the premises when possession is actually taken.[43] Thus the vendee is entitled to the damages where

39. *Georgia.*—Davis *v.* East Tennessee, etc., R. Co., 87 Ga. 605, 13 S. E. 567. But see Green *v.* South Bound R. Co., 112 Ga. 849, 38 S. E. 81.

Illinois.— Chicago, etc., R. Co. *v.* Hopkins, 90 Ill. 316.

North Carolina.— Livermon *v.* Roanoke, etc., R. Co., 109 N. C. 52, 13 S. E. 734.

Texas.— San Antonio, etc., R. Co. *v.* Ruby, 80 Tex. 172, 15 S. W. 1040.

Wisconsin.— Frey *v.* Duluth, etc., R. Co., 91 Wis. 309, 64 N. W. 1038.

See 18 Cent. Dig. tit. "Eminent Domain," § 409.

40. New Milford Water Co. *v.* Watson, 57 Conn. 237, 52 Atl. 947, 53 Atl. 57; Charles *v.* Monson, etc., Mfg. Co., 17 Pick. (Mass.) 70; Magee *v.* Brooklyn, 144 N. Y. 265, 39 N. E. 87; Sterry *v.* New York El. R. Co., 129 N. Y. 619, 22 N. E. 68 [*affirming* 14 N. Y. Suppl. 958]; Poppenheim *v.* Metropolitan El. R. Co., 128 N. Y. 436, 28 N. E. 518, 26 Am. St. Rep. 486, 13 L. R. A. 401 [*affirming* 59 N. Y. Super. Ct. 576, 13 N. Y. Suppl. 955]; Matter of Board of St. Opening, etc., 68 Hun (N. Y.) 562, 22 N. Y. Suppl. 1021; Werfelman *v.* Manhattan R. Co., 16 Daly (N. Y.) 355, 11 N. Y. Suppl. 66; Pomeroy *v.* Chicago, etc., R. Co., 25 Wis. 641; Newell *v.* Smith, 15 Wis. 101. And see Sweaney *v.* U. S., 62 Wis. 396, 22 N. W. 609 [*disapproved* in Paine Lumber Co. *v.* U. S., 55 Fed. 854]. *Compare* Wabash, etc., R. Co. *v.* McDougall, 118 Ill. 229, 8 N. E. 678.

If the conveyance is for certain uses, and the deed contains a provision for forfeiture in case the land be devoted to other uses, the grantee, and not the grantor, is entitled to the damages if the land is taken under eminent domain. Cincinnati *v.* Babb, 4 Ohio S. & C. Pl. Dec. 464, 29 Cinc. L. Bul. 284.

If greater rights are acquired under the condemnation proceedings than were previously conveyed by the owner's deed, the whole award should not be paid to the grantee. Farrand *v.* Clarke, 63 Minn. 181, 65 N. W. 361.

A purchaser under an executory contract of sale may be entitled to the compensation for a subsequent condemnation.

Illinois.— Stevenson *v.* Loehr, 57 Ill. 509, 11 Am. Rep. 36.

Iowa.— Cotes *v.* Davenport, 9 Iowa 227.

Massachusetts.— Pinkerton *v.* Boston, etc., R. Co., 109 Mass. 527.

Nebraska.— Fremont, etc., R. Co. *v.* Setright, 34 Nebr. 253, 51 N. W. 833.

New Jersey.— State *v.* Parker, 53 N. J. L. 183, 20 Atl. 1074.

Texas.— Odell *v.* Gulf, etc., R. Co., 4 Tex. Civ. App. 607, 22 S. W. 821.

See 18 Cent. Dig. tit. "Eminent Domain," § 413.

But see Clark *v.* Close, 43 Iowa 92 (holding that the purchaser cannot recover compensation for an overflowing where he had paid nothing, had obtained no deed, and the condemning corporation had obtained a license from the original owner to overflow the land and had expended money in erecting the dam before the contract was made); Korn *v.* Metropolitan El. R. Co., 59 Hun (N. Y.) 505, 13 N. Y. Suppl. 518; Smith *v.* Ferris, 6 Hun (N. Y.) 553.

One in possession under a bond for title upon which he has paid part of the purchase-money is entitled to compensation. Fulton County *v.* Amorous, 89 Ga. 614, 16 S. E. 201.

A vendor is not entitled to have an award recovered by the vendee declared on his purchase-money mortgage, where, by reason of a prior appropriation of the land, he had no title at the time of his conveyance, and is liable on his covenants for an amount in excess of his claim for unpaid purchase-money. Shields *v.* Pittsburg, 201 Pa. St. 328, 50 Atl. 820.

41. Chandler *v.* Morey, 195 Ill. 596, 63 N. E. 512 [*affirming* 96 Ill. App. 278]; McGean *v.* Metropolitan El. R. Co., 59 N. Y. Super. Ct. 472, 14 N. Y. Suppl. 761 [*distinguishing* Foote *v.* Manhattan R. Co., 58 Hun (N. Y.) 478, 12 N. Y. Suppl. 516].

42. Chicago, etc., R. Co. *v.* Loeb, 118 Ill. 203, 8 N. E. 460, 59 Am. St. Rep. 341; Kepley *v.* Taylor, 1 Blackf. (Ind.) 492; Jolly *v.* Des Moines Northwestern R. Co., 72 Iowa 759, 33 N. W. 668; Pratt *v.* Des Moines Northwestern R. Co., 72 Iowa 249, 33 N. W. 666; Doyle *v.* Kansas City, etc., R. Co., 113 Mo. 280, 20 S. W. 970.

43. *Illinois.*— Rice *v.* Chicago, 57 Ill. App. 538.

Nebraska.— Northeastern Nebraska R. Co. *v.* Frazier, 25 Nebr. 42, 40 N. W. 604.

New Hampshire.— Bean *v.* Warner, 38 N. H. 247.

New York.— Magee *v.* Brooklyn, 144 N. Y. 265, 39 N. E. 87; Matter of Leggett Ave., 80 N. Y. App. Div. 618, 80 N. Y. Suppl. 673; Whittemore *v.* Woodlawn Cemetery, 71 N. Y. App. Div. 257, 75 N. Y. Suppl. 847; Stilwell *v.* Kenedy, 36 Misc. 359, 73 N. Y. Suppl. 573.

Ohio.— Clarke *v.* Cleveland, 9 Ohio Cir. Ct. 118, 6 Ohio Cir. Dec. 176.

Virginia.— Virginia-Carolina R. Co. *v.* Booker, 99 Va. 633, 39 S. E. 591.

the land is conveyed to him after the award but before there has been a final confirmation.[44]

(III) *Purchaser at Foreclosure Sale.* A purchaser at a foreclosure sale is not entitled to compensation for damages caused by condemnation of the property previous to his purchase.[45]

f. Heir, Legatee, Devisee, and Legal Representative. Those courts which take the view that as soon as the damages are assessed they become a debt necessarily hold that if the damages are assessed but are not paid during the lifetime of the owner the money belongs to his legal representative,[46] and this right of the legal representative continues until distribution of the estate has been made;[47] while on the other hand if the damages are not assessed until after the owner's death the money belongs to the heir at law, even though the condemning party had taken possession of the land during the lifetime of the owner.[48] Other courts hold that the heir or the devisee is entitled to the money, where the damages have been assessed but not paid before the owner's death.[49] Again it is held that if nothing has been done in the lifetime of the owner to work a conversion of the

See 18 Cent. Dig. tit. "Eminent Domain," § 410.

Where the deed is made after condemnation proceedings were dismissed and the proceedings are again renewed, the vendor is entitled to damages for the use of the land from the time of entry to the date of the sale, and the vendee to the value of the land taken and the decrease in value of the remainder resulting from the appropriation. Fordyce *v.* Wolfe, 82 Tex. 239, 18 S. W. 145.

Under Wis. Priv. & Loc. Laws (1867), c. 201, (1868), c. 144, a purchaser of land, after an entry thereon under condemnation proceedings, is entitled to damages occasioned subsequent to his purchase, but the right to previous damages is in the grantor. Pick *v.* Rubicon Hydraulic Co., 27 Wis. 433.

Under the act of congress of 1866, a purchaser of public lands from the government is entitled to compensation for the taking thereof by a railroad company where such company had not filed maps of its lines previous to the sale. St. Joseph, etc., R. Co. *v.* Baldwin, 7 Nebr. 247.

44. Kiebler *v.* Holmes, 58 Mo. App. 119; New York *v.* Curran, 15 Daly (N. Y.) 116, 3 N. Y. Suppl. 533, 24 Abb. N. Cas. (N. Y.) 128; *In re* Liberty Tp. Road, 23 Pa. Co. Ct. 287; *In re* Buttonwood St., 5 Lanc. L. Rev. 317; Pomeroy *v.* Chicago, etc., R. Co., 25 Wis. 641. See also Shepard *v.* Manhattan R. Co., 72 N. Y. App. Div. 132, 76 N. Y. Suppl. 269.

A deed of land, which includes a portion which had been condemned for a street, conveys to the grantee the right to the compensation for the portion condemned, if the award was made before the deed was executed, but the possession of the grantor had not been disturbed. Charde *v.* Brooklyn, 8 Misc. (N. Y.) 598, 29 N. Y. Suppl. 390.

The grantee is entitled to the damages unless reserved to the grantor, if the party who held title when a condemnation judgment awarding him damages was entered sells the land before the damages are paid. Chandler *v.* Morey, 195 Ill. 596, 63 N. E. 512 [*affirming* 96 Ill. App. 278].

Under Minn. Gen. St. (1866) c. 34, the right to damages passes to one receiving a deed of the land after award is made and before the time for appeal lapses. Carli *v.* Stillwater, etc., R. Co., 16 Minn. 260.

45. Miller *v.* Board of Mississippi Levee Com'rs, 78 Miss. 201, 28 So. 834, 877; Matter of Washington Ave., 34 Misc. (N. Y.) 655, 70 N. Y. Suppl. 599. And see Livermon *v.* Roanoke, etc., R. Co., 109 N. C. 52, 13 S. E. 734, holding that, although such a purchaser is not entitled to damages incident to the act of entry, he might recover compensation for the land appropriated to the use of the condemning company.

46. Welles *v.* Cowles, 4 Conn. 182, 10 Am. Dec. 115; Detroit *v.* Schilling, 93 Mich. 429, 53 N. W. 565; Mortimer *v.* Manhattan R. Co., 129 N. Y. 81, 29 N. E. 5 [*affirming* 57 N. Y. Super. Ct. 509, 8 N. Y. Suppl. 536]; Gucker *v.* Manhattan El. R. Co., 38 N. Y. App. Div. 47, 55 N. Y. Suppl. 1027; Paret *v.* New York El. R. Co., 60 N. Y. Super. Ct. 441, 18 N. Y. Suppl. 580. And see Kent *v.* Essex County Com'rs, 10 Pick. (Mass.) 521.

A mere naked power to sell the realty, vested in the executor, does not give him the right to the compensation, but he must show that he is entitled to the money either for the purpose of administration or as a trustee under the will. Cashman *v.* Wood, 6 Hun (N. Y.) 520.

47. St. Albans *v.* Seymour, 41 Vt. 579.

48. Mitchell *v.* Metropolitan El. R. Co., 134 N. Y. 11, 31 N. E. 260 [*affirming* 56 Hun 543, 9 N. Y. Suppl. 829]; Ballou *v.* Ballou, 78 N. Y. 325.

Where a bill is filed to enjoin the maintenance of an elevated railroad, the owner having died after the construction of the railroad, the heirs and legal representative should join, since the legal representative is entitled to the damages suffered before the owner's death, and the heirs to those which accrued subsequently. Shepard *v.* Manhattan R. Co., 117 N. Y. 442, 23 N. E. 30 [*affirming* 57 N. Y. Super. Ct. 5, 5 N. Y. Suppl. 189].

49. Parker *v.* Chestnutt, 80 Ga. 12, 5 S. E. 289; Todemier *v.* Aspinwall, 43 Ill. 401; Web-

realty into money the heirs are the owners to whom the compensation should be paid.[50] Where the condemnation and assessment of damages are made after the decedent's death, the amount thereof must be paid to the heir or devisee[51] unless the estate is insolvent.[52]

g. Owner Absent or Under Disability. Where an owner is out of the state or incompetent, it is required in some jurisdictions that the money be paid into court, subject to disposal by the court for the benefit of such owner.[53]

h. Other Encumbrancers or Lien-Holders. Where there are liens on the land condemned, the court may allow the condemning party to pay the award into court for the benefit of the owner and the lien-holders, although the lien-holders were not made parties to the condemnation proceedings;[54] so that the rights of lien creditors will be protected.[55] But this rule applies only to lien-holders or creditors of the interest taken or affected.[56] So it has been determined the claim

ber *v.* Toledo, 23 Ohio Cir. Ct. 237; Buckner *v.* Savannah, etc., R. Co., 7 S. C. 325.

Where land of a person of unsound mind was taken by a railway company under its right of compulsory purchase, and, the lunatic having died, the money was ordered to be paid to the heir. *In re* Tugwell, 27 Ch. D. 309, 53 L. J. Ch. 1006, 51 L. T. Rep. N. S. 83, 33 Wkly. Rep. 132 [*disapproving* Matter of Cross, 1 Sim. N. S. 260, 40 Eng. Ch. 260].

50. Oliver *v.* Pittsburgh, etc., R. Co., 131 Pa. St. 408, 19 Atl. 47, 17 Am. St. Rep. 814; Pennsylvania Schuylkill Valley R. Co. *v.* Ziemer, 124 Pa. St. 560, 17 Atl. 187; Knoll *v.* New York, etc., R. Co., 121 Pa. St. 467, 15 Atl. 571, 1 L. R. A. 366; Mumma *v.* Harrisburg, etc., R. Co., 1 Pearson (Pa.) 65. And see Paducah, etc., R. Co. *v.* Dipple, 16 Ky. L. Rep. 62. But see O'Brien *v.* Pennsylvania Schuylkill Valley, etc., R. Co., 119 Pa. St. 184, 13 Atl. 74, holding the executor entitled to maintain an action for damage to property caused by excavations in the street, although the work was not completed at the testator's death.

51. Neal *v.* Knox, etc., R. Co., 61 Me. 298; Boynton *v.* Peterborough, etc., R. Co., 4 Cush. (Mass.) 467.

A son having a right under the testator's will to purchase a certain portion of the realty at a certain price is entitled to the compensation for its condemnation upon paying the purchase-price. Matter of Cant, 4 De G. & J. 503, 6 Jur. N. S. 183, 29 L. J. Ch. 119, 7 Wkly. Rep. 624, 61 Eng. Ch. 397.

Apportionment between heirs.— Where the public records showed that the widow was the owner of land left by her husband and she held possession to the exclusion of his other heirs who were entitled to a share of the land, a sum recovered by her on account of condemnation of a part of the land should be shared with those heirs who were not parties to the condemnation proceedings, but not with one who was made a party and defaulted. Legg *v.* Legg, 34 Wash. 132, 75 Pac. 130.

52. Goodwin *v.* Milton, 25 N. H. 458.

53. *Ex p.* Van Vorst, 2 N. J. Eq. 292; Matter of Board of St. Opening, 89 Hun (N. Y.) 525, 35 N. Y. Suppl. 409.

Illustration.— Thus an award of damages to the guardian of a minor as such will be regarded as an award to the minor, and will be payable only to a guardian properly authorized to receive it (Brown *v.* Rome, etc., R. Co., 86 Ala. 206, 5 So. 195; Peavey *v.* Wolfborough, 37 N. H. 286); it should not be paid to the guardian *ad litem* (Brown *v.* Rome, etc., R. Co., 86 Ala. 206, 5 So. 195).

54. Schafer *v.* Schafer, 75 Iowa 349, 39 N. W. 697; Omaha Bridge, etc., R. Co. *v.* Reed, (Nebr. 1903) 96 N. W. 276; *In re* Sleeper, 62 N. J. Eq. 67, 49 Atl. 549; Philadelphia, etc., R. Co. *v.* Pennsylvania Schuylkill Valley R. Co., 151 Pa. St. 569, 25 Atl. 177; Matter of Noble St., 1 Ashm. (Pa.) 276.

A railroad company which has paid the award into court is entitled to have all liens paid out of the fund, including the lien for taxes (*In re* Sleeper, 62 N. J. Eq. 67, 49 Atl. 549); and the amount due for taxes is to be deducted from the award to the owner of the fee, and not from that made to the owner of an easement (Baker *v.* New York, 31 N. Y. App. Div. 112, 52 N. Y. Suppl. 533).

Where judgments are docketed against the owner of land which is afterward condemned, but after the money is paid into court the right of way is abandoned and the property is sold under the judgments, if the enterprise is revived, the damages assessed are payable to the purchaser at the judgment sale. Jones *v.* Miller, (Va. 1882) 23 S. E. 35.

55. Chicago, etc., R. Co. *v.* Chamberlain, 84 Ill. 333; Brenner's Appeal, 2 Walk. (Pa.) 92; Keller's Appeal, 2 Walk. (Pa.) 32; Mack *v.* Eastern, etc., R. Co., 10 Pa. Dist. 102. *Compare* Danforth *v.* Suydam, 4 N. Y. 66.

56. Harris *v.* Brewster, 154 Pa. St. 22, 25 Atl. 829, holding that a judgment creditor of the son of the owner cannot set up a claim to a fund paid into court on the ground that the son was the real owner of the land taken, since the condemnation proceeding affected only the title of the apparent owner.

A judgment creditor of the remainder-man cannot assert his claim to money paid into court for land condemned for a right of way subject to the life-estate during the continuance of the life-estate. Kansas City, etc., R. Co. *v.* Weaver, 86 Mo. 473.

of the owner, however, is paramount to that of a mortgage creditor of the condemning party.[57]

3. CONFLICTING CLAIMS. Where there are different claimants to the fund, or the title to the land is in question, it is proper to order that the money awarded be paid into court, or be deposited with some designated officer, or in some designated depository, for the benefit of those who shall ultimately prove to be the rightful owners.[58] Where there are adverse or conflicting claims to the land sought to be condemned, the questions involved are not to be litigated until after the proceeding is ended, and the award is to be distributed.[59] The trial court will not try or determine conflicting adverse claims of different corporations seeking to condemn the same property; nor will it determine which has the better right to condemn.[60] Or it may order the payment to be withheld until the dispute is settled.[61] Such money then becomes in law the property of the party who is entitled to it, and is subject to disposal by the court having jurisdiction to determine who is the rightful owner.[62]

H. Extinguishment of Right to Compensation — 1. By Grant. The constitutional prohibition against taking property without compensation applies

57. Epling *v.* Dickson, 170 Ill. 329, 48 N. E. 1001 [*reversing* 61 Ill. App. 78]; Mercantile Trust Co. *v.* Pittsburgh, etc., R. Co., 29 Fed. 732.

58. *California.*—*In re* Lefevre, 32 Cal. 565; San Francisco, etc., R. Co. *v.* Mahoney, 29 Cal. 112.

Illinois.— Calumet River R. Co. *v.* Brown, 136 Ill. 322, 26 N. E. 501, 12 L. R. A. 84; Chicago, etc., R. Co. *v.* Prussing, 96 Ill. 203.

Kansas.— Armstrong *v.* Moore, 1 Kan. App. 450, 40 Pac. 834.

Maryland.— Gardiner *v.* Baltimore, 96 Md. 361, 54 Atl. 85.

Mississippi.— Board of Levee Com'rs *v.* Wiborn, 74 Miss. 396, 20 So. 861.

Missouri.— Hilton *v.* St. Louis, 99 Mo. 199, 12 S. W. 657.

New York.— Pecksport Connecting R. Co. *v.* West, 20 N. Y. App. Div. 636, 47 N. Y. Suppl. 230.

Pennsylvania.— *In re* Conshohocken Ave., 1 Walk. 424.

West Virginia.— Charleston, etc., Bridge Co. *v.* Comstock, 36 W. Va. 263, 15 S. E. 69.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 428–432.

The amount of the award may be paid to the county clerk where the right to it is disputed or doubtful, although in the condemnation proceedings and in the award one was designated as owner; and the money must then be obtained by application to the court and not by an action against the condemning corporation. Patterson *v.* Binghamton, 88 Hun (N. Y.) 272, 34 N. Y. Suppl. 416.

After verdict and judgment in the condemnation proceedings, it is too late to ask that the money be paid into court for distribution, on the allegation that the ownership of the land was not wholly in the one who was named in the proceedings as owner. Wood *v.* State Insane Hospital, 16 Pa. Co. Ct. 667.

59. Charleston, etc., Bridge Co. *v.* Comstock, 36 W. Va. 263, 15 S. E. 69.

60. San Francisco, etc., Water Co. *v.* Alameda Water Co., 36 Cal. 639; Lake Merced Water Co. *v.* Cowles, 31 Cal. 214.

Conflicting claims should not be litigated until after the condemnation proceeding is ended (Charleston, etc., Bridge Co. *v.* Comstock, 36 W. Va. 263, 15 S. E. 69), **unless the damages have been paid into court, and an answer in the nature of a bill of interpleader has been filed bringing in all the rival claimants** (Hilton *v.* St. Louis, 99 Mo. 199, 12 S. W. 657).

Where money is paid into court under a provision in the special act creating a corporation that where lands are held by disputed titles the money shall be paid into court, the respective interests of the parties claiming the money may be adjusted on petition to the court. *In re* London Dock Co., 11 Beav. 78, 12 Jur. 405, 17 L. J. Ch. 111; Brandon *v.* Brandon, 2 Dr. & Sm. 305, 11 Jur. N. S. 30, 34 L. J. Ch. 333, 11 L. T. Rep. N. S. 658, 13 Wkly. Rep. 251; *Ex p.* London, etc., R. Co., 38 L. J. Ch. 527; *Ex p.* Issauchaud, 3 Y. & C. Exch. 721.

61. Muire *v.* Falconer, 10 Gratt. (Va.) 12.

62. *Kansas.*— Chicago, etc., R. Co. *v.* Selders, 4 Kan. App. 497, 44 Pac. 1012.

Maryland.— Gardiner *v.* Baltimore, 96 Md. 361, 54 Atl. 85.

Michigan.— Defoe *v.* Bay Cir. Judge, 116 Mich. 567, 74 N. W. 733.

Missouri.— Union R., etc., Co. *v.* Skinner, 9 Mo. App. 189.

New York.— Patterson *v.* Binghamton, 154 N. Y. 391, 48 N. E. 739; *In re* New York, 90 N. Y. 390; *In re* New York Cent., etc., R. Co., 60 N. Y. 116.

Pennsylvania.— *In re* Cresson, 3 Pa. L. J. Rep. 107, 4 Pa. L. J. 468; *In re* Ziegler, 12 York Leg. Rec. 158.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 428–432.

Grantees of heirs of a former owner cannot contest the title of other heirs whose interests they have not acquired in a contest for money paid into court under condemnation proceedings. United New Jersey R., etc., Co. *v.* Consolidated Fruit Jar Co., (N. J. Ch. 1903) 55 Atl. 46.

to land taken without the consent of the owner, not to that which is taken with his consent;[63] and it has also been decided that if the owner has granted a right of way over his land, he must look to his contract for compensation, as it cannot be awarded to him in condemnation proceedings;[64] provided that the contract is

63. Murphy *v.* Wilmington, 6 Houst. (Del.) 108, 22 Am. St. Rep. 345; Barbin *v.* Avoyelles Police Jury, 15 La. Ann. 559; Bumpus *v.* Miller, 4 Mich. 159; Shaw *v.* Manhattan Ave. R. Co., 35 Misc. (N. Y.) 47, 71 N. Y. Suppl. 22.

Reliance on consent.— Where a railway company laid its track along a street with the consent of one of the abutting owners, such consent was not invalidated because the track was laid not by virtue of the consent but by virtue of an order of court based on an application showing that the consent of the necessary number of property-owners had not been secured. Heimburg *v.* Manhattan R. Co., 162 N. Y. 352, 56 N. E. 899 [*affirming* 19 N. Y. App. Div. 179, 45 N. Y. Suppl. 999].

64. *California.*— Western Pac. R. Co. *v.* Reed, 35 Cal. 621.

Illinois.— Conwell *v.* Springfield, etc., R. Co., 81 Ill. 232.

Indiana.— Baltimore, etc., R. Co. *v.* Highland, 48 Ind. 381.

New York.— White *v.* Manhattan R. Co., 139 N. Y. 19, 34 N. E. 887.

Pennsylvania.— See Mifflin *v.* Pennsylvania R. Co., 2 Leg. Gaz. 222.

Texas.— Faires *v.* San Antonio, etc., R. Co., 80 Tex. 43, 15 S. W. 588.

See 18 Cent. Dig. tit. "Eminent Domain," § 209.

Implied obligation to pay damages.— If the owner agrees with the corporation that the work may go on, and that the damages shall be subsequently assessed, the law implies a liability on the part of the corporation to pay the damages when they shall be assessed. Blanchard *v.* Maysville, etc., Turnpike Co., 1 Dana (Ky.) 86.

Injury to land not taken.— A grant of the right of way will relieve the company from liability for injuries to the land not taken (Radke *v.* Minneapolis, etc., R. Co., 41 Minn. 350, 43 N. W. 6; McCarty *v.* St. Paul, etc., R. Co., 31 Minn. 278, 17 N. W. 616. See also Common School Dist. No. 14 *v.* Nashville, etc., R. Co., 56 S. W. 990, 22 Ky. L. Rep. 243; Rex *v.* Leeds, etc., R. Co., 3 A. & E. 683, 5 N. & M. 246, 30 E. C. L. 315; Croft *v.* London, etc., R. Co., 3 B. & S. 436, 9 Jur. N. S. 962, 32 L. J. Q. B. 113, 7 L. T. Rep. N. S. 741, 11 Wkly. Rep. 360, 113 E. C. L. 436; Todd *v.* Metropolitan Dist. R. Co., 24 L. T. Rep. N. S. 435, 19 Wkly. Rep. 720. But see Lawrence *v.* Great Northern R. Co., 16 Q. B. 643, 15 Jur. 652, 20 L. J. Q. B. 293, 6 R. & Can. Cas. 656, 71 E. C. L. 643; Lancashire, etc., R. Co. *v.* Evans, 15 Beav. 322; Ware *v.* Regent's Canal Co., 9 Exch. 395, 23 L. J. Exch. 145, 7 R. & Can. Cas. 780), if they are of such a character that they would be taken into consideration in assessing the damages in a condemnation proceeding (Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, 19 S. E. 521, 45 Am. St. Rep. 894, 23 L. R. A. 674).

Land not included in agreement.— A contract granting to a railroad company a right of way of a certain width will not relieve the company of its obligation to pay for land outside of such width which is taken by it for the construction of its road. Maysville, etc., R. Co. *v.* Ball, 108 Ky. 241, 56 S. W. 188, 21 Ky. L. Rep. 1693; Hoffman *v.* Bloomsburg, etc., R. Co., 143 Pa. St. 503, 22 Atl. 823; Faires *v.* San Antonio, etc., R. Co., 80 Tex. 43, 15 S. W. 588. See also Tinker *v.* Rockford, (Ill. 1891) 28 N. E. 573 [*reversing* 36 Ill. App. 460].

Additional damages.— An abutting owner who grants his consent to the construction of a horse-car line is not precluded from claiming damages arising from the installation of electricity as a motive power, even though, had the right of way originally been secured by legislative authority, the change would not have imposed an additional servitude on the owner. Humphreys *v.* Ft. Smith Traction, etc., Co., 71 Ark. 152, 71 S. W. 662.

License.— Where an owner gives to a railroad verbal permission to use his land, he cannot recover damages for such use as long as the permission remains unrevoked. Miller *v.* Auburn, etc., R. Co., 6 Hill (N. Y.) 61. But the fact that an owner aided the president of a railroad company in obtaining an amendment to remove a restriction against the use of steam power by the company does not warrant a finding of a parol license for the company to enter upon his land and construct its track there without compensation. Murdock *v.* Prospect Park, etc., R. Co., 73 N. Y. 579 [*reversing* 10 Hun 598].

Expired agreement.— If, after the expiration of an agreement, a company continues to use the property under the power of eminent domain, the owner is entitled to his compensation. Heilman *v.* Union Canal Co., 50 Pa. St. 268.

Public grants.— Where grants by a state contain a condition that the grantee must furnish ground for public highways, the state is not bound to compensate the owner when a part of the land is taken for that purpose. Henderson *v.* New Orleans, 5 La. 416 (holding, however, that where a road has been laid out in virtue of a condition that the grantee should furnish ground for a highway, the owner is not bound to furnish additional road without compensation); McClenachan *v.* Curwen, 6 Binn. (Pa.) 509, 3 Yeates 362; Smith *v.* Pennington County, 2 S. D. 14, 48 N. W. 309; Wells *v.* Pennington County, 2 S. D. 1, 48 N. W. 305, 39 Am. St. Rep. 758. So where a lessee's right to in-

valid,[65] and that all its conditions have been complied with by the grantee.[66] Authority to condemn lands must be obtained from the owner of the fee.[67] Ordinarily the condemning party cannot claim any rights under or by virtue of an agreement between the owner and a third person[68] and is not bound thereby.[69]

close school land is founded on a lease from the state, he must be deemed to have consented to all the conditions imposed by the statute relating to the lease of school lands, so far as they are within the provisions of the constitution. Bugby-Coleman Land, etc., Co. *v.* Matador Land, etc., Co., 26 Tex. Civ. App. 260, 63 S. W. 914.

Payment for public property.— Where the state or municipality authorizes a corporation or an individual to build roads or other public improvements upon government property, the right to do so without making compensation is implied, since the duty to be performed is that of the sovereign delegated to a citizen. California Northern R. Co. *v.* Gould, 21 Cal. 254; Pennsylvania R. Co. *v.* New York, etc., R. Co., 23 N. J. Eq. 157; Herzog *v.* New York El. R. Co., 76 Hun (N. Y.) 486, 27 N. Y. Suppl. 1034. See also Heffner *v.* Cass, etc., Counties, 193 Ill. 439, 62 N. E. 201, 58 L. R. A. 353; Matter of Gilroy, 43 N. Y. App. Div. 359, 60 N. Y. Suppl. 200.

65. Palethorp *v.* Philadelphia, etc., R. Co., 2 Walk. (Pa.) 487 (holding that an unexecuted parol contract for the sale of lands to a railroad company is no bar to proceedings to obtain compensation, although the damages assessed may be less than the price which had been agreed to be paid. See also Common School Dist. No. 14 *v.* Nashville, etc., R. Co., 56 S. W. 990, 22 Ky. L. Rep. 243, holding that while an owner who has permitted a railroad company to take possession under a parol contract and to construct its road is estopped to recover the land itself, he may recover damages for its taking and for injury to the residue of his land.

Certainty.— A deed whereby the owners of lands through which a railroad is intended to pass conveys to the company so much of any part of their lands as may be necessary in the construction of the road is not void for uncertainty. Pollard *v.* Maddox, 28 Ala. 321.

Consideration.— Since railroad companies are required by law to fence their right of way, a conveyance of a right of way on the promise of the company to fence the same is without consideration, and the grantor may afterward have his damages assessed. Shortle *v.* Terre Haute, etc., R. Co., 131 Ind. 338, 30 N. E. 1084.

66. *Iowa.*— Hibbs *v.* Chicago, etc., R. Co., 39 Iowa 340.

Massachusetts.— Whitman *v.* Boston, etc., R. Co., 3 Allen 133 (holding that condemnation proceedings will not be defeated by proof of a written agreement to sell the land to a railroad company for a specified price within a certain time, if a tender and refusal within that time is shown); Crockett *v.* Boston, 5 Cush. 182.

Mississippi.— Currie *v.* Natchez, etc., R. Co., 61 Miss. 725.

New York.— Heimburg *v.* Manhattan R. Co., 162 N. Y. 352, 56 N. E. 899 [*affirming* 19 N. Y. App. Div. 179, 45 N. Y. Suppl. 999].

Pennsylvania.— Hoffman *v.* Bloomsburg, etc., R. Co., 143 Pa. St. 503, 22 Atl. 823; Unangst's Appeal, 55 Pa. St. 128; Philadelphia, etc., R. Co. *v.* Cooper, 105 Pa. St. 239, holding that an agreement by the owner, made subsequent to the taking of possession by a railroad company, to accept a specific sum for the right of way will not defeat condemnation proceedings, if the amount mentioned has never been paid.

See 18 Cent. Dig. tit. "Eminent Domain," § 209.

Conditions of delivery.— Where fifty-seven landowners executed an agreement to convey to a railroad company a right of way through a township, but the agreement contained a stipulation that it should not be delivered to the company until it was signed by one hundred landowners, it was not binding in the absence of proof that the company accepted the condition. Rockford, etc., R. Co. *v.* Shunick, 65 Ill. 223. So where an agreement to convey a right of way was delivered on condition that it should not be used unless the withholding of it would defeat the building of the road, it will not prevent the maker from recovering his compensation if the road was completed without any necessity having arisen for using the agreement. Humphreys *v.* Richmond, etc., R. Co., 88 Va. 431, 13 S. E. 985.

67. Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456, 458, 11 N. W. 271, holding that a railway company can obtain no rights of control over the land by any license or grant from the holder of a contingent dower interest or a tenant at will.

68. Central Land Co. *v.* Providence, 15 R. I. 246, 248, 2 Atl. 553 (holding that where mutual deeds were made in voluntary partition between heirs, each stating that "the strip of land, situate in front of lot . . . as designated on said plat, which is intended to be used at some future time to widen Worcester street, is included in the above conveyance," such statement conveyed nothing to the city, and gave it no right to take the land without compensation for the purpose of widening the street); Vermont Cent. R. Co. *v.* Baxter, 22 Vt. 365 (holding that a railroad company cannot claim the benefit of a contract made between the landowner and one who has contracted to do the work for the company).

69. Penn Gas Coal Co. *v.* Versailles Fuel Gas Co., 131 Pa. St. 522, 19 Atl. 933, holding that, although a release from the owner of surface land to the owner of the underlying minerals, exempting the latter from the ob-

Whether a grant is binding upon a subsequent grantee of the land depends largely upon the nature and terms of the agreement,[70] and also on the question whether the grantee had notice of it.[71]

2. **By Release.** The owner may lose his right to compensation by releasing the same to the party exercising the power of eminent domain.[72] A parol release has also been held to be valid,[73] at least after it has been acted upon by the corporation appropriating the land.[74] A release by one part owner will not bind the

ligation of surface support, is binding upon all who subsequently take title from the surface owner, yet one entering upon the surface under the right of eminent domain is not bound thereby.

Assignment of contract.—The right to compensation for lands taken by a railroad company accrues when the company enters on the land and commences the construction of the road; and the company cannot defeat the right by subsequently obtaining the assignment of a contract to it by which the owner had agreed with another company to convey the right of way to the latter if the latter would build the road between certain points. Oregon R., etc., Co. *v.* Day, 3 Wash. Terr. 252, 14 Pac. 588.

70. Illinois Cent. R. Co. *v.* Hodge, 55 S. W. 688, 21 Ky. L. Rep. 1479 (holding that where one grants to a railroad company a right of way through his land, to be used for a road-bed or for such other purposes as may be desired by said company or their assignees, successors, or other legal representatives, it is presumed that he received payment for the actual and incidental damages arising in the ordinary course of things from such use of his land; and therefore a purchaser from him cannot recover from the original company or its successor for injuries to the residue of the land from the proper use of a water tank constructed on the right of way); Herzog *v.* New York El. R. Co., 76 Hun (N. Y.) 486, 27 N. Y. Suppl. 1034 (holding that where a city owns not only the fee of the street but also of a lot abutting on it, and consents to the construction of an elevated road in the street, its subsequent grantee is bound by the consent and is not entitled to compensation for the use by the company of the easement appurtenant to the lot); Warner *v.* Baltimore, etc., R. Co., 31 Ohio St. 265 (holding that a landowner may recover against a railroad company the cost of building a fence, although his grantor had released to the company the right of way and had agreed to build and keep up the fences on both sides of the road); Varwig *v.* Cleveland, etc., R. Co., 6 Ohio Cir. Ct. 439, 3 Ohio Cir. Dec. 528 (holding that where an abutting owner sells a right of way to a railroad company which has laid its tracks in a street under authority of the legislature, and releases to the company all damages, the company may afterward lay an additional necessary track without making compensation to a grantee of the owner).

Grantee of state.—Where a charter gives to a railroad company the exclusive right to enter certain public lands until the expiration of a certain time, the corporation obtains, besides the right to enter and thereby acquire the fee, all the rights necessary to build its road, and among others an easement over the public lands, by which any one who enters subsequently or who subsequently obtains a grant from the state is bound, and hence such person has no claim for compensation. Davis *v.* East Tennessee, etc., R. Co., 1 Sneed (Tenn.) 94.

71. Beattie *v.* Carolina Cent. R. Co., 108 N. C. 425, 12 S. E. 913, holding that an unrecorded grant of a right of way to a railroad is not binding on a subsequent grantee of the fee, where he had no notice of it and the company did not take possession of the right of way.

72. Chicago, etc., R. Co. *v.* Snyder, 120 Iowa 532, 95 N. W. 183; Jones *v.* Pennsylvania R. Co., 143 Pa. St. 374, 22 Atl. 883; East Pennsylvania R. Co. *v.* Schollenberger, 1 Walk. (Pa.) 401.

Damages to land not taken.—If the release is silent as to damages to land not taken, it will not prevent the recovery of such. Republican Valley R. Co. *v.* Fellers, 16 Nebr. 169, 20 N. W. 217; Eaton *v.* Boston, etc., R. Co., 51 N. H. 504, 12 Am. Rep. 147; Matter of Trinity Ave., 81 N. Y. App. Div. 215, 80 N. Y. Suppl. 732 [*reversing* 35 Misc. 56, 71 N. Y. Suppl. 24]; Beaver *v.* Harrisburg, 156 Pa. St. 547, 27 Atl. 4; Updegrove *v.* Schuylkill Valley R. Co., 3 Pa. Co. Ct. 74; Fulmer *v.* Bangor, etc., R. Co., 1 Pa. Co. Ct. 46; Herner *v.* Pennsylvania Schuylkill Valley R. Co., 1 Pa. Co. Ct. 43.

Damages for additional taking.—A release by an owner of land abutting on a turnpike, given to a company authorized to lay out a turnpike of a certain width, covers only the damages resulting from the original taking, and does not contemplate any damage arising from an additional taking or enlargement of the road-bed. Commonwealth Title Ins., etc., Co. *v.* Willow Grove, etc., Plank Road Co., 17 Montg. Co. Rep. (Pa.) 76.

73. Baltimore, etc., R. Co. *v.* Highland, 48 Ind. 381; Jolly *v.* Des Moines, etc., R. Co., 72 Iowa 759, 33 N. W. 668; Pratt *v.* Des Moines, etc., R. Co., 72 Iowa 249, 33 N. W. 666; Snow *v.* Moses, 53 Me. 546; Cottrill *v.* Myrick, 12 Me. 222; Clement *v.* Durgin, 5 Me. 9; Smith *v.* Goulding, 6 Cush. (Mass.) 154; Seymour *v.* Carter, 2 Metc. (Mass.) 520; Fuller *v.* Plymouth County Com'rs, 15 Pick. (Mass.) 81. *Contra*, McKee *v.* Hull, 69 Wis. 657, 35 N. W. 49.

74. Butler *v.* Morris County, 42 Kan. 416, 22 Pac. 421; Uncanoonuck Road Co. *v.* Orr, 67 N. H. 541, 41 Atl. 665; Battles *v.* Brain-

others.[75] A release of damages by one tenant in common operates to the extent of his interest, however,[76] and so does a release by a life-tenant.[77] A release by a duly authorized guardian will bind the ward.[78]

3. By Estoppel or Waiver. The owner may be estopped by his own act to claim damages.[79] The question of what acts constitute an estoppel depends largely upon the circumstances of each case.[80] For example, an owner who has dedicated land to the public for a street or highway is not entitled to compensation upon the laying out of a street thereon.[81] So if the owner waives all claim to compensation, he cannot afterward recover.[82] The assent of the owner to the appropriation of his land may be implied from a long acquiescence;[83] but mere acquiescence in the construction of a public work on his land does not constitute

tree, 14 Vt. 348. See, however, East Pennsylvania R. Co. *v.* Schollenberger, 54 Pa. St. 144.

75. Cushing *v.* Nantasket Beach R. Co., 143 Mass. 77, 9 N. E. 22; Philadelphia, etc., R. Co. *v.* Patterson, 3 Walk. (Pa.) 143; Galveston, etc., R. Co. *v.* Pfeuffer, 56 Tex. 66. See, however, Merchants' Union Barb-Wire Co. *v.* Chicago, etc., R. Co., 79 Iowa 613, 44 N. W. 900, holding that where the lot is not taken but only injured, as by the laying of tracks in the street on which it fronts, and the constitution does not require that compensation shall be made for property damaged for public use, the consent of one tenant in common will bind his cotenant.

76. Draper *v.* Williams, 2 Mich. 536; Charleston, etc., R. Co. *v.* Leech, 33 S. C. 175, 11 S. E. 631, 26 Am. St. Rep. 667.

77. Cureton *v.* South Bound R. Co., 59 S. C. 371, 37 S. E. 914.

78. Louisville, etc., R. Co. *v.* Blythe, 69 Miss. 939, 11 So. 111, 30 Am. St. Rep. 599, 16 L. R. A. 251.

79. Pennsylvania Co. *v.* Bond, 202 Ill. 95, 66 N. E. 941; Hartshorn *v.* Burlington, etc., R. Co., 52 Iowa 613, 3 N. W. 648; Chapman *v.* Gates, 46 Barb. (N. Y.) 313.

80. Penn Mut. L. Ins. Co. *v.* Heiss, 141 Ill. 35, 31 N. E. 138, 33 Am. St. Rep. 273 (holding that, although the owner of city property attended meetings of citizens called for the purpose of inducing a railroad company to build its line to that city, and although he requested a member of the city council to vote for an ordinance granting the company a right of way through a street in front of his property, and although a firm of which he was a member subscribed money to build a depot for the company in the city, these facts do not estop him from claiming damages for injury to his property caused by building the road in front of it, if it is not shown that the ordinance would not have passed but for his action); McKee *v.* Hull, 69 Wis. 657, 35 N. W. 49 (holding that a statement by an owner to the county supervisors that he would allow a road to run on his land, and that he would not claim damages therefor, does not raise an estoppel *in pais*); Comstock *v.* U. S., 9 Ct. Cl. 141 (holding that an owner of property taken for public use who accepts without objection from the government a sum less than the amount which he demands for the property, knowing that the government officers intend such payment to be in full, is estopped from recovering the balance of his demand).

81. Bumpus *v.* Miller, 4 Mich. 159; Clark *v.* Elizabeth, 37 N. J. L. 120; Matter of Munson, 9 N. Y. St. 126, holding that where the land is indicated on a map as streets, and lots are sold bounded by such streets, although they do not thereby become public streets, they are yet liable to appropriation as such by the public for a nominal consideration. See, however, Easton Borough's Appeal, 81 Pa. St. 85, holding, in a proceeding against a municipality to recover damages for property taken in the opening of a street, that plaintiff is not estopped by a deed executed by a predecessor in title before the street was opened, calling for the line of said street, but for property in a block different from that of the property taken.

82. Haskell *v.* New Bedford, 108 Mass. 208; White *v.* Norfolk County Com'rs, 2 Cush. (Mass.) 361; Erie County *v.* Buffalo, 63 Hun (N. Y.) 565, 18 N. Y. Suppl. 635; Jones *v.* Pennsylvania R. Co., 143 Pa. St. 374, 22 Atl. 883; Pusey *v.* Allegheny, 98 Pa. St. 522; East Pennsylvania R. Co. *v.* Schollenberger, 1 Walk. (Pa.) 401; Standish *v.* Montpelier, 71 Vt. 287, 44 Atl. 339.

The burden of proving the waiver is on the party alleging it. Brown *v.* Worcester, 13 Gray (Mass.) 31.

Waiver of prepayment see *infra*, X, F, 1, d.

83. Cottrill *v.* Myrick, 12 Me. 222; Bumpus *v.* Miller, 4 Mich. 159; Chapman *v.* Gates, 46 Barb. (N. Y.) 313; Chicago, etc., R. Co. *v.* Richardson, 86 Wis. 154, 56 N. W. 741, where a period of two years was held sufficient. But where a railroad company enters upon land and constructs its road without procuring a right of way, and then after twelve years' occupation institutes a proceeding to condemn it, it has no right to insist that the owner is estopped to claim damages. Toledo, etc., R. Co. *v.* Darst, 61 Ill. 231. *Compare* Sangamon County *v.* Brown, 13 Ill. 207. See also Philadelphia *v.* Linnard, 97 Pa. St. 242, holding that where the owner of premises who was making alterations in his buildings was compelled by a statute applicable to new buildings to recede five feet from the former building line, the fact that he voluntarily began his alterations did not preclude him from recovering damages for the five feet thus appropriated for the public use.

a waiver of his right to compensation;[84] nor does a mere permission to enter upon the land and commence the construction of the work amount to an assent to the appropriation.[85] Ordinarily a mere request on the part of the owner that the improvement be made or that it be made in a certain way will not operate as a waiver of the right to compensation.[86]

XI. PROCEEDINGS TO CONDEMN PROPERTY AND TO ASSESS COMPENSATION.

A. Nature of Condemnation Proceedings. Condemnation proceedings are no more than a compulsory sale of all the owner's interest in the property sought to be appropriated.[87] Under most of the statutes such proceedings are essentially proceedings *in rem*,[88] although the methods by which the power of eminent domain is to be exercised vary according to circumstances, and according

84. Allen *v.* Wabash, etc., R. Co., 84 Mo. 646; Chapman *v.* Gates, 46 Barb. (N. Y.) 313; Mattlage *v.* New York El. R. Co., 11 N. Y. Suppl. 482 (holding that an abutting owner is not deprived of his right to compensation by merely failing to interfere with the construction of an elevated railroad in front of his premises); Glasgow *v.* Hill County, 3 Tex. App. Civ. Cas. § 467.

Waiver as against creditors of company.— The owner of a lot in front of which a railroad has been constructed does not waive his paramount right to compensation out of funds in the hands of the receivers of the company in preference to mortgagees of the road by allowing the company to construct the road on the street without first making compensation or giving security according to the constitutional requirement. Mercantile Trust Co. *v.* Pittsburgh, etc., R. Co., 29 Fed. 732.

85. *Alabama.*— Thornton *v.* Sheffield, etc., R. Co., 84 Ala. 109, 4 So. 197, 5 Am. St. Rep. 337.

Indiana.— Midland R. Co. *v.* Smith, 125 Ind. 509, 25 N. E. 153.

Kentucky.— Evansville, etc., R. Co. *v.* Grady, 6 Bush 144.

Missouri.— Allen *v.* Wabash, etc., R. Co., 84 Mo. 646.

New York.— Mattlage *v.* New York El. R. Co., 11 N. Y. Suppl. 482.

United States.— Mercantile Trust Co. *v.* Pittsburgh, etc., R. Co., 29 Fed. 732.

See 18 Cent. Dig. tit. "Eminent Domain," § 205 *et seq.*

In Illinois this rule applies where lands are taken for railroads (Illinois Cent. R. Co. *v.* Indiana, etc., Cent. R. Co., 85 Ill. 211; Toledo, etc., R. Co. *v.* Darst, 61 Ill. 231), but not where they are taken for highways. In the latter event the owner of land through which a road is to be made must object to its location in the first instance or he will be precluded from claiming damages (Sangamon County *v.* Brown, 13 Ill. 207).

86. Butler *v.* Morris County, 42 Kan. 416, 22 Pac. 421; St. Paul, etc., R. Co. *v.* Murphy, 19 Minn. 500; Koehler *v.* New York El. R. Co., 159 N. Y. 218, 53 N. E. 1114 [*affirming* 9 N. Y. App. Div. 449, 41 N. Y. Suppl. 209]; Roberts *v.* New York El. R. Co., 155 N. Y. 31, 49 N. E. 262 [*distinguishing* White *v.* Manhattan R. Co., 139 N. Y. 19, 34 N. E. 887]; Murdock *v.* Prospect Park, etc., R. Co., 73 N. Y. 579 [*reversing* 10 Hun 598]; East Pennsylvania R. Co. *v.* Schollenberger, 54 Pa. St. 144.

87. Charleston, etc., R. Co. *v.* Hughes, 105 Ga. 1, 30 S. E. 972, 70 Am. St. Rep. 17; Venable *v.* Wabash Western R. Co., 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68; Gillison *v.* Savannah, etc., R. Co., 7 S. C. 173. "The owner may become, and is in fact, made the involuntary vendor of his land under the exercise of this sovereign power." Manion *v.* Louisville, etc., R. Co., 90 Ky. 491, 494, 14 S. W. 532, 12 Ky. L. Rep. 445; State *v.* Graves, 19 Md. 351, 81 Am. Dec. 639. And no one can be thus compelled to sell who is not a party to the judgment rendered by the tribunal which is created for this purpose. Charleston, etc., R. Co. *v.* Hughes, 105 Ga. 1, 30 S. E. 972, 70 Am. St. Rep. 17. See *infra*, XI, H. When the legislature authorizes the taking of private property, a compensation must be settled either by an agreement between the legislature or the party authorized by the legislature and the owner, or by commissioners mutually selected by the parties, or by the intervention of a jury. Vanhorn *v.* Dorrance, 28 Fed. Cas. No. 16,857, 2 Dall. 304, 1 L. ed. 391. Condemnation proceedings are, until the compensation is fixed and paid or tendered, only in the nature of an executory contract to buy the land. Gillison *v.* Savannah, etc., R. Co., 7 S. C. 173.

88. Costello *v.* Burke, 63 Iowa 361, 19 N. W. 247; Chicago, etc., R. Co. *v.* Selders, 4 Kan. App. 497, 44 Pac. 1012; Kansas City, etc., R. Co. *v.* Phipps, 4 Kan. App. 252, 45 Pac. 926; St. Paul, etc., R. Co. *v.* Minneapolis, 35 Minn. 141, 27 N. W. 500; St. Louis *v.* Koch, 169 Mo. 587, 70 S. W. 143. It has been said that they are in the nature of proceedings *in rem* in the same sense that attachments and foreclosures of mortgages and other liens are proceedings *in rem*. Thompson *v.* Chicago, etc., R. Co., 110 Mo. 147, 19 S. W. 77. In Massachusetts, however, it has been held that they are not strictly proceedings *in rem*, although in some respects they resemble such proceedings. Chander *v.* Railroad Com'rs, 141 Mass. 208, 5 N. E. 509.

Notice by publication.— It is on the ground that condemnation proceedings are proceedings *in rem* that it is held competent for the

to the provisions of the different state legislatures.[89] The proceeding is not one

legislature to provide for constructive notice by publication to parties interested. St. Paul, etc., R. Co. *v.* Minneapolis, 35 Minn. 141, 27 N. W. 500. See *infra*, XI, I, 4, b.

Compliance with statutory requirements.— A proceeding to condemn private property for public use, being a purely statutory proceeding *in rem*, unless it affirmatively appears on the face of the proceedings that every essential prerequisite prescribed by the statute conferring the authority has been complied with, the proceedings will be void. St. Louis *v.* Koch, 169 Mo. 587, 70 S. W. 143. See *infra*, XI, C, D, N.

Effect of mistake as to land.— It follows from the nature of condemnation proceedings that proceedings to condemn land for a highway are invalid, if the award of damages and the subsequent proceedings in terms relate to another and distinct tract of land. Keyes *v.* Minneapolis, 42 Minn. 467, 44 N. W. 529.

89. State *v.* Graves, 19 Md. 351, 81 Am. Dec. 639. The methods in which this power is exerted vary according to circumstances. Sometimes the proceeding is initiated by summoning a jury upon warrant, in the nature of an inquest *ad quod damnum*; or boards of assessors are appointed to appraise damages and benefits, with the right of appeal to a court of record and of review by a jury. State *v.* Graves, 19 Md. 351, 81 Am. Dec. 639. See *supra*, XI, M. Proceedings to condemn land for railroad purposes are purely statutory, and the powers possessed by the court or the judge at chambers in appointing commissioners, reviewing and setting aside their report, and appointing new commissioners, are limited, and prescribed by statute, and can only be exercised in the manner provided by the legislature. Gray *v.* St. Louis, etc., R. Co., 81 Mo. 126; St. Louis *v.* Koch, 169 Mo. 587, 70 S. W. 143. In the absence of any express constitutional provision the land may be appropriated in any mode authorized by the legislature (Potter *v.* Ames, 43 Cal. 75; Secombe *v.* Milwaukee, etc., R. Co., 23 Wall. (U. S.) 108, 23 L. ed. 67), but the prescribed procedure must not destroy or substantially impair the inherent right to compensation (Potter *v.* Ames, 43 Cal. 75). If the constitution prescribes a particular mode of procedure the legislature of course cannot dispense with it. Trippe *v.* Overocker, 7 Colo. 72, 1 Pac. 695.

Exclusiveness of statutory remedy see *infra*, XI, C. D.

Strict compliance with statute see *infra*, X, D, 1.

Turnpike — Branch roads.— Where a statute confers upon a turnpike company the right to construct its main road and branches and prescribes a method for condemning a right of way for the main road only, the method prescribed for the main road is to be followed in acquiring a right of way for the branches. Heady *v.* Vevay, etc., Turnpike Co., 52 Ind. 117.

Condemnation of right of way over another railroad.— If a railroad company files a petition in the probate court, under Howell Annot. St. Mich. § 333, in order to appropriate a right of way over another road, the same proceedings must be had as in ordinary condemnation cases. Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 62 Mich. 564, 29 N. W. 500, 4 Am. St. Rep. 875.

Acquiring right to cross another railroad.— Ill. Rev. St. c. 114, § 209, provides that in case a railroad company objects to the place or mode of crossing its tracks by another railroad, either party may apply to the board of railroad and warehouse commissioners, who shall prescribe the place and manner of such crossing, and sections 18 and 20 of the same chapter, providing generally for the exercise of the power of eminent domain by railroad companies, are to be construed as *in pari materia*, and as making a valid provision for the procedure relating to the place and manner of constructing railroad crossings in the interest of safety; and therefore, in a proceeding by one company to condemn a crossing over the road of another, or even in an equitable proceeding to require a receiver of the company to consent to such crossing, the court must give effect to all its provisions, and cannot ignore the proceedings instituted by defendant company to have the place and manner of the crossing determined. Malott *v.* Collinsville, etc., R. Co., 108 Fed. 313, 47 C. C. A. 345.

Joinder and consolidation of actions and proceedings.— Under Cal. Code Civ. Proc. § 1244, it was held that a proceeding by a railroad company to acquire lands for depot purposes and one to ascertain the compensation for crossing another railroad may be united. California Southern R. Co. *v.* Southern Pac. R. Co., 67 Cal. 59, 7 Pac. 123. But an action against a railroad company for a trespass to land in building and maintaining its road thereon without license or condemnation of the land cannot be joined with a proceeding by the company to condemn the land; and therefore an appeal to the circuit court in the latter proceeding cannot be consolidated with such an action for trespass pending in the same court under a statute allowing consolidation of actions only "when the actions might have been joined." Blesch *v.* Chicago, etc., R. Co., 44 Wis. 593. And it was held in Ohio that a proceeding by a municipal corporation to condemn a portion of a turnpike within its limits, and a suit by the turnpike company to compel the city to appropriate the whole of the pike within its limits, cannot be consolidated. Cincinnati, etc., Turnpike *v.* Cincinnati, 7 Ohio Dec. (Reprint) 337, 2 Cinc. L. Bul. 126.

Street railroads — Separate proceedings.— Although a statute did not expressly provide that separate proceedings might be had by a street railroad company to acquire the rights of the city in its streets, and to acquire the property of private owners, it was held that

according to the course of the common law but is a special proceeding;[90] and it is not one to determine titles, unless this is allowed by the statute, but to fix the compensation and assess the damages.[91] It is distinct in character from proceedings by which money is raised by taxation to make compensation for the land taken.[92] In some jurisdictions condemnation proceedings by cities and by private corporations are not regulated by the general laws, but by the special provisions of their charters, or by the general incorporation laws.[93] In any case, according to the weight of authority, the proceedings are judicial and involve the exercise of judicial power,[94] and an opportunity must be given to the landowner to be heard

it did not forbid the court to permit that course to be taken. *In re* Metropolitan Transit Co., 45 Hun (N. Y.) 159.

Condemnation proceedings by municipality — Municipal regulation.— Where the constitution confers upon a municipality the right of eminent domain, proceedings to acquire lands for streets, parks, waterworks, sewers, and the like are mere matters of municipal regulation. Kansas City *v.* Marsh Oil Co., 140 Mo. 458, 41 S. W. 943.

Condemnation proceedings by federal government.— The provision in the act of congress of Aug. 1, 1888, chapter 728, that, in a proceeding in a United States court to condemn land for the use of the United States, the practice and proceedings shall conform as near as may be to the practice and proceedings existing in the state courts, must give way when the adoption of the state practice would be inconsistent with the terms, would defeat the purpose, or would impair the effect of any legislation by congress. Chappell *v.* U. S., 160 U. S. 499, 16 S. Ct. 397, 40 L. ed. 510. Since there are in South Carolina no fixed forms of pleading in condemnation proceedings, a petition by a duly authorized agent of the United States, the service of such petition on the owner, and a disposition of the matter by the United States district court, is a sufficient compliance with the above-mentioned act of congress. *In re* Rugheimer, 36 Fed. 369.

90. *California.*— Gilmer *v.* Lime Point, 19 Cal. 47.

Colorado.— Colorado Fuel, etc., Co. *v.* Four Mile R. Co., 29 Colo. 90, 66 Pac. 902; Tripp *v.* Overocker, 7 Colo. 72, 1 Pac. 695.

Iowa.— Hartley *v.* Keokuk, etc., R. Co., 85 Iowa 455, 52 N. W. 352.

Massachusetts.— Henderson *v.* Adams, 5 Cush. 610; Valentine *v.* Boston, 20 Pick. 201.

Minnesota.— State *v.* Rapp, 39 Minn. 65, 38 N. W. 926.

Missouri.— Nishnabotna Drainage Dist. *v.* Campbell, 154 Mo. 151, 55 S. W. 276; Kansas City *v.* Marsh Oil Co., 140 Mo. 458, 41 S. W. 943; Cory *v.* Chicago, etc., R. Co., 100 Mo. 282, 13 S. W. 346; Hannibal Bridge Co. *v.* Shaubacker, 49 Mo. 555; State *v.* Green County School Dist. No. 1, 79 Mo. App. 103.

New York.— Matter of One Hundred and Sixty-Third St., 61 Hun 365, 16 N. Y. Suppl. 120 [appeal *dismissed* in 131 N. Y. 569, 30 N. E. 66]; *In re* Department of Public Works, 12 N. Y. Suppl. 345 [*affirmed* in 126 N. Y. 641, 27 N. E. 852]; King *v.* New York, 36 N. Y. 182; *In re* New York, etc., R. Co., 63 How. Pr. 123; Rochester, etc., R. Co. *v.* Beckwith, 10 How. Pr. 168; *In re* Ft. Plain, etc., Plank Road Co., 3 Code Rep. 148.

Vermont.— Courser *v.* Vermont Cent. R. Co., 25 Vt. 476.

West Virginia.— Chesapeake, etc., R. Co. *v.* Pack, 6 W. Va. 397.

Wisconsin.— Gill *v.* Milwaukee, etc., R. Co., 76 Wis. 293, 45 N. W. 23; Cornish *v.* Milwaukee, etc., R. Co., 60 Wis. 476, 19 N. W. 443.

United States.— Union Pac. R. Co. *v.* Leavenworth, etc., R. Co., 29 Fed. 728.

See 18 Cent. Dig. tit. "Eminent Domain," § 449.

Validity of statute.— The general law of Kentucky relating to cities of the first class which provides that the park commissioners may order the condemnation of property is valid, although the course of procedure is no further prescribed than to require that the proceedings shall be instituted by the filing of a petition, since the court has power to regulate the further procedure according to the course of the common law. Louisville Park Com'rs *v.* Dupont, 110 Ky. 743, 62 S. W. 891, 23 Ky. L. Rep. 106.

91. Henry *v.* Centralia, etc., R. Co., 121 Ill. 264, 12 N. E. 744; *In re* Yonkers, 117 N. Y. 564, 23 N. E. 661; Mountz *v.* Philadelphia, etc., R. Co., 203 Pa. St. 128, 52 Atl. 15.

Contra by statute.— Under Cal. Code Civ. Proc. § 1247, which authorizes the court to determine all adverse and conflicting claims to the property, a city may in the same proceeding assert its claim to an interest in the property, and condemn the outstanding interest of others. Los Angeles *v.* Pomeroy, 124 Cal. 597, 57 Pac. 585.

92. St. Louis *v.* Buss, 159 Mo. 9, 59 S. W. 969; State *v.* Green County School Dist. No. 1, 79 Mo. App. 103.

93. See Kansas City *v.* Marsh Oil Co., 140 Mo. 458, 41 S. W. 943 (cities); North Missouri R. Co. *v.* Lackland, 25 Mo. 515 (railroad companies); *In re* Ft. Plain, etc., Plank Road Co., 3 Code Rep. (N. Y.) 148 (general road law); Georgia, etc., R. Co. *v.* Ridlehuber, 38 S. C. 308, 17 S. E. 24 (railroad companies).

94. Tracy *v.* Elizabethtown, etc., R. Co., 78 Ky. 309; Burke *v.* Kansas City, 118 Mo. 309, 24 S. W. 48; Union Depot Co. *v.* Frederick, 117 Mo. 138, 21 S. W. 1118, 1130, 26 S. W. 350; State *v.* Neville, 110 Mo. 345, 19 S. W. 491; Thompson *v.* Chicago, etc., R. Co., 110 Mo. 147, 19 S. W. 77; Plum *v.* Kansas

on the question of compensation,[95] and subject to some qualification,[96] on the questions whether the property is subject to appropriation and the propriety and necessity of the appropriation.[97]

B. The Right to Institute Proceedings — 1. In General. The legislature has the power to prescribe the persons or corporations who may institute condemnation proceedings, so long as the use for which it is sought to appropriate the land is a public one,[98] and to prescribe the conditions and circumstances under which such proceedings may be instituted;[99] and it follows that such proceedings can be instituted by those persons, and corporations, and those only, upon whom the requisite authority has been conferred by the legislature,[1] and only on compliance with the conditions prescribed by the legislature.[2] Statutes governing condemnation proceedings often merely regulate the procedure, and authorize such proceedings only when the person or corporation instituting the same has authority under some independent statute or charter.[3]

2. Who May Institute Proceedings.[4] Where the government, whether federal or state, is the condemning party, the application may be made by the government itself, or by any officer or agent designated by it.[5] Proceedings instituted

City, 101 Mo. 525, 14 S. W. 657, 10 L. R. A. 371; North Missouri R. Co. *v.* Lackland, 25 Mo. 515; Union Pac. R. Co. *v.* Leavenworth, etc., R. Co., 29 Fed. 728, under Kansas statute.

Contra.— But it has been held in Michigan that a railroad condemnation proceeding, although before a jury, is not a judicial proceeding so as to give the judge a right to interfere therein by granting an *ex parte* injunction restraining the owner from prosecuting an action against the condemning party as to the land in controversy. Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456, 11 N. W. 271.

Right to jury.— It has been held that a statute authorizing the taking of land, but which does not secure to the landowner the right of trial by jury, affords no protection against an action at law by the owner for the recovery of his damages. Day *v.* Stetson, 8 Me. 365. *Compare infra*, XI, M, 2, a.

95. Potter *v.* Ames, 43 Cal. 75; Kramer *v.* Cleveland, etc., R. Co., 1 Ohio Dec. (Reprint) 474, 10 West. L. J. 138; Union Pac. R. Co. *v.* Leavenworth, etc., R. Co., 29 Fed. 728, under Kansas statute. See also People *v.* Adirondack R. Co., 160 N. Y. 225, 54 N. E. 689 [*affirmed* in 176 U. S. 335, 20 S. Ct. 460, 44 L. ed. 492].

Notice see *infra*, XI, I.

96. See *supra*, VII; VIII; IX.

97. Toledo, etc., R. Co. *v.* Toledo, 5 Ohio S. & C. Pl. Dec. 306, 7 Ohio N. P. 285.

Notice see *infra*, XI, I.

98. See *supra*, VI; and cases cited in the following notes.

99. See *supra*, V, D; and the cases cited in the following notes.

1. Ventura County *v.* Thompson, 51 Cal. 577; Russell *v.* Chicago, etc., R. Co., 98 Ill. App. 347; Matter of Thomson, 86 Hun (N. Y.) 405, 33 N. Y. Suppl. 467; Prescott Irr. Co. *v.* Flathers, 20 Wash. 454, 55 Pac. 635, irrigation companies authorized to institute proceedings.

2. See *infra*, XI, C, 2; XI, D.

3. Matter of Thomson, 86 Hun (N. Y.) 405, 33 N. Y. Suppl. 467. See also Coles *v.* Midland Telephone, etc., Co., 67 N. J. L. 490, 51 Atl. 448 [*affirmed* in 68 N. J. L. 413, 53 Atl. 1125]; Paterson, etc., Traction Co. *v.* De Gray, (N. J. Sup. 1903) 56 Atl. 250; Prescott Irr. Co. *v.* Flathers, 20 Wash. 454, 55 Pac. 635.

4. Initiation of proceedings by landowner see *infra*, XII, U.

5. Chappell *v.* U. S., 160 U. S. 499, 16 S. Ct. 397, 40 L. ed. 510; *In re* Rugheimer, 36 Fed. 369. It may be instituted by the secretary of the treasury or the district attorney. U. S. *v.* Block 121, 24 Fed. Cas. No. 14,610, 3 Biss. 208. It must appear, however, that the application is made by an authorized officer, and that in his opinion the condemnation of the property is necessary. *In re* Rugheimer, *supra*.

The state may make the application itself, or may make it through the agency of others, whether domestic or foreign corporations, and whether a member of the domestic government or of the federal government, and even through a foreign government. Gilmer *v.* Lime Point, 18 Cal. 229. But where the act directs that proceedings for the use of the state shall be commenced in the name of the people of the state, if they are commenced in the name of the governor, the lieutenant-governor, and secretary of state, they are null and void. Stanford *v.* Worn, 27 Cal. 171.

Where a proceeding under the federal statute is commenced in the name of the secretary of the treasury, the petition may properly be amended by making the United States the formal petitioner. Chappell *v.* U. S., 160 U. S. 499, 16 S. Ct. 397, 40 L. ed. 510.

Under the New York statute providing that where land is taken for the use of the United States like proceedings shall be had as in cases where it is taken for the use of the state, in which latter case the proceeding is to be instituted in the name of the governor, proceedings to take land for the United States need not be in the name of the governor, but may be brought in the name of the

by a political subdivision of the state should be in the name of such subdivision,[6] unless the charter or statute provides otherwise.[7] Where the land is to be condemned for railroad purposes the railroad company should initiate the proceedings,[8] unless the statute permits either party to do so.[9] By the weight of authority, when a corporation seeks to condemn land, it is sufficient to show that it is a corporation *de facto*.[10] In the absence of statutory authority therefor one railroad company cannot institute proceedings to condemn land for the use of another.[11] But if the right is transferred during the pendency of the proceedings, it seems that the proceedings may be continued for the use of the assignee or the assignee may be substituted as the condemning party,[12] and a principal or *cestui que trust* may be substituted for the agent or trustee.[13]

3. TITLE OF APPLICANT.[14] Under statutes authorizing persons who own land and desire to erect thereon a mill, machinery, or other works which will be useful to the public, to obtain the right to do so by condemnation proceedings and payment of damages to adjoining landowners, it has been held that the petitioner must

United States by officers duly authorized. U. S. *v.* Dumplin Island, 1 Barb. 24.

6. Lake County *v.* Allman, 102 Cal. 432, 36 Pac. 767; Monterey County *v.* Cushing, 83 Cal. 507, 23 Pac. 700; Jamaica *v.* Denton, 70 N. Y. Suppl. 837; *In re* Board of St. Opening, 1 N. Y. Suppl. 145.

7. Condemnation proceedings by a city or county, etc., must be instituted by or through the officer or board prescribed by its charter or by statute. Ventura County *v.* Thompson, 51 Cal. 577. See Matter of New York, 74 N. Y. App. Div. 343, 77 N. Y. Suppl. 566.

Under the Illinois statute declaring that the title to school-houses and sites shall be vested in the school trustees in their corporate capacity, and providing that all conveyances of real estate shall be made to them in their corporate capacity, the school directors, however, being given control of school-houses, and being authorized to determine the compensation to be paid for a school-house site, and, in case of a failure to agree, to have the compensation determined in the manner provided by the eminent domain statute, it has been held that the school trustees, and not the school directors, constitute the proper body to institute condemnation proceedings for a school site. Banks *v.* McLean County School Dist. No. 1, 194 Ill. 247, 62 N. E. 604.

Opening street — Wharf property. — The city of New York, in proceedings for opening a street, may take wharf property, although acting through the board of street opening and improvements, and it is not necessary that proceedings shall be taken by the department of docks. Matter of New York, 74 N. Y. App. Div. 343, 77 N. Y. Suppl. 566.

8. Sherman *v.* Milwaukee, etc., R. Co., 40 Wis. 645. The proceedings should be brought in the name of the company, although the property is in the hands of a receiver. Bigelow *v.* Draper, 6 N. D. 152, 69 N. W. 570. If the railroad is operated by a lessee proceedings should nevertheless be taken in the name of the lessor. Gottschalk *v.* Lincoln, etc., R. Co., 14 Nebr. 389, 15 N. W. 695; Dietrichs *v.* Lincoln, etc., R. Co., 13 Nebr. 361, 13 N. W. 624. Although a railroad company has sold and conveyed its rights, yet, if it has actually begun the construction of its road, it may institute the proceedings to condemn land. Cory *v.* Chicago, etc., R. Co., 100 Mo. 282, 13 S. W. 346.

9. Cairo, etc., R. Co. *v.* Trout, 32 Ark. 17; Marion, etc., R. Co. *v.* Ward, 9 Ind. 123; Allen *v.* Wilmington, etc., R. Co., 102 N. C. 381, 9 S. E. 4. Where a railroad charter authorized either the landowner or the company to institute proceedings, but the owner brought ejectment for lands to which the railroad had acquired no title, it was held that as the company did not take the initiative it must answer to the owner for every invasion of his rights. Beck *v.* Louisville, etc., R. Co., 65 Miss. 172, 3 So. 252.

10. See *infra*, XI, L, 4.

11. Swinney *v.* Ft. Wayne, etc., R. Co., 59 Ind. 205.

12. Bradley *v.* Northern Pac. R. Co., 38 Minn. 234, 36 N. W. 345; Matter of New York El. R. Co., 17 N. Y. Suppl. 778. But see Mahoney *v.* Spring Valley Water Works Co., 52 Cal. 159.

If a railroad company, after the institution of condemnation proceedings, leases its road to another company for a long term of years, the lease does not *per se* abrogate the proceedings, since the land sought to be condemned may be as necessary for the purposes of the corporation instituting the proceedings after as before the lease. If it is necessary only for the purposes of the lessee, even then the proceedings may be continued by the lessee in the name of the lessor. Kip *v.* New York, etc., R. Co., 67 N. Y. 227 [*affirming* 6 Hun 24]. It has been held in Kansas that a motion to substitute a new company with which the original petitioner has become consolidated cannot be made later than a year from the consolidation, except with its consent. Kansas City, etc., R. Co. *v.* Way, 60 Kan. 856, 56 Pac. 78.

13. McIntyre *v.* Easton, etc., R. Co., 26 N. J. Eq. 425; Chappell *v.* U. S., 160 U. S. 499, 16 S. Ct. 397, 40 L. ed. 510.

14. **Title of landowner to sustain proceedings by him** see *infra*, XII, U.

have title to the land on which he proposes to erect the improvement.[15] In Virginia, on the other hand, it has been held that, although the statute uses the term "owner," it is sufficient if he is in actual possession and occupation of the land, and that the question of title cannot be tried.[16]

4. PROCEEDINGS BY INDIVIDUALS.[17] An individual may institute proceedings to condemn land if authorized by statute, provided he is in charge of a public use,[18] or is acting, under statutory authority, as the agent or representative of the state, of a municipality, or of a private corporation vested with the power of eminent domain;[19] but an individual cannot institute proceedings to obtain a right of way for a railroad for the purpose of transferring the same to a railroad company under a contract or otherwise.[20]

C. Jurisdiction — 1. IN GENERAL. In order that condemnation proceedings may be valid the court must have jurisdiction, and every fact essential to the exercise of the special jurisdiction conferred by the statute must appear on the record.[21] But if it appears that the jurisdiction has been conferred, it continues in any particular case from the filing of the petition to final adjournment of the term at which final judgment is rendered.[22] Jurisdiction is conferred only for the purposes mentioned in, and for the exercise of the powers conferred by, the statute or charter.[23] Where the petition presents to the court a case which it has under the statute authority to entertain, on proof of the notice which the statute requires,

15. Smith *v.* Connelly, 1 T. B. Mon. (Ky.) 58.

16. Pitzer *v.* Williams, 2 Rob. (Va.) 241.

17. See also *supra*, XI, B, 2; *infra*, XII, U.

18. See Beveridge *v.* Lewis, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083, 92 Am. St. Rep. 188, 59 L. R. A. 581; Smith *v.* Connelly, 1 T. B. Mon. (Ky.) 58; Pitzer *v.* Williams, 2 Rob. (Va.) 241. And see *supra*, VI.

19. See Beveridge *v.* Lewis, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083, 92 Am. St. Rep. 188, 59 L. R. A. 581, holding that if a proceeding to condemn land may be instituted in the name of an agent or other representative, such agency must be stated.

20. Beveridge *v.* Lewis, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083, 92 Am. St. Rep. 188, 59 L. R. A. 581, holding that such a person is not in charge of a public use.

21. Prentiss *v.* Parks, 65 Me. 559; Nishnabotna Drainage Dist. *v.* Campbell, 154 Mo. 151, 55 S. W. 276; St. Louis, etc., R. Co. *v.* Lewright, 113 Mo. 660, 21 S. W. 210; Chicago, etc., R. Co. *v.* Young, 96 Mo. 39, 8 S. W. 776; Anderson *v.* Pemberton, 89 Mo. 61, 1 S. W. 216; Kansas City, etc., R. Co. *v.* Campbell, 62 Mo. 585; Cunningham *v.* Pacific R. Co., 61 Mo. 33; Ells *v.* Pacific R. Co., 51 Mo. 200; West *v.* Porter, 89 Mo. App. 150; Taylor *v.* Todd, 48 Mo. App. 550; Fore *v.* Hoke, 48 Mo. App. 254; Blize *v.* Castlio, 8 Mo. App. 290; Rogers *v.* St. Charles, 3 Mo. App. 41. See *infra*, XI, H.

Prerequisites to jurisdiction see *infra*, XI, C, 2.

General and special jurisdiction.— It has been held that if the court is one of general jurisdiction, the usual presumption as to jurisdiction will apply (Buddecke *v.* Ziegenhein, 122 Mo. 239, 26 S. W. 696; St. Louis *v.* Lanigan, 97 Mo. 175, 10 S. W. 475; Fore *v.* Hoke, 48 Mo. App. 254); but no presumptions can be indulged if the proceeding is in an inferior tribunal of limited statutory powers (Leonard *v.* Sparks, 63 Mo. App. 585).

Under the California civil code, providing, in one section, that all proceedings must be brought in the superior court of the county in which the property is situated, and in another section that the power may be exercised for the sewerage of any incorporated city, and a municipal incorporation act providing that when it is necessary to take private property for a sewer the board of trustees may direct proceedings to be had, it has been held that the authority of the superior court to entertain such proceedings is derived from the civil code, and not from the municipal incorporation act, and therefore that the absence of the circumstances under which that act authorizes proceedings to be had goes to the right of the trustees to maintain them, and not to the jurisdiction of the court. Bishop *v.* Los Angeles Super. Ct., 87 Cal. 226, 25 Pac. 435.

22. St. Louis *v.* Weber, 140 Mo. 515, 41 S. W. 965.

Numerous continuances of the proceeding will not deprive the court of jurisdiction of the case, although the charter requires that the proceedings shall be disposed of at the first term. Lovitt *v.* Russell, 138 Mo. 474, 40 S. W. 123.

23. Where a railroad charter gives the company the right to condemn land for the construction and maintenance of its road, proceedings instituted to condemn land to be used not only for the purposes of the road, but also for the alteration of a public street are void, even on collateral attack. Chicago, etc., R. Co. *v.* Galt, 133 Ill. 657, 23 N. E. 425, 24 N. E. 674. So, where in proceedings in the probate court permission was granted by the court to raise a dam on a non-navigable stream for the purpose of supplying water for a mill, it was held that

it acquires jurisdiction of the subject-matter,[24] and if the court has jurisdiction of the person and of the subject-matter its judgment is not void, although the proceedings may be erroneous.[25] Condemnation proceedings must stand or fall as an entirety.[26] A court has no jurisdiction to condemn property situated in another state.[27] Nor has a court of equity jurisdiction of condemnation proceedings.[28] The court which is first applied to has exclusive jurisdiction.[29] Objection to the jurisdiction may be raised at any stage of the proceeding.[30] The appearance of

where the application is silent as to whether the dam was originally erected under the order of the court or in the exercise of the riparian owner's common-law right, and did not show in the words of the statute that the mill was "a water grist-mill that grinds for toll," in which the public had legal rights, the judgment would be reversed for the want of an affirmative showing in the record of the existence of the jurisdiction conferred by statute. Bottoms *v.* Brewer, 54 Ala. 288. And where it did not appear from the record that proceedings were instituted by a railroad company, or that it was a party to them, had notice of them, or was served with summons, the judgment was held void for want of jurisdiction. Junction City, etc., R. Co. *v.* Silver, 27 Kan. 741.

Condemnation of part of lands.— The jurisdiction is not affected by the fact that the proceedings are for the purpose of condemning only a part of the lands, the condemnation of which is provided by the ordinance. South Chicago City R. Co. *v.* Chicago, 196 Ill. 490, 63 N. E. 1046.

24. Rheiner *v.* Union Depot, etc., Co., 31 Minn. 289, 17 N. W. 623; Chicago, etc., R. Co. *v.* Swan, 120 Mo. 30, 25 S. W. 534; Kansas City *v.* Morse, 105 Mo. 510, 16 S. W. 893.

Effect of settlement.— If the parties are properly brought before the court, its jurisdiction cannot be affected by a settlement afterward made with plaintiff, where there are other parties remaining whose rights are to be adjudicated. St. Louis County Ct. *v.* Griswold, 58 Mo. 175.

25. Alameda *v.* Cohen, 133 Cal. 5, 65 Pac. 127; Nolensville Turnpike Co. *v.* Quinby, 8 Humphr. (Tenn.) 476. *Compare* Junction City, etc., R. Co. *v.* Silver, 27 Kan. 741.

Jurisdiction of parties.— It is just as essential to the right of condemnation that the body exercising the power have jurisdiction of the defendants, as of the subject-matter in controversy. Nishnabotna Drainage Dist. *v.* Campbell, 154 Mo. 151, 55 S. W. 276.

Where an appeal is taken from the award of commissioners on the matter of damages, it would seem to be a waiver of all irregularities in the previous proceedings. If it is desired to take advantage of such irregularities the record must be brought up by certiorari. Fitchburgh R. Co. *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 58; Lehigh Valley R. Co. *v.* Dover, etc., R. Co., 43 N. J. L. 528; Delaware, etc., R. Co. *v.* Burson, 61 Pa. St. 369.

Waiver of objection.— A defect of jurisdiction arising from want of notice to the owner may be waived by the owner; and the taking and prosecuting of an appeal waives any jurisdictional defect arising from such want of notice. Rheiner *v.* Union Depot, etc., Co., 31 Minn. 289, 17 N. W. 623.

26. Anderson *v.* Pemberton, 89 Mo. 61, 1 S. W. 216. If there is any one party in interest over whom jurisdiction has not been obtained the whole proceeding is void. Anderson *v.* Pemberton, *supra*.

27. Crosby *v.* Hanover, 36 N. H. 404; Saunders *v.* Bluefield Waterworks, etc., Co., 58 Fed. 133.

28. Union Mut. L. Ins. Co. *v.* Slee, 123 Ill. 57, 12 N. E. 543, 13 N. E. 222; Buchner *v.* Chicago, etc., R. Co., 56 Wis. 403, 14 N. W. 273. *Compare* McNail *v.* Paducah, etc., R. Co., 3 Tenn. Cas. 580. The exercise of the right of eminent domain is not one of the heads of equity, and the question whether the taking is necessary and the further question of the amount of compensation due are neither of them cognizable by a bill in equity brought to amend the proceedings of the proper tribunal. Clark *v.* Montrose Tp. Drain Com'rs, 50 Mich. 618, 16 N. W. 167.

Upon a bill by a mortgagor to redeem, where it appears that one of the defendants, a railroad company, has sought to condemn the mortgaged property, but has failed to do so by reason of a flaw in the proceedings, the court cannot entertain new proceedings to accomplish the condemnation, but will remit the parties to their remedy under the statute. Union Mut. L. Ins. Co. *v.* Slee, 123 Ill. 57, 12 N. E. 543, 13 N. E. 222.

The want of jurisdiction is not cured by a constitutional provision that no judgment or decree in any circuit court shall be reversed or annulled for want of jurisdiction, arising from any error or mistake as to whether the cause was of equity or common-law jurisdiction. Yazoo-Mississippi Delta Levee Com'rs *v.* Brooks, 76 Miss. 635, 25 So. 358.

29. Miller *v.* Barnstable County Com'rs, 119 Mass. 485. See *infra*, XI, F, 1.

30. *In re* Grove St., 61 Cal. 438; Hopkins *v.* Kansas City, etc., R. Co., 79 Mo. 98; Kansas City, etc., R. Co. *v.* Campbell, 62 Mo. 585; Rogers *v.* St. Charles, 3 Mo. App. 41. Objection to the jurisdiction may be taken for the first time on appeal. *In re* Grove St., 61 Cal. 438; Austell *v.* Atlanta, 100 Ga. 182, 27 S. E. 983.

On application for a writ of mandamus to compel a village to levy a tax in order to pay the damages awarded the relator in proceedings for the opening of a street, the village is not estopped by the part which it or its officers took in the condemnation proceed-

the parties against whom the proceeding is instituted will confer jurisdiction, if the court is one authorized to entertain the proceedings.[31]

2. PREREQUISITES TO JURISDICTION. Whenever it is attempted by summary proceedings to divest the owner of his property, every essential prerequisite to the jurisdiction called for by the statute must be strictly complied with, and this must affirmatively appear on the face of the proceedings, in order to give them validity.[32] Thus where the statute provides that a proposition for the establishment

ings from claiming that they were void for want of jurisdiction. People v. Whitney's Point, 32 Hun (N. Y.) 508.

31. St. Louis, etc., R. Co. v. Donovan, 149 Mo. 93, 50 S. W. 286; Union Depot Co. v. Frederick, 117 Mo. 138, 21 S. W. 1118, 1130, 26 S. W. 350.

32. *California.*— Siskiyou County v. Gamlich, 110 Cal. 94, 42 Pac. 468; Emigrant Ditch Co. v. Webber, 108 Cal. 88, 40 Pac. 1061; California Southern R. Co. v. Kimball, 61 Cal. 90; San Francisco, etc., Water Co. v. Alameda Water Co., 36 Cal. 639. Under the civil code a municipality may maintain proceedings to condemn land for a public street before it has resorted to the steps contemplated by the act of 1889 relating to the laying out of streets in municipalities. Los Angeles v. Leavis, 119 Cal. 164, 51 Pac. 34. And in this state an order by the board of supervisors for the payment "out of the proper fund" of money awarded for land taken for a highway is sufficient to sustain an action for the condemnation, since the particular fund need not be designated. Sutter County v. McGriff, 130 Cal. 124, 62 Pac. 412. In an action to condemn land for a public road, it is only necessary, in order to make out a *prima facie* case, for plaintiff to prove the presentation to the board of supervisors of a regular petition with a sufficient bond for the costs and expenses; the record of the board showing the appointment of viewers; the report of the viewers and its approval by the board; the assessment of damages; the order of the board that the damages so assessed be set apart in the treasury out of the proper fund; and proof that the same was set apart more than ten days prior to the commencement of the action, but had not been accepted by the owner. Siskiyou County v. Gamlich, 110 Cal. 94, 42 Pac. 468. See also Sutter County v. Tisdale, 136 Cal. 474, 69 Pac. 141. Under Pol. Code, §§ 2686, 2690, the decision of the supervisors as to the sufficiency and regularity of the proceedings is final as against a collateral attack. Sutter County v. Tisdale, 136 Cal. 474, 69 Pac. 141.

Connecticut.— New York, etc., R. Co. v. Long, 69 Conn. 424, 37 Atl. 1070.

Illinois.— Galena, etc., Union R. Co. v. Pound, 22 Ill. 399.

Indiana.— Indianapolis, etc., R. Co. v. Reed, 52 Ind. 357.

Iowa.— Crandall v. Des Moines, etc., R. Co., 103 Iowa 684, 72 N. W. 778.

Massachusetts.— Derby v. Framingham, etc., R. Co., 119 Mass. 516 (action by commissioners prescribing limits within which lands may be taken); Blaisdell v. Winthrop, 118 Mass. 138 (holding it essential to the maintenance of a petition for the assessment of damages for the laying out and establishment of a town way that the petitioner should show that the way was legally laid out).

Michigan.— Laue v. Saginaw, 53 Mich. 442, 19 N. W. 137; Powers' Appeal, 29 Mich. 504.

Minnesota.— Teick v. Carver County, 11 Minn. 292.

Missouri.— Nishnabotna Drainage Dist. v. Campbell, 154 Mo. 151, 55 S. W. 276; St. Louis v. Franks, 78 Mo. 41 [*affirming* 9 Mo. App. 579]; Kansas City, etc., R. Co. v. Campbell, 62 Mo. 585; Cunningham v. Pacific R. Co., 61 Mo. 33; Blize v. Castlio, 8 Mo. App. 290. Nothing will be supplied by intendment. Jones v. Zink, 65 Mo. App. 409; Rousey v. Wood, 57 Mo. App. 650. The record must be complete in itself; it cannot be eked out by extraneous evidence. Chicago, etc., R. Co. v. Young, 96 Mo. 39, 8 S. W. 776; Cunningham v. Pacific R. Co., 61 Mo. 33; Taylor v. Todd, 48 Mo. App. 550; Fore v. Hoke, 48 Mo. App. 254.

New Jersey.— State v. Jersey City, 54 N. J. L. 49, 22 Atl. 1052; Broome v. New York, etc., Telephone Co., 49 N. J. L. 624, 9 Atl. 754; Vanwickle v. Camden, etc., Transp. Co., 14 N. J. L. 162.

New York.—*In re* Buffalo, 78 N. Y. 362; Matter of Le Roy, 35 N. Y. App. Div. 177, 55 N. Y. Suppl. 149 [*affirming* 23 Misc. 53, 50 N. Y. Suppl. 611]; Citizens' Water-Works Co. v. Parry, 59 Hun 202, 13 N. Y. Suppl. 490 (holding that where the statute provides that a water company, when it shall have made a contract with any town or village to supply said town or village with water, may condemn land, the existence of a contract is a condition precedent to the right); People v. Whitney's Point, 32 Hun 508; Water Com'rs v. Clark, 3 N. Y. Suppl. 347; Matter of Schreiber, 3 Abb. N. Cas. 68; Gilbert v. Columbia Turnpike Co., 3 Johns. Cas. 107 (holding that an inquisition for the taking of land for a turnpike would be set aside, where it omitted to state a disagreement between the owners of the lands and the turnpike company and that the judge who appointed the commissioners was not interested).

Ohio.— Atkinson v. Marietta, etc., R. Co., 15 Ohio St. 21; Toledo Consol. St. R. Co. v. Toledo Electric St. R. Co., 6 Ohio Cir. Ct. 362, 3 Ohio Cir. Dec. 493.

Oregon.— Northern Pac. Terminal Co. v. Portland, 14 Oreg. 24, 13 Pac. 705 (holding that section 93 of the charter of Portland, Oregon, which declares that in all actions, suits, and proceedings concerning the open-

of the public work shall be submitted to a popular vote, if there is no such submission or if it is insufficient, the proceeding to condemn is without authority.[33] The same rule applies where the statute requires the consent of a person or of a city or other body,[34] inability to agree with the landowner,[35] the passage of an ordinance or resolution by a municipal corporation or board,[36] determination of the necessity for the taking by commissioners or others,[37] the acceptance of the

ing, laying out, establishing, or widening of any street or alley, all the proceedings shall be presumed to have been regularly and legally taken, until the contrary is shown, applies only after jurisdiction is acquired); Oregon R., etc., Co. *v.* Oregon Real Estate Co., 10 Oreg. 444; Douglas County Road Co. *v.* Abraham, 5 Oreg. 318.

Pennsylvania.— Reitenbaugh *v.* Chester Valley R. Co., 21 Pa. St. 100. *Compare* O'Hara *v.* Pennsylvania R. Co., 25 Pa. St. 445, showing by affidavit.

Rhode Island.—Howland *v.* Little Compton School Dist. No. 3, 16 R. I. 257, 15 Atl. 74.

Texas.— Porter *v.* Abilene, (Civ. App. 1890) 16 S. W. 107.

Utah.—Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

West Virginia.— Chesapeake, etc., R. Co. *v.* Pack, 6 W. Va. 397.

Wisconsin.— Svennes *v.* West Salem, 114 Wis. 650, 91 N. W. 121.

United States.— Madison *v.* Daley, 58 Fed. 751; Binney *v.* Chesapeake, etc., Canal Co., 8 Pet. 201, 8 L. ed. 917, holding that a canal company could not take private property or entitle itself to flow the lands of third persons until it had completed all the steps contemplated by law.

See 18 Cent. Dig. tit. "Eminent Domain," § 461 *et seq.* And see the other cases cited *supra*, XI, B; *infra*, XI, D.

33. Matter of Le Roy, 35 N. Y. App. Div. 177, 55 N. Y. Suppl. 149 [*affirming* 23 Misc. 53, 50 N. Y. Suppl. 611], holding that a compliance with the requirement of the New York statute of 1894, providing for establishing a lighting plant if authorized at a special election, is a condition precedent to the purchase or condemnation of an existing lighting plant, and cannot be waived by the village; and therefore that the village cannot be estopped by recitals in the pleadings that a valid election has been held.

Such action is not necessary unless required by statute. Thus under a New Jersey act, making it lawful for the inhabitants of Rahway, whenever it should be deemed expedient for them so to do, to pull down and remove certain dams, the maintenance of which was detrimental to public health, it was held that no action by the inhabitants of Rahway was requisite to authorize the trustees of the town to act. Miller *v.* Craig, 11 N. J. Eq. 175.

34. Hampton *v.* Clinton Water, etc., Co., 65 N. J. L. 158, 46 Atl. 650; Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 6 Ohio Cir. Ct. 362, 3 Ohio Cir. Dec. 493; Chesapeake, etc., R. Co. *v.* Pack, 6 W. Va. 397. Under an act providing for waterworks for supplying cities with water, and requiring the consent in writing of the town or city authorities to be filed with the secretary of state as a prerequisite to jurisdiction, a failure to file such certificate will defeat an attempted condemnation of property by the waterworks company. Hampton *v.* Clinton Water, etc., Co., *supra*. The consent, when requisite, must be proved or admitted as given in court, before or at the time when the court adjudicates the right to take the land and proceeds to appoint the commissioners. Chesapeake, etc., R. Co. *v.* Pack, 6 W. Va. 397.

Time of consent.— Although it be conceded that city streets cannot be used by a railroad company until the right has been granted by the city, it is not necessary that such a grant shall precede the institution of proceedings to condemn the rights of the abutting owners. California Southern R. Co. *v.* Kimball, 61 Cal. 90.

Such consent is not necessary unless required by the statute. See Ligare *v.* Chicago, etc., R. Co., 166 Ill. 249, 46 N. E. 803 (holding that the consent of a city is not in Illinois a necessary prerequisite to the condemnation of property for a right of way in the city by a railroad company which is chartered by the state and authorized by its charter to build and operate its road to such city); Crary *v.* Port Arthur Channel, etc., Co., 92 Tex. 275, 47 S. W. 967 (holding that under Tex. Rev. St. arts. 721, 722, authorizing channel companies to construct channels from the Gulf inland and to condemn land therefor, such a company need not show permission of the secretary of war for such construction, since the consent of the secretary does not concern the landowner). A railroad company could not object to the condemnation of its right of way by a telegraph company on the ground that the latter had not obtained leave from the municipal authorities to erect its line through the towns along the proposed route, as required by statute. Union Pac. R. Co. *v.* Colorado Postal Tel. Cable Co., 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106.

Ordinance or resolution see *infra*, XI, D, 5.

35. See *infra*, XI, D, 3.

36. See *infra*, XI, D, 5.

37. In the taking of land for railroad purposes under the Connecticut statute, the approval of the railroad commissioners is the essential fact to show necessity, and this essential fact is shown by an authenticated copy of the vote of the applicant to take, and the ordering of the taking, the land described, with a like copy of the doings of the railroad commissioners thereunder. New York, etc., R. Co. *v.* Long, 69 Conn. 424, 37

provisions of a statute or ordinance,[38] or notice to the landowner or other persons interested.[39] It has been held that the corporate existence and the right to exercise the power of eminent domain must be shown,[40] although the rule as to showing the corporate existence is by no means uniform, and the weight of authority is to the effect that it is sufficient for a condemning corporation to show that it is a corporation *de facto*.[41] The preliminary questions going to the right to condemn must be determined before the proceedings are had for fixing the compen-

Atl. 1070. And under the Iowa statute, providing that any completed and operating railroad company may condemn lands for necessary additional depot grounds, but also providing that before such condemnation the company shall apply to the railway commissioners, who shall notify the landowners, and certify to the district court the amount and description of additional land necessary, it is held that the action of the commissioners must precede the effort to condemn, regardless of whether the land already occupied by the railroad company was obtained by purchase or condemnation. Crandall *v.* Des Moines, etc., R. Co., 103 Iowa 684, 72 N. W. 778. Under the Texas statute, however, authorizing channel companies to construct channels from the Gulf so far inland as to reach places of safety from storms and tidal waves, and to condemn land therefor, such a company need not show, as a prerequisite to condemnation, that it is necessary to take the land in order to reach a place of safety. Crary *v.* Port Arthur Channel, etc., Co., 92 Tex. 275, 47 S. W. 967. And in a proceeding under the Colorado irrigation law to condemn for reservoir purposes land covered by water, it was held too late, after the owner demanded a jury and entered on the trial, to ask for the appointment of commissioners to determine whether or not a necessity existed for the condemnation of the land. Siedler *v.* Seely, 8 Colo. App. 499, 46 Pac. 848.

Necessity for taking, etc., and by whom it is to be determined see *supra*, VIII; IX.

38. Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21; Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

39. See *infra*, XI, I.

40. *In re* Brooklyn, etc., R. Co., 72 N. Y. 245; Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21. Under the provisions of W. Va. Code, c. 42, when a company incorporated for the construction of an internal improvement makes application to a circuit court to appoint commissioners to ascertain a just compensation to the owner of land proposed to be taken, the applicant must prove, or the owner must admit, or it must in some way appear to the court, that the applicant has a lawful right to take the land for the purpose stated in the application, and the court must decide that fact before the appointment of freeholders. Chesapeake, etc., R. Co. *v.* Pack, 6 W. Va. 397.

A description of the route of a telegraph or telephone company in the articles of incorporation is not necessary, if the general purpose of conducting a telegraph or telephone business throughout the state is expressed therein. St. Louis, etc., R. Co. *v.* Southwestern Telephone, etc., Co., 121 Fed. 276, 58 C. C. A. 198.

41. See *infra*, XI, L, 4, a.

In California, while Civ. Code, § 299, providing that any corporation holding property in a county shall not maintain an action in relation to such property, without filing a copy of its articles of incorporation with the clerk of the county in which such property is situated, does not apply to corporations seeking to condemn property, yet, where a ditch company incorporated in Tulare county seeks to condemn defendant's land in Fresno county, and alleges its ownership of ditches, canals, and water in Fresno county, which ownership is denied by defendant, the issue involves the determination of the ownership of property claimed by plaintiff, and the action cannot be maintained until a copy of its articles of incorporation is filed in Fresno county. Emigrant Ditch Co. *v.* Webber, 108 Cal. 88, 40 Pac. 1061.

In Ohio the right of persons associated as a railroad corporation to condemn private property for the use of the railroad depends on the legal sufficiency and validity of the certificate and public record of organization, from which they have their corporate powers. Atlantic, etc., R. Co. *v.* Sullivant, 5 Ohio St. 276.

In Indiana, however, upon an application by a turnpike company for the appointment of appraisers, the county commissioners are not required to ascertain and determine as a jurisdictional fact whether the company has been duly and legally organized. Rhodes *v.* Piper, 40 Ind. 369.

In West Virginia the delivery of the certificate of incorporation of a railroad company or of a properly certified copy of it to the clerk of the county court for record in the county in which is the principal office of such company, as required by the code, is not a condition precedent to the proper and lawful exercise of the right to condemn. Wheeling Bridge, etc., R. Co. *v.* Camden Consol. Oil Co., 35 W. Va. 205, 13 S. E. 369.

In England, by section 16 of the Lands Clauses Act of 1845 the subscription of the whole of the capital stock of the company, and a certificate from two justices to that effect, were made conditions precedent to its putting in force any of the powers conferred by the act or by any special act into which it is incorporated. Ystalyfera Iron Co. *v.* Neath, etc., R. Co., L. R. 17 Eq. 142, 43 L. J. Ch. 476, 29 L. T. Rep. N. S. 662, 22 Wkly. Rep. 149; Weld *v.* South Western R. Co.,

sation.[42] The passage of an ordinance authorizing the condemnation of land by a city does not make out a *prima facie* case of compliance with precedent requirements.[43]

D. Compliance With Requirements of Statute — 1. In General. The mode in which land may be condemned and the steps to be taken for that purpose are prescribed either by the statute or charter conferring the right of eminent domain or by a general law.[44] The remedy so provided is exclusive, and as a general rule the steps prescribed by the statute must be followed or the proceedings will be void.[45] Since these statutes are in derogation of general right and of common-law modes of procedure, they must be strictly construed in favor of the landowner,[46] and must be at least substantially[47] or as is sometimes said, "fully and

32 Beav. 340, 9 Jur. N. S. 510, 33 L. J. Ch. 142, 8 L. T. Rep. N. S. 13, 1 New Rep. 415, 11 Wkly. Rep. 448; Great Western R. Co. *v.* Swindon, etc., Extension R. Co., 22 Ch. D. 677, 52 L. J. Ch. 306, 47 L. T. Rep. N. S. 709, 31 Wkly. Rep. 479 [*affirmed* in 9 App. Cas. 787, 48 J. P. 821, 53 L. J. Ch. 1075, 51 L. T. Rep. N. S. 798, 32 Wkly. Rep. 957].

42. Barrett *v.* Kemp, 91 Iowa 296, 59 N. W. 76; Matter of Snyder Ave., 14 Phila. (Pa.) 346; Chesapeake, etc., R. Co. *v.* Pack, 6 W. Va. 397.

43. St. Louis *v.* Franks, 9 Mo. App. 579 [*affirmed* in 78 Mo. 41].

44. See *supra*, XI, A, 2; XI, B, 1; and the cases in the following notes.

Municipal corporations.—The mode in which the power of eminent domain may be exercised by municipal corporations may be and often is prescribed in their charters. See Kansas City *v.* Marsh Oil Co., 140 Mo. 458, 41 S. W. 943; Cincinnati *v.* Coombs, 16 Ohio 181.

The special charter of Kansas City of 1895, providing an exclusive method for condemning land, is not open to the objection that it attempts to regulate the practice and jurisdiction of the circuit court, since the exercise of the right of eminent domain is not regulated by the code practice. Kansas City *v.* Marsh Oil Co., 140 Mo. 458, 41 S. W. 943.

45. *California.*—Ventura County *v.* Thompson, 51 Cal. 577.

Florida.— Florida Cent. R. Co. *v.* Bear, 43 Fla. 319, 31 So. 287.

Georgia.— Frank *v.* Atlanta, 72 Ga. 428; Decatur County *v.* Humphrey, 47 Ga. 565.

Illinois.— Chicago, etc., R. Co. *v.* Smith, 78 Ill. 96; Mitchell *v.* Illinois, etc., R., etc., Co., 68 Ill. 286.

Indiana.— Graves *v.* Middletown, 137 Ind. 400, 37 N. E. 157.

Iowa.— Walters *v.* Houck, 7 Iowa 72.

Michigan.— Powers' Appeal, 29 Mich. 504.

Mississippi.— Illinois Cent. R. Co. *v.* Hoskins, 80 Miss. 730, 32 So. 150, 92 Am. St. Rep. 612.

Missouri.— Gray *v.* St. Louis, etc., R. Co., 81 Mo. 126.

Nebraska.— Propst *v.* Cass County, 51 Nebr. 736, 71 N. W. 748.

New Jersey.—Paret *v.* Bayonne, 39 N. J. L. 559; Durant *v.* Jersey City, 25 N. J. L. 309.

New York.— *In re* Buffalo, 78 N. Y. 362; People *v.* Whitney's Point, 32 Hun 508.

North Carolina.— Allen *v.* Wilmington, etc., R. Co., 102 N. C. 381, 9 S. E. 4.

Ohio.— Cincinnati *v.* Coombs, 16 Ohio 181.

West Virginia.— Adams *v.* Clarksburg, 23 W. Va. 203; Chesapeake, etc., R. Co. *v.* Pack, 6 W. Va. 397.

Wisconsin.— Svennes *v.* West Salem, 114 Wis. 650, 91 N. W. 121; Hood *v.* Finch, 8 Wis. 381.

United States.—Binney *v.* Chesapeake, etc., Canal Co., 8 Pet. 201, 8 L. ed. 917.

See 18 Cent. Dig. tit. "Eminent Domain," § 452 *et seq.* And see the other cases cited *supra*, X, I, 2, c, and in the following notes.

Compliance by city with charter provisions. — Where a city is authorized to provide by ordinance a particular remedy to the owners of land taken for streets, and it does make such a provision, but the provision is not in accordance with the city charter, a proceeding commenced under the ordinance will not bar an action at common law. Cincinnati *v.* Coombs, 16 Ohio 181.

Remedies of landowner see *infra*, XII.

46. Gilmer *v.* Lime Point, 19 Cal. 47; Fore *v.* Hoke, 48 Mo. App. 254. See also *supra*, V, D, 2, b.

47. Brown *v.* Macfarland, 19 App. Cas. (D. C.) 525; Florida Cent. R. Co. *v.* Bear, 43 Fla. 319, 31 So. 287; Graves *v.* Middletown, 137 Ind. 400, 37 N. E. 157; *In re* Washington Park, 52 N. Y. 131, 133 (where it is said: "While the law requires a strict compliance with every requirement of a statute by which an individual may be divested of his property against his will, especially every requirement essential to the protection of the rights of the property owner, it looks to the substance rather than to the form, and, if there is a substantial compliance with every essential condition and requisite of the statute, it is sufficient, and the power will be duly exercised"); Johnstown *v.* Wade, 30 N. Y. App. Div. 5, 51 N. Y. Suppl. 763; People *v.* Whitney's Point, 32 Hun (N. Y.) 508; *In re* Flatbush Ave., 1 Barb. (N. Y.) 286; Doughty *v.* Hope, 3 Den. (N. Y.) 249. And see Rochester R. Co. *v.* Robinson, 133 N. Y. 242, 30 N. E. 1008.

By express statutory provision in California mere informalities or irregularities are not fatal. Pol. Code, § 2690. See Sutter County

fairly"[48] complied with. Indeed the general rule, in the absence of statutory provision to the contrary, is that they must be "strictly" complied with.[49] The rule applies with the same force in favor of the landowner when proceedings are instituted by him for the purpose of having his damages assessed.[50] Thus the statutes must be complied with as to the filing and contents of the petition or application,[51] efforts to agree with the landowner as to the compensation,[52] the party in whose name the proceedings are to be instituted and conducted,[53] the public officer

v. Tisdale, 136 Cal. 474, 69 Pac. 141; Glenn County *v.* Johnston, 129 Cal. 404, 62 Pac. 66; Sonoma County *v.* Crozier, 118 Cal. 680, 50 Pac. 845.

48. Walters *v.* Houck, 7 Iowa 72.

49. *California.*— Stanford *v.* Worn, 27 Cal. 171; Gilmer *v.* Lime Point, 19 Cal. 47; Bensley *v.* Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575.

Colorado.— Colorado Fuel, etc., Co. *v.* Four Mile R. Co., 29 Colo. 90, 66 Pac. 902.

Illinois.— Chicago, etc., R. Co. *v.* Smith, 78 Ill. 96; Mitchell *v.* Illinois, etc., R., etc., Co., 68 Ill. 286; Trainer *v.* Lawrence, 36 Ill. App. 90; Highway Com'rs *v.* Newby, 31 Ill. App. 378.

Kentucky.— Penny *v.* Pindell, 7 Bush 571; Shackleford *v.* Coffey, 4 J. J. Marsh. 40.

Louisiana.— *In re* Exchange Alley, 4 La. Ann. 4.

Michigan.— Detroit Sharpshooters' Assoc. *v.* Hamtramck Highway Com'rs, 34 Mich. 36; Powers' Appeal, 29 Mich. 504.

Minnesota.— Teick *v.* Carver County, 11 Minn. 292.

Mississippi.— Madden *v.* Louisville, etc., R. Co., 66 Miss. 258, 6 So. 181.

Missouri.— St. Louis *v.* Koch, 169 Mo. 587, 70 S. W. 143; Nishnabotna Drainage Dist. *v.* Campbell, 154 Mo. 151, 55 S. W. 276; Orrick School Dist. *v.* Dorton, 125 Mo. 439, 28 S. W. 765; Thompson *v.* Chicago, etc., R. Co., 110 Mo. 147, 19 S. W. 77; Anderson *v.* Pemberton, 89 Mo. 61, 1 S. W. 216; St. Louis *v.* Franks, 78 Mo. 41 [*affirming* 9 Mo. App. 579]; Hannibal Bridge Co. *v.* Schaubacker, 49 Mo. 555; Anderson *v.* St. Louis, 47 Mo. 479; Lind *v.* Clemens, 44 Mo. 540; Shaffner *v.* St. Louis, 31 Mo. 264; West *v.* Porter, 89 Mo. App. 150; State *v.* School Dist. No. 1, 79 Mo. App. 103; Fore *v.* Hoke, 48 Mo. App. 254; Blize *v.* Castlio, 8 Mo. App. 290, where it is said that "the utmost strictness is required to give validity to the proceeding."

Nebraska.— Nelson *v.* Harlan County, (1902) 89 N. W. 458.

New Jersey.— State *v.* Jersey City, 54 N. J. L. 49, 52, 22 Atl. 1052 (where it is said: "Every condition prescribed by the legislature in the grant [conferring the power of condemnation] must be complied with, and the proceedings to condemn must be conducted in the manner and with the formalities prescribed in the grant of power. Formalities and modes of procedure prescribed are of the essence of the grant, which the courts cannot disregard on a conception that they are not essential"); Paret *v.* Bayonne, 39 N. J. L. 559; Durant *v.* Jersey City, 25 N. J. L. 309; Vanwickle *v.* Camden, etc., R., etc., Co., 14 N. J. L. 162.

New York.—Stewart *v.* Wallis, 30 Barb. 344.

West Virginia.— Adams *v.* Clarksburg, 23 W. Va. 203.

Wisconsin.— Svennes *v.* West Salem, 114 Wis. 650, 91 N. W. 121.

See 18 Cent. Dig. tit. "Eminent Domain," § 452.

Statute mandatory.— A statute providing how the property of an individual shall be condemned for public use is mandatory and not merely directory. Mitchell *v.* Illinois, etc., R., etc., Co., 68 Ill. 286. *Compare*, however, Doughty *v.* Hope, 3 Den. (N. Y.) 249, holding that a provision that the estimate and assessment for a public improvement in the city of New York should be made by the commissioners before the execution of the work was merely directory.

Purchase of another railroad and condemnation to connect tracks.— A railroad company authorized by its articles of incorporation to construct, acquire, purchase, own, equip, and operate a railroad between designated termini may lawfully purchase the road of another company, and make use of its own line of such portion of the track of such road as it sees fit; and the building of a new road connecting with such track does not make necessary a compliance with the requirements of the Arkansas statutes relating to an extension by a railroad company of its road before it can maintain proceedings to condemn a right of way. Arkansas, etc., R. Co. *v.* St. Louis, etc., R. Co., 103 Fed. 747.

Who may object.— It is, however, a matter of no concern to persons who merely seek to obtain damages for injury to their property which is not taken, whether or not the law is strictly followed in taking the property of others. Huff *v.* Donehoo, 109 Ga. 638, 34 S. E. 1035.

50. White *v.* Memphis, etc., R. Co., 64 Miss. 566, 1 So. 730; Lesieur *v.* Custer County, 61 Nebr. 612, 85 N. W. 892. Statutes providing for appointment of viewers to assess damages for land taken under the power of eminent domain are liberally construed in favor of the landowner. Leiper *v.* Baltimore, etc., R. Co., 3 Del. Co. (Pa.) 373.

51. Lesieur *v.* Custer County, 61 Nebr. 612, 85 N. W. 892; People *v.* Whitney's Point, 32 Hun (N. Y.) 508. And see Rochester R. Co. *v.* Robinson, 133 N. Y. 242, 30 N. E. 1008. See *infra*, XI, J, 2.

52. See *infra*, XI, D, 3.

53. Stanford *v.* Worn, 27 Cal. 171. See *supra*, I, B, 1, 2.

by or under whom they are to be conducted,[54] the filing of maps, plats, surveys, and the like,[55] the mode of decision as to whether the improvement shall be made,[56] the passage of ordinances, resolutions, etc.,[57] the tribunal in which the proceedings are to be instituted,[58] the powers of the court or judge,[59] notice to the landowner and other persons interested in the property,[60] appointment, qualifications, and powers of commissioners or viewers,[61] appointment of the time for hearing persons interested, and the persons or body who shall make such appointment,[62] assessment, or appraisement of the damages,[63] giving bond,[64] payment of the compensation into court within a certain time after judgment,[65] the report of the commissioners and its contents,[66] and all other conditions precedent prescribed by the statute.[67]

2. SURVEYS, MAPS, LOCATION, TERMINI, ETC. In many statutes or charters the filing of maps and surveys showing the property intended to be appropriated is made a prerequisite to the institution of condemnation proceedings and the taking of the lands, so that as a general rule a failure to comply with the requirements in this respect renders the proceedings void, and so that the petitioner or applicant will be restricted to the particular land described or shown.[68] This may be and in many cases is required in the case of streets and public roads or highways.[69]

54. Ventura County *v.* Thompson, 51 Cal. 577.

55. See *infra*, XI, D, 2.

56. People *v.* Whitney's Point, 32 Hun (N. Y.) 508. See *infra*, XI, D, 5.

57. See *infra*, XI, A; XI, D, 5.

58. See *infra*, XI, F.

59. Gray *v.* St. Louis, etc., R. Co., 81 Mo. 126. See also *infra*, XI, N.

60. See *infra*, XI, I.

61. Madden *v.* Louisville, etc., R. Co., 66 Miss. 258, 6 So. 181 (commissioners must be disinterested); White *v.* Memphis, etc., R. Co., 64 Miss. 566, 1 So. 750 (to the same effect); Anderson *v.* Pemberton, 89 Mo. 61, 1 S. W. 216; State *v.* Jersey City, 25 N. J. L. 309. See *infra*, XI, M, 2.

62. State *v.* Jersey City, 25 N. J. L. 309, holding that where a charter requires the common council of a city to appoint a time when persons interested in an application for opening or altering a street will be heard, it is not sufficient for the council to devolve that duty on the clerk.

63. *Illinois.*— Highway Com'rs *v.* Newby, 31 Ill. App. 378.

Iowa.— Walters *v.* Houck, 7 Iowa 72.

Nebraska.— Propst *v.* Cass County, 51 Nebr. 736, 71 N. W. 748.

New Jersey.—Paret *v.* Bayonne, 39 N. J. L. 559.

North Carolina.— Allen *v.* Wilmington, etc., R. Co., 102 N. C. 381, 9 S. E. 4.

See also *infra*, XI, M.

64. See *infra*, XI, D, 7.

65. Bensley *v.* Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575; Florida Cent., etc., R. Co. *v.* Bear, 43 Fla. 319, 31 So. 287.

66. State *v.* Jersey City, 25 N. J. L. 309; *In re* Flatbush Ave., 1 Barb. (N. Y.) 286. See *infra*, XI, M, 2, b, (IV).

67. See *supra*, XI, C, 2.

68. *Illinois.*— Gillinwater *v.* Mississippi, etc.. R. Co., 13 Ill. 1; Trainer *v.* Lawrence, 36 Ill. App. 90.

Massachusetts.— Reed *v.* Acton, 120 Mass. 130; Hazen *v.* Boston, etc., R. Co., 2 Gray 574.

Michigan.— Convers' Appeal, 18 Mich. 459.

Minnesota.— Teick *v.* Carver County, 11 Minn. 292.

New Jersey.— United New Jersey R., etc., Co. *v.* National Docks, etc., Connecting R. Co., 52 N. J. L. 90, 18 Atl. 574; Morris Canal, etc., Co. *v.* New Jersey Cent. R. Co., 16 N. J. Eq. 419; Southard *v.* Morris Canal, etc., Co., 1 N. J. Eq. 518.

New York.— McCrea *v.* Champlain, 165 N. Y. 264, 59 N. E. 83 [*reversing* 35 N. Y. App. Div. 89, 55 N. Y. Suppl. 125].

Pennsylvania.— Lance's Appeal, 55 Pa. St. 16, 93 Am. Dec. 722.

Wisconsin.— Svennes *v.* West Salem, 114 Wis. 650, 91 N. W. 121.

United States.— Madison *v.* Daley, 58 Fed. 751; Great Falls Mfg. Co. *v.* Garland, 25 Fed. 521 [*affirmed* in 124 U. S. 581, 8 S. Ct. 631, 31 L. ed. 527]; Bonaparte *v.* Camden, etc., R. Co., 3 Fed. Cas. No. 1,617, Baldw. 205.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 500–504; and other cases cited in the notes following.

Filing and recording.— The word "filed" as used in a Massachusetts statute requiring a location of land taken for a school-house to be filed in the office of the town clerk, was held to mean a deposit thereof in the town clerk's custody. Reed *v.* Acton, 120 Mass. 130. The provision in Wisconsin that certain papers be recorded in the register's office, in order to perfect the title to land condemned, has relation to the office of the register of deeds of the county in which the land is located. Svennes *v.* West Salem, 114 Wis. 650, 91 N. W. 121.

69. Trainer *v.* Lawrence, 36 Ill. App. 90; Taylor *v.* Hulick, 37 N. J. L. 70; Ladd *v.* East Portland, 18 Oreg. 87, 22 Pac. 533.

Under the charter of Kansas City the filing of the map is not jurisdictional, and the failure of the mayor's record to recite such filing

So these requirements are often found in statutes relating to railroad companies.[70]

is not fatal to the validity of the proceedings. *In re* Independence Ave. Boulevard, 128 Mo. 272, 30 S. W. 773.

70. *Connecticut.*— Although the fact that the location of the railroad is fixed only by the center line without any statement as to its width would as a general rule be a fatal defect, such defect is immaterial where the parties understand the location of the line and the width of the road, and the land taken is fully described in the award. New York, etc., R. Co. *v.* New York, etc., R. Co., 52 Conn. 274. The charter of the Hartford and New Haven Railroad Company does not require that the width of the road shall be fixed before the route is approved by the commissioners and the freeholders are appointed to assess the damages. Williams *v.* Hartford, etc., R. Co., 13 Conn. 110.

Illinois.— Companies organized under the general railroad law of 1849 could not proceed to condemn lands for their right of way until after obtaining from the legislature a law approving of the route and termini of the proposed road. Gillinwater *v.* Mississippi, etc., R. Co., 13 Ill. 1. Under a statute providing that all corporations created by special charter, or under the general law, "where the termini have been fixed by the legislature, and none others, may avail themselves of this act," the termini are sufficiently fixed if the original act of incorporation states that the road is from a designated city to some eligible and convenient point in a county named, there to connect with a designated other railroad, and by an amendatory act the company is authorized to construct a branch railroad from its main line from that city, by a designated route, to and in the city of Chicago. Chicago R. Co. *v.* Chamberlain, 84 Ill. 333.

Iowa.— Under section 1995 of the code, no prior location or survey of the railroad is necessary, and if such is made it is not the commencement of condemnation proceedings so as to give to the company making it a prior right as against any other company. Minneapolis, etc., R. Co. *v.* Chicago, etc., R. Co., 116 Iowa 681, 88 N. W. 1082.

Kansas.— Under Kan. Gen. St. c. 23, §§ 48, 49, the map, profile, and notice need not be filed prior to commencing the condemnation proceedings Missouri River, etc., R. Co. *v.* Shepard, 9 Kan. 647.

Louisiana.— A map or plan which in connection with the petition gives intelligible information respecting the locus and condition of the land sought to be expropriated complies with the legal requirements. Baltimore, etc., Tel. Co. *v.* Morgan's Louisiana, etc., R., etc., Co., 37 La. Ann. 883.

Massachusetts.— The location of a railroad filed pursuant to the statute is conclusive evidence as against the corporation in an action of trespass brought against them, as to the land taken for the road. Hazen *v.* Boston, etc., R. Co., 2 Gray 574. A plan or map filed with the location, and expressly made a part of the description of it, may be referred to to explain the written location, but not to modify or control it. Grand Junction R., etc., Co. *v.* Middlesex County Com'rs, 14 Gray 553; Hazen *v.* Boston, etc., R. Co., 2 Gray 574. If the company files its location, with an accompanying plan, and the land of plaintiff is included in the location, while his name does not appear either in the location or plan as one of the owners, a failure on the part of the company to furnish him with a plan of the land taken, as required by the statute, will not affect the company's title. Brock *v.* Old Colony R. Co., 146 Mass. 194, 15 N. E. 555. Where in a proceeding to assess the damages it appears that there is difficulty in applying the plan, with its accompanying description, to the land of the petitioner, but it further appears that before the location was filed the line of the railroad was surveyed over the petitioner's land and was pointed out to him, and that the road was afterward built in substantial conformity to the line pointed out, the location will be treated as valid and sufficient as against the corporation. Drury *v.* Midland R. Co., 127 Mass. 571. A railroad company will be liable as a trespasser if it enters upon land for the purpose of constructing its road before the expiration of the time limited by statute for filing its location, in case its written location subsequently filed does not cover the land so entered upon. Hazen *v.* Boston, etc., R. Co., 2 Gray 574. The statutory provision that lands outside the limits of a railroad shall not be taken without permission of the owner, unless the commissioners first prescribe the limits within which land may be taken, applies even where the owner has conveyed to the corporation a part of the lot after the corporation had filed its location over the lot, and the commissioners afterward on petition of the corporation ordered the taking. Derby *v.* Framingham, etc., R. Co., 119 Mass. 516.

Michigan.— Toledo, etc., R. Co. *v.* Campau, 83 Mich. 33, 46 N. W. 1026. A map purporting to be drawn by a scale, and on which the lines of the road are not so laid down as to enable any one by the use of instruments to ascertain its location with any degree of accuracy, with nothing to show distances, and in other respects defective, and with no other paper, survey, or certificate left in the office of the registrar, is not a sufficient compliance with the statute requiring persons applying for a railroad charter to file in the county registry a map and survey of the proposed road. Convers' Appeal, 18 Mich. 459.

Minnesota.— Teick *v.* Carver County, 11 Minn. 292. Gen. St. (1894) § 2749, which requires that before an extension of a railroad the directors shall by resolution designate the route of the extension and file a verified copy, has no application to a case where the limits of the proposed extension

And this is true not only in respect of commercial or steam railroads, but also of

are included within the charter or articles of incorporation of the road; and a compliance with the statute is not necessary to confer jurisdiction of the condemnation proceedings. Minneapolis, etc., R. Co. *v.* Olson, 81 Minn. 265, 83 N. W. 1086, 84 N. W. 101, 742.

New Hampshire.— The report of a laying out by the railroad commissioners of the land to be taken, which does not describe the land by such definite and fixed monuments that a jury, going upon the ground, may readily discover where the laying out is, is void for uncertainty. Northern R. Co. *v.* Concord, etc., R. Co., 27 N. H. 183.

New Jersey.— The survey of a route for a proposed railroad does not confer any vested or legal right upon the company until it is adopted. Morris, etc., R. Co. *v.* Blair, 9 N. J. Eq. 635. Under an act prescribing the manner of proceeding for the assessment of damages, and requiring that a survey of the route must be deposited with the secretary of state, it must appear that the location was fixed and the survey filed before the application was made for the commissioners to assess the damages. Vail *v.* Morris, etc., R. Co., 21 N. J. L. 189. Under an act which provides that when the route is determined and surveyed, and the survey is deposited in the office of the secretary of state, the company may enter on and take possession of the land, the location of the whole route need not be filed before application is made to assess the value of the land on any part of it; it is sufficient if the location through that particular land is filed. Doughty *v.* Somerville, etc., R. Co., 21 N. J. L. 442. But it was held by the chancellor in a case decided in the same year with the foregoing, that the company could not apply to have the value and damages assessed until the route of the whole road was established. Doughty *v.* Somerville, etc., R. Co., 7 N. J. Eq. 51. Under the general railroad law the survey of the route, filed in the office of the secretary of state, limits the right of condemnation to the lands included in its description. United New Jersey R., etc., Co. *v.* National Docks, etc., Connecting R. Co., 52 N. J. L. 90, 18 Atl. 574.

New York.— Under a statute which requires as a condition to condemnation proceedings that the railroad company shall file a map and profile of its road, such filing is a condition precedent to the appointment of commissioners to assess the damages. Wallkill Valley R. Co. *v.* Norton, 12 Abb. Pr. N. S. 317; New York, etc., R. Co. *v.* Godwin, 12 Abb. Pr. N. S. 21. And a railroad company is not entitled to condemn land for a right of way, unless it serves notice on the owner of the proposed route, as required by statute, thereby enabling him to take the steps necessary to obtain an alteration of the route. *In re* New York, etc., R. Co., 62 Barb. 85. And see Rochester, etc., R. Co. *v.* New York, etc., R. Co., 110 N. Y. 128, 17 N. E. 680 [*affirming* 44 Hun 206]; *In re* Niagara Falls, etc., R. Co., 46 Hun 94. Nor can the company condemn land if the map is not of such a character as to enable the property-owners to tell by inspection where the route is to cross their property. *In re* New York, etc., R. Co., *supra*. A map containing but a single line, showing the general course of the road, but failing to show whether such line is an exterior, center, or what line, and failing to show the location and direction of the road, or to describe by metes and bounds the parcels of land over which it is to pass, is insufficient. New York, etc., R. Co. *v.* New York, etc., R. Co., 11 Abb. N. Cas. 386; New York, etc., R. Co. *v.* Goodwin, 12 Abb. Pr. N. S. 21. See also Matter of Boston, etc., R. Co., 10 Abb. N. Cas. 104. Where a company, having located and completed its road under the requirement of the general laws of 1850, afterward required additional land and sought to acquire it under the provisions of chapter 237 of the laws of 1869, it was held not necessary to file the map required by the laws of 1850. *In re* New York Cent., etc., R. Co., 4 Hun 381; New York Cent., etc., R. Co. *v.* Sweeney, 6 Thomps. & C. 669. And no new profile is necessary before the taking of the additional land, if a change of route is not intended. Matter of South Brooklyn R., etc., Co., 50 Hun 405, 2 N. Y. Suppl. 613. The filing of the map does not definitely establish the route of the railroad, since notice must be given to occupants, and they may, within fifteen days thereafter, apply for a change of route (*In re* New York, etc., R. Co., *supra*; New York, etc., R. Co. *v.* New York, etc., R. Co., *supra*), and the directors themselves may change the route (New York, etc., R. Co. *v.* New York, etc., R. Co., *supra*).

North Carolina.— Where a railroad company has acquired title to its right of way prior to the enactment of a statute, its title is not affected by failing to file a map of its route in accordance with the statute. Purifoy *v.* Richmond, etc., R. Co., 108 N. C. 100, 12 S. E. 741. The rule now is that the filing of a map and profile is a condition precedent to a valid condemnation. Kingston, etc., R. Co. *v.* Stroud, 132 N. C. 413, 43 S. E. 913.

Pennsylvania.— Under the lateral railroad law of May, 1832, the petitioner was authorized to enter on land and survey a route, and the petitioner alone had this authority; neither the viewers nor the jury could make the location. Hays *v.* Risher, 32 Pa. St. 169. See H. C. Frick Coke Co. *v.* Painter, 198 Pa. St. 468, 48 Atl. 302. Under the acts regulating the manner in which damages to the owners of land taken by the Pennsylvania Railroad Company for depots, water stations, etc., shall be assessed, the court has no power to grant a view until it appears, at least by affidavit, that the company has determined upon, surveyed, located, and marked the ground which it deems neces-

street railroads.[71] Railroad crossings,[72] canals,[73] telegraph lines,[74] pipe-lines,[75] parks,[76]

sary to take for its purposes. O'Hara *v.* Pennsylvania R. Co., 25 Pa. St. 445. It is not necessary that the grades of the road should appear in the plat or in the petition. Boyd *v.* Negley, 40 Pa. St. 377. If after surveying and locating its road the company locates a second route, which it afterward abandons and adopts the first, the appropriation of the property for the route dates from its final adoption, rather than from its original location. Hagner *v.* Pennsylvania Schuylkill Valley R. Co., 154 Pa. St. 475, 25 Atl. 1082. Where the statute exempts from condemnation only houses which are occupied as homesteads, the map of the lands intended to be taken by the railroad company need not state the kind of buildings or other improvements which are on them. Shick *v.* Pennsylvania R. Co., 1 Pearson 262. The survey which accompanies the petition shows what the petitioner asks liberty to do. The courses and distances, grades, and the like, are to be laid down on the plans, and if the road be allowed they remain on file to define the rights acquired on the one hand and taken on the other, and where a view has been granted and the damages assessed, the location cannot be changed except upon a new petition. Lance's Appeal, 55 Pa. St. 16, 93 Am. Dec. 722. The survey and plan should remain on file to define the rights acquired on the one hand and taken on the other. Lance's Appeal, *supra*.

Rhode Island.— The purpose of the plat is to show the course and width of the road as located, the names of the landowners, and the quantity of land taken, and not the mode in other respects in which the road will be constructed; therefore, where damages are to be appraised prospectively, and before the road is built, for injuries to land located by a railroad company, the company is not estopped from proving that the location of a culvert through their embankment is a matter of necessity, by the fact that the plat does not indicate a culvert at that point. Nason *v.* Woonsocket Union R. Co., 4 R. I. 377.

West Virginia.— Under the statutory provision (Code, c. 54, § 65) that the company shall within a reasonable time after its railroad is located cause a map and profile, with the names of the owners and of the noted places along the same, to be made and filed in the office of the secretary of state, and in the office of the county clerk of each county in which any part of the road is located, this is not a condition precedent to the appointment of commissioners for the assessment of the compensation. Wheeling Bridge, etc., R. Co. *v.* Camden Consol. Oil Co., 35 W. Va. 205, 13 S. E. 369.

United States.— Where the charter of a railroad company authorizes an entry on land for the purpose of locating the road, and directs that a survey of the route of the road be deposited in the office of the secretary of state, and then provides that when the location is determined, and the survey is so deposited, the company may take possession of the land for the purpose of constructing its road, a location and deposit of the survey are conditions precedent to the entry by the company for the purpose of constructing its road. Bonaparte *v.* Camden, etc., R. Co., 3 Fed. Cas. No. 1,617, Baldw. 205.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 500–504.

71. Bay City Belt-Line R. Co. *v.* Hitchcock, 90 Mich. 533, 51 N. W. 808. The failure of a street railway company to file a map of its proposed route, as required by the statute (N. Y. Laws (1884), c. 252, § 3), is fatal to its right to maintain the proceedings. *In re* Rochester Electric R. Co., 123 N. Y. 351, 25 N. E. 381.

72. *In re* Boston, Hoosac Tunnel, etc., R. Co., 79 N. Y. 64.

73. Kough *v.* Darcey, 11 N. J. L. 237; Van Alstine *v.* Belden, 41 N. Y. App. Div. 123, 58 N. Y. Suppl. 521 [*affirmed* in 161 N. Y. 661, 57 N. E. 1127]; Morris Canal, etc., Co. *v.* New Jersey Cent. R. Co., 16 N. J. Eq. 419; Southard *v.* Morris Canal, etc., Co., 1 N. J. Eq. 518.

74. St. Louis, etc., R. Co. *v.* Illinois Postal Tel. Co., 173 Ill. 508, 51 N. E. 382. The survey of the line is not an indispensable prerequisite, if the data for a clear description and location of it otherwise exist. St. Louis, etc., R. Co. *v.* Southwestern Telephone, etc., Co., 121 Fed. 276, 58 C. C. A. 198. The New Jersey acts to incorporate and regulate telegraph companies require such companies to apply to any municipality through which streets rather than roads are laid, and to the legislative body to which the control of such streets is given, for a designation of their route through the streets before they can proceed to have the damages of individuals assessed. Broome *v.* New York, etc., Telephone Co., 49 N. J. L. 624, 9 Atl. 754.

75. Adams *v.* San Angelo Waterworks Co., (Tex. Civ. App. 1894) 25 S. W. 165.

76. The third section of the act of congress of 1890, establishing a park in the District of Columbia, provides that the commissioners shall cause a map to be made, showing the location, quality, and character of each parcel of land to be taken, and that this map must be filed in the public records of the District. It provides further that from the date of filing the map the lands embraced in the park are to be held as condemned for public use, and the title thereto vested in the United States, subject to the payment of just compensation. The commissioners filed the map, and it was afterward found that the compensation for the lands included in it would exceed the authorized expenditure, whereupon the commissioners designated a smaller area on the map, as to which the condemnation proceedings were had. It was held that such proceedings for the reduced area were valid, and that the filing of the map did not bind the commis-

land for school-houses,[77] lands to be flowed by dams,[78] water-rights and water-supply,[79] sewers or drains,[80] and harbor construction have been held within the statute.[81]

3. Attempt to Agree With Owner. Unless required by constitutional or statutory provision, an attempt to reach an agreement with the owner for a purchase of the land or of an easement in it is not a condition precedent to an institution of condemnation proceedings.[82] But in most of the states by express provision, either in the constitution or by statute, and in some cases by both, proceedings to condemn property cannot be instituted unless such an attempt has been made,[83]

sioners to take all the parts included in it. Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170.

77. Reed *v.* Acton, 120 Mass. 130.

78. Macon *v.* Owen, 3 Ala. 116.

79. Moseley *v.* York Shore Water Co., 94 Me. 83, 46 Atl. 809; Northborough *v.* Worcester County, 138 Mass. 263; Wilson *v.* Lynn, 119 Mass. 174; Champlain *v.* McCrea, 165 N. Y. 264, 59 N. E. 83 [*reversing* 33 N. Y. App. Div. 259, 53 N. Y. Suppl. 1096]; McCrea *v.* Champlain, 35 N. Y. App. Div. 89, 55 N. Y. Suppl. 125. The advertisement, map, and survey made by the secretary of war for the purpose of increasing the water-supply of the city of Washington under the act of congress July 15, 1882, are sufficiently definite as a description of the property to be taken, if they definitely state the quantity of land to be appropriated, and the nature of the construction to be placed upon it. Great Falls Mfg. Co. *v.* Garland, 25 Fed. 521 [*affirmed* in 124 U. S. 581, 8 S. Ct. 631, 31 L. ed. 527].

80. Kohlhepp *v.* West Roxbury, 120 Mass. 596; Joplin Consol. Min. Co. *v.* Joplin, 124 Mo. 129, 27 S. W. 406.

81. Madison *v.* Daley, 58 Fed. 751.

82. Detroit *v.* Beecher, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813; *In re* Kansas City Independent Ave. Boulevard, 128 Mo. 272, 30 S. W. 773; Lewis County *v.* Schobey, 31 Wash. 357, 71 Pac. 1029.

A statute is not unconstitutional because it does not contain a provision requiring the company to attempt to obtain the voluntary consent of the owner. Matter of First St., 58 Mich. 641, 26 N. W. 159. And may provide that it shall not be necessary to make an attempt to agree with the owner as to the price. Matter of New York, 83 N. Y. Suppl. 951, 41 Misc. (N. Y.) 134.

Statute held not to require attempt to agree.— Where the statute or charter provides that if the company and the landowner fail to agree upon the terms of purchase and sale the court shall appoint commissioners to value the land taken, it is not necessary that the parties should make an effort to agree and fail, before the court has jurisdiction to appoint the commissioners. Bigelow *v.* Mississippi Cent., etc., R. Co., 2 Head (Tenn.) 624.

83. *California.*—San Francisco, etc., Water Co. *v.* Alameda Water Co., 36 Cal. 639; Gilmer *v.* Lime Point, 19 Cal. 47. And see Mahoney *v.* San Francisco, 53 Cal. 383.

Colorado.— Colorado Fuel, etc., Co. *v.* Four Mile R. Co., 29 Colo. 90, 66 Pac. 902.

Connecticut.— Westfield Cemetery Assoc. *v.* Danielson, 62 Conn. 319, 26 Atl. 345.

Illinois.— Hall *v.* People, 57 Ill. 307.

Indiana.— Under the Indiana act of May 11, 1852, a railroad company was not required to make an offer to purchase the land before commencing the condemnation proceedings. Swinney *v.* Ft. Wayne, etc., R. Co., 59 Ind. 205.

Iowa.— Minneapolis, etc., R. Co. *v.* Chicago, etc., R. Co., 116 Iowa 681, 88 N. W. 1082. And see Corbin *v.* Wisconsin, etc., R. Co., 66 Iowa 269, 23 N. W. 662. If the owner has for a valuable consideration conveyed the right, this is sufficient to give the court jurisdiction of the condemnation proceedings. Council Bluffs, etc., R. Co. *v.* Bentley, 62 Iowa 446, 17 N. W. 668.

Massachusetts.— Norton School Dist. No. 8 *v.* Copeland, 2 Gray 414.

Michigan.—Marquette, etc., R. Co. *v.* Longyear, (1903) 94 N. W. 670; Arnold *v.* Decatur, 29 Mich. 77.

New Jersey.— If a railroad company acquires a right to construct a bridge over city property by a contract with the city, which contains a condition that the right must be used so as not to interfere with the city's right to open a street under the right of way of the bridge, the company cannot thereafter repudiate such agreement and acquire a right of way by condemnation. Jersey City *v.* National Docks R. Co., 55 N. J. L. 194, 26 Atl. 145; Jersey City *v.* Lehigh Valley Terminal R. Co., 55 N. J. L. 203, 26 Atl. 148.

New York.— *In re* Opening House Ave., 67 Barb. 350; New York, etc., R. Co. *v.* Godwin, 12 Abb. Pr. N. S. 21; Gilbert *v.* Columbia Turnpike Co., 3 Johns. Cas. 107. Where an attempt has been made to agree with the owner and proceedings have been commenced, a further attempt is not rendered necessary by an amendment of the petition, so as to ask for a less quantity of land than the original petition asked for; and this is especially true where the owners, being represented in court, make no suggestion of a withdrawal of opposition with a view to an agreement upon the price. *In re* Prospect Park, etc., R. Co., 67 N. Y. 371.

North Carolina.— Allen *v.* Wilmington, etc., R. Co., 102 N. C. 381, 9 S. E. 4.

Ohio.— If a statute provides that one telegraph company may use the poles of others under certain regulations, and no regulations have been adopted by the city council as to the compensation to be paid, if the company seeking to use the poles of another fails to agree with the latter, a court of

and in some statutes unless there is a refusal on the part of the owner to consent.[84] Such a provision is mandatory and not merely directory,[85] and the condemnation proceedings are absolutely void in case no attempt is made before beginning them to come to an agreement with the owner.[86] The attempt must be made to agree as to the price for the purpose which it is sought to condemn the land, and for no other purpose.[87] The failure to agree on a price must be alleged and proved,[88]

equity will determine the rights of the parties. Toledo Electric St. R. Co. *v.* Western Electric Light, etc., Co., 10 Ohio Cir. Ct. 531, 4 Ohio Cir. Dec. 43.

Oregon.— Douglas County Road Co. *v.* Abraham, 5 Oreg. 318.

Pennsylvania.— Reitenbaugh *v.* Chester Valley R. Co., 21 Pa. St. 100; Neal *v.* Pittsburg, etc., R. Co., 2 Grant 137; Bertsch *v.* Lehigh Coal, etc., Co., 4 Rawle 130.

Rhode Island.— McCotter *v.* New Shoreham, 21 R. I. 43, 41 Atl. 572.

Texas.— Sullivan *v.* Missouri, etc., R. Co., 29 Tex. Civ. App. 429, 68 S. W. 745; Porter *v.* Abilene, (App. 1890) 16 S. W. 107.

Utah.— Where a telegraph company makes a *bona fide* offer to agree with a railroad company on terms for the use of its right of way, and the railroad company refuses to negotiate, the telegraph company may properly condemn the right, notwithstanding there may be other land equally available for its purpose. Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

United States.— Under the act of congress (29 St. at L. 138) directing the secretary of war to select such lands on the Colorado river as he might deem necessary for a canal and locks, and, if he could not purchase them at a reasonable price, to condemn them under the laws of Oregon, it was held that as a condition precedent to condemnation it must be shown that defendant refused a reasonable price, but that any offer which the secretary of war might in the exercise of his judgment have made was to be considered a reasonable one for the purpose of that proceeding. U. S. *v.* Oregon R., etc., Co., 16 Fed. 524, 9 Sawy. 61.

See 18 Cent. Dig. tit. "Eminent Domain," § 462 *et seq.*

Existing contract.— Where a statute gives the right to condemn land only in case of disagreement with the owner as to the price, such proceedings cannot be maintained where the party seeking to condemn has contracted to purchase at an agreed price. Gilmer *v.* Lime Point, 19 Cal. 47.

84. *Illinois.*— Chaplin *v.* Wheatland Tp. Highway Com'rs. 27 Ill. App. 643.

Missouri.— Lingo *v.* Buford, 112 Mo. 149, 20 S. W. 459; Kansas City *v.* Morse, 105 Mo. 510, 16 S. W. 893; Chicago, etc., R. Co. *v.* Young, 96 Mo. 39, 8 S. W. 776; Ells *v.* Pacific R. Co., 51 Mo. 200; Jones *v.* Zink, 65 Mo. App. 409.

New York.— Schenectady R. Co. *v.* Lyon, 41 Misc. 506, 85 N. Y. Suppl. 40; Water Com'rs *v.* Clark, 3 N. Y. Suppl. 347.

Rhode Island.— Howland *v.* Little Compton School Dist. No. 3, 16 R. I. 257, 15 Atl. 74.

South Carolina.— Tompkins *v.* Augusta, etc., R. Co., 37 S. C. 382, 16 S. E. 149.

See 18 Cent. Dig. tit. "Eminent Domain," § 462 *et seq.*

It is not necessary to seek the owner's consent if he has shown himself opposed to the improvement (Chaplin *v.* Wheatland Tp., 27 Ill. App. 643); and the incapacity of a landowner to sell his land is a sufficient refusal to sell it (Balch *v.* Essex County, 103 Mass. 106. See *infra*, note 95). An effort need not be made to obtain the consent of a mortgagee of the land to use it for telegraph poles and wires, if the owner refuses his consent. Coles *v.* Midland Telephone, etc., Co., 67 N. J. L. 490, 51 Atl. 448 [*affirmed* in 68 N. J. L. 413, 53 Atl. 1125].

85. Hall *v.* People, 57 Ill. 307; McCotter *v.* New Shoreham, 21 R. I. 43, 41 Atl. 572; and other cases in the two preceding notes.

86. Wilkinson *v.* St. Louis Sectional Dock Co., 102 Mo. 130, 14 S. W. 177; Moses *v.* St. Louis Sectional Dock Co., 84 Mo. 242 [*reversing* 9 Mo. App. 571]; Springfield *v.* Whitlock, 34 Mo. App. 642; Graf *v.* St. Louis, 8 Mo. App. 562. See also Kansas City, etc., R. Co. *v.* Campbell, 62 Mo. 585; Anderson *v.* St. Louis, 47 Mo. 479; Leslie *v.* St. Louis, 47 Mo. 474; Lind *v.* Clemens, 44 Mo. 540; Rogers *v.* St. Charles, 3 Mo. App. 41.

87. New York, etc., R. Co. *v.* Long, 69 Conn. 424, 37 Atl. 1070; Fort St. Union Depot Co. *v.* Jones, 83 Mich. 415, 47 N. W. 349.

88. See *infra*, XI, J, 2, a, (v).

In New Jersey it is not necessary that the judge should be satisfied that the parties were unable to agree prior to the notice of the application. It is sufficient if he is satfied of that fact at the time the appointment of the commissioners is made. Coster *v.* New Jersey R., etc., Co., 23 N. J. L. 227.

The offer of a bond by a railroad company is an assertion by it that an agreement cannot be reached with the owner, and the action of the court in approving the bond and directing it to be filed involves an adjudication that everything had been done to entitle the company to file the bond. Wadhams *v.* Lackawanna, etc., R. Co., 42 Pa. St. 303.

Filing of petition.— In Massachusetts it is held that the filing of a petition for a jury shows the petitioner's election not to agree, and therefore no previous attempt at an agreement is necessary. Ætna Mills *v.* Waltham, 126 Mass. 422; Burt *v.* Brigham, 117 Mass. 307.

Effect of non-performance of agreement.— It has been held that if a railroad company

and this should appear on the face of the proceedings.[89] This rule applies although the United States is the condemning party.[90] It may be made by the statute to apply to a case where the landowner initiates the proceeding.[91] It is not necessary to show that the party seeking to condemn the land could not by agreement obtain some other land suited to its purpose.[92] Where the statute provides that there must be an attempt to agree with the owner, the word "owner" is not restricted to the holder of the fee.[93] The effort to agree with the owner must be an honest *bona fide* one.[94] Where, on account of the minority of the land-

which has entered on land and laid a track there under a contract with the owner has failed to pay the purchase-money, and has lost its interest therein, it may still under its charter appropriate the land on making compensation. Pittsburg, etc., R. Co. *v.* Jones, 59 Pa. St. 433.

A formal offer and refusal of compensation is not necessary; but the fact that the parties fail to come to an amicable agreement is sufficient. Dyckman *v.* New York, 7 Barb. (N. Y.) 498. If the owner puts an extravagant price on his property this is equivalent to a refusal to agree. *In re* Middletown, 82 N. Y. 196; *In re* Prospect Park, etc., R. Co., 67 N. Y. 37 [*affirming* 8 Hun 30]; *In re* Metropolitan El. R. Co., 2 N. Y. Suppl. 278. If the company makes an effort to get the right of way by contract, and does not within a reasonable time receive any reply to its offer, it may resort to condemnation proceedings. Louisville, etc., R. Co. *v.* Postal Tel. Cable Co., 68 Miss. 806, 10 So. 74.

89. Morseman *v.* Ionia, 32 Mich. 283; Moses *v.* St. Louis Sectional Dock Co., 84 Mo. 242 [*reversing* 9 Mo. App. 571]; Jones *v.* Zink, 65 Mo. App. 409; Graf *v.* St. Louis, 8 Mo. App. 562; Vail *v.* Morris, etc., R. Co., 21 N. J. L. 189; *In re* Philadelphia, etc., R. Co., 7 Phila. 461; Howland *v.* Little Compton School Dist. No. 3, 16 R. I. 257, 15 Atl. 74. But in Missouri the record of proceedings to open a public road need not show that there was any attempt on the part of the petitioner to agree with the owner. *In re* Gardner, 41 Mo. App. 589.

Where the record shows an adverse proceeding by the owner on a question of damages, this is sufficient to show that the parties failed to agree (Mississippi, etc., R. Co. *v.* Rosseau, 8 Iowa 373; *In re* Prospect Park, etc., R. Co., 67 N. Y. 371), as where the owners combined in a body against the work, attended the selection of the jury, showed their lines to the jury, and made preparations for their coming (Schuylkill, etc., Nav. Co. *v.* Diffebach, 1 Yeates (Pa.) 367).

90. Gilmer *v.* Lime Point, 19 Cal. 47.

91. Corbin *v.* Wisconsin, etc., R. Co., 66 Iowa 269, 23 N. W. 662. Under the California act of 1861, a person whose lands had been taken for a public road had no right of action against the county for damages, until after a fair and honest attempt on his part to agree upon the amount with the board of supervisors; and it was held that proof that he filed a petition for just and reasonable damages with the board, as required by the act, did not tend to show that he had ever made such an attempt at an agreement. Lincoln *v.* Colusa County, 28 Cal. 662.

92. Rittenhouse *v.* Creasy, 12 Luz. Leg. Reg. (Pa.) 14.

93. *In re* Rochester, etc., R. Co., 110 N. Y. 119, 17 N. E. 678; *In re* Boston Hoosac Tunnel, etc., R. Co., 79 N. Y. 69; McCotter *v.* New Shoreham, 21 R. I. 43, 41 Atl. 572. A failure to agree with those claiming to be the owners of the land is sufficient, although there is no attempt to agree with one who claims a vendor's lien on it (Thomas *v.* St. Louis, etc., R. Co., 164 Ill. 634, 46 N. E. 8), or with one who is a lessee (*In re* Rochester, etc., R. Co., 110 N. Y. 119, 17 N. E. 678).

Under the Greater New York Charter, § 824, it is not necessary to attempt to agree with one who is a tenant in common or a joint tenant with the city of wharf property. Matter of New York, 41 Misc. 134, 83 N. Y. Suppl. 951.

94. St. Louis, etc., R. Co. *v.* Postal Tel. Co., 173 Ill. 508, 51 N. E. 382; Laue *v.* Saginaw, 53 Mich. 442, 19 N. W. 137; Chambers *v.* Carteret, etc., R. Co., 54 N. J. L. 85, 22 Atl. 995; McCotter *v.* New Shoreham, 21 R. I. 43, 41 Atl. 572. The mere attempt of a city to get information from the owners of land as to the probable cost of opening a street through it, so as to enable the council to pass on the expediency of making the improvement, does not constitute a *bona fide* effort to agree on the terms of the purchase; the effort to agree must be made after the council has determined to make the improvement. Core *v.* Norfolk, 99 Va. 190, 37 S. E. 845. But a formal offer and refusal of compensation is not essential. Dyckman *v.* New York, 7 Barb. (N. Y.) 498. And it is immaterial that the agent who has authority to negotiate with the owners has not the money actually in hand. *Ex p.* U. S., 24 Pittsb. Leg. J. (Pa.) 105. A *bona fide* offer of an amount which the condemning party considers a fair price, and a refusal by the landowner to accept, with knowledge of the purpose for which the land is wanted, is sufficient, although the company admits that it had no expectation that the offer would be accepted. Fort St. Union Depot Co. *v.* Jones, 83 Mich. 415, 47 N. W. 349. Where an elevated railroad company, before commencing proceedings to condemn easements in property abutting on a street in which it had operated its road for ten years, employed reputable and experienced brokers, who had not before been employed by it, to examine the property and fix the compensation which in their opinion should be paid, and the company then offered to pay the

owner,[95] or of the fact that the land is held under a long lease by a tenant who refuses to sell,[96] or that the owner is a non-resident,[97] or that there are encumbrances on the land,[98] negotiations for its purchase would be useless, the want of agreement will be excused. So too where the property has been already appropriated.[99] The owner may waive objection to the fact that there has been no attempt at an agreement;[1] but his refusal to agree will not authorize the taking of the land without condemnation proceedings.[2] Where there is an agreement it may be enforced against the owner[3] or by him.[4]

4. NOTICE TO TREAT. Under the English Lands Clauses Act of 1845 a necessary preliminary to the compulsory taking of land is a notice to treat.[5] By the term

sums so fixed, and allowed the owners forty-eight hours to accept, it was held that the company in good faith endeavored to purchase. *In re* Metropolitan El. R. Co., 12 N. Y. Suppl. 502. And where the county court, before proceeding to establish a highway, offered to compensate a landowner partly in money and partly in water privileges, which offer was declined, it was held that the court was thereupon authorized to proceed to condemn, whether the refusal was based upon inadequacy of the compensation in money, or upon the fact that part of the compensation was to consist of water privileges. Herron *v.* Carson, 26 W. Va. 62. As to the sufficiency of an offer see also *In re* Metropolitan El. R. Co., 2 N. Y. Suppl. 278.

95. *Alabama.*— Brown *v.* Rome, etc., R. Co., 86 Ala. 206, 5 So. 195.

Illinois.— Davis *v.* Northwestern El. R. Co., 170 Ill. 595, 48 N. E. 1058.

Indiana.— Indiana Cent. R. Co. *v.* Oakes, 20 Ind. 9.

Michigan.— Grand Rapids, etc., R. Co. *v.* Chesebro, 74 Mich. 466, 42 N. W. 66.

New York.— Stillwater, etc., St. R. Co. *v.* Slade, 36 N. Y. App. Div. 587, 55 N. Y. Suppl. 966. The general railroad act of New York of 1850 providing that, if any title or interest in land acquired by any company is vested in a trustee not authorized to sell, release, or convey, or in any infant, idiot, or person of unsound mind, the supreme court may authorize the trustee, or the general guardian or committee, to sell and convey the land on such terms as may be just, was intended to enable the trustee, guardian, or committee, to move in order to acquire the power to contract or agree for the sale of the land, and was not compulsory on the railroad company. *In re* New York Bridge Co., 67 Barb. 295.

See 18 Cent. Dig. tit. "Eminent Domain," § 463.

96. Pennsylvania R. Co. *v.* National Docks, etc., Connecting R. Co., 57 N. J. L. 86, 30 Atl. 183.

97. Davis *v.* Northwestern El. R. Co., 170 Ill. 595, 48 N. E. 1058.

98. Stillwater, etc., St. R. Co. *v.* Slade, 36 N. Y. App. Div. 587, 55 N. Y. Suppl. 966; *In re* New York Cent. R. Co., 20 Barb. (N. Y.) 419; U. S. *v.* Block 121, 24 Fed. Cas. No. 14,610, 3 Biss. 208.

99. Kennedy *v.* Cleveland, etc., R. Co., 20 Ind. App. 315, 50 N. E. 592.

1. U. S. *v.* Reed, 56 Mo. 565.

2. Birmingham Traction Co. *v.* Birmingham R., etc., Co., 119 Ala. 129, 24 So. 368.

3. Bertsch *v.* Lehigh Coal, etc., Co., 4 Rawle (Pa.) 130; Munns *v.* Isle of Wight R. Co., L. R. 5 Ch. 414, 39 L. J. Ch. 522, 23 L. T. Rep. N. S. 96, 18 Wkly. Rep. 781. A railway company may compel specific performance of a contract to convey the right of way after it has complied with the conditions of the contract. Chicago, etc., R. Co. *v.* Swinney, 38 Iowa 182.

In England, however, under the Lands Clauses Act, if a company exercises its compulsory powers, and proceeds under the sections relating to the purchase of lands otherwise than by agreement, it cannot afterward enforce a prior agreement made with the owner for the sale of the lands. Bedford, etc., R. Co. *v.* Stanley, 2 Johns. & H. 746, 9 Jur. N. S. 152, 32 L. J. Ch. 60, 7 L. T. Rep. N. S. 177, 1 New Rep. 162, 11 Wkly. Rep. 139.

4. If a railroad company enters on land with the verbal consent of the owner, and with the promise on the part of the company for compensation, a proceeding by the owner to recover such compensation cannot be enlarged to include an inquiry as to damages to other lands which are not taken. Fries *v.* Wheeling, etc., R. Co., 56 Ohio St. 135, 46 N. E. 516.

5. St. 8 & 9 Vict. c. 18, § 18, where it is provided as follows: "When the Promoters of the Undertaking shall require to purchase or take any of the Lands which by this or the special Act, or any Act incorporated therewith, they are authorized to purchase or take, they shall give Notice thereof, to all the other Parties interested in such Lands, or to the Parties enabled by this Act to sell and convey or release the same, or such of the said Parties as shall, after diligent Inquiry, be known to the Promoters of the Undertaking, and by such Notice shall demand from such Parties the Particulars of their Estate and Interest in such Lands, and of the Claims made by them in respect thereof; and every such Notice shall state the Particulars of the Lands so required, and that the Promoters of the Undertaking are willing to treat for the Purchase thereof, and as to the Compensation to be made to all Parties for the Damage that may be sustained by them by reason of the Execution of the Works."

Nature of notice.— The notice to treat is not necessarily an exercise of the powers of

"owner" in the Lands Clauses Act is meant a person having some title.[6] The provisions as to the service of the notice to treat must be strictly complied with.[7] Where in the notice to treat the promoters propose to take part of a building, the owner may serve a counter notice requiring that the whole of the building shall be taken.[8] The word "hereditaments," used in the interpretation clause,[9] as a meaning of the word "lands," signifies corporeal hereditaments, and therefore does not include a right of way or easement of way.[10] Where a railway company is authorized to construct its line in a public street, a notice to treat to the abutting owners is not necessary.[11] The condemning party must comply with the conditions attached by the act to the taking of land by it.[12] Notice to treat given by a railway com-

the act "in relation to the compulsory taking of land." Guest *v.* Poole, etc., R. Co., L. R. 5 C. P. 553, 39 L. J. C. P. 329, 22 L. T. Rep. N. S. 589, 18 Wkly. Rep. 836.

Necessity and effect in general.— A railway company has no power to summon a jury to assess the value of lands as to which it has given no previous notice to treat. Doo *v.* London, etc., R. Co., 1 R. & Can. Cas. 257. Where the notice to treat relates to a right of way which the company desires to take, this does not give the owner the right to require the company to take the whole of a manufactory, since a right of way cannot be considered a part of a manufactory. Pinchin *v.* London, etc., R. Co., 5 De G. M. & G. 851, 3 Eq. R. 433, 1 Jur. N. S. 241, 24 L. J. Ch. 417, 3 Wkly. Rep. 125, 54 Eng. Ch. 667, 43 Eng. Reprint 1101. Where a notice to treat for a part of a rope-walk was accompanied by a diagram or plan of the entire rope-walk, indicating by colored lines the manner in which the railway would intersect it, and the portion required, but having no scale attached, it was held sufficient. Dowling *v.* Pontypool, etc., R. Co., L. R. 18 Eq. 714, 43 L. J. Ch. 761.

6. Wells *v.* Chelmsford Local Bd. of Health, 15 Ch. D. 108, 49 L. J. Ch. 827, 45 J. P. 6, 43 L. T. Rep. N. S. 378, 29 Wkly. Rep. 381; Douglas *v.* North-western R. Co., 3 Jur. N. S. 181, 3 Kay & J. 173. He must be the owner at the time the land is taken. *Ex p.* Sunderland, 1 Drew. 184, 16 Jur. 37.

7. Morgan *v.* Metropolitan R. Co., L. R. 4 C. P. 97, 38 L. J. C. P. 87, 19 L. T. Rep. N. S. 655, 17 Wkly. Rep. 261; Tawney *v.* Lynn, etc., R. Co., 16 L. J. Ch. 282, 4 R. & Can. Cas. 615; Harrington *v.* Metropolitan R. Co., 13 L. T. Rep. N. S. 583, 658. And it seems that the subsequent adoption of the notice by the owner will not cure the illegality, so that the owner may compel the company to proceed. Shepherd *v.* Norwich, 30 Ch. D. 553, 54 L. J. Ch. 1050, 53 L. T. Rep. N. S. 251, 33 Wkly. Rep. 841; Harrington *v.* Metropolitan R. Co., 13 L. T. Rep. N. S. 583, 658.

8. St. 8 & 9 Vict. c. 18, § 92, providing that "no Party shall at any Time be required to sell or convey to the Promoters of the Undertaking a Part only of any House or other Building or Manufactory, if such Party be willing and able to sell and convey the whole thereof." The notice to take a part of a building, and the counter notice under section 92 to take the whole, must be read together as constituting one transaction. Schwinge *v.* London, etc., R. Co., 3 Eq. R. 536, 1 Jur. N. S. 368, 24 L. J. Ch. 405, 3 Smale & G. 30, 3 Wkly. Rep. 260.

The counter notice need not describe accurately the building; if the owner calls it a manufactory or a building, when he should have called it a house, it is immaterial. Richards *v.* Swansea Imp., etc., Co., 9 Ch. D. 425, 38 L. T. Rep. N. S. 833, 26 Wkly. Rep. 764. Where a counter notice to take the whole is given, the fact that the company thereupon gives the owner notice of its intention to apply for the appointment of a surveyor does not amount to a binding contract by the company to take the whole property, and the company may nevertheless withdraw its notice to treat. Grierson *v.* Cheshire Lines Committee, L. R. 19 Eq. 83, 44 L. J. Ch. 35, 31 L. T. Rep. N. S. 428, 23 Wkly. Rep. 68. See also *Ex p.* Quicke, 12 L. T. Rep. N. S. 580, 13 Wkly. Rep. 924. Where there has been a notice and a counter notice, it is not necessary that before summoning a jury there should be a second notice; it is necessary that a reasonable opportunity be given the landowner to agree before summoning a jury. Schwinge *v.* London, etc., R. Co., 3 Eq. R. 536, 1 Jur. N. S. 368, 24 L. J. Ch. 405, 3 Smale & G. 30, 3 Wkly. Rep. 260.

The giving of a counter notice does not destroy the effect of the original notice to treat, but only suspends it. Schwinge *v.* London, etc., R. Co., 3 Eq. R. 536, 1 Jur. N. S. 368, 24 L. J. Ch. 405, 3 Smale & G. 30, 3 Wkly. Rep. 260.

9. St. 8 & 9 Vict. c. 18, § 3.

10. Pinchin *v.* London, etc., R. Co., 5 De G. M. & G. 851, 3 Eq. R. 433, 1 Jur. N. S. 241, 24 L. J. Ch. 417, 3 Wkly. Rep. 125, 54 Eng. Ch. 667, 43 Eng. Reprint 1101.

11. Souch *v.* East London R. Co., L. R. 16 Eq. 108, 42 L. J. Ch. 477, 21 Wkly. Rep. 590, 22 Wkly. Rep. 566.

12. Where the act incorporating defendant attached certain conditions to the taking of land, and defendant gave notice to treat before it had complied with such conditions, it was nevertheless held that if the conditions were such as defendant was able and compellable to comply with, the land was such as defendant was authorized to purchase or take within the meaning of section 18, and that defendant was entitled to serve the notice to treat. Spencer *v.* Metropolitan Bd. of Works, 22 Ch. D. 142, 52 L. J. Ch. 249, 47 L. T. Rep. N. S. 459, 31 Wkly. Rep. 347.

pany having compulsory powers constitutes between the parties the relation of vendor and purchaser.[13] Where the owner treats with the company, such treating will be regarded as a waiver by the owner of objections to the proceedings, the subject of the treaty, although such proceedings are not in fact authorized by the act.[14] The notice once given cannot be withdrawn nor the purchase abandoned.[15] The power of a railway company is not exhausted by giving one notice, but it may give a further notice if it becomes necessary to take additional lands within the prescribed limits.[16] Since the owner can compel the company

13. Walker *v.* Eastern Counties R. Co., 6 Hare 594, 12 Jur. 787, 5 R. & Can. Cas. 469, 31 Eng. Ch. 594; Doo *v.* London, etc., R. Co., 1 R. & Can. Cas. 257. *Compare* Bristol, etc., R. Co. *v.* Somerset, etc., R. Co., 22 Wkly. Rep. 399, 601. The notice and the subsequent fixing of the price by arbitration together constitute a contract for sale and purchase which the courts will enforce. Harding *v.* Metropolitan R. Co., L. R. 7 Ch. 154, 41 L. J. Ch. 371, 26 L. T. Rep. N. S. 109, 20 Wkly. Rep. 321; Regent's Canal Co. *v.* Ware, 23 Beav. 575, 3 Jur. N. S. 924, 26 L. J. Ch. 566, 5 Wkly. Rep. 617; Mason *v.* Stokes Bay Pier, etc., Co., 32 L. J. Ch. 110, 1 New Rep. 84, 11 Wkly. Rep. 80; Blount *v.* Great Southern, etc., R. Co., 2 Ir. Ch. 40. And after notice is given neither party can get rid of the obligation to buy and sell. Metropolitan R. Co. *v.* Woodhouse, 11 Jur. N. S. 296, 34 L. J. Ch. 297, 12 L. T. Rep. N. S. 113, 13 Wkly. Rep. 516. If the owner dies before the contract is complete, devising his estate to his children, some of whom are infants, the company may file a bill for specific performance. London, etc., R. Co. *v.* Bridger, 10 Jur. N. S. 650, 10 L. T. Rep. N. S. 689, 4 New Rep. 261, 12 Wkly. Rep. 948. One who acquires an interest in the land after the service of a notice to treat is not entitled to compensation (*In re* Marylebone Imp. Act, L. R. 12 Eq. 389, 40 L. J. Ch. 697, 25 L. T. Rep. N. S. 149, 19 Wkly. Rep. 1047; *Re* Marylebone Imp. Act, 25 L. T. Rep. N. S. 407, 19 Wkly. Rep. 1058; Carter *v.* Great Eastern R. Co., 9 Jur. N. S. 618, 8 L. T. Rep. N. S. 197), the interest affected being that which existed at the date of the notice (Tyson *v.* London, L. R. 7 C. P. 18, 41 L. J. C. P. 6, 25 L. T. Rep. N. S. 640, 20 Wkly. Rep. 112). A notice and an offer by the owner to take a certain amount for the land do not constitute a binding agreement as to the price. *In re* Batterson Park Acts, 9 Jur. N. S. 883, 8 L. T. Rep. N. S. 623, 11 Wkly. Rep. 793. See in this connection Inge *v.* Birmingham, etc., R. Co., 1 Smale & G. 347, 1 Wkly. Rep. 300, 3 De G. M. & G. 658, 2 Eq. R. 80, 2 Wkly. Rep. 22, 52 Eng. Ch. 513, 43 Eng. Reprint 259.

Where notice was given to the lessee, who held under a lease which contained a provision giving the landlord the right to resume possession for the purpose of building, planting, etc., the lessor had no power to resume possession under the proviso after the company had given the notice, and the company is bound to pay the compensation to the lessee. Johnson *v.* Edgware, etc., R. Co., 14 L. T. Rep. N. S. 45, 14 Wkly. Rep. 416.

A covenant in a lease that the lessee shall not assign without the consent of the lessor is abrogated by the notice to treat, and a subsequent agreement between the company and the lessee as to the price of his interest. Slipper *v.* Tottenham, etc., R. Co., L. R. 4 Eq. 112, 36 L. J. Ch. 841, 16 L. T. Rep. N. S. 446, 15 Wkly. Rep. 861.

Notice superseding agreement.— Where the company entered into certain lands under an agreement with the owner, and as a part of the agreement it was stipulated that if the company desired additional land it should be paid for at a stipulated rate, if the company afterward gives notice to treat for such additional lands the notice supersedes the agreement. Kemp *v.* South-Eastern R. Co., L. R. 7 Ch. 364, 25 L. T. Rep. N. S. 622, 41 L. J. Ch. 404, 26 L. T. Rep. N. S. 110, 20 Wkly. Rep. 306.

14. Tower *v.* Eastern Counties R. Co., 3 R. & Can. Cas. 374.

15. Rex *v.* Hungerford Market Co., 4 B. & Ad. 327, 1 N. & M. 112, 24 E. C. L. 148; Birch *v.* St. Marylebone Parish, 20 L. T. Rep. N. S. 697, 17 Wkly. Rep. 1014. Except where commissioners act on behalf of the executive government. Steele *v.* Liverpool, 14 Wkly. Rep. 311. But if on serving the notice to take a part, the owner serves a counter notice requiring the company to take the whole, the company may withdraw their notice and refuse to take any part. Grierson *v.* Cheshire Lines' Committee, L. R. 19 Eq. 83, 44 L. J. Ch. 35, 31 L. T. Rep. N. S. 428, 23 Wkly. Rep. 68; King *v.* Wycombe R. Co., 28 Beav. 104, 6 Jur. N. S. 239, 29 L. J. Ch. 462, 2 L. T. Rep. N. S. 107; Morrison *v.* Great Eastern R. Co., 53 L. T. Rep. N. S. 384. See in this connection Shepherd *v.* Norwich, 30 Ch. D. 553, 54 L. J. Ch. 1050, 53 L. T. Rep. N. S. 251, 33 Wkly. Rep. 841.

16. Stamps *v.* Birmingham, etc., R. Co., 7 Hare 251, 12 Jur. 720, 17 L. J. Ch. 431, 6 R. & Can. Cas. 123, 27 Eng. Ch. 251, 2 Phil. 673, 6 R. & Can. Cas. 132, 22 Eng. Ch. 673, 41 Eng. Reprint 1103. And it is immaterial that the first notice was for land designed for the railway itself, while the second notice is for land intended for a station, the act empowering the company to do both. Simpson *v.* Lancaster, etc., R. Co., 11 Jur. 879, 4 R. & Can. Cas. 625, 15 Sim. 580, 38 Eng. Ch. 580. It is held, however, in Tawney *v.* Lynn, etc., R. Co., 16 L. J. Ch. 282, 4 R. & Can. Cas. 615, that where one valid notice is given, another and different notice, describing a different tract, cannot be given without the consent of the owner. If both

to proceed to complete the purchase of the land as to which it has given notice to treat, he cannot urge the delay of the company as a ground for interference by a court of equity with the company's subsequent attempt to obtain the land.[17]

5. Ordinances and Resolutions. The corporation instituting condemnation proceedings, whether it be a municipal or a private corporation, as a railroad company for example, since it must show that the proper preliminary steps to authorize it to institute the proceedings have been taken, must show that it has complied with the statutory or charter requirement of a resolution or a formal ordinance.[18] Compliance must also be shown with a requirement that the same be

parties treat the first notice as a nullity a new notice may be given. Tawney *v.* Lynn, etc., R. Co., 16 L. J. Ch. 282, 4 R. & Can. Cas. 615.

17. Pinchin *v.* London, etc., R. Co., 5 De G. M. & G. 851, 3 Eq. R. 433, 1 Jur. N. S. 241, 24 L. J. Ch. 417, 3 Wkly. Rep. 125, 54 Eng. Ch. 667, 43 Eng. Reprint 1101.

Laches of the company in following up a notice to treat will not preclude it from entering on the lands. Willey *v.* South-Eastern R. Co., 1 Hall & T. 56, 13 Jur. 241, 18 L. J. Ch. 201, 1 Macn. & G. 58, 6 R. & Can. Cas. 108, 47 Eng. Ch. 47, 41 Eng. Reprint 1184. But *compare* Stretton *v.* Great Western, etc., R. Co., L. R. 5 Ch. 751, 40 L. J. Ch. 50, 23 L. T. Rep. N. S. 379, 18 Wkly. Rep. 1078; Hedges *v.* Metropolitan R. Co., 28 Beav. 109, 6 Jur. N. S. 1275, 3 L. T. Rep. N. S. 643. This is especially true where the powers of the company are extended by a subsequent act. Ystalyfera Iron Co. *v.* Neath, etc., R. Co., L. R. 17 Eq. 142, 43 L. J. Ch. 476, 29 L. T. Rep. N. S. 662, 22 Wkly. Rep. 149; Bentley *v.* Rotherham, etc., Local Bd. of Health, 4 Ch. D. 588, 46 L. J. Ch. 284.

18. Los Angeles *v.* Pomeroy, 124 Cal. 597, 57 Pac. 585; St. Louis *v.* Franks, 78 Mo. 41 [*affirming* 9 Mo. App. 579]; *In re* Buffalo, 78 N. Y. 362; People *v.* Whitney's Point, 32 Hun (N. Y.) 508; Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 6 Ohio Cir. Ct. 362, 3 Ohio Cir. Dec. 493. And see *In re* Viaduct on West Lackawanna Ave., (Pa. Com. Pl.) 3 Lack. Jur. 273.

Under the Denver city charter which in one part confers on the city council power to condemn realty for parks, etc., and in another part provides that whenever the city is divided into park districts the park commission may in the name of the city condemn lands for such purposes, the park commission cannot condemn any lands until it is shown that the city has been divided into park districts, or that the council has authorized the proceeding. Whitehead *v.* Denver, 13 Colo. App. 134, 56 Pac. 913.

Publication of ordinance.— Although an ordinance for the opening and widening of a street has been validly adopted, yet, if the council of the city, without authority of the mayor, tenders out of the city's money a sum sufficient to compensate the owner, without previous publication of the ordinance and filing by the owner of his claim for damage, the proceedings are void. Bates *v.* Titusville, 3 Pittsb. (Pa.) 434.

Change of ordinance.— Where, after damages have been assessed under an ordinance providing for a straight street, and after the time for appeal has expired, the ordinance is changed so as to call for a crooked street, and as a consequence the damages as assessed are totally inadequate, the city has no authority to take possession of land by reason of the condemnation proceedings had. San Antonio *v.* Sullivan, 23 Tex. Civ. App. 658, 57 S. W. 45.

When resolution not necessary.— Under a statute (N. Y. Laws (1830), p. 207), authorizing canal commissioners to enter on, take possession of, and use all lands, the appropriation of which shall in their judgment be necessary for the canal and works, no formal resolution of the canal commissioners is necessary to warrant such appropriation. Baker *v.* Johnson, 2 Hill (N. Y.) 342.

If the special charter of a railroad company permits it to condemn land for a branch road without filing a resolution of the board of directors with the secretary of state, as required by Ala. Code, § 1173, a proceeding by the company to condemn land for a branch line is valid, notwithstanding no resolution had been filed. Tennessee Coal, etc., Co. *v.* Birmingham Southern R. Co., 128 Ala. 526, 29 So. 455.

Under that section of the Kansas City charter conferring on the park board the power and duty of devising a system of parks, and giving the city general authority to establish parks, a proceeding to establish a parkway is not invalid because there is no statement in the ordinance that the park board has devised a system of parks, since, in the absence of a provision that such step shall constitute a condition precedent to the acquisition of a parkway by condemnation, it is not a jurisdictional fact. Kansas City *v.* Mastin, 169 Mo. 80, 68 S. W. 1037.

Sufficiency of ordinance.—An ordinance for condemnation is not void for failing to mention certain lots, if the description of courses and bounds contained in the ordinance necessarily includes the lots. Joplin Consol. Min. Co. *v.* Joplin, 124 Mo. 129, 27 S. W. 406. In proceedings to condemn land for a street extension, where the ordinance for the extension shows that it was enacted by the common council of the city, and that the extension is within the city limits, as described in the city charter, and the charter declares the city to be within a certain county, the record sufficiently shows the extension to be in that county; it will be presumed that the city

recorded.[19] In some instances a resolution is a necessary preliminary to the adoption of an ordinance.[20] The want of these preliminaries may, however, under some circumstances, be supplied by a subsequent ratification.[21] The mere passage of the ordinance does not make out a *prima facie* case of a compliance with the precedent requirements.[22]

6. INSTITUTING PROCEEDINGS. The method of instituting condemnation proceedings, as well as what constitutes the first step therein, is regulated by the statutes, which must be followed in this as in other respects.[23] Under some statutes condemnation proceedings may be instituted after the land is appropriated, and even after the construction of the work, as well as before.[24] Where the statute

did not by its ordinance extend the street beyond its territorial limits. Kansas City *v.* Vineyard, 128 Mo. 75, 30 S. W. 326. If a landowner is given due notice of the proceedings, the mere fact that the ordinance, which was enacted without notice, declared that the lands in question were "hereby taken and condemned," does not affect the validity of the proceedings. Joplin Consol. Min. Co. *v.* Joplin, 124 Mo. 129, 27 S. W. 406.

Ordinance covering more land than is condemned.— There is jurisdiction to render a condemnation judgment, although only a part of the lands for the condemnation of which the ordinance provided is proceeded against. South Chicago City R. Co. *v.* Chicago, 196 Ill. 490, 63 N. E. 1046.

19. Svennes *v.* West Salem, 114 Wis. 650, 91 N. W. 121.

20. Matter of Schreiber, 3 Abb. N. Cas. (N. Y.) 68. Where a city charter requires that an ordinance to establish a street must be passed upon the unanimous recommendation of the board of public improvements, or upon the petition of the majority of the owners, the fact that the ordinance was based on such recommendation or petition must be shown in order to give the court jurisdiction of the proceeding. St. Louis *v.* Gleason, 89 Mo. 67, 14 S. W. 768, 93 Mo. 33, 8 S. W. 348 [*reversing* 15 Mo. App. 25]. So too where a charter provides that no street shall be extended nearer than five hundred feet to a street already opened, except on the unanimous recommendation of the board of public improvements, such recommendation is in the nature of a jurisdictional fact. St. Louis *v.* Franks, 78 Mo. 41 [*affirming* 9 Mo. App. 579].

The provision of Ind. Rev. St. § 3167, that city councils, before referring any matter of condemnation to the city commissioners, shall first refer it to an appropriate committee, who shall examine and report on it, is mandatory, and a failure to comply with it is fatal. Madison *v.* Daley, 58 Fed. 751.

The Ohio statute requiring a city council to pass a resolution when it is deemed necessary to appropriate private property (Gen. St. div. 7, c. 3, § 4) is modified when the property is required for streets, alleys, etc., by division 1, chapter 13, section 2, providing for the adoption of an ordinance, and therefore the resolution is not required in such cases. Cincinnati *v.* Mathers, 6 Ohio Dec. (Reprint) 755, 7 Am. L. Rec. 734, 4 Cinc. L. Bul. 273. See also Tyler *v.* Columbus, 6 Ohio Cir. Ct. 224.

21. Los Angeles *v.* Pomeroy, 124 Cal. 597, 57 Pac. 585; Imler *v.* Springfield, 30 Mo. App. 669. Where the directors of the Morris aqueduct determined on the necessity of acquiring certain lands, although they passed no resolution to that effect, and the president of the company instituted condemnation proceedings, and thereafter the directors by resolution approved such proceedings and directed their further prosecution, an order appointing commissioners in the proceedings was held proper. Kountze *v.* Morris Aqueduct, 58 N. J. L. 303, 33 Atl. 252.

22. St. Louis *v.* Franks, 9 Mo. App. 579 [*affirmed* in 78 Mo. 41]; Toledo, etc., R. Co. *v.* Toledo, 5 Ohio S. & C. Pl. Dec. 306, 7 Ohio N. P. 285.

23. **In California,** under Pol. Code, § 2690, which provides that the board of highway supervisors shall direct proceedings against all owners who shall not accept the award of damages for laying out a road, an order merely stating in general terms that the suit be brought against the non-consenting landowners is sufficient. Monterey County *v.* Cushing, 83 Cal. 507, 23 Pac. 700.

In Missouri, in proceedings by a railway company against a non-resident, the court has jurisdiction of the subject-matter and of the person after the petition has been filed and the notice published as provided by the statute. Chicago, etc., R. Co. *v.* Swan, 120 Mo. 30, 25 S. W. 534.

In New York condemnation proceedings are instituted when the maps showing the property intended to be appropriated are filed in the proper offices, and not when the application is first made to the court. McCrea *v.* Champlain, 35 N. Y. App. Div. 89, 55 N. Y. Suppl. 125. Under N. Y. Laws (1895), c. 986, authorizing the city of New York to construct a bridge over the Harlem river and to acquire title to the land necessary for the bridge and its approaches, with necessary abutments, and giving it power to acquire any right necessary for temporary purposes, a single proceeding for the purpose of building a bridge with its approaches, and at the same time widening the streets leading to the bridge, is proper. Matter of New York, 174 N. Y. 26, 65 N. E. 584 [*affirming* 74 N. Y. App. Div. 197, 77 N. Y. Suppl. 737].

24. Coster *v.* New Jersey R., etc., Co., 24 N. J. L. 730; Jones *v.* Franklin County, 130

fixes the time within which the proceedings must be commenced, such provision must be strictly complied with.[25] The proceedings may be commenced either in term-time or in vacation.[26]

7. Giving Bond or Other Security. It is not an unusual statutory requirement that the condemning party shall before commencing proceedings give to the owner a bond, make a deposit of money, or in some other way secure to him the payment of the compensation which may be awarded him and the expenses incurred by him, and the requirements in this respect must be complied with.[27] By some statutes it is required that the necessity of the improvement must be determined before the bond is approved.[28]

8. Waiver of Objections For Non-Compliance. Where the condemning party has omitted to take some step which is made a prerequisite to the institution of the proceedings the owner may waive the defect.[29] Thus he may waive the

N. C. 451, 42 S. E. 144; Ohio Southern R. Co. *v.* Hinkle, 1 Ohio S. & C. Pl. Dec. 682, 1 Ohio N. P. 63; Mifflin *v.* Southwark, 5 Serg. & R. (Pa.) 69. Under the charter of the New Jersey Railroad Company empowering it to acquire without the consent of the owner the requisite land and materials for the construction of a continuous line of road between certain designated termini, without expressly limiting the time within which proceedings for the purpose should be instituted, it was held that the company might institute proceedings to acquire a title in fee of the land over which their road had been constructed, whenever such acquisition of title was necessary. Coster *v.* New Jersey R., etc., Co., 23 N. J. L. 227. There was a decision to like effect under a Maryland statute. Hopkins *v.* Philadelphia, etc., R. Co., 94 Md. 257, 51 Atl. 404.

Effect as to antecedent trespass.— While the proceedings may be instituted after the appropriation of the land by plaintiff, this will not cure the antecedent trespass. Cory *v.* Chicago, etc., R. Co., 100 Mo. 282, 13 S. W. 346.

25. Danforth *v.* Groton Water Co., 176 Mass. 118, 57 N. E. 351.

In Connecticut the statute providing that no land shall be taken for railroad purposes without the consent of its owner, except within two years after the approval of the location of the route by the railroad commissioners, applies to all railroads, whether organized under a special charter or the general law. Hartford, etc., R. Co. *v.* Montague, 72 Conn. 687, 45 Atl. 961.

In Illinois, if notice is given by the company that application will be made for the appointment of commissioners on a specified day during a term of court, the company is not restricted to that day, but may apply on a subsequent day of the term, the term being regarded by legal intendment as but one day for the purpose of such an application. Chicago, etc., R. Co. *v.* Chamberlain, 84 Ill. 333.

26. Click *v.* Western North Carolina R. Co., 98 N. C. 390, 4 S. E. 183.

27. *Ex p.* Reynolds, 52 Ark. 330, 12 S. W. 570; Madera County *v.* Raymond Granite Co., 139 Cal. 128, 72 Pac. 915, 989; Sutter County *v.* Tisdale, 136 Cal. 474, 69 Pac. 141; Bigelow *v.* Pittsburg, 189 Pa. St. 455, 42 Atl. 110; Michael *v.* Crescent Pipe Line Co., 159 Pa. St. 99, 28 Atl. 204; Zanziger *v.* Wayne Electric Light Co., 6 Pa. Dist. 577; Chester Rolling Mills *v.* Grannan, 1 Del. Co. (Pa.) 379. Where a city seeks to appropriate land for public purposes, it cannot delay or defeat the proceedings brought by an owner to recover compensation by failing to file the bond, required by the statute as a condition precedent to its taking possession or instituting the proceedings on its own behalf. *In re* Delafield, 109 Fed. 577. If the company offers the property-owner the required bond, and the owner takes and holds it for several months, the burden is on him to show that he did not intend to accept it as security for his damages. Studebaker *v.* New Castle Gas Co., 7 Pa. Super. Ct. 641.

The approval by the supervisors of the bond accompanying the petition for the laying out of a road is equivalent to a declaration that the sum named in the bond is double the amount of probable cost, as required by statute. Sutter County *v.* Tisdale, 136 Cal. 474, 69 Pac. 141.

In an action on a bond conditioned to be void if the railroad company executing it shall pay the damages after they have been agreed upon or assessed in the manner provided for by law, a statement which alleges that in proceedings to ascertain the damages the railroad had fraudulently procured a judgment for a certain amount to be entered for plaintiff does not show a breach of the condition. Harris *v.* Schuylkill River East Side R. Co., 159 Pa. St. 468, 28 Atl. 296.

Giving bond as a prerequisite to taking possession see *supra*, XI, D, 7.

28. *In re* Bessemer Coke Co., 5 Pa. Dist. 765. But in Pennsylvania on a petition to approve a bond tendered by a railroad company the court will not determine questions which involve the legal or constitutional power to take, since jurisdiction of the supervision and control of all corporations other than those of a municipal character is committed to the equity courts. *In re* Bangor, etc., R. Co., 8 Pa. Dist. 65.

29. Embury *v.* Conner, 3 N. Y. 511, 53 Am. Dec. 325.

Where land is to be taken in invitum, the assent of the owner is not to be implied, or

objection that there has been no attempt at an agreement as to the price,[30] that the surveys and plans were not sufficient,[31] that a summons was improperly issued,[32] or that the notice was defective.[33]

E. Statute or Charter Governing Proceedings — 1. In General. Where the charter of the corporation contains a provision as to the manner in which it shall condemn the lands necessary for its purposes, the method pointed out must be followed, and not that prescribed by the general law,[34] especially where the company was incorporated prior to the enactment of the general law.[35] This rule does not apply, however, where the charter of a corporation does not prescribe the mode of condemning land,[36] or where a general law passed subsequent to the charter, and which purports to deal with the entire subject, may be held to supersede the charter in this respect.[37] In some instances it is held that the company has the option to proceed under its charter or under the general law.[38] The question as to whether proceedings may or should be brought under a particular statute, and the operation and effect of the statute, depend of course on the circumstances and on the construction of the statute, so that no general rule can be

his rights considered waived, by anything less than an affirmative act. His mere default in failing to appear and object to the proceedings is not to be regarded as a dedication of his land to the public. Quackenbush *v.* District of Columbia, 20 D. C. 300.

30. U. S. *v.* Reed, 56 Mo. 565.

31. Matter of New York, etc., R. Co., 21 How. Pr. (N. Y.) 434; Great Falls Mfg. Co. *v.* Garland, 124 U. S. 581, 8 S. Ct. 631, 31 L. ed. 527.

32. St. Louis, etc., R. Co. *v.* Donovan, 149 Mo. 93, 50 S. W. 286.

Waiver by appearance see *supra*, XI, I, 1, b.

33. Graves *v.* Middletown, 137 Ind. 400, 37 N. E. 157; Great Falls Mfg. Co. *v.* Garland, 124 U. S. 581, 8 S. Ct. 631, 31 L. ed. 527.

Waiver by appearance see *supra*, XI, I, 1, b.

In a proceeding before the board of selectmen for the laying out of a cemetery, the failure of the owner, who has had notice, to object that notice was not given to the town clerk, is a waiver of such defect. Crowell *v.* Londonderry, 63 N. H. 42.

34. Kearney Tp. *v.* Ballantine, 54 N. J. L. 194, 23 Atl. 821 [*affirming* 52 N. J. L. 338, 19 Atl. 792]; Visscher *v.* Hudson River R. Co., 15 Barb. (N. Y.) 37; Hudson River R. Co. *v.* Outwater, 3 Sandf. (N. Y.) 689; Norfolk Southern R. Co. *v.* Ely, 95 N. C. 77; Snyder *v.* Pennsylvania R. Co., 55 Pa. St. 340; Summy *v.* Pennsylvania R. Co., 2 Leg. Op. (Pa.) 56. The rule applies, although the general act provides that existing railroads shall be subject to its provisions when not inconsistent with the provisions of their charters. Visscher *v.* Hudson River R. Co., *supra*. See also *supra*, XI, B.

Municipal corporations.— Where the charter of a city is declared to be a public act, and the city has never availed itself of the general laws governing cities and their classifications, so as to change the conditions of its organization, it will be held that the city is still acting under its special charter, and condemnation proceedings must conform to the provisions of its charter, and not to those of the general law governing cities of its class. Springfield *v.* Whitlock, 34 Mo. App. 642.

35. Snyder *v.* Pennsylvania R. Co., 55 Pa. St. 340.

36. Mabire *v.* New Orleans Canal, etc., Co., 11 La. 83, 30 Am. Dec. 710.

37. Dulaney *v.* National Turnpike Road Co., 5 Ky. L. Rep. 512; Hunt *v.* Card, 94 Me. 386, 47 Atl. 921; Kearney Tp. *v.* Ballantine, 54 N. J. L. 194, 23 Atl. 821 [*affirming* 52 N. J. L. 338, 19 Atl. 792]. Thus the New Jersey act of March 24, 1885, relating to sewers (Suppl. Rev. p. 508), is a general law in force in all the cities of the state, purports to deal with the entire subject of the drainage of a neighborhood, as distinguished from local sewerage, and operates to supersede the special provisions on the same subject in the city charters, except so far as their provisions are retained or adopted by the act. Vreeland *v.* Jersey City, 54 N. J. L. 49, 22 Atl. 1052.

Railroad companies.— Where a railroad charter prescribed the method by which lands should be condemned, and further provided that the charter should be void unless the road was completed in five years, but before that period had elapsed the legislature extended the time and made the charter subject to all general railroad laws subsequently passed, it was held that the company was obliged to proceed according to its charter for the time between the passage of a general act and the time such general act went into effect. Croft *v.* Bennington, etc., R. Co., 64 Vt. 1, 23 Atl. 922. Where the Port Royal Railroad Company in South Carolina was chartered in 1857, and the charter was renewed in 1870, and the charter of 1857 prescribed the mode for condemning lands, but by a general act passed in 1868 a different mode was prescribed, it was held that the company must proceed after the renewal of its charter in the mode prescribed by the act of 1868. McCrea *v.* Port Royal R. Co., 3 Rich. (S. C.) 381, 16 Am. Rep. 729.

38. East St. Louis, etc., R. Co. *v.* Belleville City R. Co., 159 Ill. 544, 42 N. E. 974; Williams *v.* Council Bluffs, 85 Iowa 735, 52

laid down.[39] If there are several distinct statutes under which a corporation may condemn lands, proceedings commenced under any one must be conducted throughout under that statute, and they cannot be supported or helped out by a resort to any other.[40] The provisions of the statutes of other states cannot affect the proceedings.[41]

2. CHANGE OR REPEAL OF STATUTES. The general rule is that if a statute is changed while condemnation proceedings are pending the damages are to be assessed under the new law,[42] although this rule is subject to some excep-

N. W. 349; Arnold *v.* Council Bluffs, 85 Iowa 441, 52 N. W. 347; Cory *v.* Chicago, etc., R. Co., 100 Mo. 282, 13 S. W. 346; Shroder *v.* Lancaster, 170 Pa. St. 136, 32 Atl. 587.

39. For decisions as to particular statutes of local interest only see the following cases:

Illinois.— Pittsburg, etc., R. Co. *v.* Reich, 101 Ill. 157 (act of Feb. 8, 1861, to perfect the title of the purchasers of the Pittsburg, Ft. Wayne & Chicago railroad, etc.); People *v.* Wells, 12 Ill. 102 (act of 1843 transferring the Illinois and Michigan canal to a board of trustees, etc., and act of 1847, as to claims for damages from construction of the canal).

Indiana.— McMahon *v.* Cincinnati, etc., Short-Line R. Co., 5 Ind. 413, act of May 11, 1852, providing for the incorporation of railroad companies, and act of June 18, 1852, relating to assessment of damages for land taken by a railroad company.

Louisiana.— Fuselier *v.* Iberia Parish Police Jury, 109 La. 551, 33 So. 597, holding that when the police jury of a parish wishes to acquire a site for a court-house or jail, the land must be condemned under article 2630 of the civil code, as amended by the acts of 1886 and 1896.

Michigan.— Clay *v.* Penoyer Creek Imp. Co., 34 Mich. 204, holding the act of April 5, 1869, authorizing corporations for improving the navigation of rivers, fatally defective in not providing for the appointment of commissioners or pointing out their duties.

New York.— *In re* Southern Boulevard R. Co., 146 N. Y. 352, 40 N. E. 1000 (effect of Laws (1887), c. 723, excepting railroad companies organized under Laws (1884), c. 252, from the prohibition of Laws (1867), c. 290, § 24, against the construction of rail or tramways on the boulevard created by the act, without special legislative authority); *In re* Brooklyn Union Ferry Co., 98 N. Y. 139 (holding that the act of 1882 (Laws (1882), c. 259), directing that the right of a ferry company to use a pier and the adjoining land under water shall be acquired "in the manner and by the proceedings provided by law for acquiring title to lands for railroad use," is a sufficiently definite reference to the general railroad act); Connolly *v.* Van Wyck, 35 Misc. 746, 72 N. Y. Suppl. 382 (validity and effect of Laws (1899), c. 652, § 2, giving the East river bridge commission the power to condemn land); *In re* Metropolitan El. R. Co., 2 N. Y. Suppl. 278 (rights and procedure by the Metropolitan Elevated Railway Company under Laws (1850), c. 140; Laws (1866), c. 697; Laws (1867), c. 489; Laws (1872), c. 885; Laws (1875), cc. 595, 606).

Pennsylvania.—Power *v.* Ridgway Borough, 149 Pa. St. 317, 24 Atl. 307 (holding that the act of May 24, 1878, Pub. Laws, 129, providing that when the authorities of any borough shall change the grade of a street or alley, or in any way alter or injure the same, the remedy shall be a special proceeding by view, applies to the case of the rebuilding in a different manner of a bridge which is part of a public highway); *Ex p.* Broomal, 1 Del. Co. 79 (statute authorizing borough to lay water-pipes "as in cases of public road or bridge damages"); *In re* Royersford Toll Bridge, 2 Montg. Co. Rep. 21, 61 (proceedings under act of Feb. 27, 1839, incorporating the Royersford Bridge Company, and not under the general act of May 8, 1876).

Rhode Island.— *In re* Condemnation of Certain Land, 19 R. I. 326, 33 Atl. 448, proceedings under Pub. Laws, c. 285, by the board of commissioners created by Pub. Laws, c. 1201, with power to acquire a site for a new state house.

Texas.— Telephone Tel. Co. *v.* Forke, 2 Tex. App. Civ. Cas. § 365, proceedings to condemn right of way in behalf of a telegraph company are, under Rev. St. art. 263, the same as those provided in the case of railroads.

Virginia.—Plecker *v.* Rhodes, 30 Gratt. 795, holding that the act of March 6, 1874, authorizing the erection of a toll-bridge and the purchase or condemnation of land therefor in the mode prescribed by law, authorizes proceedings under the general act, Code (1873), c. 52, governing proceedings to condemn land, although the latter act does not refer to toll-bridges.

West Virginia.— The act of April 3, 1873, which prescribed the method by which railroad companies should become entitled to lands superseded the provisions of the code of 1866 in that regard. Chesapeake, etc., R. Co. *v.* Patton, 9 W. Va. 648.

40. Peoria, etc., R. Co. *v.* Laurie, 63 Ill. 264; Enterprise *v.* Smith, 62 Kan. 815, 62 Pac. 324. After a railroad company had elected to proceed under the Illinois act of 1852, it was held that it would not be allowed to amend so as to proceed under the prior act of 1845. Peoria, etc., R. Co. *v.* Black, 58 Ill. 33. This rule does not affect the general rule that all the acts on the subject must be construed together. Wheelock *v.* Young, 4 Wend. (N. Y.) 647.

41. Pittsburg, etc., R. Co. *v.* Reich, 101 Ill. 157.

42. Springfield, etc., R. Co. *v.* Hall, 67 Ill. 99; Dantorth *v.* Groton Water Co., 178 Mass. 472, 59 N. E. 1033, 86 Am. St. Rep. 495;

tions.[43] Where proceedings prescribed in a general statute are exclusive of all special proceedings, this operates as a repeal of the charter or special act, so far as relates to the proceedings.[44] A statute prescribing methods of procedure is repealed by a subsequent statute which prescribes methods inconsistent with the former.[45]

F. Tribunal and Venue — 1. The Tribunal. Where property is taken or injured under the power of eminent domain, the compensation to which the owner is entitled is to be fixed by the established judicial tribunals of the state.[46] If the constitution is silent as to the method by which the compensation shall be ascertained and paid, this gives the legislature discretionary power in the matter; but the owner has the right to demand that an impartial tribunal shall be provided, and that an opportunity for a hearing shall be given him.[47] Where the statute provides that a proceeding shall be by a court, that term may be construed to mean the judge of the court, or to include the judge and jury, according to the connection and the object of its use.[48] In some states the condemning

Matter of One Hundred and Sixty-Ninth St., 26 Misc. (N. Y.) 257, 56 N. Y. Suppl. 819 [*affirmed* in 40 N. Y. App. Div. 452, 58 N. Y. Suppl. 100 (*affirmed* in 161 N. Y. 622, 55 N. E. 1097)]; Gulf, etc., R. Co. *v.* Southwestern Tel., etc., Co., 25 Tex. Civ. App. 488, 61 S. W. 406. If after the proceedings are instituted by a city its charter is changed the proceedings begun under the former charter are valid, on the *de facto* principle. St. Louis *v.* Stoddard, 15 Mo. App. 173.

43. Emerson *v.* Western Union R. Co., 75 Ill. 176; *In re* Spring Garden Road, 43 Pa. St. 144.

44. *Arkansas.*— Organ *v.* Memphis, etc., R. Co., 51 Ark. 235, 11 S. W. 96.

Illinois.— Taylor *v.* Pettijohn, 24 Ill. 312.

Kentucky.— Louisville Park Com'rs *v.* Du Pont, 110 Ky. 743, 62 S. W. 891, 23 Ky. L. Rep. 106; Tracy *v.* Elizabethtown, etc., R. Co., 85 Ky. 270, 3 S. W. 168, 8 Ky. L. Rep. 922.

West Virginia.— Herron *v.* Carson, 26 W. Va. 62.

Wisconsin.— Sherman *v.* Milwaukee, etc., R. Co., 40 Wis. 645.

See 18 Cent. Dig. tit. "Eminent Domain," § 455.

45. Clarkson *v.* Hudson River R. Co., 12 N. Y. 304; *In re* Pennsburg Alley, 2 Pa. Dist. 136, 12 Pa. Co. Ct. 213; Clayton's Case, 1 Walk. (Pa.) 527. See, generally, Statutes.

46. Ames *v.* Lake Superior, etc., R. Co., 21 Minn. 241; Fisher's Petition, 178 Pa. St. 325, 35 Atl. 922. In Illinois it has been held that the determination of what is just compensation for the taking of private property for a public use is a judicial act, which can only be performed by the judiciary, and that it cannot be conferred on persons not of the judicial department, such as the commissioners of the board of public works of a city. Rich *v.* Chicago, 59 Ill. 286. *Compare*, however, *infra*, XI, M, 2.

Right of the parties to submit the question of damages to arbitration see *infra*, XI, M, 2, b.

47. Boston El. R. Co. *v.* Presho, 174 Mass. 99, 54 N. E. 348; Bruggerman *v.* True, 25 Minn. 123 [*distinguishing* Langford *v.* Ramsey County Com'rs, 16 Minn. 375]; Branson *v.* Gee, 25 Oreg. 462, 36 Pac. 527, 24 L. R. A. 355. While the legislature must provide an impartial tribunal, it may determine the character of such tribunal, whether it shall be a jury, or a court without a jury, or commissioners. Ames *v.* Lake Superior, etc., R. Co., 21 Minn. 241. It has been said in Oregon that it does not matter that the owner has no voice in choosing the assessors of his damages; that the county court, composed of the supervisors and the judge, acts in such a matter judicially, and must be deemed an impartial tribunal. Branson *v.* Gee, 25 Oreg. 462, 36 Pac. 527, 24 L. R. A. 355. When the power to condemn is vested in one tribunal, it cannot be exercised by another; but when two or more tribunals are required to act conjointly, as for instance a city board of public improvements and the circuit court, neither can act alone. St. Louis *v.* Gleason, 93 Mo. 33, 8 S. W. 348.

48. Ames *v.* Lake Superior, etc., R. Co., 21 Minn. 241; Click *v.* Western North Carolina R. Co., 98 N. C. 390, 4 S. E. 183; Gold *v.* Vermont Cent. R. Co., 19 Vt. 478. Resort must be had, for the purpose of determining the form of trial, where there is no express legislative provision other than the use of the general term, to the nature of the questions submitted to the court, and the mode of determining similar questions previously in use. Gold *v.* Vermont Cent. R. Co., 19 Vt. 478. Ohio Rev. St. § 6448, in giving the probate court jurisdiction of an action by the owner to compel the condemnation of land occupied by a corporation and the payment of compensation, impliedly also gives jurisdiction to impanel a jury and try the question of the owner's title to the land when it is denied by the corporation. Lawrence R. Co. *v.* O'Harra, 48 Ohio St. 343, 28 N. E. 175. But in Michigan it has been held that a judge or circuit court commissioner "attending" a jury forms no part of the special tribunal, and his functions are at most advisory. Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456, 11 N. W. 271. See also Smith *v.* Wilton School Dist. No. 2, 40 Mich. 143. Since Cal. Const. art. 6, § 8, provides that county courts shall

party has the election to apply to either of two courts;[49] but when it has made its election, it cannot, because dissatisfied with a verdict in the court of its choice, commence proceedings *de novo* in the other, although the latter be a court of superior jurisdiction to the former.[50] Congress has power to clothe the federal courts with authority to entertain jurisdiction of condemnation proceedings in behalf of the general government, or it may confer that power upon the state courts.[51] In most of the states certain courts have been specially designated by statute or by the constitution for condemnation proceedings.[52]

have jurisdiction of special cases and proceedings not otherwise provided for, a statute conferring on the county judge jurisdiction of condemnation proceedings is void. Spencer Creek Water Co. *v.* Vallejo, 48 Cal. 70. Proceedings in Missouri to condemn land for a railroad right of way are purely statutory, and the powers possessed by the judge at chambers or by the court, in appointing commissioners, reviewing and setting aside their report, and appointing new commissioners, are prescribed and limited by the statute, and can only be exercised in the manner thus prescribed. Gray *v.* St. Louis, etc., R. Co., 81 Mo. 126. See also *supra*, XI, B, C, D.

49. Toluca, etc., R. Co. *v.* Haws, 194 Ill. 92, 62 N. E. 312; Central Bridge Corp. *v.* Lowell, 4 Gray (Mass.) 474; Cincinnati Southern R. Co. *v.* O'Meara, 7 Ohio Dec. (Reprint) 346, 2 Cinc. L. Bul. 142.

50. Hughes *v.* Lake Erie, etc., R. Co., 21 Ind. 175; Central Bridge Corp. *v.* Lowell, 4 Gray (Mass.) 474; Cincinnati Southern R. Co. *v.* O'Meara, 7 Ohio Dec. (Reprint) 346, 2 Cinc. L. Bul. 142. In Ohio proceedings had in the probate court may be pleaded in bar of an action subsequently brought in a court of common pleas. Toledo *v.* Preston, 50 Ohio St. 361, 34 N. E. 353.

51. Gilmer *v.* Lime Point, 18 Cal. 229; Chappell *v.* U. S., 81 Fed. 764, 26 C. C. A. 600; U. S. *v.* Block 121, 24 Fed. Cas. No. 14,610, 3 Biss. 208. Congress may also confer upon the federal courts authority to proceed in the condemnation of property in conformity with a particular state statute. U. S. *v.* Block 121, *supra*. Where a railroad is in the possession of the federal court through its receiver, a telegraph company cannot condemn the right of way by proceedings in the state court, unless they are instituted with the consent of the federal court. Western Union Tel. Co. *v.* Atlantic, etc., Tel. Co., 29 Fed. Cas. No. 17,445, 7 Biss. 367.

52. As to the construction of statutes in particular states see the following cases:

Colorado.— In this state, since the jurisdiction of county courts is limited to two thousand dollars, they have no jurisdiction of proceedings when the amount of the award exceeds that sum. Denver City Irr., etc., Co. *v.* Middaugh, 12 Colo. 434, 21 Pac. 565, 13 Am. St. Rep. 234.

Illinois.— Under Rev. St. (1891) c. 37, § 240, giving city courts concurrent jurisdiction with circuit courts in all civil cases, city courts have jurisdiction of condemnation proceedings. Hercules Iron Works *v.* Elgin, etc., R. Co., 141 Ill. 491, 30 N. E. 1050. A police magistrate is vested with the same jurisdiction in this respect as a justice of the peace. Highway Com'rs *v.* Jackson, 61 Ill. App. 381. The act of 1872 increasing the jurisdiction of county courts does not apply to the condemnation of property for a city improvement. Fitzpatrick *v.* Joliet, 87 Ill. 58. Under Rev. St. (1899) c. 47, § 2, the proceedings may be brought either in the circuit or the county court. Toluca, etc., R. Co. *v.* Haws, 194 Ill. 92, 62 N. E. 312.

Indiana.— In early cases it was held that the circuit court and common pleas courts had concurrent jurisdiction (Hughes *v.* Lake Erie, etc., R. Co., 21 Ind. 175), except that under the law incorporating the Terre Haute & Richmond Railroad Company the circuit court had no jurisdiction (McCormack *v.* Terre Haute, etc., R. Co., 9 Ind. 283).

Kentucky.— Reed *v.* Louisville Bridge Co., 8 Bush 69, holding that the court of common pleas of Jefferson county had jurisdiction in condemnation proceedings brought by the Louisville Bridge Company.

Maryland.— Western Maryland R. Co. *v.* Patterson, 37 Md. 125, holding that the superior court and the circuit court had jurisdiction in railroad condemnation proceedings.

Massachusetts.— Under the Massachusetts statute providing for the determination of damages for the taking or injury to water-rights, the superior court has no jurisdiction. Danforth *v.* Groton Water Co., 176 Mass. 118, 57 N. E. 351. The proceeding must be brought in the supreme court. Sawyer *v.* Metropolitan Water Bd., 178 Mass. 267, 59 N. E. 658. In a recent case it was held that the board of aldermen of the city of Boston has jurisdiction to assess the damages for the construction of an elevated railroad. Boston El. R. Co. *v.* Presho, 174 Mass. 99, 54 N. E. 348.

Michigan.— In the condemnation of lands for a school-house, the statute does not require the circuit judge to act in preference to a circuit court commissioner, but places them on the same footing. Smith *v.* Milton School Dist. No. 2, 40 Mich. 143. See also Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456, 11 N. W. 271.

Minnesota.— Where, under the amendment of 1898 to the constitution of Minnesota, a city charter is adopted which prescribes appropriate means for the exercise of the power of eminent domain and confers jurisdiction on the district courts to hear the questions involved, and which prescribes the methods by which issues shall be determined, such charter is valid and impliedly authorized by

2. Venue and Change of Venue. Condemnation proceedings should be

the general statute, under which a freeholder's commission may lawfully impose duties on the courts of the state in the condemnation of private property for public use. State *v.* Ramsey County Dist. Ct., 87 Minn. 146, 91 N. W. 300.

Missouri.— The framers of the scheme and charter of the city of St. Louis had power to confer jurisdiction in street opening proceedings upon the circuit court. St. Louis *v.* Greely, 14 Mo. App. 578. A statute conferring power upon a justice of the peace to entertain condemnation proceedings by a railroad company for land to be used as a reservoir is valid. Musick *v.* Kansas City, etc., R. Co., 114 Mo. 309, 21 S. W. 491.

New York.— In New York the supreme court has jurisdiction of condemnation proceedings brought by an owner of land across which a drain has been built by commissioners appointed under the drainage act. Matter of Hodge, 28 Misc. 104, 59 N. Y. Suppl. 775. The superior court of Buffalo, having territorial jurisdiction coextensive only with the city limits, a statute purporting to confer on that court jurisdiction in proceedings to condemn for park purposes lands outside the city is void. *In re* Buffalo, 139 N. Y. 422, 34 N. E. 1103 [*affirming* 18 N. Y. Suppl. 771]. It was held in 1853 by the supreme court that the county court still retained the jurisdiction, conferred on it as a court of record by the statute of 1847, to appoint commissioners to appraise real estate upon the application of the Lockport and Niagara Falls Railroad Company. Mosier *v.* Hilton, 15 Barb. 657.

North Dakota.— In North Dakota all issues except that of compensation are triable by the court without a jury. Bigelow *v.* Draper, 6 N. D. 152, 69 N. W. 570.

Ohio.— Under the constitution of 1851 (art. 4, § 8), conferring upon the probate court jurisdiction in probate and testamentary matters, and such other jurisdiction as may be provided by law, it was held that the legislature properly conferred jurisdiction on those courts in condemnation matters. Toledo *v.* Preston, 50 Ohio St. 361, 34 N. E. 353. But that court has a limited jurisdiction, which can only be exercised as prescribed by the statute. Dayton, etc., R. Co. *v.* Marshall, 11 Ohio St. 497. The fact that the commercial court was not organized at the time of the adoption of the general railroad act which provided for condemnation proceedings before any court of record does not deprive it of jurisdiction in such matters, it being a court of record. Cincinnati, etc., R. Co. *v.* Sundry Persons, 1 Ohio Dec. (Reprint) 326, 7 West. L. J. 265.

Pennsylvania.— The jurisdiction is vested in the common pleas and the court of quarter sessions. Easton *v.* Walters, (1886) 5 Atl. 46; Shaaber *v.* Reading, 133 Pa. St. 643, 19 Atl. 419. The court of quarter sessions of any county through which the Union canal passes has jurisdiction to assess damages for land taken by the canal company. Heilman *v.* Union Canal Co., 50 Pa. St. 268. The act of 1864, giving the court of quarter sessions jurisdiction to assess damages for the opening of streets, was repealed by the act of 1874, which transferred such jurisdiction to the common pleas. Boyer's Petition, 15 Pa. Co. Ct. 531. But it was held in a decision of the same court, rendered in the same year, that jurisdiction to assess damages for opening a street at the instance of the borough council was in the quarter sessions. Speakman *v.* Coatesville Borough, 2 Pa. Dist. 386. Where a statute gives to the court of common pleas jurisdiction to appoint a jury to adjudicate the price to be paid for a bridge, the court of quarter sessions has no jurisdiction. *In re* Royersford Bridge, 112 Pa. St. 627, 4 Atl. 742. The act of 1811, providing for the construction of a canal, and conferring jurisdiction for the assessment of damages on the courts of quarter sessions, or the mayor's court in the city of Philadelphia, did not confine the jurisdiction to the quarter sessions or the mayor's court of Philadelphia, but the court of quarter sessions of any county through which the canal passed might assess the damages. Bassler *v.* Union Canal Co., 2 Watts 271. Where an act incorporating a railroad company prescribed the mode of assessing the damages, and directed that the tribunal to which resort must be had was the court of common pleas in which the lands lay, the assessment was local both by statute and at common law. Gettysburg R. Co. *v.* Kohler, 3 Lanc. Bar 10.

Texas.— Under Rev. St. arts. 4175–4177, the county court has jurisdiction either in term-time or in vacation to appoint commissioners to assess damages resulting from the crossing of one railroad by another. Gulf, etc., R. Co. *v.* Ft. Worth, etc., R. Co., 86 Tex. 537, 26 S. W. 54. And under articles 4181–4208, the district court has no jurisdiction to condemn land. Gulf, etc., R. Co. *v.* Poindexter, 70 Tex. 98, 7 S. W. 316; Galveston Wharf Co. *v.* Gulf, etc., R. Co., 72 Tex. 454, 10 S. W. 537.

Vermont.— The statutes of 1867–1869 relating to flowage gave jurisdiction of all proceedings under them to the county court. Tyler *v.* Beacher, 44 Vt. 648, 8 Am. Rep. 398.

Washington.— The city of Spokane Falls must under its charter proceed in the district court. Northern Pac. R. Co. *v.* Haas, 2 Wash. 376, 26 Pac. 869. The superior court has jurisdiction of a proceeding by a street railway company to condemn land for its right of way. State *v.* King County Super. Ct., 30 Wash. 219, 70 Pac. 484.

West Virginia.— The county court and not the circuit court has jurisdiction of condemnation proceedings brought by a railroad company. Chesapeake, etc., R. Co. *v.* Hoard, 16 W. Va. 270.

See 18 Cent. Dig. tit. "Eminent Domain," § 470 *et seq.*

brought in the county in which the land lies which it is sought to appropriate,[53] but as a rule, if there are several parcels to be condemned, lying in different counties, the proceedings may be commenced in any county in which either of the parcels lies.[54] And the same rule obtains where the land is located on the dividing line between two counties.[55] A change of venue is allowable in condemnation proceedings for the same reasons as in other civil cases.[56]

G. What Will Bar Right to Institute Proceedings — 1. In General. A previous seizure of and entry upon the property will not defeat the right to institute proceedings to condemn the same, whether such entry was with or without the consent of the owner.[57] Nor will the right to institute proceedings be

53. Pool *v.* Simmons, 134 Cal. 621, 66 Pac. 872; Thomas *v.* Placerville Gold Quartz Min. Co., 65 Cal. 600, 4 Pac. 641; California Southern R. Co. *v.* Southern Pac. R. Co., 65 Cal. 409, 4 Pac. 388, 65 Cal. 394, 4 Pac. 344, 346; Missouri Pac. R. Co. *v.* Carter, 85 Mo. 448.

54. Bates *v.* Ray, 102 Mass. 458. Condemnation may be had in any one county for a telegraph line along a railroad right of way which extends through several counties. St. Louis, etc., R. Co. *v.* Postal Tel. Co., 173 Ill. 508, 51 N. E. 382; Houston, etc., R. Co. *v.* Postal Tel. Cable Co., 18 Tex. Civ. App. 502, 45 S. W. 179; Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705. And the courts of either of the counties may condemn the right for the entire length of the line, even though it is crossed by navigable streams. Postal Tel. Cable Co. *v.* Texas, etc., R. Co., (Tex. Civ. App. 1898) 46 S. W. 912. And by the term "right of way," as applied to railroads in such connection, is meant the strip of land over which the track is laid through the country, and which is used in connection therewith. Postal Tel. Cable Co. *v.* Southern R. Co., 90 Fed. 30.

Under the Illinois statute providing that the party authorized to take or damage the property may apply to the judge of the circuit or county court where the property or any part thereof is situate to cause compensation to be assessed, and that any number of separate parcels situate in the same county may be included in one petition, it is improper to include in one petition separate tracts of land lying in different counties, except when one tract lies partly in different counties. Toluca, etc., R. Co. *v.* Haws, 194 Ill. 92, 62 N. E. 312.

Under the Montana statute, requiring that actions for the recovery of real property or for injuries thereto shall be tried in the county in which the subject of the action or some part thereof is situated, and providing that condemnation proceedings shall be brought in the district court of the county in which the property is situated, proceedings to condemn water appropriated for irrigation purposes may be brought in the county in which the land is situated, although the water is to be taken in another county. Helena *v.* Rogan, 26 Mont. 452, 68 Pac. 798, 69 Pac. 709.

A statute is not unconstitutional because it fails to provide that the condemnation proceedings shall be had in the county or the judicial district where the property is situated. Weir *v.* St. Paul, etc., R. Co., 18 Minn. 155. The provision of the eminent domain statute that all proceedings must be brought in the county in which the property or some part thereof is situated is not in conflict with Const. art. 8, § 5, providing that all civil or criminal business arising in any county must be tried in such county, so as to preclude a telegraph company from bringing an action to condemn a railroad's right of way, which extends through several counties, for the construction of its lines in one of such counties. Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

55. Atchison, etc., R. Co. *v.* Gough, 29 Kan. 94; Ætna Mills *v.* Brookline, 178 Mass. 482, 59 N. E. 1018.

56. Curtis *v.* St. Paul, etc., R. Co., 20 Minn. 28; Lehmicke *v.* St. Paul, etc., R. Co., 19 Minn. 464; St. Louis, etc., R. Co. *v.* Fowler, 113 Mo. 458, 20 S. W. 1069. See, generally, Venue. Where the statute provides that a change of venue shall be allowed upon affidavit that a fair trial cannot otherwise be had, and that in such case the change shall be to the nearest county where a fair trial can be had, the burden is not imposed upon the court of determining which is the nearest impartial county, without proof from the moving party as to such fact, and in the absence of such proof the motion is properly denied. Simmons *v.* St. Paul, etc., R. Co., 18 Minn. 184. Condemnation proceedings are not within the provision of the California statute that actions brought by a county or city against citizens of another county must be transferred to a county other than plaintiff or the county in which plaintiff is situate. Santa Rosa *v.* Fountain Water Co., 138 Cal. 579, 71 Pac. 1123, 1136.

57. *Florida.*— Jacksonville, etc., R. Co. *v.* Adams, 28 Fla. 631, 10 So. 465, 14 L. R. A. 533; State *v.* Baker, 20 Fla. 616.

Louisiana.— Carrollton, etc., R. Co. *v.* Avart, 9 La. 205.

Michigan.— Grand Rapids, etc., R. Co. *v.* Chesebro, 74 Mich. 466, 42 N. W. 66.

Missouri.— Cory *v.* Chicago, etc., R. Co., 100 Mo. 282, 13 S. W. 346.

Montana.— Ellinghouse *v.* Taylor, 19 Mont. 462, 48 Pac. 757.

New Jersey.— Wheeler *v.* Essex Public Road Bd., 40 N. J. L. 138.

New York.— *In re* Prospect Park, etc., R.

barred by the fact that the owner has brought an action to recover the damages caused by such entry,[58] or ejectment or forcible entry and detainer,[59] or obtained a judgment therein,[60] or by the fact that he obtained an injunction against an illegal appropriation or occupation of the property.[61] A former proceeding

Co., 67 N. Y. 371 [*affirming* 8 Hun 30]; Metropolitan El. R. Co. *v.* Dominick, 55 Hun 198, 8 N. Y. Suppl. 151; Matter of Wiley, 52 Hun 382, 5 N. Y. Suppl. 241; *In re* Metropolitan El. R. Co., 12 N. Y. Suppl. 502.

Ohio.— Ohio Southern R. Co. *v.* Hinkle, 1 Ohio S. & C. Pl. Dec. 682, 1 Ohio N. P. 63.

Pennsylvania.— Harrisburg *v.* Crangle, 3 Watts & S. 460.

South Carolina.— Leitzsey *v.* Columbia Water-Power Co., 47 S. C. 464, 25 S. E. 744, 34 L. R. A. 215.

Texas.— Southern Cotton Press, etc., Co. *v.* Galveston Wharf Co., 3 Tex. App. Civ. Cas. § 256.

United States.—Douglass *v.* Byrnes, 59 Fed. 29; Grafton *v.* Baltimore, etc., R. Co., 21 Fed. 309.

See 18 Cent. Dig. tit. "Eminent Domain," § 459.

Prior occupation of the land without authority of law, even though it be a trespass, will not preclude the company from taking subsequent measures authorized by law to condemn the land for its use; and though as a general rule things affixed to the freehold so as to be a part thereof become as against a trespasser or person entering tortiously and affixing them the property of the owner of the soil, this rule is not applicable as against a body having the power of eminent domain and entering without leave and making improvements for the public purpose for which it was created and given such power, and the owner of the land is not entitled to have the value of the improvements considered in assessing the damages.

Alabama.— Jones *v.* New Orleans, etc., R. Co., 70 Ala. 227.

Arkansas.— Newgass *v.* St. Louis, etc., R. Co., 54 Ark. 140, 15 S. W. 188.

California.— San Francisco, etc., R. Co. *v.* Taylor, 86 Cal. 246, 24 Pac. 1027; Albion River R. Co. *v.* Hesser, 84 Cal. 435, 24 Pac. 288.

Florida.— Florida Cent. R. Co. *v.* Bell, 43 Fla. 359, 31 So. 259; Jacksonville, etc., R. Co. *v.* Adams, 28 Fla. 631, 10 So. 465, 14 L. R. A. 533; State *v.* Baker, 20 Fla. 616.

Illinois.— Chicago, etc., R. Co. *v.* Goodwin, 111 Ill. 273, 53 Am. Rep. 622; Fisher *v.* Chicago, etc., R. Co., 104 Ill. 323.

Iowa.— Daniels *v.* Chicago, etc., R. Co., 41 Iowa 52.

Michigan.— Grand Rapids, etc., R. Co. *v.* Chesebro, 74 Mich. 466, 42 N. W. 66; Dunlap *v.* Toledo, etc., R. Co., 50 Mich. 470, 15 N. W. 555; Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456, 11 N. W. 271; Morgan *v.* Chicago, etc., R. Co., 39 Mich. 675.

Minnesota.— Greve *v.* First Div. St. Paul, etc., R. Co., 26 Minn. 66, 1 N. W. 816.

Mississippi.—Louisville, etc., R. Co. *v.* Dickson, 63 Miss. 380, 56 Am. Rep. 809.

Missouri.— Cory *v.* Chicago, etc., R. Co., 100 Mo. 282, 13 S. W. 346.

North Carolina.— Western North Carolina R. Co. *v.* Deal, 90 N. C. 110; Burgess *v.* Clark, 35 N. C. 109.

Oregon.— Oregon R., etc., Co. *v.* Mosier, 14 Oreg. 519, 13 Pac. 300, 58 Am. Rep. 321.

Pennsylvania.— Justice *v.* Nesquehoning Valley R. Co., 87 Pa. St. 28.

Texas.— Texas, etc., R. Co. *v.* Matthews, 60 Tex. 215.

Utah.— Chase *v.* Jemmett, 8 Utah 231, 30 Pac. 757, 16 L. R. A. 805; Denver, etc., R. Co. *v.* Stancliff, 4 Utah 117, 7 Pac. 530.

Washington.— Bellingham Bay, etc., R. Co. *v.* Strand, 14 Wash. 144, 44 Pac. 140, 46 Pac. 238.

Wisconsin.— Lyon *v.* Green Bay, etc., R. Co., 42 Wis. 538.

United States.— Searl *v.* Lake County School Dist. No. 2, 133 U. S. 553, 10 S. Ct. 374, 33 L. ed. 740 [*affirming* 38 Fed. 18].

58. Dixon *v.* Baltimore, etc., R. Co., 1 Mackey (D. C.) 78; Jacksonville, etc., R. Co. *v.* Adams, 28 Fla. 631, 10 So. 465, 14 L. R. A. 533; Mead *v.* New York El. R. Co., 24 N. Y. Suppl. 908; *In re* Metropolitan El. R. Co., 2 N. Y. Suppl. 278, 12 N. Y. Suppl. 506.

59. Jacksonville, etc., R. Co. *v.* Adams, 28 Fla. 631, 10 So. 465, 14 L. R. A. 533; Thomas *v.* St. Louis, etc., R. Co., 164 Ill. 634, 46 N. E. 8; Mead *v.* New York El. R. Co., 24 N. Y. Suppl. 908; *In re* Metropolitan El. R. Co., 2 N. Y. Suppl. 278, 12 N. Y. Suppl. 506.

60. Where a judgment against a railroad company for the recovery of land on which its road is constructed is affirmed on appeal, the company is entitled to a reasonable time after the order of affirmance becomes final within which to commence condemnation proceedings. Southern R. Co. *v.* Standiford, 53 S. W. 668, 21 Ky. L. Rep. 1023. The court may under special circumstances stay an action of ejectment or an execution on a judgment therein for a reasonable time to enable defendant to institute condemnation proceedings. Byrnes *v.* Douglass, 23 Nev. 83, 42 Pac. 798; Oliver *v.* Pittsburgh, etc., R. Co., 131 Pa. St. 408, 19 Atl. 47, 17 Am. St. Rep. 814; Bass *v.* Metropolitan West Side El. R. Co., 82 Fed. 857, 27 C. C. A. 147, 39 L. R. A. 711.

61. *In re* Metropolitan El. R. Co., 12 N. Y. Suppl. 506. The injunction may under special circumstances be suspended or stayed for a reasonable time to enable defendant to bring condemnation proceedings. Willamette Iron Works *v.* Oregon R., etc., Co., 26 Oreg. 224, 37 Pac. 1016, 46 Am. St. Rep. 620, 29 L. R. A. 88. See also as to the operation and effect of an injunction Peck *v.* Schenectady R. Co., 170 N. Y. 298, 63 N. E. 357; Hart *v.* Brooklyn El. R. Co., 89 Hun (N. Y.) 259, 35

which has not been completed, and in which the damages assessed have not been paid, will not bar a second proceeding to condemn the same land.[62] And the fact that the corporation has once acquired a right of way will not preclude it from acquiring a more extended way by means of condemnation proceedings.[63] Condemnation proceedings are not barred by the fact that a foreign corporation is interested in the corporation seeking to condemn;[64] and a proceeding by a city to condemn a steamboat dock and adjoining landing for the purpose of establishing a public landing is not barred by the fact that the city has agreed to grant a right of way across the land to a railroad company.[65]

2. PENDENCY OF PROCEEDINGS BY ANOTHER. Condemnation proceedings are not barred by the pendency of prior proceedings instituted by another corporation to condemn the same land, unless such fact is properly brought before the court by answer, intervention, or otherwise.[66]

3. LACHES. The right to condemn land as authorized by statute is a mere privilege and may be lost by laches.[67] Where the statute declares that in case of delay the rights and franchises shall be forfeited, the right to institute condemnation proceedings will be lost by such delay.[68]

H. Parties[69] — 1. DEFENDANTS OR RESPONDENTS. All persons having any interest in the property which will be affected by the proceedings are entitled to be heard and should be made parties,[70] and conversely it is not necessary or proper

N. Y. Suppl. 39; Eno *v.* Metropolitan El. R. Co., 56 N. Y. Super. Ct. 313, 8 N. Y. Suppl. 197. And see *infra*, XII, B, 2, f.

62. Alabama Midland R. Co. *v.* Newton, 94 Ala. 443, 10 So. 89; Allen *v.* Chicago, 176 Ill. 113, 52 N. E. 33; Bennett *v.* Woody, 137 Mo. 377, 38 S. W. 972; Bowers *v.* Citizens' Water Co., 162 Pa. St. 9, 29 Atl. 98, 99. Where one of several defendants has not asked or procured the proceedings to be dismissed for failure of the petitioner to make payment within the time fixed, they are nevertheless a bar to subsequent proceedings to condemn the same land, if they were dismissed on the application of another owner. Pearce *v.* Chicago, 169 Ill. 631, 48 N. E. 330.

63. Chicago, etc., R. Co. *v.* Illinois Cent. R. Co., 113 Ill. 156.

64. Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705, holding that the fact that a telegraph company of another state is interested in a corporation duly organized under the laws of the state to construct a telegraph line does not affect the latter's right to maintain proceedings to condemn a right of way for its line.

65. Diamond Jo Line Steamers *v.* Davenport, 114 Iowa 432, 87 N. W. 399, 54 L. R. A. 859, where, however, the city possessed the power to make such grant to the railroad company.

66. Lake Merced Water Co. *v.* Cowles, 31 Cal. 214, 217, where mandamus was issued to compel the court to appoint commissioners in the proceedings last instituted, the court holding that the lower court could not take judicial notice of the prior proceedings and refuse to proceed on that ground. The court said: "If a corporation starts proceedings under the statute, to get a title of that quality, after like proceedings for acquiring a like title have been commenced by another company, and there should be a condemnation and payment in both proceedings, both corporations would have good title as against the original owner or owners; but as between the companies, the lands would belong to the one over whose proceedings the court first acquired jurisdiction — a question to be litigated between the companies. It may be that either company might make the other a party defendant in its suit to condemn; or, failing that, that either of the companies might intervene in the proceedings of the other (Contra Costa Coal Mines R. Co. *v.* Moss, 23 Cal. 323), so that the question of priority might be determined in advance of a purchase by either; but should the junior applicant, knowing all the facts, or having the means of knowing them, push its suit to a quitclaim, and voluntarily pay the purchase-money, the responsibility would not be with the law."

67. Where a charter authorized a railroad company to condemn a stated number of feet on each side of its road-bed, in case the condemnation of such land should not interfere with any building, it was held that it will not authorize the company to condemn land upon which it had located its road without condemnation, where, thereafter, and before the condemnation proceedings were commenced, the owner had placed a building upon it. Alabama Great Southern R. Co. *v.* Gilbert, 71 Ga. 591.

68. *In re* Kings County El. R. Co., 41 Hun (N. Y.) 425.

69. Who may institute proceedings see *supra*, XI, B, 2.

Parties to proceedings instituted by the owner of the property taken or injured see *infra*, XII, I.

70. *Missouri.*— Anderson *v.* Pemberton, 89 Mo. 61, 1 S. W. 216.

Nebraska.— Gerrard *v.* Omaha, etc., R. Co., 14 Nebr. 270, 15 N. W. 231.

New York.— *In re* New York, etc., R. Co.,

to bring in those whose interests are of such a character that they will not be affected.[71] As a general rule those persons who are owners of or have an interest

26 Hun 194; Matter of Metropolitan Transit Co., 7 N. Y. St. 477.

North Carolina.— Gamble *v.* McCrady, 75 N. C. 509.

Texas.— Davidson *v.* Texas, etc., R. Co., 29 Tex. Civ. App. 54, 67 S. W. 1093.

Vermont.— Hagar *v.* Brainerd, 44 Vt. 294.

See 18 Cent. Dig. tit. "Eminent Domain," § 478.

The owner of the fee in a public street is a proper defendant in proceedings for the laying of a sewer in the street. *In re* Wells Ave., 4 N. Y. Suppl. 301.

A corporation holding a lease perpetual at its option has a right to be heard in proceedings to establish a street over the property. Storm Lake *v.* Iowa Falls, etc., R. Co., 62 Iowa 218, 17 N. W. 489.

The "persons interested" in the laying out of a highway include those whose lands are taken for the way and also those who may be injuriously affected by the laying out of the same. Shelton *v.* Derby, 27 Conn. 414.

Where a telephone company institutes a proceeding to condemn a right of way along the line of a railroad in which a telegraph company has an interest, the latter must be made a party in order to bind it. South Carolina, etc., R. Co. *v.* American Telephone, etc., Co., 65 S. C. 459, 43 S. E. 970.

One who has control of a lot, pays the taxes on it, and has an equitable interest in it, is a proper party, and has the right to be heard on the question of compensation. Anderson *v.* Pemberton, 89 Mo. 61, 1 S. W. 216; Matter of Hand St., 52 Hun (N. Y.) 206, 5 N. Y. Suppl. 158.

Where the grade of certain streets is to be changed, so as to cross over a railroad by a viaduct, instead of at grade, under an agreement between the city and the company that the latter will pay the expense of the change, the company is a party in interest, and it is entitled to answer a petition of the grade crossing commissioners in proceedings to determine the compensation to be paid the landowners injured by such change. *In re* Buffalo Grade Crossing Com'rs, 166 N. Y. 69, 59 N. E. 706 [*affirming* 46 N. Y. App. Div. 473, 61 N. Y. Suppl. 748].

After a railroad company has laid out its route and filed the map and given the notice required by statute it has acquired a right in the property which cannot be defeated by subsequent condemnation proceedings on the part of the state to appropriate the same property for the purpose of a park, where the company is not made a party to the proceedings. People *v.* Adirondack R. Co., 39 N. Y. App. Div. 34, 56 N. Y. Suppl. 869.

In proceedings to abolish the crossing at grade of a highway by a railroad, under the Massachusetts statute, landowners are not entitled to be heard in the proceedings before the commissioners, but are entitled to be made parties to the proceeding after the report of the commissioners is filed in the superior court for confirmation. *In re* Old Colony R. Co., 163 Mass. 356, 40 N. E. 198.

In Massachusetts, if it appears that any interest is unrepresented by reason of any contingency or other cause by which the owner is unknown or cannot be ascertained, the court may appoint a guardian *ad litem* to represent such interest. Parker *v.* Parker, 118 Mass. 110.

71. Allen *v.* Chicago, 176 Ill. 113, 52 N. E. 33; Matter of First St., 58 Mich. 641, 26 N. W. 159; Watson *v.* New York Cent. R. Co., 47 N. Y. 157 [*affirming* Sheld. 159, 6 Abb. Pr. N. S. 91]; Matter of Niagara Falls, etc., R. Co., 15 N. Y. St. 546.

A judgment creditor of the owner is not a necessary party. Watson *v.* New York Cent. R. Co., 47 N. Y. 157 [*affirming* Sheld. 159, 6 Abb. Pr. N. S. 91].

A mere naked trustee of an equitable interest in land is not a necessary party, under a statute requiring notice to be given to owners and persons interested. McIntyre *v.* Easton, etc., R. Co., 26 N. J. Eq. 425.

Where land has been dedicated as a street but not accepted the municipality is not a necessary party to proceedings to condemn a railroad right of way across the same. Pease *v.* Paterson, etc., Traction Co., 69 N. J. L. 165, 54 Atl. 524.

The owner of an easement is not a necessary party where the easement is of such a character that its enjoyment will not be interfered with for the purpose for which the land is condemned. Allen *v.* Chicago, 176 Ill. 113, 52 N. E. 33; Matter of Niagara Falls, etc., R. Co., 15 N. Y. St. 546.

The mortgagees of the franchise of a railway company need not be made parties to a proceeding to condemn a right of way across the track for a street where the track is not disturbed and the company's control of the road is not interfered with. Matter of First St., 58 Mich. 641, 26 N. W. 159.

A person owning land on one side of the street only is not a proper party to proceedings to condemn a right of way for a street railroad located on the opposite side of the center of the street. New Decatur Belt, etc., R. Co. *v.* Karcher, 112 Ala. 676, 21 So. 825.

The state is not a necessary party to a proceeding to condemn tide lands which the state has contracted to sell, since the state's interest in such land is not subject to condemnation. North River Boom Co. *v.* Smith, 15 Wash. 138, 45 Pac. 750.

Where a railroad company leases to another company the right to use a portion of its track but retains the full control and direction of the management and use of the road, and the right to grant similar privileges to other roads, the lessee does not acquire such an interest as to make it a necessary party in proceedings by another company to condemn a right of way across the track. Englewood Connecting R. Co. *v.* Chicago, etc., R. Co., 117 Ill. 611, 6 N. E. 684.

in the property at the time the proceedings are commenced are the proper and necessary parties thereto;[72] and consequently it is unnecessary that a former owner who parted with all his interest before the proceedings were instituted,[73] or a person who purchases the property while the proceedings are pending,[74] should be made a party. In condemning lands constituting the estate of a decedent, the proceedings must be brought against the heirs,[75] unless there are statutes authorizing the proceedings to be brought against the executor or administrator alone.[76] The death of the owner does not determine proceedings already pending against him so as to necessitate their being commenced anew,[77] but in such cases the heirs must be made parties to the subsequent proceedings.[78] In the condemnation of trust property the trustee is the proper party to represent the trust estate, and it is not necessary that the beneficiaries should be made parties to the proceedings.[79] Where the land to be condemned belongs to minors, their guardian should be made a party defendant,[80] and if they have no regular guardian, a guardian *ad litem* should be appointed.[81] In some states it is held that the mortgagee, and not the mortgagor in possession, is the owner for the purposes of the condemnation proceedings,[82] while in others he is not so regarded and it is held that he is not a necessary party.[83] Where there are adverse claimants to the property sought to be condemned, all of such claimants should be

72. Stewart *v.* White, 98 Mo. 226, 11 S. W. 568.

Proceedings to which only the former owner is made a party, he having conveyed the title before the institution of the proceedings, will not affect the title of the true owner. Smith *v.* Chicago, etc., R. Co., 67 Ill. 191.

Although a city charter provides that it shall be sufficient to make the owners at the date of the ordinance authorizing the proceedings parties thereto, and that all persons claiming through or under such owners shall be bound thereby, it is the better practice to substitute the owner at the time the action is commenced as a party in the place of the former owner (Stewart *v.* White, 98 Mo. 226, 11 S. W. 568; Kiebler *v.* Holmes, 58 Mo. App. 119), and the former owner is not a necessary party (Stewart *v.* White, 98 Mo. 226, 11 S. W. 568), although the fact that he is joined with the real owner will not affect the validity of the proceedings (Kiebler *v.* Holmes, 58 Mo. App. 119).

73. Stewart *v.* White, 98 Mo. 226, 11 S. W. 568.

Where the petitioning party has settled with the owner of a portion of the land, such owner need not be joined with the other owners. Detroit *v.* Robinson, 93 Mich. 426, 53 N. W. 564.

74. Houston *v.* Paterson, etc., Traction Co., 69 N. J. L. 168, 54 Atl. 403; Plumer *v.* Wausau Boom Co., 49 Wis. 449, 5 N. W. 232. *Compare* Curran *v.* Shattuck, 24 Cal. 427.

75. Kane *v.* Kansas City, etc., R. Co., 112 Mo. 34, 20 S. W. 532; Boonville *v.* Ormrod, 26 Mo. 193. See also Shelton *v.* Derby, 27 Conn. 414.

76. Monterey County *v.* Cushing, 83 Cal. 507, 23 Pac. 700; Barlage *v.* Detroit, etc., R. Co., 54 Mich. 564, 20 N. W. 587.

77. Monterey County *v.* Cushing, 83 Cal. 507, 23 Pac. 700; Hale *v.* Burwell, 2 Patt. & H. (Va.) 608.

78. Peoria, etc., R. Co. *v.* Rice, 75 Ill. 329; Satterfield *v.* Crow, 8 B. Mon. (Ky.) 553; Valley R. Co. *v.* Bohm, 29 Ohio St. 633; Hale *v.* Burwell, 2 Patt. & H. (Va.) 608.

Under the California statute the proceedings may be continued against the executor or administrator without making the heirs parties. Monterey County *v.* Cushing, 83 Cal. 507, 23 Pac. 700.

79. Small *v.* Georgia Southern, etc., R. Co., 87 Ga. 602, 13 S. E. 694; National R. Co. *v.* Easton, etc., R. Co., 36 N. J. L. 181.

80. Missouri Pac. R. Co. *v.* Carter, 85 Mo. 448; Charleston, etc., Bridge Co. *v.* Comstock, 36 W. Va. 263, 15 S. E. 69.

81. Missouri Pac. R. Co. *v.* Carter, 85 Mo. 448.

82. *Iowa.*— Severin *v.* Cole, 38 Iowa 463.

Maine.— Wilson *v.* European, etc., R. Co., 67 Me. 358.

Michigan.— Michigan Air Line R. Co. *v.* Barnes, 40 Mich. 383.

New Jersey.— Platt *v.* Bright, 29 N. J. Eq. 128.

Ohio.— Harrison *v.* Sabina, 1 Ohio Cir. Ct. 49, 1 Ohio Cir. Dec. 30.

See 18 Cent. Dig. tit. "Eminent Domain," § 478.

The fact that a mortgagee was not made a party will not deprive the court of jurisdiction and render the judgment subject to collateral attack where there was sufficient land left to pay the mortgage. Smith *v.* Detroit, 120 Mich. 572, 79 N. W. 808.

83. Schumacker *v.* Toberman, 56 Cal. 508; Chicago, etc., R. Co. *v.* Sheldon, 53 Kan. 169, 35 Pac. 1105; Chicago, etc., R. Co. *v.* Nashua Sav. Bank, 52 Kan. 467, 35 Pac. 18; Rand *v.* Ft. Scott, etc., R. Co., 50 Kan. 114, 31 Pac. 683; Warren *v.* Gibson, 40 Mo. App. 469; Gurnsey *v.* Edwards, 26 N. H. 224; Parish *v.* Gilmanton, 11 N. H. 293. *Compare* Longwell *v.* Kansas City, 69 Mo. App. 177.

The reason for this rule is that the substantial rights of the mortgagee are not dis-

made parties to the proceeding.[84] Remainder-men should be made parties as well as the life-tenants.[85] A married woman must be made a party where she has a separate estate in the property,[86] and where it is community property;[87] but where the land belongs to the husband she need not be made a party, since the judgment against the husband bars her inchoate right of dower.[88] Ordinarily the husband should be made a party to proceedings for the condemnation of his wife's property.[89] Where it is sought to condemn several tracts belonging to different owners, all the owners may be joined in one proceeding.[90]

2. INTERVENTION AND NEW PARTIES. Where all of the persons interested have not been made parties to the proceeding the court may allow them to file a petition of intervention,[91] or may allow the original petition to be amended so as to make such persons parties to the proceeding;[92] but the allowance or refusal of such an amendment is a matter of discretion.[93]

3. EFFECT OF DEFECT OR MISJOINDER OF PARTIES. One whose interest is affected,

turbed, since when the mortgaged land is converted into money the mortgagee may pursue the money in place of the land and have it applied to the payment of his debt. Warren *v.* Gibson, 40 Mo. App. 469. See also Chicago, etc., R. Co. *v.* Sheldon, 53 Kan. 169, 35 Pac. 1105.

84. McCurdy *v.* Chestnut Hill R. Co., 8 Wkly. Notes Cas. (Pa.) 143; Wade *v.* Hennessy, 55 Vt. 207; Hagar *v.* Brainerd, 44 Vt. 294; Charleston, etc., Bridge Co. *v.* Comstock, 36 W. Va. 263, 15 S. E. 69.

85. Charleston, etc., R. Co. *v.* Hughes, 105 Ga. 1, 30 S. E. 972, 70 Am. St. Rep. 17; Missouri Pac. R. Co. *v.* Wilson, 45 Mo. App. 1; *In re* Metropolitan El. R. Co., 12 N. Y. Suppl. 506.

86. Grandjean *v.* San Antonio, (Tex. Civ. App. 1897) 38 S. W. 837.

87. Chehalis County *v.* Ellingson, 21 Wash. 638, 59 Pac. 485.

88. Baker *v.* Atchison, etc., R. Co., 122 Mo. 396, 30 S. W. 301; Chouteau *v.* Missouri Pac. R. Co., 122 Mo. 375, 22 S. W. 458, 30 S. W. 299; Venable *v.* Wabash Western R. Co., 112 Mo. 103, 20 S. W. 493. *Compare* Marcellus Electric R. Co. *v.* Crisler, 33 Misc. (N. Y.) 1, 67 N. Y. Suppl. 932.

89. St. Louis *v.* Lanigan, 97 Mo. 175, 10 S. W. 475, holding, however, that if the husband is a non-resident he is not a necessary party, and that where the record is silent as to why he was not joined it will be presumed that the court found that it was unnecessary that he should be made a party.

Under the Colorado statute the husband of a married woman must be made a party in all cases where the compensation cannot be agreed upon and it is sought to take the property of the wife against her consent. Colorado Cent. R. Co. *v.* Allen, 13 Colo. 229, 22 Pac. 605.

90. New Haven Evergreen Cemetery Assoc. *v.* Beecher, 53 Conn. 551, 5 Atl. 353; Todd *v.* Austin, 33 Conn. 87; McKee *v.* St. Louis, 17 Mo. 184.

In condemnation proceedings for a single purpose, as where a city for the purpose of securing a water-supply seeks to condemn land containing a spring, and other lands for a right of way to conduct the water, the proceedings should be against all the owners at the same time. Houghton Common Council *v.* Huron Copper Min. Co., 57 Mich. 547, 24 N. W. 820.

In Missouri the statute which provides that any number of owners who are residents of the same county or circuit may be joined in one petition does not by implication prohibit the joinder of non-residents with owners living in the county or circuit where the land was situated. Union Depot Co. *v.* Frederick, 117 Mo. 138, 21 S. W. 1118, 1130, 26 S. W. 350 [*overruling* Missouri Pac. R. Co. *v.* Carter, 85 Mo. 448; Quincy, etc., R. Co. *v.* Kellogg, 54 Mo. 334]. See also Missouri Pac. R. Co. *v.* Wilson, 45 Mo. App. 1.

A lessor and lessee may be joined as defendants and their joint damages assessed in one proceeding. Pennsylvania R. Co. *v.* National Docks, etc., Connecting R. Co., 57 N. J. L. 86, 30 Atl. 183.

91. Hutchinson *v.* McLaughlin, 15 Colo. 492, 25 Pac. 317, 11 L. R. A. 287.

92. Chicago, etc., R. Co. *v.* Gates, 120 Ill. 86, 11 N. E. 527; Wood *v.* West Boston, etc., Bridge Com'rs, 122 Mass. 394.

The court cannot impose as a condition of allowing new parties to be brought in that they shall not question the regularity of the prior proceedings or the right of the petitioner to maintain them. *In re* New York, etc., R. Co., 26 Hun (N. Y.) 194.

93. Wood *v.* West Boston, etc., Bridge Com'rs, 122 Mass. 394.

Where it is not shown that the parties sought to be brought in are in fact interested it is not error for the court to refuse to delay the trial for the purpose of such amendment. Chicago, etc., R. Co. *v.* Gates, 120 Ill. 86, 11 N. E. 527.

The Alabama statute providing that any person making an affidavit that he is interested adversely to an application to build a dam for a mill to be operated for the public must be made a party and permitted to contest the same does not preclude the court from terminating such contest whenever it appears that such person is not in fact, within the meaning of the statute, an interested party. Tallassee Falls Mfg. Co. *v.* Jones, 128 Ala. 424, 29 So. 448.

but who is not made a party, is not bound by the proceedings,[94] but by the weight of authority the failure to join all the persons interested as parties defendant will not invalidate the proceedings as against such persons as were made parties,[95] although there are a few decisions in which the contrary has been held.[96] The misjoinder of an improper party is no ground for dismissing the proceedings except as to the person improperly joined.[97] An objection to a misjoinder of parties must be made in the condemnation proceedings and cannot be raised in a collateral action.[98]

I. Process or Notice — 1. Necessity — a. In General. Wherever land is taken under the power of eminent domain it is necessary that the owner should have notice of the proceedings and an opportunity to appear and protect his rights,[99] and such notice is necessary, although there is no constitutional or statu-

94. *Georgia.*— Charleston, etc., R. Co. *v.* Hughes, 105 Ga. 1, 30 S. E. 972, 70 Am. St. Rep. 17.

Illinois.— Ind., etc., R. Co. *v.* Conness, 184 Ill. 178, 56 N. E. 402.

Kansas.— Long *v.* Emporia, 59 Kan. 46, 51 Pac. 897.

Missouri.— Longwell *v.* Kansas City, 69 Mo. App. 177.

New Hampshire.— Jewell *v.* Rochester, 68 N. H. 603, 44 Atl. 134.

New Jersey.— National R. Co. *v.* Easton, etc., R. Co., 36 N. J. L. 181; Platt *v.* Bright, 29 N. J. Eq. 128.

North Carolina.— Gamble *v.* McCrady, 75 N. C. 509.

Texas.— Houston, etc., R. Co. *v.* Postal Tel. Cable Co., 18 Tex. Civ. App. 502, 45 S. W. 179; Grandjean *v.* San Antonio, (Tex. Civ. App. 1897) 38 S. W. 837.

See 18 Cent. Dig. tit. "Eminent Domain," § 480.

Proceedings to open a street across a railroad right of way are invalid if the company was not named in the proceedings and did not appear, even though damages were awarded to it. Detroit, etc., R. Co. *v.* Detroit, 49 Mich. 47, 12 N. W. 904.

Where a telegraph company condemns its right of way along a railroad right of way, under a statute providing that it may conduct such proceedings if the corporation owning the easement is made a party, but that only the interest of the parties before the court shall be condemned, the owner of the fee if not a party is not affected by the judgment. Phillips *v.* Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868.

95. Stevens *v.* Norfolk, 46 Conn. 227; National R. Co. *v.* Easton, etc., R. Co., 36 N. J. L. 181; Houston, etc., R. Co. *v.* Postal Tel. Cable Co., 18 Tex. Civ. App. 502, 45 S. W. 179; State *v.* King County Super. Ct., 31 Wash. 445, 72 Pac. 89.

It is not essential to the jurisdiction of the court that all of the owners or persons interested should be made parties to the proceeding, since the damages due to each may be assessed separately. Indiana, etc., R. Co. *v.* Conness, 184 Ill. 178, 56 N. E. 402; Bowman *v.* Venice, etc., R. Co., 102 Ill. 459.

Failure to make a mortgagee a party does not invalidate the proceedings as against the mortgagor or his lessee who were parties to the proceeding. St. Louis, etc., R. Co. *v.* Postal Tel. Cable Co., 173 Ill. 508, 51 N. E. 382.

The want of notice to one owner of land over which a street is laid out is no ground for an injunction against the completion of the street on the part of another owner. Nichols *v.* Salem, 14 Gray (Mass.) 490.

Where a section house was located on a railroad right of way, the company cannot complain because the occupant of such house is not made a party to a proceeding to condemn the land on which it was situated, for the opening of a street across the right of way. Illinois Cent. R. Co. *v.* Normal, 175 Ill. 562, 51 N. E. 781.

In proceedings by a telegraph company to condemn the right to construct its lines on a railroad right of way, the railroad company cannot complain that another telegraph company, to whom it had granted the exclusive privilege over its right of way, was not made a party. New Orleans, etc., R. Co. *v.* Southern, etc., Tel. Co., 53 Ala. 211.

96. In the case of tenants in common owning undivided interests in the property to be taken, it has been held that if any are not made parties the proceedings are invalid as to all. Morgan's Louisiana, etc., R., etc., Co. *v.* Bourdier, McGloin (La.) 232; Grand Rapids, etc., R. Co. *v.* Alley, 34 Mich. 16. *Contra*, Stevens *v.* Norfolk, 46 Conn. 227.

The court cannot dismiss as to a part of the joint owners who were not served with notice and proceed as to the others. Grand Rapids, etc., R. Co. *v.* Alley, 34 Mich. 16.

Proceedings to condemn land for a public highway are proceedings in entirety, and if void as to one of the parties in interest because of failure to make him a party to the proceedings, they are void as to all. Brush *v.* Detroit, 32 Mich. 43; Anderson *v.* Pemberton, 89 Mo. 61, 1 S. W. 216.

97. Missouri Pac. R. Co. *v.* Carter, 85 Mo. 448.

98. Dyckman *v.* New York, 5 N. Y. 434.

99. *California.*— Silva *v.* Garcia, 65 Cal. 591, 4 Pac. 628.

District of Columbia.— Davidson *v.* Wight, 16 App. Cas. 371.

Florida.— Jacksonville, etc., R. Co. *v.* Adams, 27 Fla. 443, 9 So. 2.

Illinois.— Chicago, etc., R. Co. *v.* Smith, 78 Ill. 96; Wood *v.* Highway Com'rs, 62 Ill.

tory provision expressly requiring it.[1] Any legislation authorizing the taking of property under the right of eminent domain without notice to the owner is

391; Peoria, etc., R. Co. *v.* Warner, 61 Ill. 52.

Kentucky.— Shackleford *v.* Coffey, 4 J. J. Marsh. 40.

Maryland.— Baltimore Belt R. Co. *v.* Baltzell, 75 Md. 94, 25 Atl. 74 [*distinguishing* George's Creek Coal, etc., Co. *v.* New Cent. Coal Co., 40 Md. 425].

Massachusetts.— Norton School Dist. No. 8 *v.* Copeland, 2 Gray 414; Walker *v.* Boston, etc., R. Co., 3 Cush. 1.

Michigan.— Morgan *v.* Chicago, etc., R. Co., 36 Mich. 428.

Minnesota.— Lyle *v.* Chicago, etc., R. Co., 55 Minn. 223, 56 N. W. 820.

Missouri.— Thompson *v.* Chicago, etc., R. Co., 110 Mo. 147, 19 S. W. 77; Moses *v.* St. Louis Sectional Dock Co., 84 Mo. 242 [*reversing* 9 Mo. App. 571]; Dickey *v.* Tennison, 27 Mo. 373; Boonville *v.* Ormrod, 26 Mo. 193; Leonard *v.* Sparks, 63 Mo. App. 585; Taylor *v.* Todd, 48 Mo. App. 550.

Nebraska.— Lesieur *v.* Custer County, 61 Nebr. 612, 85 N. W. 892; Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110.

New Jersey.— Kearney Tp. *v.* Ballantine, 54 N. J. L. 194, 23 Atl. 821 [*affirming* 52 N. J. L. 338, 19 Atl. 792].

New Mexico.— Leyba *v.* Armijo, (1902) 68 Pac. 939.

New York.— People *v.* Smith, 7 Hun 17; Owners *v.* Albany, 15 Wend. 374.

Oklahoma.— Aldredge *v.* Payne County School Dist. No. 16, 10 Okla. 694, 65 Pac. 96.

Oregon.— Thompson *v.* Multnomah County, 2 Oreg. 34.

Rhode Island.— Ross *v.* North Providence, 10 R. I. 461.

Texas.— Parker *v.* Ft. Worth, etc., R. Co., 84 Tex. 333, 19 S. W. 518; Vogt *v.* Bexar County, 5 Tex. Civ. App. 272, 23 S. W. 1044.

Virginia.— Bernard *v.* Brewer, 2 Wash. 76.

United States.— Burns *v.* Multnomah R. Co., 15 Fed. 177, 8 Sawy. 543.

See 18 Cent. Dig. tit. "Eminent Domain," § 489.

In Missouri two notices are required to be given to the owner of the land: the first, a notice of the hearing of the petition; and the second, a notice of the commissioners' report. Thompson *v.* Chicago, etc., R. Co., 110 Mo. 147, 19 S. W. 77.

In North Carolina a proceeding to condemn land for railroad purposes is a "special proceeding" and the statutory provision as to notice does not dispense with the requirement that a summons should also be issued as in other special proceedings. Carolina, etc., R. Co. *v.* Pennearden Lumber, etc., Co., 132 N. C. 644, 44 S. E. 358.

Under the railroad law of New York a written notice of the time and place of filing the map required by that act, showing the route intended to be adopted, must be served upon all the owners and occupants of the lands over which the road is to pass, and no proceedings can be instituted until fifteen days after such notice is filed. Greenwich, etc., R. Co. *v.* Greenwich, etc., R. Co., 75 N. Y. App. Div. 220, 78 N. Y. Suppl. 24; Wallkill Valley R. Co. *v.* Norton, 12 Abb. Pr. N. S. 317.

An ordinance authorizing condemnation proceedings is not in itself a condemnation of the land, and the owner is not entitled to any notice of the proposed passage of the ordinance, but only of the subsequent condemnation proceedings. Joplin Consol. Min. Co. *v.* Joplin, 124 Mo. 129, 27 S. W. 406. See also McMicken *v.* Cincinnati, 4 Ohio St. 394.

The making of an order in vacation for a deposit of money by a railroad company for the purpose of compensation is a step taken in the proceedings, of the time and place of which the owner is entitled to notice. *Ex p.* Reynolds, 52 Ark. 330, 12 S. W. 570.

1. *California.*— Curran *v.* Shattuck, 24 Cal. 427.

Illinois.— Peoria, etc., R. Co. *v.* Warner, 61 Ill. 52. *Compare* Johnson *v.* Joliet, etc., R. Co., 23 Ill. 202.

Kentucky.— Tracy *v.* Elizabethtown, etc., R. Co., 80 Ky. 259. *Compare* Cowan *v.* Glover, 3 A. K. Marsh. 356.

New Jersey.— Kearney Tp. *v.* Ballantine, 54 N. J. L. 194, 23 Atl. 821 [*affirming* 52 N. J. L. 338, 19 Atl. 792].

New York.— People *v.* Gray, 49 Hun 465, 2 N. Y. Suppl. 251.

Ohio.— Kramer *v.* Cleveland, etc., R. Co., 5 Ohio St. 140. *Compare* Cincinnati, etc., R. Co. *v.* Sundry Persons, 1 Ohio Dec. (Reprint) 326, 7 West L. J. 265.

Oklahoma.— Aldredge *v.* Payne County School Dist. No. 16, 10 Okla. 694, 65 Pac. 96.

Pennsylvania.—Reitenbaugh *v.* Chester Valley R. Co., 21 Pa. St. 100; *In re* Harbaugh Ave., 10 Pa. Co. Ct. 440.

See 18 Cent. Dig. tit. "Eminent Domain," § 489.

Compare Wilson *v.* Baltimore, etc., R. Co., 5 Del. Ch. 524.

In Mississippi it is held, upon the ground that the proceeding is a proceeding *in rem*, that where the statute does not expressly require notice, no notice to the landowner, other than that which would arise from the assembling of the jury upon the premises, is necessary. New Orleans, etc., R. Co. *v.* Hemphill, 35 Miss. 17.

Notice of the appointment of the jury need not be given when not required by statute, and if improper persons are appointed this fact is merely a ground of exception to the report. *In re* Still, 2 Chest. Co. Rep. (Pa.) 233.

Where property is taken for a public purpose the right to take exists independent of any notice, and unless required by statute no notice of the taking need be given, but only of the subsequent assessment of damages. Buckwalter *v.* Neosho County School Dist. No. 42, 65 Kan. 603, 70 Pac. 604; *In re* Mid-

unconstitutional and void;[2] although it has been held that a mere failure to provide for notice does not render the act invalid.[3] Notice is essential to the jurisdiction,[4] and failure to give it renders the proceedings void.[5] The fact that the required notice has been served being a jurisdictional fact must affirmatively appear in the record.[6] Where a constitution provides that property shall not be damaged, injured, or destroyed for public use without just compensation therefor, any exercise of the power of eminent domain by which property is injured or destroyed requires the same formalities with regard to notice as in cases where the property is actually taken.[7] Where notice has been properly given, the owners notified are bound to take cognizance of all acts or steps thereafter taken in the proceedings and are not usually entitled to any further notice.[8]

dleton, 82 N. Y. 196. See also State *v.* Heppenheimer, 54 N. J. L. 268, 23 Atl. 664.

Where a railroad charter does not require notice of the application for the appointment of viewers but does require the viewers to give notice of the time when they will view the property and assess the damages, the latter notice is sufficient. St. Joseph, etc., R. Co. *v.* Shambaugh, 106 Mo. 557, 17 S. W. 581. See also Roosa *v.* St. Joseph, etc., R. Co., 114 Mo. 508, 21 S. W. 1124.

2. Matter of New York, 34 Misc. (N. Y.) 719, 70 N. Y. Suppl. 227. See also Aldredge *v.* Payne County School Dist. No. 16, 10 Okla. 694, 65 Pac. 96.

The legislature cannot validate a proceeding to condemn land where no notice was given. Burns *v.* Multnomah R. Co., 15 Fed. 177, 8 Sawy. 543.

3. Wilson *v.* Baltimore, etc., R. Co., 5 Del. Ch. 524; Sullivan *v.* Cline, 33 Oreg. 260, 54 Pac. 154; Towns *v.* Klamath County, 33 Oreg. 225, 53 Pac. 604. *Contra*, Matter of New York, 34 Misc. (N. Y.) 719, 70 N. Y. Suppl. 227.

Where actual notice is given the omission of the act to require it cannot be made a ground for invalidating the proceedings. Kramer *v.* Cleveland, etc., R. Co., 5 Ohio St. 140.

An objection that the statute does not provide for adequate notice to non-residents cannot be raised by an owner who is a resident and who is personally served with notice. Weir *v.* St. Paul, etc., R. Co., 18 Minn. 155.

4. Morgan *v.* Chicago, etc., R. Co., 36 Mich. 428; Leonard *v.* Sparks, 63 Mo. App. 585; Kearney Tp. *v.* Ballantine, 54 N. J. L. 194, 23 Atl. 821 [*affirming* 52 N. J. L. 338, 19 Atl. 792]; Parker *v.* Ft. Worth, etc., R. Co., 84 Tex. 333, 19 S. W. 518.

5. *California.*— Silva *v.* Garcia, 65 Cal. 591, 4 Pac. 628.

Illinois.— Wood *v.* Highway Com'rs, 62 Ill. 391.

Kansas.— Missouri Pac. R. Co. *v.* Houseman, 41 Kan. 300, 304, 21 Pac. 284.

Louisiana.— Morgan's Louisiana, etc., Co. *v.* Bourdier, McGloin 232.

Maine.— Atlantic, etc., R. Co. *v.* Cumberland County Com'rs, 51 Me. 36.

Michigan.— Morgan *v.* Chicago, etc., R. Co., 36 Mich. 428; Names *v.* Olive, etc., Tp., 30 Mich. 490.

Minnesota.— Kanne *v.* Minneapolis, etc., R. Co., 33 Minn. 419, 23 N. W. 854; Lohman *v.* St. Paul, etc., R. Co., 18 Minn. 174.

Missouri.— Williams *v.* Kirby, 169 Mo. 622, 70 S. W. 140; Williams *v.* Monro, 125 Mo. 574, 28 S. W. 853; Taylor *v.* Todd, 48 Mo. App. 550.

Nebraska.— Lesieur *v.* Custer County, 61 Nebr. 612, 85 N. W. 892.

New Jersey.— Kearney Tp. *v.* Ballantine, 54 N. J. L. 194, 23 Atl. 821 [*affirming* 52 N. J. L. 338, 19 Atl. 792]; State *v.* Easton, etc., R. Co., 36 N. J. L. 181.

New Mexico.— Leyba *v.* Armijo, (1902) 68 Pac. 939.

New York.— People *v.* Whitney's Point, 32 Hun 508.

Oklahoma.— Aldredge *v.* Payne County School Dist. No. 16, 10 Okla. 694, 65 Pac. 96.

See 18 Cent. Dig. tit. "Eminent Domain," § 489.

The notice to the tenant of the owner required by the Kansas statute is not a part of the condemnation proceedings, but is intended only to enable the tenant to prepare his fences so as to confine his stock and preserve his crops, and a failure to give such notice does not affect the validity of the proceedings, but merely renders the condemning party liable for any damages resulting from such failure. Chicago, etc., R. Co. *v.* Griesser, 48 Kan. 663, 29 Pac. 1082.

6. *Alabama.*— Barnett *v.* State, 15 Ala. 829; Talladega County *v.* Thompson, 15 Ala. 134.

Maine.— Prentiss *v.* Parks, 65 Me. 559.

Missouri.— Chicago, etc., R. Co. *v.* Young, 96 Mo. 39, 8 S. W. 776; Taylor *v.* Todd, 48 Mo. App. 550.

Oregon.— State *v.* Officer, 4 Oreg. 180; Thompson *v.* Multnomah County, 2 Oreg. 34.

Pennsylvania.— New Jersey Cent. R. Co.'s Appeal, 102 Pa. St. 38; *In re* Boyer, 37 Pa. St. 257. *Compare* Bryant *v.* New Castle Northern R. Co., 6 Pa. Co. Ct. 53.

Rhode Island.— Ross *v.* North Providence, 10 R. I. 461.

Texas.— Bowie County *v.* Powell, (Civ. App. 1901) 66 S. W. 237; Voght *v.* Bexar County, 5 Tex. Civ. App. 272, 23 S. W. 1044.

See 18 Cent. Dig. tit. "Eminent Domain," § 489.

7. McGavock *v.* Omaha, 40 Nebr. 64, 58 N. W. 543.

8. St. Joseph *v.* Geiwitz, 148 Mo. 210, 49 S. W. 1000; Matter of Brooklyn El. R. Co., 25 Misc. (N. Y.) 120, 53 N. Y. Suppl. 1087.

b. Effect of Appearance.[9] If the landowner appears and contests the proceedings on other grounds than want of notice he thereby waives the right to object that he was not notified of such proceedings,[10] or that the notice was defective,[11] or that it was not served in the proper manner.[12]

2. Persons Entitled to Notice. All persons having any interest in the lands proposed to be taken are entitled to notice.[13] A lessee is entitled to notice as well as the owner,[14] and where the land is owned by tenants in common notice must be given to each.[15] Where the land of an intestate is to be taken notice must be given to the heirs, and a notice to the administrator is not sufficient;[16] but notice

If the order for the laying out of a highway has been reversed notice must be given of any subsequent proceedings. People *v.* Kniskern, 54 N. Y. 52 [*reversing* 50 Barb. 87].

Where the assessment is not made at the time stated in the original notice the owner is justified in supposing that the proceedings have been abandoned, and the assessment cannot be made at a later date unless a new notice is given. Hull *v.* Chicago, etc., R. Co., 21 Nebr. 371, 32 N. W. 162.

9. See, generally, on this subject, Appearances, 3 Cyc. 500.

10. *Ex p.* Reynolds, 52 Ark. 330, 12 S. W. 570; Kimball *v.* Alameda County, 46 Cal. 19; Ellsworth *v.* Chicago, etc., R. Co., 91 Iowa 386, 59 N. E. 78; Polly *v.* Saratoga, etc., R. Co., 9 Barb. (N. Y.) 449.

Where the landowner moved to set aside the award, on the united grounds of want of notice and of misconduct and irregularities on the part of the commissioners, and also that the award had not been paid, this is not a general appearance which waives objections to the jurisdiction. Kanne *v.* Minneapolis, etc., R. Co., 33 Minn. 419, 23 N. W. 854.

Where the owner does not appear until after the return of the inquisition upon a writ of ad quod damnum, and makes no defense upon the merits of the case, he does not waive a failure to give notice of the original application for the writ. Bernard *v.* Brewer, 2 Wash. (Va.) 76.

11. Graves *v.* Middletown, 137 Ind. 400, 37 N. E. 157; Parish *v.* Gilmanton, 11 N. H. 293; Galveston, etc., R. Co. *v.* Baudat, 18 Tex. Civ. App. 595, 45 S. W. 939; Coleman *v.* Moody, 4 Hen. & M. (Va.) 1. *Contra*, Taylor *v.* Todd, 48 Mo. App. 550.

12. Parish *v.* Gilmanton, 11 N. H. 293; Dyckman *v.* New York, 5 N. Y. 434.

Where a non-resident has twice appeared in proceedings to condemn his land for depot purposes, the court has jurisdiction over him, however defective the service of process may have been. Union Depot Co. *v.* Frederick, 117 Mo. 138, 21 S. W. 1118, 1130, 26 S. W. 350.

13. Dodge *v.* Omaha, etc., R. Co., 20 Nebr. 276, 29 N. W. 936; Whitcher *v.* Benton, 48 N. H. 157, 97 Am. Dec. 597; Platt *v.* Bright, 29 N. J. Eq. 128; *In re* Oneida St., 22 Misc. (N. Y.) 235, 29 N. Y. Suppl. 828.

The holder of a certificate of purchase at a tax-sale is entitled to notice of proceedings to condemn land embraced in the certificate. Cochran *v.* Council Bluffs Independent School Dist., 50 Iowa 663.

A remainder-man is entitled to notice as well as the tenant in possession of the preceding estate. Chicago, etc., R. Co. *v.* Smith, 78 Ill. 96.

The owner of upland has no interest in adjoining land under water belonging to the state, and is not entitled to notice of proceedings to condemn the same. *In re* New York, etc., R. Co., 29 Hun (N. Y.) 269.

A mere naked trustee of an equitable interest in lands is not a "person interested" and is not entitled to notice of the proceedings. McIntyre *v.* Easton, etc., R. Co., 26 N. J. Eq. 425.

An easement of a way is not interfered with by condemning the fee for a street, and the owner of the easement is not entitled to notice of the proceedings. Allen *v.* Chicago, 176 Ill. 113, 52 N. E. 33.

A resident on the land, who has resided there for a number of years prior to the institution of the proceedings, will be presumed to be a "known resident owner," as the term is used in the statute of Kansas relating to the condemnation of a right of way for a sewer. Long *v.* Emporia, 59 Kan. 46, 51 Pac. 897.

A railroad company by merely filing its map and profile of a proposed extension of its road and serving notice on the occupants of the land therein designated acquires no lien or property right as against the state so as to entitle it to notice and compensation as an owner in proceedings by the state to condemn such land. People *v.* Adirondack R. Co., 176 U. S. 335, 20 Super. Ct. 460, 44 L. ed. 492 [*affirming* 160 N. Y. 225, 54 N. E. 689].

14. Board of Levee Com'rs *v.* Johnson, 66 Miss. 248, 6 So. 199.

15. Morgan's Louisiana, etc., R., etc., Co. *v.* Bourdier, McGloin (La.) 232; Dyckman *v.* New York, 5 N. Y. 434.

Notice to the husband alone of a hearing for the laying out of a highway over lands of which his wife is a tenant in common, whether by an antenuptial contract or otherwise, will not bind the wife. Whitcher *v.* Benton, 48 N. H. 157, 97 Am. Dec. 597.

16. Boonville *v.* Ormrod, 26 Mo. 193.

If the heirs of the deceased owner are served with notice while the proceedings are pending, and appear, it is immaterial that the original owner was not served with notice prior to his death. Allen *v.* Chicago, 176 Ill. 113, 52 N. E. 33.

to an executor has been held to be sufficient.[17] A mortgagee is a party interested and is entitled to notice of the proceedings.[18] Where notice has been duly served upon the person who is owner at the time the proceedings are instituted, no further notice is necessary to one who purchases the property while the proceedings are pending.[19] It has been held that one owner, although properly served with notice, may contest the proceedings upon the ground that other owners were not served.[20]

3. FORM AND SUFFICIENCY — a. In General. The form of the notice, when not prescribed by statute, is not essential, provided it contains the material facts of which the landowner is entitled to notice,[21] and there is a substantial conformity between the notice and the petition for condemnation, or the statute or ordinance authorizing the proceedings.[22] All matters which the statute expressly requires must be included,[23] but mere irregularities, not affecting any substantial right of the parties, will not vitiate the notice.[24]

17. See Barlage v. Detroit, etc., R. Co., 54 Mich. 564, 20 N. W. 587, holding that under the Michigan statute, until the estate is settled, the possession of an executor is in the right of, and as representing, the heirs or devisees, and that notice to him is sufficient.

18. *Iowa.*— Severin v. Cole, 38 Iowa 463.

Maine.— Wilson v. European, etc., R. Co., 67 Me. 358.

Nebraska.— Dodge v. Omaha, etc., R. Co., 20 Nebr. 276, 29 N. W. 936.

New Jersey.— Platt v. Bright, 29 N. J. Eq. 128.

New York.— Matter of Oneida St., 22 Misc. 235, 49 N. Y. Suppl. 828.

Ohio.— Harrison v. Sabina, 1 Ohio Cir. Ct. 49, 1 Ohio Cir. Dec. 30; Garvin v. Columbus, 5 Ohio S. & C. Pl. Dec. 333, 5 Ohio N. P. 236.

Rhode Island.— Warwick Sav. Inst. v. Providence, 12 R. I. 144.

This rule is not affected by the fact that the mortgagor has accepted the damages awarded. Garvin v. Columbus, 5 Ohio S. & C. Pl. Dec. 333, 5 Ohio N. P. 236.

Where the statute requires notice to be given "the owners" of the land it has been held that a mortgagor in possession will be regarded as the owner and is the only person entitled to notice (Gurnsey v. Edwards, 26 N. H. 224; Parish v. Gilmanton, 11 N. H. 293); but under similar statutes the term "owner" has been held to apply to all persons having an interest in the property and to include a mortgagee (Dodge v. Omaha, etc., R. Co., 20 Nebr. 276, 29 N. W. 936; Garvin v. Columbus, 5 Ohio S. & C. Pl. Dec. 333, 5 Ohio N. P. 236; Harrison v. Sabina, 1 Ohio Cir. Ct. 49, 1 Ohio Cir. Dec. 30).

Notice of a resolution to pass an ordinance authorizing condemnation proceedings prior to the passage of the same need not be given to a mortgagee, although the statute requires such notice to be given to the owners of the property to be appropriated. Put-In-Bay v. Stimmel, 18 Ohio Cir. Ct. 644, 7 Ohio Cir. Dec. 380.

A failure on the part of a city to give notice of the proceedings to the trustee in a deed of trust, notice having been given to the grantor in the deed, who was in possession of the land, will not render the proceedings void. Harkins v. Asheville, 123 N. C. 636, 31 S. E. 853.

19. Houston v. Paterson, etc., Traction Co., 69 N. J. L. 168, 54 Atl. 403; Plumer v. Wausau Boom Co., 49 Wis. 449, 50 N. W. 232. *Contra,* Curran v. Shattuck, 24 Cal. 427.

20. Greenwich, etc., R. Co. v. Greenwich, etc., R. Co., 75 N. Y. App. Div. 220, 78 N. Y. Suppl. 84 [*affirmed* in 172 N. Y. 462, 65 N. E. 278]. *Contra, In re* Pennsburg Alley, 2 Pa. Dist. 136, 12 Pa. Co. Ct. 213.

21. Heady v. Vevay, etc., Turnpike Co., 52 Ind. 117.

The publication of the ordinance under which the proceedings are instituted has been held as sufficient notice, where no special form of notice was prescribed by statute. *In re* Rochester, 137 N. Y. 243, 33 N. E. 320; McMicken v. Cincinnati, 4 Ohio St. 394.

The fact that the owner is a married woman does not entitle her to any special form of notice different from that given to other owners. Baubie v. Ossman, 142 Mo. 499, 44 S. W. 338.

22. Baltimore v. Little Sisters of Poor, 56 Md. 400; Detroit v. Beecher, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813.

23. Lyle v. Chicago, etc., R. Co., 55 Minn. 223, 56 N. W. 820; Matter of Broadway, etc., R. Co., 69 Hun (N. Y.) 275, 23 N. Y. Suppl. 609.

Where the statute requires that the notice should set out the substance of the petition, it need not contain all that it is necessary to embody in the petition; but is sufficient if it gives the owner notice that steps are to be taken to procure the appropriation and condemnation of his lands, giving the time and place, and setting out a description of the land. Quincy, etc., R. Co. v. Taylor, 43 Mo. 35.

24. Knoblauch v. Minneapolis, 56 Minn. 321, 57 N. W. 928.

The fact that notice is given to the owner as "occupant" instead of owner does not affect the validity of the proceedings. McIntyre v. Easton, etc., R. Co., 26 N. J. Eq. 425.

Describing the land in the notice to each individual owner as "his land" does not render the notice invalid. Ross v. Elizabethtown, etc., R. Co., 20 N. J. L. 230.

b. Description of Improvement and Lands Affected. The notice should fairly define the nature and extent of the proposed improvement,[25] and must contain a sufficiently accurate description of the property to inform the parties in interest what land it is proposed to appropriate.[26]

c. Designation of Owners or Persons Interested. A notice by posting or publication should contain the names of all the owners whose lands are affected,[27] and a notice addressed to certain persons "and all other persons interested" is insufficient,[28] although some one owner is named in it.[29]

4. SERVICE — a. In General. It is competent for the legislature to determine the manner in which notice shall be given;[30] and the statutes authorizing the proceedings usually make this provision.[31] In some cases it is provided that service

25. McManus *v.* McDonough, 107 Ill. 95; State *v.* Wright, 54 N. J. L. 130, 23 Atl. 116; Doughty *v.* Somerville, etc., R. Co., 21 N. J. L. 442; *In re* Albany St., 6 Abb. Pr. (N. Y.) 273.

Describing a proposed location for a road as running from one point to another "over the most practicable route" is insufficient. Potter *v.* Ames, 43 Cal. 75.

Where the statute requires notices to be posted at the termini of a proposed highway, if the notices do not correctly locate such termini, the notice and the subsequent proceedings are invalid. Williams *v.* Kirby, 169 Mo. 622, 70 S. W. 140.

Where the notice has been amended so as to allow the owner of the land the alternative of fixing the location of the proposed improvement, he cannot object to the notice on the ground that the description of the proposed location is indefinite. Savannah, etc., R. Co. *v.* Postal Tel. Cable Co., 115 Ga. 554, 42 S. E. 1.

26. Quackenbush *v.* District of Columbia, 20 D. C. 300; Midland R. Co. *v.* Smith, 109 Ind. 488, 9 N. E. 474; Lumbermen's Ins. Co. *v.* St. Paul, 85 Minn. 234, 88 N. W. 749; Lyle *v.* Chicago, etc., R. Co., 55 Minn. 223, 56 N. W. 820; Fairchild *v.* St. Paul, 46 Minn. 540, 49 N. W. 325; Kuschke *v.* St. Paul, 45 Minn. 225, 47 N. W. 786; Wilkin *v.* First Div. St. Paul, etc., R. Co., 16 Minn. 271.

A reference to a map on file in some public office is not sufficient. *In re* Central Park Com'rs, 51 Barb. (N. Y.) 277.

Land taken for the widening of a street is sufficiently described in the notice to the owner as being his lands on a certain street between the intersection of two other streets. Boice *v.* Plainfield, 41 N. J. L. 138.

If the notice states the frontage of the owner's land on the proposed street as less than it actually is, this will not affect the validity of the proceedings, but no more land can be taken than is described in the notice "as proposed to be taken." *In re* Newland Ave., 15 N. Y. Suppl. 63.

A statute requiring the boundaries of the taxing district in which the property is located to be set out in the notice is sufficiently complied with by stating the numbers of the city blocks included in such district. St. Louis *v.* Koch, 169 Mo. 587, 70 S. W. 143.

A notice describing the land as that of which the state was mortgagee, when in fact the state was mortgagee of only a part thereof, is not insufficient where the property is further described by a reference to the petition in the proceedings which had been served upon the owner and in which the boundaries of the land were defined with precision. Williams *v.* Hartford, etc., R. Co., 13 Conn. 397.

27. Chicago, etc., R. Co. *v.* Smith, 78 Ill. 96; Lyle *v.* Chicago, etc., R. Co., 55 Minn. 223, 56 N. W. 820.

A notice by publication omitting the name of a mortgagee of the land proposed to be taken is not sufficient. Warwick Sav. Inst. *v.* Providence, 12 R. I. 144.

28. Ellsworth *v.* Chicago, etc., R. Co., 91 Iowa 386, 59 N. W. 78; Birge *v.* Chicago, etc., R. Co., 65 Iowa 440, 21 N. W. 767; Cochran *v.* Council Bluffs Independent School Dist., 50 Iowa 663.

Where the commissioners have the power to determine the precise location of a proposed road, and the location cannot be definitely known at the time of notice, a notice addressed to all persons owning lands in the section, township, range, and county through which the road is to pass is sufficient. Huling *v.* Kaw Valley R., etc., Co., 130 U. S. 559, 9 S. Ct. 603, 32 L. ed. 1045.

29. Ellsworth *v.* Chicago, etc., R. Co., 91 Iowa 386, 59 N. W. 78.

30. Nishnabotna Drainage Dist. *v.* Campbell, 154 Mo. 151, 55 S. W. 276; *In re* Middletown, 82 N. Y. 196; McIntosh *v.* Pittsburg, 112 Fed. 705.

31. *Florida.*— Jacksonville, etc., R. Co. *v.* Adams, 27 Fla. 443, 9 So. 2.

Massachusetts.— Beals *v.* James, 173 Mass. 591, 54 N. E. 245.

Michigan.— Owosso *v.* Richfield, 80 Mich. 328, 45 N. W. 129; Power's Appeal, 29 Mich. 504.

Mississippi.— Cage *v.* Trager, 60 Miss. 563.

Missouri.— Williams *v.* Monroe, 125 Mo. 574, 28 S. W. 853; Thompson *v.* Chicago, etc., R. Co., 110 Mo. 147, 19 S. W. 77; Quincy, etc., R. Co. *v.* Taylor, 43 Mo. 35.

Pennsylvania.— New Jersey Cent. R. Co.'s Appeal, 102 Pa. St. 38.

Texas.— Parker *v.* Ft. Worth, etc., R. Co., 84 Tex. 333, 19 S. W. 518.

West Virginia.—Adams *v.* Clarksburg, 23 W. Va. 203.

See 18 Cent. Dig. tit. "Eminent Domain," § 493.

If the owner is a minor, notice, under the Indiana statute, may be served upon his

may be made upon an agent of the owner.[32] Where the statutes relative to condemnation proceedings do not provide the manner in which the notice shall be served, the service should be made according to the provisions of the general statutes in regard to notice in judicial proceedings;[33] but when expressly provided for the method prescribed is exclusive,[34] and all the requirements of the statute must be complied with.[35] Where the statute is silent as to who shall give the notice it may be given by the commissioners appointed to assess the compensation,[36] or by the party instituting the proceedings.[37]

b. By Publication. Personal notice to the owner is not a constitutional prerequisite to the validity of condemnation proceedings,[38] and it is competent for the legislature to provide for constructive notice by publication.[39] Service on

guardian if the guardian is a resident of the county. Norristown, etc., Turnpike Co. *v.* Burket, 26 Ind. 53.

Posting a notice of intention to lay out a town way as required by the general statutes of Massachusetts is sufficient, although the owner is a resident of the town, if the ownership is not known to the selectmen. Healey *v.* Newton, 119 Mass. 480.

Where the notice required by statute has been given it is not necessary, in the absence of statute, that the justice before whom the proceedings are heard should also issue a summons as in ordinary civil actions. Musick *v.* Kansas City, etc., R. Co., 114 Mo. 309, 21 S. W. 491.

32. Beals *v.* James, 173 Mass. 591, 54 N. E. 245; Peach Bottom R. Co. *v.* McAlister, 7 Pa. Super. Ct. 574; Watkins *v.* Hopkins County, (Tex. Civ. App. 1903) 72 S. W. 872.

Where service upon agent of a non-resident owner is permitted by statute, it is optional whether the service be made on the agent or on the owner personally, within or without the state. Saginaw, etc., R. Co. *v.* Bordner, 108 Mich. 236, 66 N. W. 62.

If the notice is served on one whom the owner has designated as his agent, and the land is taken and the improvement constructed thereon, the report of the viewers will not be set aside twenty-three years later, on the ground that the notice was not served on the owner. Peach Bottom R. Co. *v.* McAlister, 7 Pa. Super. Ct. 574.

33. Chicago, etc., R. Co. *v.* Swan, 120 Mo. 30, 25 S. W. 534; Mississippi River, etc., R. Co. *v.* Jones, 54 Mo. App. 529.

Personal service should be made on resident owners when the mode of service is not specified by statute. Chicago, etc., R. Co. *v.* Smith, 78 Ill. 96.

Notice may be left at the owner's residence instead of being served upon him personally, if his residence is within the jurisdiction of the court. Cincinnati Southern R. Co. *v.* O'Meara, 7 Ohio Dec. (Reprint) 346, 2 Cinc. L. Bul. 142.

A copy of the petition need not be served with the notice when not required by statute. Cox *v.* Buie, 34 N. C. 139.

34. *In re* St. Paul, etc., R. Co., 36 Minn. 85, 30 N. W. 432; Williams *v.* Monroe, 125 Mo. 574, 28 S. W. 853.

35. Laney *v.* Garbee, 105 Mo. 355, 16 S. W. 831, 24 Am. St. Rep. 391; New Jersey Cent. R. Co.'s Appeal, 102 Pa. St. 38; Adams *v.* Clarksburg, 23 W. Va. 203.

Where the statute requires a notice to be posted upon the property intended to be taken, the notice is insufficient if posted on any other property. Owosso *v.* Richfield, 80 Mich. 328, 45 N. W. 129.

Under the Missouri statute requiring notices of both the hearing of the petition and also of the commissioners' report, the fact that a copy of the petition was not served with the first notice, as provided by statute, does not render the proceedings void and subject to collateral attack. Thompson *v.* Chicago, etc., R. Co., 110 Mo. 147, 19 S. W. 77.

36. Clement *v.* Wichita, etc., R. Co., 53 Kan. 682, 37 Pac. 133.

37. Ross *v.* Elizabethtown, etc., R. Co., 20 N. J. L. 230.

38. Harper *v.* Lexington, etc., R. Co., 2 Dana (Ky.) 227; Kuschke *v.* St. Paul, 45 Minn. 225, 47 N. W. 786.

39. *Kentucky.*— Harper *v.* Lexington, etc., R. Co., 2 Dana 227.

Minnesota.— St. Paul, etc., R. Co. *v.* Minneapolis, 35 Minn. 141, 27 N. W. 500.

Missouri.— Nishnabotna Drainage Dist. *v.* Campbell, 154 Mo. 151, 55 S. W. 276.

Ohio.— Cincinnati Southern R. Co. *v.* O'Meara, 7 Ohio Dec. (Reprint) 346, 2 Cinc. L. Bul. 142.

Pennsylvania.— *In re* Harrisburg, etc., Turnpike, 2 Dauph. Co. Rep. 51.

Wisconsin.— Winnebago Furniture Mfg. Co. *v.* Wisconsin Midland R. Co., 81 Wis. 389, 51 N. W. 576.

United States.— Wight *v.* Davidson, 181 U. S. 371, 21 S. Ct. 616, 45 L. ed. 900 [*reversing* 16 App. Cas. (D. C.) 371].

See 18 Cent. Dig. tit. "Eminent Domain," § 494.

An act which provides for notice by publication, and describes the land to be taken, sufficiently provides for notice to the landowners, and affords ample opportunity to be heard. *In re* New York, 99 N. Y. 569, 2 N. E. 642 [*affirming* 34 Hun 441].

After notice by publication has been given, in conformity with the statute, that the commissioners will proceed at a given time and place to commence the condemnation of a railroad right of way through the country, it is the duty of all persons owning property that is liable to be affected thereby to take notice of all future proceedings and protect

non-residents and unknown owners is usually by publication,[40] but if personal service is actually made on a non-resident owner, it is sufficient, although the statute provides for notice by publication in such cases.[41] Where notice by publication is expressly required the notice must be given in this manner,[42] and the requirements of the statute complied with.[43] The length of time, the number of times, and the paper in which the notice is to be published is usually regulated by the different statutes.[44]

c. By Mail. Where the manner of serving the notice is not prescribed by statute a notice by mail is sufficient,[45] but it must appear that the notice was addressed to the owner's actual residence.[46]

5. Time of Service. The time for which the notice must be given is usually regulated by the statutes,[47] but where the statute does not fix the time it must be

their rights. Chicago, etc., R. Co. *v.* Selders, 4 Kan. App. 497, 44 Pac. 1012; Kansas, etc., R. Co. *v.* Phipps, 4 Kan. App. 252, 45 Pac. 926.

40. See Graves *v.* Middletown, 137 Ind. 400, 37 N. E. 157; Chicago, etc., R. Co. *v.* Swan, 120 Mo. 30, 25 S. W. 534; Mississippi River, etc., R. Co. *v.* Jones, 54 Mo. App. 529; Asher *v.* Jones County, 29 Tex. Civ. App. 353, 68 S. W. 551.

The words "non-resident owner," as used in the Nebraska statute, mean a non-resident of the state, and not of the land affected or of the county in which it is located. Pacific R. Co. *v.* Perkins, 36 Nebr. 456, 54 N. W. 845.

41. State *v.* Hudson River R., etc., Co., (N. J. Sup. 1892) 25 Atl. 853.

Where a written notice is served upon the landowners personally the fact that they were not also constructively notified by publication is a purely technical objection and does not affect the validity of the proceeding. *In re* Metropolitan El. R. Co., 2 N. Y. Suppl. 278.

42. Kansas City, etc., R. Co. *v.* Fisher, 53 Kan. 512, 36 Pac. 1004; Sieferer *v.* St. Louis, 141 Mo. 586, 43 S. W. 163.

A statute expressly requiring the notice by publication where "land" is condemned for railroad purposes does not apply where only easements appurtenant to the land are sought to be condemned. *In re* Metropolitan El. R. Co., 2 N. Y. Suppl. 278, 12 N. Y. Suppl. 502.

43. Missouri Pac. R. Co. *v.* Houseman, 41 Kan. 300, 304, 21 Pac. 284; Hull *v.* Chicago, etc., R. Co., 21 Nebr. 371, 32 N. W. 162.

Failure to publish a copy of the application with the notice when required by statute renders the notice invalid. Harbeck *v.* Toledo, 11 Ohio St. 219.

A mere irregularity which does not in any way prejudice the rights of the owner will not affect the validity of the notice. Broezel *v.* Buffalo, 2 Silv. Supreme (N. Y.) 375, 6 N. Y. Suppl. 723.

44. See Kansas City *v.* Mastin, 169 Mo. 80, 68 S. W. 1037; Hull *v.* Chicago, etc., R. Co., 21 Nebr. 371, 32 N. W. 162.

If the statute requires a notice of fifteen days to be given by publication, it is only necessary that fifteen days shall intervene between the first publication and the day fixed for the hearing or appearance. Nishnabotna Drainage Dist. *v.* Campbell, 154 Mo. 151, 55 S. W. 276.

Where the statute requires the first publication to be at least thirty days before the day of hearing, thirty full days, excluding the days of publication and hearing, must intervene. Rifenburg *v.* Muskegon, 83 Mich. 279, 47 N. W. 231.

If the statute does not provide the number of times the notice shall be published a single publication is sufficient. Philadelphia, etc., R. Co. *v.* Shipley, 72 Md. 88, 19 Atl. 1.

A statute requiring the notice to be in "some newspaper" published in the county means that the publication for the entire time must be in the same paper. Hull *v.* Chicago, etc., R. Co., 21 Nebr. 371, 32 N. W. 162.

Where the statute requires the notice to be published in a paper with which the circuit judges have contracted for the publication of all notices and orders, it is not necessary that the notice should recite that the paper in which it is published is under such contract. Kansas City *v.* Mastin, 169 Mo. 80, 68 S. W. 1037.

The choice of papers in which the notice is to be published must be made by those who are appointed to give the notice, and they should select a paper adapted to give the widest currency to the notice. Powers' Appeal, 29 Mich. 504.

45. Crane *v.* Camp, 12 Conn. 464.

46. Morgan *v.* Chicago, etc., R. Co., 36 Mich. 428. See also Bowie County *v.* Powell, (Tex. Civ. App. 1901) 66 S. W. 237.

47. Norton Eighth School Dist. *v.* Copeland, 2 Gray (Mass.) 414; People *v.* Richards, 38 Mich. 214; Detroit Sharpshooters' Assoc. *v.* Hamtramck Highway Com'rs, 34 Mich. 46; Thompson *v.* Chicago, etc., R. Co., 110 Mo. 147, 19 S. W. 77; Hays *v.* Risher, 32 Pa. St. 169.

A longer notice than that required by the statute constitutes no objection to it. *In re* Lexington Ave., 17 N. Y. Suppl. 870.

The fact that the petition was heard at a later day than the one named in the notice does not invalidate the proceedings, especially where the owner did not appear on the day named in the notice. Thompson *v.* Chicago, etc., R. Co., 110 Mo. 147, 19 S. W. 77.

Failure to give notice for the full time required by statute does not render the pro-

given for such a reasonable time as will allow the owner opportunity to prepare to defend his rights.[48] In the absence of statute it is not essential that the notice should be served before the proceedings are instituted,[49] but notice of an intended application may lawfully be given before the application is made.[50]

6. RETURN AND PROOF OF SERVICE. Where a return of the notice or process is required by statute it must be made within the time which the statute prescribes,[51] and must show that the statutory provisions as to the manner of service were complied with;[52] but in the absence of statutory requirement a return of the notice is unnecessary and any other satisfactory proof of its service is sufficient.[53] A summons returnable in vacation is properly returnable to the court and not to the judge.[54] It is essential to the validity of the proceedings that there be some proof that the notice was served,[55] but as to the sufficiency of such proof the authorities are conflicting. It has been held that an affidavit,[56] or a recital in the record,[57] or in the report of the commissioners,[58] or a mere return of the warrant

ceedings absolutely void and subject to a collateral attack. Leonard *v.* Sparks, 117 Mo. 103, 22 S. W. 899, 38 Am. St. Rep. 646 [*overruling* 63 Mo. App. 585].

The court has jurisdiction to grant a continuance, although the notice is not served the proper number of days before the hearing, and in such case the proceedings are not abated and no new notice is necessary. Bowman *v.* Venice, etc., R. Co., 102 Ill. 472.

Under the Massachusetts statute authorizing a railroad company to take land after thirty days' notice, and providing that all general laws relating to the location of railroads shall govern the proceedings, the location may be filed before the expiration of the thirty days. Eastern R. Co. *v.* Boston, etc., R. Co., 111 Mass. 125, 15 Am. Rep. 13.

48. *Alabama.*— Burden *v.* Stein, 25 Ala. 455.

District of Columbia.— Davidson *v.* Wight, 16 App. Cas. 371.

Maryland.— Baltimore Belt R. Co. *v.* Baltzell, 75 Md. 94, 23 Atl. 74.

Michigan.— People *v.* Richards, 38 Mich. 214.

Missouri.— Nishnabotna Drainage Dist. *v.* Campbell, 154 Mo. 151, 55 S. W. 276.

See 18 Cent. Dig. tit. "Eminent Domain," § 496.

A notice served on the day previous to the time appointed for the appraisal has been held sufficient where the owner lived only a short distance from the place appointed and was at home and did not request a delay. Williams *v.* Hartford, etc., R. Co., 13 Conn. 397.

If the owner is present and objects to the action of the jury because he was not "duly notified" of the time when it was to assemble, his objection will not be considered valid, unless he affirmatively shows that the notice given him was too short to enable him to prepare for the protection of his interests. Burden *v.* Stein, 25 Ala. 455.

49. Chicago, etc., R. Co. *v.* Abbott, 44 Kan. 170, 24 Pac. 52.

Where the statute requires a copy of the notice to be filed with the petition, it is not necessary that the notice should be served before the petition is filed (Hoag *v.* Denton, 20 Iowa 118); but there is no objection to its being so served (Gammell *v.* Potter, 2 Iowa 562).

50. Baltimore *v.* Little Sisters of Poor, 56 Md. 400.

51. Owosso *v.* Richfield, 80 Mich. 328, 45 N. W. 129; Powers' Appeal, 29 Mich. 504.

52. Williams *v.* Monroe, 125 Mo. 574, 28 S. W. 853; Laney *v.* Garbee, 105 Mo. 355, 16 S. W. 831, 24 Am. St. Rep. 391.

Where notice is served on the agent or representative of the owner a failure of the return to state the name of the agent or representative is immaterial where no evidence is introduced to show that the service was not on the proper person. Beals *v.* James, 173 Mass. 591, 54 N. E. 245.

53. Parish *v.* Gilmanton, 11 N. H. 293.

54. St. Louis, etc., R. Co. *v.* Postal Tel. Co., 173 Ill. 508, 51 N. E. 382.

The fact that the summons reads "returnable to the judge" instead of the court is not misleading and does not affect the validity of the summons. Leibengut *v.* Louisville, etc., R. Co., 103 Ill. 431.

55. Nielsen *v.* Wakefield, 43 Mich. 434, 5 N. W. 458; Detroit Sharpshooters' Assoc. *v.* Hamtramck Highway Com'rs, 34 Mich. 36.

56. Swayze *v.* New Jersey Midland R. Co., 36 N. J. L. 295.

An affidavit that the notice was served without stating the manner of service is not sufficient proof that the service was made in the manner the statute required. New Jersey Cent. R. Co.'s Appeal, 102 Pa. St. 38.

A statute which requires an affidavit that the notice was posted in a conspicuous place does not require that the affidavit should specify the place; it is sufficient if the affidavit states that the notice was put up, and that the place was a conspicuous one. *In re* Albany St., 6 Abb. Pr. (N. Y.) 273.

57. Hunt *v.* Card, 94 Me. 386, 47 Atl. 921.

It is competent to overthrow a recital in the record that the landowner was duly served with notice by other portions of the record of equal dignity showing that the recital is not true. Williams *v.* Monroe, 125 Mo. 574, 28 S. W. 853.

58. Clement *v.* Wichita, etc., R. Co., 53 Kan. 682, 37 Pac. 133.

indorsed as "executed,"[59] is *prima facie* sufficient; while on the other hand it has been held that notice will not be presumed from declarations in the report of the commissioners or recitals in the decree of condemnation, but must be proved otherwise.[60]

J. Pleadings — 1. In General. Condemnation proceedings are often informal,[61] and the strict rules of pleading do not apply.[62]

2. Application, Petition, or Complaint — a. Sufficiency of Allegations — (i) *In General.* In drawing the application, petition, or complaint, the same strictness is not required as in a petition or declaration in an ordinary action.[63] But in general it should be in writing,[64] should state all jurisdictional facts,[65] such as the

59. Harper *v.* Lexington, etc., R. Co., 2 Dana (Ky.) 227.

60. Parker *v.* Ft. Worth, etc., R. Co., 84 Tex. 333, 19 S. W. 518.

A recital in the order establishing a road that notice was given as required by law is no proof of the fact stated. Taylor *v.* Todd, 48 Mo. App. 550; People *v.* Smith, 7 Hun (N. Y.) 17.

It is not sufficient to say "upon proof of due notice having been given," but it must appear on the face of the order what notice was given. Vanwickle *v.* Camden, etc., Transp. Co., 14 N. J. L. 162.

61. Detroit *v.* Robinson, 93 Mich. 426, 53 N. W. 564 (holding that where the purpose of a condemnation is the improvement of a continuous street, the fact that a certain part of it is called by one name and another part by a different name does not render it necessary to institute such a proceeding for each); New York Cent., etc., R. Co. *v.* New York, 22 N. Y. App. Div. 124, 47 N. Y. Suppl. 965 (holding that the manner of the hearing in a matter of condemnation for public streets is analogous to that of a motion, although there is no objection to the imposition of a plea or answer if the party desires).

62. Miller *v.* Newark, 35 N. J. L. 460; Bexar County *v.* Terrell, (Tex. Sup. 1890) 14 S. W. 62; Union Pac. R. Co. *v.* Leavenworth, etc., R. Co., 29 Fed. 728.

The inquest taken in connection with the application and writ is sufficient to apprise the opposite party of what is to be answered, and no complaint need be filed (Marion, etc., R. Co. *v.* Ward, 9 Ind. 123); and thereafter any one interested may appear with or without process and contest the claim of the applicant (Hendricks *v.* Johnson, 6 Port. (Ala.) 472).

A second application for condemnation upon the setting aside of a finding of the commissioners in the first condemnation proceedings is a continuance of the original proceeding, and the addition of the receiver of a condemning company as a party, he having been appointed in the meantime, does not make it necessary to file a new petition nor give the owners of the land the right to file an answer which they had raised by proceeding without objection. Matter of Rochester, etc., R. Co., 4 Silv. Supreme (N. Y.) 92, 7 N. Y. Suppl. 279.

In Kansas, where condemnation proceedings are regular and have been appealed by the landowner to the district court, the filing of pleadings rests wholly within the discretion of the court. Southwestern Mineral R. Co. *v.* Russell, 7 Kan. App. 503, 54 Pac. 140.

In Ohio it is held that, in case of doubt whether the rules of code pleading apply, the judgment of the probate court that certain ordinances attached to the petition constitute a part of it will not be disturbed. Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 6 Ohio Cir. Ct. 362, 3 Ohio Cir. Dec. 493.

63. Martinsville, etc., R. Co. *v.* Bridges, 6 Ind. 400; Portland, etc., Turnpike Co. *v.* Bobb, 88 Ky. 226, 10 S. W. 794, 10 Ky. L. Rep. 796; Rochester R. Co. *v.* Robinson, 133 N. Y. 242, 30 N. E. 1008.

64. Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110; Vail *v.* Morris, etc., R. Co., 21 N. J. L. 189; Anderson *v.* McKinney, 24 Ohio St. 467.

But a petition to erect a dam may be made by word of mouth. Mairs *v.* Gallahue, 9 Gratt. (Va.) 94.

65. *Alabama.*— McCulley *v.* Cunningham, 96 Ala. 583, 11 So. 694.

Michigan.— Heck *v.* Essex School Dist. No. 2, 49 Mich. 551, 14 N. W. 493.

Minnesota.— Faribault *v.* Hulett, 10 Minn. 30.

Missouri.— St. Louis, etc., R. Co. *v.* Lewright, 113 Mo. 660, 21 S. W. 210.

Nebraska.— Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110.

New Mexico.— Leyba *v.* Armijo, (1902) 68 Pac. 939.

New York.— *In re* Marsh, 71 N. Y. 315 [*reversing* 10 Hun 49].

North Dakota.— Lidgerwood *v.* Michalek, (1903) 97 N. W. 541.

See 18 Cent. Dig. tit. "Eminent Domain," § 509 *et seq.*; and see cases more specifically cited hereafter.

This applies to proceedings for improving the navigation of rivers (Clay *v.* Penoyer Creek Imp. Co., 34 Mich. 204), and to proceedings to condemn lands for mill purposes (Fox *v.* Holcomb, 34 Mich. 298, holding that the petition must, in particular, show whether the stream is navigable or not, and if navigable, that the required permission from the county commissioners has been obtained, and that the proposed dam will not injure any mill or mill site on the stream, whether above or below it). *Compare* Faribault *v.* Hulett, 10 Minn. 30.

Non-jurisdictional facts, however, need not be alleged. Kansas City *v.* Mastin, 169 Mo.

name of the corporation or other petitioner;[66] the names of the owners of the lands to be condemned,[67] that all preliminary requirements have been complied with,[68] although such compliance need not be set forth in detail,[69] nor need the exact language of the statute be employed.[70] And while mere informalities may be disregarded,[71] the constitutive facts must be clearly stated, so that the owners may be reasonably advised of the rights claimed by the condemning party.[72] But it need not be alleged that provision has been made to pay the award.[73]

(II) *Right and Capacity to Institute Proceedings.* The petition must show that the petitioner is authorized to exercise the right of eminent domain,[74]

80, 68 S. W. 1037; Helena *v.* Rogan, 26 Mont. 452, 68 Pac. 798, 27 Mont. 135, 69 Pac. 709.

66. Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110; Lidgerwood *v.* Michalek, (N. D. 1903) 97 N. W. 541.

67. See *infra*, XI, J, 2, a, (VIII).

68. *Delaware.*— Front, etc., R. Co.'s Petition, 1 Pennew. 370, 41 Atl. 200.

Idaho.—Canyon County *v.* Toole, 8 Ida. 501, 69 Pac. 320.

Illinois.— Danville *v.* McAdams, 153 Ill. 216, 38 N. E. 632.

Missouri.— St. Louis *v.* Gleason, 15 Mo. App. 25 [*affirmed* in 89 Mo. 67, 14 S. W. 768].

New York.— People *v.* Adam, 79 N. Y. App. Div. 306, 80 N. Y. Suppl. 452.

North Carolina.— Durham, etc., R. Co. *v.* Richmond, etc., R. Co., 106 N. C. 16, 10 S. E. 1041.

Pennsylvania.— *In re* Harbaugh Ave., 10 Pa. Co. Ct. 440.

See 18 Cent. Dig. tit. "Eminent Domain," § 510; and see cases more specifically cited in the following sections.

69. Front, etc., R. Co.'s Petition, 1 Pennew. (Del.) 370, 41 Atl. 200; Rochester R. Co. *v.* Robinson, 133 N. Y. 242, 30 N. E. 1008; Matter of Citizens' Water Works Co., 32 N. Y. App. Div. 54, 52 N. Y. Suppl. 473; Lewis County *v.* Schobey, 31 Wash. 357, 71 Pac. 1029.

70. Canyon County *v.* Toole, 8 Ida. 501, 69 Pac. 320; Townsend *v.* Chicago, etc., R. Co., 91 Ill. 545.

71. Buffalo, etc., R. Co. *v.* New York Cent., etc., R. Co., 15 Hun (N. Y.) 365 [*affirmed* in 77 N. Y. 557].

N. Y. Laws (1850), c. 140, § 28, subd. 6, providing that commissioners to ascertain the point of intersection of railroads shall "be appointed by the court, as is provided in this act in respect to acquiring title to real estate," merely refers to the manner of appointment and the practice of the court, and does not require that the petition should set forth the matters required in proceedings to acquire such title (Buffalo, etc., R. Co. *v.* New York Cent., etc., R. Co., 15 Hun 365 [*affirmed* in 77 N. Y. 557]); and if a railroad company has located and completed its road under said statute, and afterward requires additional land, which it seeks to acquire under the law of 1869, it is not necessary for the petition to contain the allegations made in the original petition (*In re* New York Cent., etc., R. Co., 33 Hun 274; *In re* New York Cent., etc., R. Co., 4 Hun 381; New York Cent., etc., R. Co. *v.* Sweeney, 6 Thomps. & C. 669).

72. Geer *v.* Rockwell, 65 Conn. 316, 32 Atl. 924; Florida Cent., etc., R. Co. *v.* Bell, 43 Fla. 359, 31 So. 259; Mansfield, etc., R. Co. *v.* Clark, 23 Mich. 519.

In Virginia a petition for leave to erect a dam which substantially conforms to the requirements of the statute is sufficient; and if the applicant states that he was the owner of the banks on both sides of the stream, this is in fact a statement that he was the owner of the land on both sides, and therefore the presumption is that he owned the bed of the stream (Mairs *v.* Gallahue, 9 Gratt. 94); and it is immaterial that the petition states that the bed of the stream belongs to the commonwealth, where it in fact belongs in part to the petitioner (Mead *v.* Haynes, 3 Rand. 33).

73. Lidgerwood *v.* Michalek, (N. D. 1903) 97 N. W. 541, by a city.

74. *Connecticut.*— Hartford, etc., R. Co. *v.* Wagner, 73 Conn. 506, 48 Atl. 218.

Florida.— Florida Cent., etc., R. Co. *v.* Bell, 43 Fla. 359, 31 So. 259.

Illinois.— Lake Shore, etc., R. Co. *v.* Baltimore, etc., R. Co., 149 Ill. 272, 37 N. E. 91; Du Buol *v.* Freeport, etc., R. Co., 111 Ill. 499.

Missouri.— Kansas City *v.* Mastin, 169 Mo. 80, 68 S. W. 1037.

New Jersey.— Brinkerhoff *v.* Newark, etc., Traction Co., 66 N. J. L. 478, 49 Atl. 812.

New York.— Stannards Corners Rural Cemetery Assoc. *v.* Brandes, 14 Misc. 270, 35 N. Y. Suppl. 1015.

Ohio.— Cincinnati, etc., R. Co. *v.* Sundry Persons, 1 Ohio Dec. (Reprint) 326, 7 West. L. J. 265, holding that a petition by a railroad company need not set forth the acceptance by the company of the provisions of the statute.

Wisconsin.— Wisconsin Water Co. *v.* Winans, 85 Wis. 26, 54 N. W. 1003, 39 Am. St. Rep. 813, 20 L. R. A. 662.

United States.— *In re* Montgomery, 48 Fed. 896.

See 18 Cent. Dig. tit. "Eminent Domain," § 511.

But the company's determination to condemn need not be shown by a formal resolution of its board of directors. Lake Shore, etc., R. Co. *v.* Baltimore, etc., R. Co., 149 Ill. 272, 37 N. E. 91; *In re* New York Cent., etc., R. Co., 33 Hun (N. Y.) 274.

A petition by a telephone company must show that the company is organized under

and it should further be shown that the petitioner is a corporation, if such be the fact.[75]

(III) *PURPOSE AND NECESSITY.* The petition should disclose the specific purpose to which it is intended to apply the land,[76] that the purpose for which the land is to be taken and the use to which it is to be devoted are public within the meaning of the constitutional provisions,[77] that such purpose is within the powers

the laws of the state, and that the city council has designated the streets in which the poles are to be placed. State *v.* New York, etc., Telephone Co., 51 N. J. L. 83, 16 Atl. 188.

75. London *v.* Sample Lumber Co., 91 Ala. 606, 8 So. 281; Orrick School Dist. *v.* Dorton, 125 Mo. 439, 28 S. W. 765; Roosa *v.* St. Joseph, etc., R. Co., 114 Mo. 508, 21 S. W. 1124; St. Joseph, etc., R. Co. *v.* Shambaugh, 106 Mo. 557, 17 S. W. 581; Hopkins *v.* Kansas City, etc., R. Co., 79 Mo. 98 [all *overruling* West End Narrow Gauge R. Co. *v.* Almeroth, 13 Mo. App. 91].

In some states it is held that the incorporation need not be expressly averred, if the petition names the corporation and in effect states its corporate capacity. Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110; *In re* New York, etc., R. Co., 64 How. Pr. (N. Y.) 216.

Where a railway company, in its petition to condemn real estate for right of way, sets forth the necessary facts to show that it is a corporation duly organized under the laws of this state, and there is no denial of that fact, the petition will be *prima facie* sufficient to authorize the company to condemn real estate without proof of its incorporation. Clarke *v.* Chicago, etc., R. Co., 23 Nebr. 613, 37 N. W. 484.

76. *Florida.*— Florida Cent., etc., R. Co. *v.* Bell, 43 Fla. 359, 31 So. 259.

Illinois.— Suver *v.* Chicago, etc., R. Co., 123 Ill. 293, 14 N. E. 12; Chicago, etc., R. Co. *v.* Smith, 111 Ill. 363.

Indiana.— Farneman *v.* Mt. Pleasant Cemetery Assoc., 135 Ind. 344, 35 N. E. 271.

Iowa.— Curtis *v.* Pocahontas County, 72 Iowa 151, 33 N. W. 616, holding that a petition asking that a "highway be opened for travel" is insufficient under a statute authorizing a highway to be established.

Michigan.— Detroit *v.* Beecher, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813.

New Jersey.— Pennsylvania R. Co. *v.* National Docks, etc., Connecting R. Co., 57 N. J. L. 86, 30 Atl. 183.

New York.— *In re* New York Cent., etc., R. Co., 5 Hun 86; Matter of Meagher, 35 Misc. 601, 72 N. Y. Suppl. 157; Matter of Hartford, etc., R. Co., 65 How. Pr. 133.

Oregon.— Dallas *v.* Hallock, 44 Oreg. 246, 75 Pac. 204.

Texas.— Barnes *v.* Chicago, etc., R. Co., (Civ. App. 1895) 33 S. W. 601; Foster *v.* Chicago, etc., R. Co., 10 Tex. Civ. App. 476, 31 S. W. 529; Galveston, etc., R. Co. *v.* Mud Creek, etc., Co., 1 Tex. App. Civ. Cas. § 393.

See 18 Cent. Dig. tit. "Eminent Domain," § 512.

A statement that the petitioner is a telegraph company is a sufficient statement of the use to be served by the condemnation. Mobile, etc., R. Co. *v.* Postal Tel. Cable Co., 120 Ala. 21, 24 So. 408.

A petition to condemn lands for railway purposes need not specify the particular use to which each tract is to be put. Fletcher *v.* Chicago, etc., R. Co., 67 Minn. 339, 69 N. W. 1085.

The sufficiency of a petition for laying out a road is not impaired by its also asking for the abandonment of an old road. Sutter County *v.* Tisdale, 136 Cal. 474, 69 Pac. 141.

Exhibits.— An ordinance providing for an improvement need not be attached to the petition if the cost of the improvement is to be paid by general taxation and not by special assessments (Chicago, etc., R. Co. *v.* Streator, 172 Ill. 435, 50 N. E. 167); nor where attached need it be offered in evidence (Chicago, etc., R. Co. *v.* Pontiac, 169 Ill. 155, 48 N. E. 485).

77. *Alabama.*— McCulley *v.* Cunningham, 96 Ala. 583, 11 So. 694; London *v.* Sample Lumber Co., 91 Ala. 606, 8 So. 281.

California.— Contra Costa Coal Mines R. Co. *v.* Moss, 23 Cal. 323.

Connecticut.— Evergreen Cemetery Assoc. *v.* Beecher, 53 Conn. 551, 5 Atl. 353.

Indiana.— Great Western Nat. Gas, etc., Co. *v.* Hawkins, 30 Ind. App. 557, 66 N. E. 765.

Kentucky.— Portland, etc., Turnpike Co. *v.* Bobb, 88 Ky. 226, 10 S. W. 794, 10 Ky. L. Rep. 796.

New York.— Matter of Broadway, etc., R. Co., 73 Hun 7, 25 N. Y. Suppl. 1080.

Ohio.— Valley R. Co. *v.* Bohm, 34 Ohio St. 114.

West Virginia.— Fork Ridge Baptist Cemetery Assoc. *v.* Redd, 33 W. Va. 262, 10 S. E. 405.

Wisconsin.— Wisconsin Water Co. *v.* Winans, 85 Wis. 26, 54 N. W. 1003, 39 Am. St. Rep. 813, 20 L. R. A. 662.

See 18 Cent. Dig. tit. "Eminent Domain," § 512.

If the petition alleges that the petitioner is incorporated to operate a railroad or a telegraph line, it is a sufficient allegation that the use is a public one. San Francisco, etc., R. Co. *v.* Leviston, 134 Cal. 412, 66 Pac. 473; Union Pac. R. Co. *v.* Colorado Postal Tel. Cable Co., 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106; De Buol *v.* Freeport, etc., R. Co., 111 Ill. 499.

In proceedings by an irrigation district, a complaint that in order to properly irrigate the lands in the district it is necessary to construct a pipe-line across defendant's land,

conferred upon the petitioner;[78] and that it is necessary to take the land for an intended purpose.[79]

(iv) *Intention to Complete and Operate Improvement.* The petition should also allege that the petitioner intends in good faith to complete the improvement for which the land is appropriated,[80] and to operate it when completed.[81]

(v) *Inability to Agree With Owner.* As has been already stated[82] the failure of the parties to agree as to the value of the property to be appropriated is a jurisdictional fact; hence, except where the statute regulating the proceedings does not require it,[83] the inability to agree must be alleged,[84] or a reason

has been held sufficient to show that the use is a public one. Rialto Irrigating Dist. *v.* Brandon, 103 Cal. 384, 37 Pac. 484. *Compare* Wisconsin Water Co. *v.* Winans, 85 Wis. 26, 54 N. W. 1003, 39 Am. St. Rep. 812, 20 L. R. A. 662.

A petition to condemn land for an addition to a cemetery need not allege that the cemetery is for a public use if it shows that the cemetery has been in existence for forty years and belongs to the town. Phillips *v.* Scales Mound, 195 Ill. 353, 63 N. E. 180.

78. McCulley *v.* Cunningham, 96 Ala. 583, 11 So. 694; Illinois Cent. R. Co. *v.* Chicago, 138 Ill. 453, 28 N. E. 740; Boyd *v.* Negley, 40 Pa. St. 377.

79. *Alabama.*— London *v.* Sample Lumber Co., 91 Ala. 606, 8 So. 281.

Arizona.— Sanford *v.* Tucson, (1903) 71 Pac. 903.

California.— Rialto Irrigating Dist. *v.* Brandon, 103 Cal. 384, 37 Pac. 484; Los Angeles *v.* Waldron, 65 Cal. 283, 1 Pac. 883, holding that a petition by a city alleging that the council had duly passed an ordinance condemning certain property, and that it is now necessary to condemn said land for public use, is a sufficient showing of the necessity.

Michigan.— Flint, etc., R. Co. *v.* Detroit, etc., R. Co., 64 Mich. 350, 31 N. W. 281.

Montana.— Helena *v.* Harvey, 6 Mont. 114, 9 Pac. 903.

New Jersey.— Kountze *v.* Morris Aqueduct, 58 N. J. L. 303, 33 Atl. 252.

New York.— Matter of Union El. R. Co., 55 Hun 611, 8 N. Y. Suppl. 813; Matter of Meagher, 35 Misc. 601, 72 N. Y. Suppl. 157.

Oregon.— Dallas *v.* Hallock, 44 Oreg. 246, 75 Pac. 204.

Pennsylvania.— Shick *v.* Pennsylvania R. Co., 1 Pearson 259.

West Virginia.— Fork Ridge Baptist Cemetery Assoc. *v.* Redd, 33 W. Va. 262, 10 S. E. 405.

Wisconsin.— Winnebago Furniture Mfg. Co. *v.* Wisconsin Midland R. Co., 81 Wis. 389, 51 N. W. 576.

See 18 Cent. Dig. tit. "Eminent Domain," § 512.

An ordinance which provides for the extension of a street is a legislative determination of the necessity for such street, and therefore the petition need not allege facts showing the public necessity. Chicago, etc., R. Co. *v.* Pontiac, 169 Ill. 155, 48 N. E. 485.

An act providing that the complaint may aver that it is necessary for the city to take the land, without setting forth the proceedings provided for in the statute, is constitutional. Heffernan *v.* San Francisco Super. Ct., (Cal. 1893) 33 Pac. 725; San Francisco *v.* Kiernan, 98 Cal. 614, 33 Pac. 720.

80. Florida Cent., etc., R. Co. *v.* Bell, 43 Fla. 359, 31 So. 259; Rochester R. Co. *v.* Robinson, 133 N. Y. 242, 30 N. E. 1008; Erie, etc., R. Co. *v.* Welch, 1 N. Y. App. Div. 140, 37 N. Y. Suppl. 996; Metropolitan El. R. Co. *v.* Dominick, 55 Hun (N. Y.) 198, 8 N. Y. Suppl. 151; *In re* New York El. R. Co., 15 N. Y. Suppl. 909; *In re* Metropolitan El. R. Co., 12 N. Y. Suppl. 506 [*affirmed* in 13 N. Y. Suppl. 159].

81. Helena *v.* Rogan, 26 Mont. 452, 68 Pac. 798, 27 Mont. 135, 69 Pac. 709; Rochester R. Co. *v.* Robinson, 133 N. Y. 242, 30 N. E. 1008.

This averment is not necessary, however, where the improvement has already been constructed and used on the land sought to be condemned. Chicago, etc., R. Co. *v.* Richardson, 86 Wis. 154, 56 N. W. 741.

82. See *supra*, XI, D, 3.

83. Chicago, etc., R. Co. *v.* Pontiac, 169 Ill. 155, 48 N. E. 485; Danville *v.* McAdams, 153 Ill. 216, 38 N. E. 632; Lake Shore, etc., R. Co. *v.* Chicago, 151 Ill. 359, 37 N. E. 880; Chicago, etc., R. Co. *v.* Chicago, 150 Ill. 597, 37 N. E. 1029; Chicago, etc., R. Co. *v.* Chicago, 149 Ill. 495, 36 N. E. 1006, 148 Ill. 141, 35 N. E. 881; Cahill *v.* Norwood Park, 149 Ill. 156, 36 N. E. 606, 149 Ill. 162, 36 N. E. 608; Lake Shore, etc., R. Co. *v.* Chicago, 148 Ill. 509, 37 N. E. 88; *In re* Sixteenth St., 4 Pa. Co. Ct. 124, all of which cases hold that a petition to condemn land for the opening or extension of a street need not allege that compensation for the property could not be agreed upon.

84. *California.*— Contra Costa Coal Mines R. Co. *v.* Moss, 23 Cal. 323.

Delaware.— Front, etc., R. Co.'s Petition, 1 Pennew. 370, 41 Atl. 200.

Illinois.— Lieberman *v.* Chicago, etc., R. Co., 141 Ill. 140, 30 N. E. 544; Reed *v.* Ohio, etc., R. Co., 126 Ill. 48, 17 N. E. 807; Byron *v.* Blount, 97 Ill. 62.

Kentucky.— Portland, etc., Turnpike Co. *v.* Bobb, 88 Ky. 226, 10 S. W. 794, 10 Ky. L. Rep. 796.

Michigan.— Smith *v.* Milton School Dist. No. 2, 40 Mich. 143.

Missouri.— Cunningham *v.* Pacific R. Co., 61 Mo. 33; Ells *v.* Pacific R. Co., 51 Mo. 200.

Montana.— Helena *v.* Rogan, 26 Mont. 452, 68 Pac. 798, 27 Mont. 135, 69 Pac. 709.

must be given for not making the attempt,[85] as that the owner is absent,[86] or is legally incapable of contracting.[87] Any words which show the inability to agree will suffice, although the exact words of the statute are not followed;[88] but it would seem that an allegation upon information and belief is not sufficient.[89] A want of consent to the taking need not also be alleged.[90]

New Jersey.— Vail *v.* Morris, etc., R. Co., 21 N. J. L. 189.

Oregon.— Oregon R., etc., Co. *v.* Oregon Real Estate Co., 10 Oreg. 444.

Pennsylvania.— *Ex p.* U. S., 24 Pittsb. Leg. J. 105.

Texas.— Galveston, etc., R. Co. *v.* Mud Creek, etc., Co., 1 Tex. App. Civ. Cas. § 393.

See 18 Cent. Dig. tit. "Eminent Domain," § 514.

A petition filed by one railroad company to condemn a right of way over the land of another must show an offer to obtain the right of way by agreement with such other (Cincinnati, etc., R. Co. *v.* Danville, etc., R. Co., 75 Ill. 113; Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578, 19 N. E. 440; Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 62 Mich. 578, 29 N. W. 506, 62 Mich. 564, 29 N. W. 500, 4 Am. St. Rep. 875; *In re* Boston, Hoosac Tunnel, etc., R. Co., 79 N. Y. 69); but where it is sought to condemn a crossing the petition need not state that the companies could not agree upon the point or the manner of making the crossing, when it does not appear that there was any dispute in that respect (Gulf, etc., R. Co. *v.* Ft. Worth, etc., R. Co., 86 Tex. 537, 26 S. W. 54).

An allegation of a failure to agree with the alleged owners of the premises is sufficient without also alleging a failure to agree with one holding a vendor's lien on the property. Thomas *v.* St. Louis, etc., R. Co., 164 Ill. 634, 46 N. E. 8.

A railroad company seeking to condemn land cannot properly aver inability to agree with the owner without an effort by someone authorized to bind it to induce him to accept an offer made honestly and not merely formal and colorable. Grand Rapids, etc., R. Co. *v.* Weiden, 70 Mich. 290, 38 N. W. 294.

In a proceeding nominally against both lessor and lessee, if the petition alleges an attempt to agree with the lessee, but makes no mention of any attempt to agree with the lessor, it gives no authority for proceeding as against the lessor. *In re* Boston Hoosac Tunnel, etc., R. Co., 79 N. Y. 69.

In Maine there is a decision to the effect that if a failure to agree is not alleged this is not a fatal defect, since the presumption is that the parties could not agree. Farnsworth *v.* Lime Rock R. Co., 83 Me. 440, 22 Atl. 373.

In Iowa an application to the sheriff by a landowner, asking that a jury be impaneled to assess his damages for land taken by a railroad company, need not allege that he had refused to grant the right of way. Hartley *v.* Keokuk, etc., R. Co., 85 Iowa 455, 52 N. W. 352.

In Texas it is held that a petition by a telephone company to condemn a right to build its line along a railroad right of way is not objectionable because it does not allege that the company has offered to agree with the railroad or commissioners as to the amount to be paid. Texas Midland R. Co. *v.* Southwestern Tel., etc., Co., (Civ. App. 1900) 57 S. W. 312.

85. *In re* Marsh, 71 N. Y. 315 [*reversing* 10 Hun 49]; *Ex p.* U. S., 24 Pittsb. Leg. J. (Pa.) 105.

86. *In re* Union El. R. Co., 8 N. Y. Suppl. 813; Reitenbaugh *v.* Chester Valley R. Co., 21 Pa. St. 100.

87. Reitenbaugh *v.* Chester Valley R. Co., 21 Pa. St. 100; Charleston, etc., Bridge Co. *v.* Comstock, 36 W. Va. 263, 15 S. E. 69.

88. St. Louis, etc., R. Co. *v.* Postal Tel. Co., 173 Ill. 508, 51 N. E. 382; Fore *v.* Hoke, 48 Mo. App. 254; *In re* Suburban Rapid Transit Co., 38 Hun (N. Y.) 553.

Allegations held sufficient.— Thus it is sufficient to allege that the owner demands an unreasonable price for the land (*In re* Long Island R. Co., 21 N. Y. Suppl. 489); or a price far in excess of its value (Marcellus Electric R. Co. *v.* Crisler, 33 Misc. (N. Y.) 1, 67 N. Y. Suppl. 932). So an allegation that the petitioner has been unable to acquire the right of way from said owners, by voluntary grant or purchase.

Colorado.— Colorado Fuel, etc., Co. *v.* Four Mile R. Co., 29 Colo. 90, 66 Pac. 902.

Illinois.— Bowman *v.* Venice, etc., R. Co., 102 Ill. 459; Booker *v.* Venice, etc., R. Co., 101 Ill. 333; Chicago, etc., R. Co. *v.* Chamberlain, 84 Ill. 333.

Michigan.— Cincinnati, etc., R. Co. *v.* Bay City, etc., R. Co., 106 Mich. 473, 64 N. W. 471.

Missouri.— Quayle *v.* Missouri, etc., R. Co., 63 Mo. 465.

Nebraska.— Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110.

New York.— *In re* Metropolitan El. R. Co., 12 N. Y. Suppl. 506; *In re* Metropolitan El. R. Co., 12 N. Y. Suppl. 502.

United States.— U. S. *v.* Oregon R., etc., Co., 16 Fed. 524, 9 Sawy. 61.

See 18 Cent. Dig. tit. "Eminent Domain," § 514.

89. Metropolitan El. R. Co. *v.* Dominick, 55 Hun (N. Y.) 198, 8 N. Y. Suppl. 151. But *compare In re* Metropolitan El. R. Co., 12 N. Y. Suppl. 506.

90. Front, etc., St. R. Co.'s Appeal, 1 Pennew. (Del.) 370, 41 Atl. 200; Faribault *v.* Hulett, 10 Minn. 30 (holding that where an injury to the property of another is alleged the law presumes want of consent); Helena *v.* Rogan, 26 Mont. 452, 68 Pac. 798, 27 Mont. 135, 69 Pac. 709.

(VI) *Description of Property and Interests Affected* — (A) *In General.* The petition must contain a description of the property which the petitioner is seeking to condemn,[91] and must define with precision the location and quantity required, so that the owner may know the extent of the claim which is made;[92]

91. *Alabama.*— Hobbs *v.* Nashville, etc., R. Co., 122 Ala. 602, 26 So. 139, 82 Am. St. Rep. 103; Nashville, etc., R. Co. *v.* Hobbs, 120 Ala. 600, 24 So. 933; Folmar *v.* Folmar, 68 Ala. 120.

California.— Santa Ana *v.* Brunner, 132 Cal. 234, 64 Pac. 287; Los Angeles *v.* Pomeroy, 124 Cal. 597, 57 Pac. 585.

Florida.— Florida Cent., etc., R. Co. *v.* Bell, 43 Fla. 359, 31 So. 259.

Illinois.— Cincinnati, etc., R. Co. *v.* Danville, etc., R. Co., 75 Ill. 113.

Kentucky.— Portland, etc., Turnpike Co. *v.* Bobb, 88 Ky. 226, 10 S. W. 794, 10 Ky. L. Rep. 796; Smoot *v.* Schooler, 87 Ky. 157, 8 S. W. 202, 9 Ky. L. Rep. 985.

Michigan.— Smith *v.* Detroit, 120 Mich. 572, 97 N. W. 808.

Missouri.— Sieferer *v.* St. Louis, 141 Mo. 586, 43 S. W. 163.

Nebraska.— Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110.

North Dakota.— Lidgerwood *v.* Michalek, (1903) 97 N. W. 541.

Pennsylvania.— Hays *v.* Risher, 32 Pa. St. 169; Mifflin *v.* Pennsylvania R. Co., 2 Leg. Gaz. 222.

Texas.— Galveston, etc., R. Co. *v.* Mud Creek, etc., Co., 1 Tex. App. Civ. Cas. § 393.

See 18 Cent. Dig. tit. "Eminent Domain," § 515.

Separate tracts of land may be described in the same petition, although they are the property of different persons (Concordia Cemetery Assoc. *v.* Minnesota, etc., R. Co., 121 Ill. 199, 12 N. E. 536; Smith *v.* Detroit, 120 Mich. 572, 79 N. W. 808; State *v.* Central New Jersey Telephone Co., 53 N. J. L. 341, 21 Atl. 460, 11 L. R. A. 664; Brooklyn El. R. Co. *v.* Nagel, 75 Hun (N. Y.) 590, 27 N. Y. Suppl. 669); but if it is sought to take part of the land owned and used by a railroad company for its right of way and also part of a town lot owned by the company but not used for a right of way, it is proper to separate the two tracts in the petition (Chicago, etc., R. Co. *v.* Cicero, 154 Ill. 656, 39 N. E. 574).

The lands owned by defendant must also be described under a North Dakota statute (Rev. Code (1899), § 5962). Lidgerwood *v.* Michalek, (1903) 97 N. W. 541.

92. *Alabama.*— Folmar *v.* Folmar, 68 Ala. 120.

California.— San Francisco, etc., R. Co. *v.* Gould, 122 Cal. 601, 55 Pac. 411.

Illinois.— Galena, etc., R. Co. *v.* Pound, 22 Ill. 399.

Maine.— Prescott *v.* Curtis, 42 Me. 64.

Maryland.— Shipley *v.* Western Maryland Tidewater Co., (1904) 56 Atl. 968.

Michigan.— Toledo, etc., R. Co. *v.* Munson, 57 Mich. 42, 23 N. W. 455.

Minnesota.— Hanford *v.* St. Paul, etc., R. Co., 43 Minn. 104, 42 N. W. 596, 44 N. W. 1144, 7 L. R. A. 722; Wilkin *v.* First Div. St. Paul, etc., R. Co., 16 Minn. 271.

Missouri.— St. Louis, etc., R. Co. *v.* Lewright, 113 Mo. 660, 21 S. W. 210.

Montana.— Helena *v.* Rogan, 26 Mont. 452, 68 Pac. 798, 27 Mont. 135, 69 Pac. 709.

Nebraska.— Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110.

New Jersey.— National Docks, etc., R. Co. *v.* State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. Rep. 421; Vail *v.* Morris, etc., R. Co., 21 N. J. L. 189.

North Dakota.— Lidgerwood *v.* Michalek, (1903) 97 N. W. 541.

See 18 Cent. Dig. tit. "Eminent Domain," § 515.

The description must be full and precise (Helena *v.* Rogan, 26 Mont. 452, 68 Pac. 798, 27 Mont. 135, 69 Pac. 709); must describe the land with as much certainty as would be necessary in a conveyance (Rising Sun, etc., Turnpike Co. *v.* Hamilton, 50 Ind. 580; Rice *v.* Danville, etc., Turnpike Road Co., 7 Dana (Ky.) 81; Kohlhepp *v.* West Roxbury, 120 Mass. 596); and must describe the entire tract to be taken (Spring Grove Cemetery *v.* Cincinnati, etc., R. Co., 1 Ohio Dec. (Reprint) 343, 7 West. L. J. 392).

One whose land is properly described cannot object that the land of other defendants is insufficiently described. New Orleans, etc., R. Co. *v.* Southern, etc., Tel. Co., 53 Ala. 211; Pontiac *v.* Lull, 111 Mich. 509, 69 N. W. 1110.

The flowing capacity of a dam which the petitioner proposed to erect may be a sufficient measure and description of the right sought to be taken. Hovey *v.* Perkins, 63 N. H. 516, 3 Atl. 923.

Government subdivisions.—A description of lands sought to be taken within the limits of a city, which have been laid out and platted into lots and blocks, by the government subdivision is insufficient (Omaha, etc., R. Co. *v.* Rickards, 38 Nebr. 847, 57 N. W. 739), unless accompanied by a further description by courses and distances (Marion, etc., R. Co. *v.* Ward, 9 Ind. 123).

Railroads.— In a petition to condemn land for a railroad, if the description gives the exact point where the railroad enters the land, the general course of the road, the point of exit, the width of the strip to be taken, and the quantity of land to be taken, it is sufficient (California Southern R. Co. *v.* Colton Land, etc., Co., (Cal. 1884) 2 Pac. 38; Suver *v.* Chicago, etc., R. Co., 123 Ill. 293, 14 N. E. 12; St. Louis, etc., R. Co. *v.* Lewright, 113 Mo. 660, 21 S. W. 210; Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110; National Docks, etc., R. Co. *v.* State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. Rep.

and uncertainty in this respect will vitiate the proceedings,[93] unless an amendment of the description is allowed.[94] But it is sufficient if the land is described

421; Ohio River R. Co. *v.* Harness, 24 W. Va. 511); but it is insufficient to give merely the width and length of the strip and its general location on the tract (London *v.* Sample Lumber Co., 91 Ala. 606, 8 So. 281) without giving the location of the line of road or designating the exact points of entry and departure (San Francisco, etc., R. Co. *v.* Gould, 122 Cal. 601, 55 Pac. 411; Detroit, etc., R. Co. *v.* Wayne County Cir. Judge, 95 Mich. 318, 54 N. W. 946; Marcellus Electric R. Co. *v.* Crisler, 33 Misc. (N. Y.) 1, 67 N. Y. Suppl. 932; Parker *v.* Ft. Worth, etc., R. Co., 84 Tex. 333, 19 S. W. 518) or to describe the location of the road as "extending diagonally through said tract of land from a point near the northeast corner to a point near the southwest corner" (Indianapolis, etc., R. Co. *v.* Newsom, 54 Ind. 121).

Street railway.— A petition by an elevated railroad company to condemn easements in a street is sufficient if it describes the easements as those "which are now or may be the subject of injury from a construction of a street railroad, and incidental to its use" (Brooklyn El. R. Co. *v.* Nagel, 75 Hun (N. Y.) 590, 27 N. Y. Suppl. 669); and where the road has been already constructed, a petition is sufficient which prays that damages be assessed for "so much of the privileges, easements or other interest in said street as is taken, appropriated or interfered with by the construction and maintenance of" petitioner's elevated railroad (*In re* Metropolitan El. R. Co., 2 N. Y. Suppl. 278. But see Metropolitan El. R. Co. *v.* Dominick, 55 Hun (N. Y.) 198, 8 N. Y. Suppl. 151).

If a city seeks to extend a street across a railroad right of way, it is sufficient to give the width of the street, and to state that it is to be extended across defendant's right of way. Chicago, etc., R. Co. *v.* Pontiac, 169 Ill. 155, 48 N. E. 485; Illinois Cent. R. Co. *v.* Lostant, 167 Ill. 85, 47 N. E. 62.

Telegraph and telephone companies.— Where a telegraph or telephone company seeks to condemn a railroad right of way the petition is sufficient if it states that defendant's property is a railway running between certain named termini, within certain counties in the state, and if it sets forth the amount of ground needed for each pole, the distance of the poles from each other and their distance from the railroad track (Mobile, etc., R. Co. *v.* Postal Tel. Cable Co., 120 Ala. 21, 24 So. 408; South Carolina, etc., R. Co. *v.* American Telephone, etc., Co., 65 S. C. 459, 43 S. E. 970; Houston, etc., R. Co. *v.* Postal Tel. Cable Co., 18 Tex. Civ. App. 502, 45 S. W. 179; Gulf, etc., R. Co. *v.* Southwestern Tel., etc., Co., 18 Tex. Civ. App. 500, 45 S. W. 151; Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705); it need not locate each pole nor state how many wires are to be put on the cross line (St. Louis, etc., R. Co. *v.* Postal Tel. Co., 173 Ill. 508, 51 N. E. 382). So where such a company condemns a right to erect its poles and string its wires over the premises of an individual or along a highway the petition must contain a description of the size and location of the poles to be erected and of the premises to be occupied by them so that the burden to be imposed upon the landowner and the rights to be acquired by the company can be defined and settled. Winter *v.* New York, etc., Telephone Co., 51 N. J. L. 83, 16 Atl. 188; New York, etc., Telephone Co. *v.* Broome, 50 N. J. L. 432, 14 Atl. 122 [*affirming* 49 N. J. L. 624, 9 Atl. 754]; Trenton, etc., Turnpike Co. *v.* American, etc., Commercial News Co., 43 N. J. L. 381.

A pipe-line company may describe the property, which it desires to appropriate, by lines running certain courses and distances. Adams *v.* San Angelo Waterworks Co., (Tex. Civ. App. 1894) 25 S. W. 165.

Water-rights.— For a sufficient description of water-rights sought to be condemned see Champlain *v.* McCrea, 165 N. Y. 264, 59 N. E. 83 [*reversing* 33 N. Y. App. Div. 259, 53 N. Y. Suppl. 1096]; *In re* Malone Water-Works Co., 15 N. Y. Suppl. 649, holding that where the charter of a waterworks company requires that the petition shall state definitely the quantity of water to be diverted, the petition is sufficient if it sets forth the apparatus to be used in conveying the water and the number of gallons per day which will flow through the conduit. For descriptions held to be insufficient see Aliso Water Co. *v.* Baker, 95 Cal. 268, 30 Pac. 537; Syracuse *v.* Stacey, 86 Hun (N. Y.) 441, 33 N. Y. Suppl. 929.

93. *California.*—San Francisco, etc., R. Co. *v.* Gould, 122 Cal. 601, 55 Pac. 411.

Nebraska.— Omaha, etc., R. Co. *v.* Rickards, 38 Nebr. 847, 57 N. W. 739.

New Jersey.— National Docks, etc., R. Co. *v.* State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. Rep. 421.

Pennsylvania.—Pennsylvania R. Co. *v.* Porter, 29 Pa. St. 165.

Texas.— Lester *v.* Ft. Worth, etc., R. Co., (Civ. App. 1894) 26 S. W. 166.

But see Philadelphia, etc., R. Co. *v.* Rochester, etc., R. Co., 12 Pa. Co. Ct. 513 (holding that a variance in the description furnishes no ground for a new trial where it does not appear that defendant was injured by such variance); *Ex p.* Bennett, 26 S. C. 317, 2 S. E. 389 (holding that the statute does not require for jurisdictional purposes that the petition shall set forth a sufficient or exact description of the land).

See 18 Cent. Dig. tit. "Eminent Domain," § 515.

94. Smith *v.* Detroit, 120 Mich. 572, 79 N. W. 808, holding that under Howell St. § 3064*j*, an amendment may be allowed in the description of the property proposed to be taken whenever it will not interfere with the substantial rights of the parties.

with such certainty as to enable one skilled in such matters to locate it,[95] and no land need be described except such as the petitioner proposes to appropriate.[96] Nor is it necessary to set forth the value of the land to be taken,[97] nor the interest which the petitioner seeks to acquire, whether an easement or the fee.[98]

(B) *Reference to Maps, Plats, Etc.* Although the description may be in itself insufficient it may be made sufficient by referring to other documents, as to maps, plats, surveys, and the like, by which it is rendered certain,[99] unless such maps, etc., are insufficient in themselves to aid or render certain the description given in the petition;[1] or by referring to stakes which have been driven or to trees which have been blazed.[2]

(VII) *Description of Route, Location, Improvements, and the Like.* Under some statutes the petition must also describe the location, route, and termini of the proposed improvement.[3] The exact place need not be described,[4] but it is sufficient if the general direction of the route and names of the termini are given together with sufficient data to enable one who is conversant with such matters to accurately lay out the improvement, although it may be necessary to subsequently make slight alterations,[5] and unless the statute expressly requires it

95. Houston, etc., R. Co. *v.* Postal Tel. Cable Co., 18 Tex. Civ. App. 502, 45 S. W. 179.

96. *Alabama.*— Brown *v.* Rome, etc., R. Co., 86 Ala. 206, 5 So. 195.

Illinois.— Hyde Park *v.* Dunham, 85 Ill. 569.

New York.— New Rochelle Water Co. *v.* Brush, 19 N. Y. Suppl. 954.

Ohio.— Schaible *v.* Lake Shore, etc., R. Co., 10 Ohio Cir. Ct. 334, 6 Ohio Cir. Dec. 505.

Washington.— Northern Pac., etc., R. Co. *v.* Coleman, 3 Wash. 228, 28 Pac. 514.

See 18 Cent. Dig. tit. "Eminent Domain," § 515.

Land which will only be injuriously affected need not be described. New Rochelle Water Co. *v.* Brush, 19 N. Y. Suppl. 954. And see Frick Coke Co. *v.* Painter, 198 Pa. St. 468, 48 Atl. 302.

97. California Southern R. Co. *v.* Southern Pac. R. Co., 67 Cal. 59, 7 Pac. 123. But see Colorado Cent. R. Co. *v.* Allen, 13 Colo. 229, 22 Pac. 605.

98. *In re* Metropolitan El. R. Co., 12 N. Y. Suppl. 506.

99. *California.*— Madera County *v.* Raymond Granite Co., 139 Cal. 128, 72 Pac. 915; San Francisco, etc., R. Co. *v.* Gould, 122 Cal. 601, 55 Pac. 411.

Illinois.— Illinois Cent. R. Co. *v.* Lostant, 167 Ill. 85, 47 N. E. 62.

Massachusetts.— Grand Junction R., etc., Co. *v.* Middlesex County Com'rs, 14 Gray 553.

Michigan.— Cincinnati, etc., R. Co. *v.* Bay City, etc., R. Co., 106 Mich. 473, 64 N. W. 471.

Missouri.— St. Louis, etc., R. Co. *v.* Fowler, 113 Mo. 458, 20 S. W. 1069; Cory *v.* Chicago, etc., R. Co., 100 Mo. 282, 13 S. W. 346; Quincy, etc., R. Co. *v.* Kellogg, 54 Mo. 334.

Nebraska.— Fremont, etc., R. Co. *v.* Matthies, 35 Nebr. 48, 52 N. W. 698.

New Jersey.— State *v.* Central New Jersey Telephone Co., 53 N. J. L. 341, 21 Atl. 460, 11 L. R. A. 664.

New York.— *In re* Washington Park, 52 N. Y. 131; Stillwater, etc., R. Co. *v.* Slade, 36 N. Y. App. Div. 587, 55 N. Y. Suppl. 966; Marcellus Electric R. Co. *v.* Crisler, 33 Misc. 1, 67 N. Y. Suppl. 932.

Pennsylvania.— *In re* Harbaugh Ave., 10 Pa. Co. Ct. 440.

Wisconsin.— Babcock *v.* Chicago, etc., R. Co., 107 Wis. 280, 83 N. W. 316, 81 Am. St. Rep. 845.

See 18 Cent. Dig. tit. "Eminent Domain," § 515.

But in New York it has been held that where the petition of a railroad company fails to so describe the land as to show its location and boundaries, the defect cannot be remedied by reference to a deed. *In re* New York Cent., etc., R. Co., 70 N. Y. 191.

1. California Cent. R. Co. *v.* Hooper, 76 Cal. 404, 18 Pac. 599; Ft. Worth, etc., R. Co. *v.* Hogsett, 1 Tex. App. Civ. Cas. § 444.

2. *Illinois.*— Suver *v.* Chicago, etc., R. Co., 123 Ill. 293, 14 N. E. 12.

Mississippi.— West *v.* West, etc., R. Co., 61 Miss. 536.

Missouri.— Chicago, etc., R. Co. *v.* Swan, 120 Mo. 30, 25 S. W. 534.

New York.— Stillwater, etc., R. Co. *v.* Slade, 36 N. Y. App. Div. 587, 55 N. Y. Suppl. 966; Marcellus Electric R. Co. *v.* Crisler, 33 Misc. 1, 67 N. Y. Suppl. 932.

Ohio.— Cleveland, etc., R. Co. *v.* Prentice, 13 Ohio St. 373.

See 18 Cent. Dig. tit. "Eminent Domain," § 515.

3. San Francisco, etc., R. Co. *v.* Leviston, 134 Cal. 412, 66 Pac. 473; Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604; Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110; Lidgerwood *v.* Michalek, (N. D. 1903) 97 N. W. 541. And see cases in the following notes.

4. Folmar *v.* Folmar, 71 Ala. 136.

5. *California.*— San Francisco, etc., R. Co. *v.* Leviston, 134 Cal. 412, 66 Pac. 473; California Southern R. Co. *v.* Southern Pac. R. Co., 67 Cal. 59, 7 Pac. 123.

Delaware.— Front, etc., R. Co.'s Petition, 1 Pennew. 370, 41 Atl. 200.

the petition need not show the grade on which a railroad is to be laid,[6] nor the number of tracks which it is proposed to lay.[7]

(VIII) *DESIGNATION OF OWNERS.* The names and residences of the owners should be stated if known,[8] or there should be a statement that they are unknown.[9] But it is not necessary to state the exact nature of the owner's interest.[10]

(IX) *NEW USE.* Under statutes providing that property already devoted to a public use cannot be taken except for a more necessary public use, a petition seeking to condemn such property must allege facts which show that the new use is more necessary than the existing one,[11] or that the new use will not interfere

Illinois.— Suver *v.* Chicago, etc., R. Co., 123 Ill. 293, 14 N. E. 12, holding also that the petition need not set out the lands and specifications of the road, although the owner has a right to call for such specifications.

Missouri.— Williams *v.* Kirby, 169 Mo. 622, 70 S. W. 140.

New York.—Stillwater, etc., R. Co. *v.* Slade, 36 N. Y. App. Div. 587, 55 N. Y. Suppl. 966; *In re* Suburban Rapid Transit Co., 38 Hun 553.

See 18 Cent. Dig. tit. "Eminent Domain," § 516.

No statement is required that the proposed location of a railroad is compatible with the greatest public good and the least private injury. San Francisco, etc., R. Co. *v.* Leviston, 134 Cal. 412, 66 Pac. 473.

Maps.— The location of the route may be made by reference to a map filed with the petition. Bay City Belt-Line R. Co. *v.* Hitchcock, 90 Mich. 533, 51 N. W. 808; State *v.* Central New Jersey Telephone Co., 53 N. J. L. 341, 21 Atl. 460, 11 L. R. A. 664; Lidgerwood *v.* Michalek, (N. D. 1903) 97 N. W. 541.

A complaint to condemn land for a sewer already partially built, which states the termini of the whole sewer, need not state the exact spot to which it has been already constructed; and the phrase "along and east of the center line" of a certain avenue, sufficiently shows the location of the proposed sewer. Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604.

Where a telegraph company seeks to build its line on a railroad right of way, the petition is sufficient if it describes the railroad right of way in general terms, giving the termini and the counties through which it runs. State *v.* Central New Jersey Telephone Co., 53 N. J. L. 341, 21 Atl. 460, 11 L. R. A. 664; Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 23 Utah 474, 65 Pac. 735; Idaho Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 104 Fed. 623.

A petition by a natural gas company is sufficient if it states the size of pipe to be laid, the number of feet of land it will traverse, and its general or approximate direction. *In re* Ohio Valley Gas Co., 6 Pa. Dist. 200.

6. Bay City Belt-Line R. Co. *v.* Hitchcock, 90 Mich. 533, 51 N. W. 808; Flint, etc., R. Co. *v.* Detroit, etc., R. Co., 64 Mich. 350, 31 N. W. 281.

7. Chicago, etc., R. Co. *v.* Smith, 111 Ill. 363; Bay City Belt-Line R. Co. *v.* Hitchcock, 90 Mich. 533, 51 N. W. 808.

Where the intention to lay more than one track is not asserted, and the map shows the location of only one track, no more than one can be laid. Bay City Belt-Line R. Co. *v.* Hitchcock, 90 Mich. 533, 51 N. W. 808.

8. *California.*— California Southern R. Co. *v.* Colton Land, etc., Co., (1884) 2 Pac. 38.

Maine.— Jones *v.* Skinner, 61 Me. 25.

Michigan.— Toledo, etc., R. Co. *v.* Munson, 57 Mich. 42, 23 N. W. 455.

Missouri.— Sieferer *v.* St. Louis, 141 Mo. 586, 43 S. W. 163.

Nebraska.— Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110.

New York.— Matter of Washington Park, 52 N. Y. 131; People *v.* Whitney's Point, 32 Hun 508.

North Dakota.— Lidgerwood *v.* Michalek, (1903) 97 N. W. 541.

Pennsylvania.— Boyd *v.* Negley, 40 Pa. St. 377; Reitenbaugh *v.* Chester Valley R. Co., 21 Pa. St. 100; *In re* Harbaugh Ave., 10 Pa. Co. Ct. 440.

Texas.— Galveston, etc., R. Co. *v.* Mud Creek, etc., Co., 1 Tex. App. Civ. Cas. § 393.

See 18 Cent. Dig. tit. "Eminent Domain," § 517.

Residence of wife.— Under a statute providing that the word "owner" shall include all persons having any estate, interest, or easement in the property, a petition which fails to state the residence of a wife having an inchoate right of dower in the land is defective, although the residence of the husband is given. Marcellus Electric R. Co. *v.* Crisler, 33 Misc. (N. Y.) 1, 67 N. Y. Suppl. 932.

9. California Southern R. Co. *v.* Colton Land, etc., Co., (Cal. 1884) 2 Pac. 38.

10. Los Angeles *v.* Pomeroy, 124 Cal. 597, 57 Pac. 585; Thomas *v.* St. Louis, etc., R. Co., 164 Ill. 634, 46 N. E. 8; Cincinnati, etc., R. Co. *v.* Sundry Persons, 1 Ohio Dec. (Reprint) 326, 7 West. L. J. 265.

Where a telegraph company seeks to condemn a railroad right of way, it is not necessary that it should state by what tenure the railroad company holds its right of way (Postal Tel. Cable Co. *v.* Southern R. Co., 89 Fed. 190); and the railroad company cannot object that the petition does not show whether there were owners in fee, apart from the railroad corporation, of the lands over which the easement is sought (New Orleans, etc., R. Co. *v.* Southern, etc., Tel. Co., 53 Ala. 211).

11. Helena *v.* Rogan, 26 Mont. 452, 68 Pac. 798, 27 Mont. 135, 69 Pac. 709, holding that this is essential, the degrees of necessity being a question for judicial determination.

with the prior use,[12] unless the statute does not require that such statements shall be made.[13]

b. Signing, Verifying, and Filing. A petition filed by an individual may be signed by an agent[14] or attorney.[15] Where the petition is filed by a corporation, it must be signed by some person authorized by the corporation to do so,[16] but need not be verified,[17] unless the statute requires its verification;[18] nor need it be authenticated by the corporate seal.[19] A petition to the commissioners is filed when presented to the full board, with the request that it be filed, although it is not indorsed by the clerk until a subsequent time.[20]

c. Defects and Objections — (I) *In General.* If the petition is insufficient in any of the required particulars a demurrer will lie,[21] but not a motion to strike out[22] nor a motion to dismiss.[23] Even a substantial defect may be cured by proof at the trial, where no objection is made before,[24] but not by evidence *aliunde*,[25] or by supplementary affidavits.[26] The petition may be attacked on the ground that there is a jurisdictional defect in it, and if such defect is found to exist the petition should be dismissed.[27]

(II) *Waiver.* An appearance and participation in the proceedings waives all technical objections to the sufficiency of the petition.[28] Thus it is too late to object to the form of the petition or the proceedings after verdict,[29] or to its verification after answer has been filed.[30]

d. Amendment. The court has full power to allow the petition to be amended[31]

12. St. Louis, etc., R. Co. *v.* Postal Tel. Co., 173 Ill. 508, 51 N. E. 382.

13. Chicago, etc., R. Co. *v.* Pontiac, 169 Ill. 155, 48 N. E. 485.

14. Harvey *v.* Loyd, 3 Pa. St. 331.

15. Gammell *v.* Potter, 2 Iowa 562.

16. Detroit *v.* Beecher, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813; Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110; *In re* Metropolitan El. R. Co., 7 N. Y. Suppl. 707; *In re* Cambria St., 75 Pa. St. 357.

17. Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110; *In re* Towanda Bridge Co., 91 Pa. St. 216.

18. Detroit *v.* Beecher, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813; Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110; *In re* Metropolitan El. R. Co., 7 N. Y. Suppl. 707; Rittenbaugh *v.* Chester Valley R. Co., 21 Pa. St. 100.

The provision of a Maryland statute to the effect that a petition in the state court to condemn land for the use of the United States shall be verified by affidavit of an agent of the United States does not apply where the petition is presented to the United States court by the officer who has been designated in the act of congress. Chappell *v.* U. S., 160 U. S. 499, 16 S. St. 397, 40 L. ed. 510.

19. Coles *v.* Midland Telephone, etc., Co., 67 N. J. L. 490, 51 Atl. 448 [*affirmed* in 68 N. J. L. 413, 53 Atl. 1125].

20. Brockton *v.* Cross, 138 Mass. 297.

21. Santa Ana *v.* Brunner, 132 Cal. 234, 64 Pac. 287; Johnson *v.* Freeport, etc., R. Co., 111 Ill. 413; Township Bd. of Education *v.* Hackmann, 48 Mo. 243; Parker *v.* Snohomish County Super. Ct., 25 Wash. 544, 66 Pac. 154.

22. Johnson *v.* Freeport, etc., R. Co., 111 Ill. 413.

23. Willard *v.* Boston, 149 Mass. 176, 21 N. E. 298.

24. New Milford Water Co. *v.* Watson, 75 Conn. 237, 52 Atl. 947, 53 Atl. 57; New Rochelle Water Co. *v.* Brush, 19 N. Y. Suppl. 954.

25. Parker *v.* Ft. Worth, etc., R. Co., 84 Tex. 333, 19 S. W. 518.

26. *In re* Suburban Rapid-Transit Co., 16 Abb. N. Cas. (N. Y.) 152.

27. Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 62 Mich. 564, 578, 29 N. W. 500, 506, 4 Am. St. Rep. 875; State *v.* Shelton, 154 Mo. 670, 55 S. W. 1008, 50 L. R. A. 798; St. Joseph Terminal R. Co. *v.* Hannibal, etc., R. Co., 94 Mo. 535, 543, 6 S. W. 690.

The filing of a written protest by an owner, and his basing a motion thereon to quash the proceedings for want of jurisdiction, is like a demurrer in that it admits all the facts in the petition which are well pleaded. Emerson *v.* Western Union R. Co., 75 Ill. 176.

28. Matter of Washington St., 60 Hun (N. Y.) 580, 14 N. Y. Suppl. 470.

Where the petition is defective in failing to state the residence of the owners, their appearance by attorneys on the hearing is sufficient to give the court jurisdiction, even without amending the petition. Matter of Rochester, etc., R. Co., 9 N. Y. St. 560.

29. Thayer *v.* Worcester County, 10 Cush. (Mass.) 151; Rochester, etc., R. Co. *v.* Hartshorn, 4 Silv. Supreme (N. Y.) 92, 7 N. Y. Suppl. 279, holding that if the owners make no answer to the petition and no objection to the proceedings until after the commissioners have made an award, such objection will come too late.

30. *In re* New York, etc., R. Co., 33 Hun (N. Y.) 148.

31. *California.*— Contra Costa Coal Mines R. Co. *v.* Moss, 23 Cal. 323.

on the trial of an appeal from the award of commissioners,[32] and even after verdict,[33] for any defect or informality in it,[34] unless the amendment would change the issues.[35] But it is within the discretion of the court whether it shall be allowed[36] and on what terms.[37]

3. Answer and Subsequent Pleadings — a. Answer, Cross Petition, or Plea. Although it is usually unnecessary, in order to determine the rights of the parties, for defendant in condemnation proceedings to file an answer, cross petition, or plea,[38] unless he also desires to set up a claim for damages to his improve-

Indiana.— Indiana, etc., R. Co. *v.* Rinehart, 14 Ind. App. 588, 43 N. E. 238.

Iowa.— Pollard *v.* Dickinson County, 71 Iowa 438, 32 N. W. 418.

Minnesota.—Wilcox *v.* St. Paul, etc., R. Co., 35 Minn. 439, 29 N. W. 148.

New York.— Mooney *v.* New York El. R. Co., 163 N. Y. 242, 57 N. E. 496, 31 N. Y. Civ. Proc. 49 [*reversing* 13 N. Y. App. Div. 380, 43 N. Y. Suppl. 35]; Syracuse *v.* Stacey, 86 Hun 441, 33 N. Y. Suppl. 929; *In re* Rochester, etc., R. Co., 45 Hun 126, 9 N. Y. St. 560.

North Carolina.— Holly Shelter R. Co. *v.* Newton, 133 N. C. 132, 25 S. E. 549, 98 Am. St. Rep. 701.

See 18 Cent. Dig. tit. "Eminent Domain," § 523.

A railroad company may amend its petition by inserting a stipulation or agreement to construct proper and sufficient drainage under the road-bed. Chicago, etc., R. Co. *v.* Jones, 103 Ind. 386, 6 N. E. 8; Indiana, etc., R. Co. *v.* Rinehart, 14 Ind. App. 588, 43 N. E. 238. But a stipulation signed by its attorney and in no sense an amendment of the petition is properly stricken from the files. Wabash, etc., R. Co. *v.* McDougall, 126 Ill. 111, 18 N. E. 291, 9 Am. St. Rep. 539, 1 L. R. A. 370.

Where the action is brought by the owner, and the company relinquishes a part of plaintiff's land which it had appropriated at its first location, it has no right to apply to amend the owner's petition by excluding therefrom the land it has relinquished. Bate *v.* Philadelphia, etc., R. Co., 1 Montg. Co. Rep. (Pa.) 47.

But a city cannot pass an ordinance after an application to condemn land for a street is filed, so as to change the terms of the application, and ask an appropriation of more or less land than demanded in the original application. Grant *v.* Hyde Park, 67 Ohio St. 166, 65 N. E. 891.

32. Grand Junction R., etc., Co. *v.* Middlesex County Com'rs, 14 Gray (Mass.) 553; Boyd *v.* Negley, 40 Pa. St. 377; Texas, etc., R. Co. *v.* Postal Tel. Cable Co., (Tex. Civ. App. 1899) 52 S. W. 108.

But it is discretionary with the court, and the permission to amend may be refused at that stage. Elizabethtown, etc., R. Co. *v.* Catlettsburg Water Co., 110 Ky. 175, 61 S. W. 47, 22 Ky. L. Rep. 1632; *In re* New York, etc., R. Co., 89 N. Y. 453.

33. Russell *v.* Turner, 62 Me. 496.

34. *Colorado.*— Colorado Cent. R. Co. *v.* Allen, 13 Colo. 229, 22 Pac. 605.

Indiana.— Hunt *v.* New York, etc., R. Co., 99 Ind. 593.

New York.— *In re* Metropolitan Transit Co., 45 Hun 159; *In re* Rochester, etc., R. Co., 45 Hun 126, 9 N. Y. St. 560.

Pennsylvania.— Pennsylvania R. Co. *v.* Porter, 29 Pa. St. 165; *Ex p.* United States, 24 Pittsb. Leg. J. 105.

Texas.— Houston, etc., R. Co. *v.* Postal Tel. Cable Co., 18 Tex. Civ. App. 502, 45 S. W. 179.

See 18 Cent. Dig. tit. "Eminent Domain," § 523.

35. Denver Power, etc., Co. *v.* Denver, etc., R. Co., 30 Colo. 204, 69 Pac. 568, 60 L. R. A. 383.

36. *Connecticut.*— New London Water Com'rs *v.* Perry, 69 Conn. 461, 37 Atl. 1059.

Indiana.— Hunt *v.* New York, etc., R. Co., 99 Ind. 593.

Kentucky.— Elizabethtown, etc., R. Co. *v.* Catlettsburg Water Co., 110 Ky. 175, 61 S. W. 47, 22 Ky. L. Rep. 1632.

Minnesota.— Fletcher *v.* Chicago, etc., R. Co., 67 Minn. 339, 69 N. W. 1085.

Pennsylvania.— Robinson *v.* Pennsylvania R. Co., 174 Pa. St. 199, 34 Atl. 546; Philadelphia Water Supply Co. *v.* Susquehanna Canal Co., 4 Pa. Dist. 637.

See 18 Cent. Dig. tit. "Eminent Domain," § 523.

37. Robinson *v.* Pennsylvania R. Co., 174 Pa. St. 199, 34 Atl. 546.

38. *Arkansas.*— Fayetteville, etc., R. Co. *v.* Hunt, 51 Ark. 330, 11 S. W. 418.

California.— North Pac. R. Co. *v.* Reynolds, 50 Cal. 90.

Colorado.— Whitehead *v.* Denver, 13 Colo. App. 134, 56 Pac. 913.

Illinois.— St. Louis, etc., R. Co. *v.* Postal Tel. Co., 173 Ill. 508, 51 N. E. 382; Chicago Sanitary Dist. *v.* Loughran, 160 Ill. 362, 43 N. E. 359; Reed *v.* Ohio, etc., R. Co., 126 Ill. 48, 17 N. E. 807; Hyslop *v.* Finch, 99 Ill. 171; Illinois Western Extension R. Co. *v.* Mayrand, 93 Ill. 591; Bloomington *v.* Miller, 84 Ill. 621.

Louisiana.—New Orleans, etc., R. Co. *v.* McNeely, 47 La. Ann. 1298, 17 So. 798.

Minnesota.— Sheldon *v.* Minneapolis, etc., R. Co., 29 Minn. 318, 13 N. W. 134.

New Jersey.— Miller *v.* Newark, 35 N. J. L. 460.

North Carolina.— Carolina Cent. R. Co. *v.* Love, 81 N. C. 434.

Washington.— Seattle, etc., R. Co. *v.* Murphine, 4 Wash. 448, 30 Pac. 720.

See 18 Cent. Dig. tit. "Eminent Domain," § 519.

ments;[39] and although in some cases it is not permitted,[40] it is nevertheless generally permissible to file one within the proper time.[41] If an answer is filed it may be a general denial,[42] or it may set up any facts showing that the petitioner has no right to maintain the proceeding,[43] or it may be in the nature of a plea in abatement.[44] The filing of an answer on the merits waives all technical objections to the petition.[45]

b. **Bill of Particulars.** Defendant usually cannot be required to file a bill of particulars of his claim for damages.[46]

c. **Reply.** A reply is not needed unless it would be requisite under the ordinary practice provided by the code.[47]

An owner who claims no special damages need interpose no answer. Bentonville R. Co. *v.* Stroud, 45 Ark. 278.

The owner is not required to proceed, by cross petition or otherwise, to have the description in the petition corrected or enlarged, in order to include the recovery of damages to the entire tract. Sheldon *v.* Minneapolis, etc., R. Co., 29 Minn. 318, 13 N. W. 134.

39. Alameda *v.* Cohen, 133 Cal. 5, 65 Pac. 127.

40. Henry *v.* Centralia, etc., R. Co., 121 Ill. 264, 12 N. E. 744; Johnson *v.* Freeport, etc., R. Co., 111 Ill. 413; Smith *v.* Chicago, etc., R. Co., 105 Ill. 511.

41. Whitehead *v.* Denver, 13 Colo. App. 134, 56 Pac. 913; Reed *v.* Ohio, etc., R. Co., 126 Ill. 48, 17 N. E. 807; Johnson *v.* Freeport, etc., R. Co., 111 Ill. 413; Chicago, etc., R. Co. *v.* Hopkins, 90 Ill. 316; Stetson *v.* Chicago, etc., R. Co., 75 Ill. 74; Mellichar *v.* Iowa City, 116 Iowa 390, 90 N. W. 86; Bennett *v.* Marion, 106 Iowa 628, 76 N. W. 844; Water Com'rs *v.* Clark, 3 N. Y. Suppl. 347.

An answer denying the title of the petitioner cannot be filed *nunc pro tunc* after the award is filed. *In re* Connecting R. Co., 1 Leg. Gaz. (Pa.) 22.

If a more specific answer is desired, it should be sought by the usual means of a motion to make more specific. Decatur *v.* Grand Rapids, etc., R. Co., 146 Ind. 577, 45 N. E. 793.

Sufficient answers.— When a petition alleges that the land to be condemned is private land, held by a corporation for other purposes than the business in which it is engaged, an answer setting forth defendant's incorporation, the business in which it is engaged, and alleging that the land is necessary for the purposes of such business, is sufficient. Denver, etc., R. Co. *v.* Union Pac. R. Co., 34 Fed. 386.

The title of the one named in the petition as owner is admitted, unless it is expressly denied, and the averment in the answer of title to property not covered by the petition will entitle the owner to damages in respect thereto, if such averment is not denied. G. B. & L. R. Co. *v.* Haggart, 9 Colo. 346, 12 Pac. 215.

42. Santa Ana *v.* Gildmacher, 133 Cal. 395, 65 Pac. 883; Southwestern Telephone Co. *v.* Kansas City, etc., R. Co., 108 La. 691, 32 So. 958; *In re* Broadway, etc., R. Co., 73 Hun (N. Y.) 7, 25 N. Y. Suppl. 1080.

43. Marion, etc., R. Co. *v.* Ward, 9 Ind. 123; Axtell *v.* Coombs, 4 Me. 322.

A claim for damages may be joined in the same answer with the denial of the right of the petitioner to maintain the proceeding. Peed *v.* Brenneman, 72 Ind. 288; Bridal Veil Lumbering Co. *v.* Johnson, 25 Oreg. 105, 34 Pac. 1026.

N. Y. Code Civ. Proc. § 1776, which dispenses with the necessity of proving corporate existence, unless the answer is verified and contains an affirmative allegation that plaintiff is not a corporation, has no application to condemnation proceedings. *In re* Broadway, etc., R. Co., 73 Hun 7, 25 N. Y. Suppl. 1080.

In Illinois the court will proceed to the trial of the case without disposing of a plea of *nul tiel corporation.* Henry *v.* Centralia, etc., R. Co., 121 Ill. 264, 12 N. E. 744.

An answer which merely alleges that the articles of incorporation of the petitioner, which are not set out either in the petition or answer, are not sufficient to enable it to maintain its action, is insufficient unless it specifies the defects in the incorporation. Denver, etc., R. Co. *v.* Union Pac. R. Co., 34 Fed. 386.

44. Willard *v.* Boston, 149 Mass. 176, 21 N. E. 298.

45. Township Bd. of Education *v.* Hackmann, 48 Mo. 243.

If the owner files a cross petition, asking for damages for injury done to lands which are not taken, but which are contiguous to the proposed railroad right of way, and then goes to trial on the merits, he admits the incorporation of the petitioner, its right to exercise the power of eminent domain, and that the parties have been unable to agree. Ward *v.* Minnesota, etc., R. Co., 119 Ill. 287, 10 N. E. 365.

46. Dallas, etc., R. Co. *v.* Day, 3 Tex. Civ. App. 353, 22 S. W. 538. But see Kansas City, etc., R. Co. *v.* Kennedy, 49 Kan. 19, 30 Pac. 126, holding that it is within the discretion of the court whether defendant shall be required to file such a bill.

47. Denver, etc., R. Co. *v.* Griffith, 17 Colo. 598, 31 Pac. 171.

Under the provision of the code that there need be no reply except where there is a counter-claim, or where the answer contains matter to which plaintiff has a defense in confession and avoidance, it is not necessary, in a proceeding to assess damages for

K. Issues and Variance — 1. Issues — a. In General. Issues of law may be raised,[48] which, being determined, may be followed by issues of fact to be formed and tried according to the practice in the civil cases.[49] And in general the hearing can proceed and evidence be introduced only on such issues as are raised by the pleadings[50] or submitted by the court.[51]

land taken for railroad purposes, to file a reply where the answer sets up the defense of limitation, alleges that the railroad company, and not plaintiff, is the owner of the property taken, and that plaintiff is estopped by his acts of acquiescence from demanding compensation for the land. Hartley *v.* Keokuk, etc., R. Co., 85 Iowa 455, 52 N. W. 352.

48. Cincinnati, etc., R. Co. *v.* McFarland, 22 Ind. 459.

49. Santa Ana *v.* Brunner, 132 Cal. 234, 64 Pac. 287; Cincinnati, etc., R. Co. *v.* McFarland, 22 Ind. 459; State *v.* Engelmann, 106 Mo. 628, 17 S. W. 759.

50. *Colorado.*— Colorado Cent. R. Co. *v.* Allen, 13 Colo. 229, 22 Pac. 605.

Connecticut.— New Milford Water Co. *v.* Watson, 75 Conn. 237, 52 Atl. 947, 53 Atl. 57.

Illinois.— Ligare *v.* Chicago, 157 Ill. 637, 41 N. E. 1021; Mix *v.* Lafayette, etc., R. Co., 67 Ill. 319.

Indiana.— Schnied *v.* Kenney, 72 Ind. 309.

Michigan.— Cincinnati, etc., R. Co. *v.* Bay City, etc., R. Co., 106 Mich. 473, 64 N. W. 471.

New York.— *In re* Staten Island Rapid Transit R. Co., 38 Hun 381, holding that where subscriptions to the stock of a railroad company and the amount paid in are sufficient to authorize the company to maintain condemnation proceedings, the question whether there has been an improper issue of stock cannot be inquired into.

Pennsylvania.— H. C. Frick Coke Co. *v.* Painter, 198 Pa. St. 468, 48 Atl. 302; Becker *v.* Philadelphia, etc., R. Co., 177 Pa. St. 252, 35 Atl. 617, 35 L. R. A. 583.

Texas.— Barnes *v.* Chicago, etc., R. Co., (Civ. App. 1895) 33 S. W. 601.

Washington.— No. Pac., etc., R. Co. *v.* Coleman, 3 Wash. St. 228, 28 Pac. 514.

See 18 Cent. Dig. tit. "Eminent Domain," § 524.

An undenied allegation that the parties were unable to agree need not be proved. *In re* Boston Hoosac Tunnel, etc., R. Co., 79 N. Y. 64; Cory *v.* Chicago, etc., R. Co., 100 Mo. 282, 13 S. W. 346; Barnes *v.* Chicago, etc., R. Co., (Tex. Civ. App. 1895) 33 S. W. 601.

Election of issues.— If defendant denies that plaintiff is a corporation, and also presents issues as to the value of the land and the amount of the damages, the denial of plaintiff's corporate capacity will be stricken out, if defendant refuses to elect upon which issue he will defend. Oregon Cent. R. Co. *v.* Wait, 3 Oreg. 91.

The question of the validity of the location cannot be tried on a motion to dismiss, where the petition states that the improvement has been located. Beynon *v.* Brandywine, etc., Turnpike Co., 39 Ind. 129.

Crossing of railroads.— The demand by the petitioner for a crossing at a particular point is not conclusive, and does not limit the inquiry to that particular point, since it is for the commissioners to determine both the point and the manner of crossing (Union Pac. R. Co. *v.* Leavenworth, etc., R. Co., 29 Fed. 728), and in determining the point and manner of the crossing and connections the commissioners are to determine all such particulars as would ordinarily be provided for by a contract between the two companies had they been able to agree, with reference both to their own interests and the public safety. *In re* Lockport, etc., R. Co., 19 Hun (N. Y.) 38. But in such case the commissioners have no power to review any fact on which the order is based, nor to question the right of the petitioner to a crossing, and they cannot regulate the rate of speed at which trains on the respective roads shall pass the crossing. *In re* Long Island Cent. R. Co., 1 Thomps. & C. (N. Y.) 419.

Where a telephone company has the right to condemn the right of way of a railroad company, provided the ordinary use by the railroad company of its right of way shall not be obstructed, the questions on the issue of necessity are: (1) Whether the use by the railroad company will be substantially obstructed; and (2) whether the location and easement sought to be acquired are necessary for the telephone company; the question whether the telephone company could construct its lines on other property is not open to determination. St. Louis, etc., R. Co. *v.* Southwestern Telephone, etc., Co., 121 Fed. 276, 58 C. C. A. 198.

51. Chicago, etc., R. Co. *v.* Townsdin, 38 Kan. 78, 15 Pac. 889; Yazoo-Mississippi Delta Levee Com'rs *v.* Dillard, 76 Miss. 641, 25 So. 292; Miller *v.* Newark, 35 N. J. L. 460; Wood *v.* Boughan, 1 Call (Va.) 329.

The right of the owner to insist that issues raised should be framed by the clerk and transmitted to the superior court for trial by jury is waived by his failure, before the commissioners are appointed, to insist on a verdict upon the controverted facts, and cannot be restored against the protest of the petitioner. Chowan, etc., R. Co. *v.* Parker, 105 N. C. 246, 11 S. E. 328.

If the court submits to the jury the question whether the owner has sustained substantial injury, this necessarily involves the inquiry whether the injury resulted from the act of the railroad company or the condition of the property. Denslow *v.* New Haven, etc., Co., 16 Conn. 98.

b. As to Owner's Title. If the petitioner recognizes the person in possession of the land as its owner by instituting against him a condemnation proceeding, no issue is raised as to the title to the land, and such person will not be required on the trial to prove his title,[52] since the petitioner will not be permitted to deny it.[53] But while the condemning party is bound by its allegation of title in defendants, the latter are not bound by the petitioner's averments, but may show the true state of facts and what their right and title actually are.[54]

2. Variance. The rule as to the effect of a variance between the petition and the proof does not differ from that in ordinary civil cases.[55] An immaterial variance between a writ of ad quod damnum by the condemning party and the order directing it is no ground for setting aside the proceedings.[56]

L. Hearing and Determination of Right to Take — 1. In General. Although the tribunal which hears and determines the questions in condemnation proceedings has a special jurisdiction,[57] and the proceedings are summary in their nature,[58] yet the conduct of the proceedings is governed by the ordinary rules of law which obtain in the trial of civil cases,[59] with such modifications as are required by the peculiar nature of the questions to be determined.[60] The hearing should

52. *Arkansas.*— Bentonville R. Co. *v.* Stroud, 45 Ark. 278.

Georgia.— Selma, etc., R. Co. *v.* Camp, 45 Ga. 180.

Illinois.— Chicago, etc., R. Co. *v.* Hopkins, 90 Ill. 316; Peoria, etc., R. Co. *v.* Laurie, 63 Ill. 264; Peoria, etc., R. Co. *v.* Bryant, 57 Ill. 473.

Iowa.— Cummins *v.* Des Moines, etc., R. Co., 63 Iowa 397, 19 N. W. 268.

Minnesota.— Wilcox *v.* St. Paul, etc., R. Co., 35 Minn. 439, 29 N. W. 148; Knauft *v.* St. Paul, etc., R. Co., 22 Minn. 173; St. Paul, etc., R. Co. *v.* Matthews, 16 Minn. 341.

Montana.— Helena, etc., Smelting, etc., Co. *v.* Lynch, 25 Mont. 497, 65 Pac. 919.

See 18 Cent. Dig. tit. "Eminent Domain," § 524.

An allegation of ownership in defendant is to be deemed an allegation of ownership in fee. St. Paul, etc., R. Co. *v.* Matthews, 16 Minn. 341.

53. *Arkansas.*— Bentonville R. Co. *v.* Stroud, 45 Ark. 278.

Illinois.— Chicago, etc., R. Co. *v.* Hopkins, 90 Ill. 316; Metropolitan City R. Co. *v.* Chicago West Div. R. Co., 87 Ill. 317; Mt. Sterling *v.* Givens, 17 Ill. 255.

Montana.— Helena, etc., Smelting, etc., Co. *v.* Lynch, 25 Mont. 497, 65 Pac. 919.

Nebraska.— Omaha, etc., R. Co. *v.* Gerrard, 17 Nebr. 587, 24 N. W. 279; Deitrichs *v.* Lincoln, etc., R. Co., 14 Nebr. 355, 15 N. W. 728; Gerrard *v.* Omaha, etc., R. Co., 14 Nebr. 270, 15 N. W. 231; Republican Valley R. Co. *v.* Hayes, 13 Nebr. 489, 14 N. W. 521.

Oregon.— Willamet Falls Canal, etc., Co. *v.* Kelly, 3 Oreg. 99.

Washington.— Bellingham Bay, etc., R. Co. *v.* Strand, 14 Wash. 144, 44 Pac. 140, 46 Pac. 238.

See 18 Cent. Dig. tit. "Eminent Domain," § 524.

Contra.—Thurston *v.* Portland, 63 Me. 149.

Where the petition alleges the title to be in defendant, evidence of a dedication by defendant is inadmissible. San Jose *v.* Reed, 65 Cal. 241, 3 Pac. 806; Olean *v.* Steyner, 135 N. Y. 341, 32 N. E. 9, 17 L. R. A. 640.

54. Brisbine *v.* St. Paul, etc., R. Co., 23 Minn. 114.

55. Chicago, etc., R. Co. *v.* Pontiac, 169 Ill. 155, 48 N. E. 485; Philadelphia, etc., R. Co. *v.* Rochester, etc., R. Co., 12 Pa. Co. Ct. 513; Woolard *v.* Nashville, 108 Tenn. 353, 67 S. W. 801. And see, generally, Pleading.

56. Coleman *v.* Moody, 4 Hen. & M. (Va.) 1, holding that the fact that a certain height of dam is mentioned in the writ is no ground for setting aside the proceedings, although no particular height was specified in the order directing the writ.

57. See *supra*, XI, F.

58. Ascension Police Jury *v.* Manning, 16 La. Ann. 182, also holding that the statute does not require that the district judge shall sit in vacation to hear the application.

59. Davidson *v.* Texas, etc., R. Co., 29 Tex. Civ. App. 54, 67 S. W. 1093. And see, generally, Trial.

The court may properly refuse to have a part of the issues tried at one time by a jury, and the remaining issues at another time by the court. Cincinnati, etc., R. Co. *v.* McFarland, 22 Ind. 459.

If the purpose for which the land is to be appropriated is partly legal and partly illegal, and it cannot be determined how much of the property is necessary for the legal, the proceeding will be dismissed. *In re* Metropolitan El. R. Co., 12 N. Y. Suppl. 506.

60. See Gilmer *v.* Lime Point, 19 Cal. 47.

The parties may agree that the court shall hear evidence as to the preliminary question of petitioner's right to condemn after the jury has rendered its verdict upon the question of compensation. O'Hare *v.* Chicago, etc., R. Co., 139 Ill. 151, 28 N. E. 923.

The owner has not a constitutional right to be heard on the preliminary question of whether his property shall be taken for a public use; it being a matter of statutory construction whether there shall be a hearing before the taking. Chandler *v.* Railroad Com'rs, 141 Mass. 208, 5 N. E. 509.

be commenced at the time designated in the notice;[61] and if tried on a wrong theory it is reversible error.[62] The right to institute condemnation proceedings may properly be determined on a motion to dismiss the same.[63]

2. QUESTIONS OF LAW AND FACT. As to the province of the court and jury respectively in condemnation proceedings, the ordinary rule in civil cases applies, questions of law being for the court and those of fact for the jury or commissioners.[64] It is for the court to determine the preliminary question of the right to condemn the land,[65] or whether the use is a public one,[66] while it is for the jury to determine the measure of compensation,[67] or whether the use is temporary or permanent;[68] and all questions of value and benefits,[69] as well as questions growing out of the obstruction of water or the erection of mill-dams.[70] But the appli-

Objections to the proposed improvement are matters to be considered by the commissioners and need not be considered on the application for their appointment. *In re* Boston Hoosac Tunnel, etc., R. Co., 79 N. Y. 64.

In a proceeding to condemn a railroad right of way for a reservoir the people have no right to intervene through the attorney-general in order to determine whether the railroad company has forfeited its franchise and such right of way. Denver Power, etc., Co. *v.* Denver, etc., R. Co., 30 Colo. 204, 69 Pac. 568, 60 L. R. A. 383.

61. Adams *v.* Clarksburg, 23 W. Va. 203.

But the fact that the petition was heard at a later day than that named in the notice does not oust the court of its jurisdiction, if the owner did not appear on the day named in the notice. Thompson *v.* Chicago, etc., R. Co., 110 Mo. 147, 19 S. W. 77.

62. Parsons Water Co. *v.* Knapp, 33 Kan. 752, 7 Pac. 568, holding that it is reversible error to try a proceeding by a water company to procure the right to flood lands in which it does not ask for the entire use of the water to the exclusion of the water company, on the theory that plaintiff would obtain the right to the exclusive use of the water.

63. Harvey *v.* Aurora, etc., R. Co., 174 Ill. 295, 51 N. E. 163.

64. Gammell *v.* Potter, 6 Iowa 548.

Questions as to the determination of the route of a railroad are not for the jury. Barrall *v.* Quick, 74 S. W. 214, 24 Ky. L. Rep. 2393; New Orleans, etc., R. Co. *v.* Robertson, 34 La. Ann. 865.

The insufficiency of the price to be paid is a question for the court and jury, and the owner cannot object to the taking of his land merely on that ground. Kansas City, etc., R. Co. *v.* Vicksburg, etc., R. Co., 49 La. Ann. 29, 21 So. 144.

Whether the erection and maintenance of gates or the employment of flagmen is at the time of condemnation necessary for the proper protection of the railroad and the public is a question of fact for the jury. Detroit Park, etc., Com'rs *v.* Chicago, etc., R. Co., 91 Mich. 291, 51 N. W. 934.

Whether several tracts are to be considered as one is a question for the jury. Chicago, etc., R. Co. *v.* Huncheon, 130 Ind. 520, 30 N. E. 636; Ellsworth *v.* Chicago, etc., R. Co., 91 Iowa 386, 59 N. W. 78; Cincinnati, etc., R. Co. *v.* Longworth, 30 Ohio St. 108; Charleston, etc., Bridge Co. *v.* Comstock, 36 W. Va. 263, 15 S. E. 69.

65. *Alabama.*— London *v.* Sample Lumber Co., 91 Ala. 606, 8 So. 281.

Illinois.— O'Hare *v.* Chicago, etc., R. Co., 139 Ill. 151, 28 N. E. 923.

Massachusetts.— Burt *v.* Brigham, 117 Mass. 307.

Michigan.— Manistee, etc., R. Co. *v.* Fowler, 73 Mich. 217, 41 N. W. 261.

Tennessee.—Tennessee Cent. R. Co. *v.* Campbell, 109 Tenn. 655, 73 S. W. 112; McWhirter *v.* Cockrell, 2 Head 10.

See 18 Cent. Dig. tit. "Eminent Domain," § 536.

Whether the proposed use will interfere with another use is a question which must be determined by the court and entered of record. Cincinnati, etc., R. Co. *v.* Ohio Postal Tel. Cable Co., 68 Ohio St. 306, 67 N. E. 890, 62 L. R. A. 941.

66. St. Joseph Terminal R. Co. *v.* Hannibal, etc., R. Co., 94 Mo. 535, 6 S. W. 691; Savannah *v.* Hancock, 91 Mo. 54, 3 S. W. 215.

67. O'Hare *v.* Chicago, etc., R. Co., 139 Ill. 151, 28 N. E. 923; Burt *v.* Brigham, 117 Mass. 307; Manistee, etc., R. Co. *v.* Fowler, 73 Mich. 217, 41 N. W. 261.

68. Pennsylvania, etc., Canal, etc., Co. *v.* Billings, 94 Pa. St. 40.

69. *California.*—Colusa County *v.* Hudson, 85 Cal. 633, 24 Pac. 791.

Colorado.— Rio Grande Southern R. Co. *v.* Knight, 1 Colo. App. 219, 28 Pac. 19.

Illinois.— Chicago Sanitary Dist. *v.* Loughran, 160 Ill. 362, 43 N. E. 359.

Massachusetts.— Cole *v.* Boston, 181 Mass. 374, 63 N. E. 1061.

Michigan.— Grand Rapids, etc., R. Co. *v.* Heisel, 47 Mich. 393, 11 N. W. 212.

New York.— Matter of Thomson, 1 Silv. Supreme 389, 5 N. Y. Suppl. 370.

70. *Connecticut.*— Hartford Manilla Co. *v.* Olcott, 52 Conn. 452.

Illinois.— Kiernan *v.* Chicago, etc., R. Co., 123 Ill. 188, 14 N. E. 18.

Iowa.— Damour *v.* Lyons City, 44 Iowa 276.

Massachusetts.— Davidson *v.* Boston, etc., R. Co., 3 Cush. 91.

Wisconsin.— Smith *v.* Russ, 17 Wis. 227, 84 Am. Dec. 739.

United States.— Paine Lumber Co. *v.* U. S., 55 Fed. 854.

cation of these rules is not free from difficulty, and has given rise to some conflict of opinion. Thus the question whether the taking of property in any particular instance is necessary or not is by some courts held to be one for the court,[71] and by others to be one for the jury or commissioners.[72] In all cases where there is a conflict of evidence, or the facts are disputed, the ordinary rule prevails that the question is one for the triers of the facts.[73]

8. RIGHT TO OPEN AND CLOSE. While there are cases which hold that the right to open and close belongs to the owner, no matter which party initiates the proceeding,[74] yet the more numerous authorities and the better reasoning support the doctrine that the petitioner has the opening and closing, on the ground that the burden of making out the case rests with him,[75] although in some instances it is held that if the opening and closing are given to the owner on his assumption of

Under the Massachusetts mill act (Rev. St. c. 116) which provides that any person whose land is overflowed or otherwise injured by a dam constructed under the act may obtain compensation through a sheriff's jury, it was held that on the trial before a sheriff's jury the construction and effect of a former verdict are to be determined by the sheriff and not by the jury. Wilmarth *v.* Knight, 7 Gray 294.

71. New Cent. Coal Co. *v.* George's Creek Coal, etc., Co., 37 Md. 537; Palmer *v.* Harris County, 29 Tex. Civ. App. 340, 69 S. W. 229; Seattle, etc., R. Co. *v.* Murphine, 4 Wash. 448, 30 Pac. 720; St. Louis, etc., R. Co. *v.* Southwestern Telephone, etc., Co., 121 Fed. 276, 58 C. C. A. 198. And see, generally, on this subject, *supra*, IX.

72. Southern Pac. R. Co. *v.* Raymond, 53 Cal. 223; Kansas Cent. R. Co. *v.* Allen, 22 Kan. 285, 31 Am. Rep. 190; Serrell *v.* Patterson, 107 Mich. 234, 65 N. W. 107; Fort-St. Union Depot Co. *v.* Morton, 83 Mich. 265, 47 N. W. 228; Manistee, etc., R. Co. *v.* Fowler, 73 Mich. 217, 41 N. W. 261; Arnold *v.* Decatur, 29 Mich. 77.

A jury of the vicinage is peculiarly competent to judge of the necessity of allowing one railroad to cross the line of another at a particular place and to assess the amount to be paid therefor. Houston, etc., R. Co. *v.* Kansas City, etc., R. Co., 109 La. 581, 33 So. 609.

Whether the necessities of the railroad company require occupancy of the condemned land, exclusive of all uses by the owner of the fee, is a question of fact, and not of law. Kansas Cent. R. Co. *v.* Allen, 22 Kan. 285, 31 Am. Rep. 190.

In California, when the question whether the taking is necessary for the designated use is submitted to a jury, and the jury finds on the issue, the court has no power to disregard such finding and make findings of its own. Wilmington Canal, etc., Co. *v.* Dominguez, 50 Cal. 505.

73. Todd *v.* Austin, 34 Conn. 78; Missouri, etc., R. Co. *v.* Ward, 10 Kan. 352; Stevenson *v.* Missouri Pac. R. Co., (Mo. 1895) 31 S. W. 793; Hancock *v.* Philadelphia, 175 Pa. St. 124, 34 Atl. 570; Shaw *v.* Philadelphia, 169 Pa. St. 506, 32 Atl. 593; Grugan *v.* Philadelphia, 158 Pa. St. 337, 27 Atl. 1000.

It is a question of fact whether a crossing of one railroad by another in a certain manner is compatible with the greatest possible public benefit and the least private injury (California Southern R. Co. *v.* Southern Pac. R. Co., 67 Cal. 59, 7 Pac. 123, 128) or whether an opening under a bridge constructed by a railroad company can be advantageously used by the landowner as an undergrade crossing (Chicago, etc., R. Co. *v.* Cosper, 42 Kan. 561, 22 Pac. 634) or as to the extent of the falling off in rents of property abutting on a street in which an elevated railroad is maintained (Moore *v.* New York El. R. Co., 15 Daly (N. Y.) 510, 8 N. Y. Suppl. 769, 24 Abb. N. Cas. (N. Y.) 74).

74. Springfield, etc., R. Co. *v.* Rhea, 44 Ark. 258; Colorado Cent. R. Co. *v.* Allen, 13 Colo. 229, 22 Pac. 605; Burt *v.* Wigglesworth, 117 Mass. 302; Winnisimmet Co. *v.* Grueby, 111 Mass. 543; St. Louis, etc., R. Co. *v.* Donovan, 149 Mo. 93, 50 S. W. 286; Connecticut River R. Co. *v.* Clapp, 1 Cush. (Mass.) 559; Oregon, etc., R. Co. *v.* Barlow, 3 Oreg. 311.

In South Carolina there is a decision to the effect that where an appeal is taken from the assessment of the commissioners it is within the discretion of the judge to direct which party shall have the right to open and close the matter before the jury, but that in the absence of such direction the owner should be considered as the actor, and entitled to the opening and closing. Charleston, etc., R. Co. *v.* Blake, 12 Rich. 634.

75. *Georgia.*— Williams *v.* Macon, etc., R. Co., 94 Ga. 709, 21 S. E. 997.

Illinois.— South Park Com'rs *v.* School Trustees, 107 Ill. 489; McReynolds *v.* Burlington, etc., R. Co., 106 Ill. 152.

Texas.— Ft. Worth, etc., R. Co. *v.* Culver, (App. 1889) 14 S. W. 1013; Gulf, etc., R. Co. *v.* Abney, 3 Tex. App. Civ. Cas. § 413; Gainesville, etc., R. Co. *v.* Waples, 3 Tex. App. Civ. Cas. § 409.

Washington.— Seattle, etc., R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738; Seattle, etc., R. Co. *v.* Murphine, 4 Wash. 448, 30 Pac. 720; Bellingham Bay, etc., R. Co. *v.* Strand, 4 Wash. 311, 30 Pac. 144.

West Virginia.— Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812, Johnson, J., delivering the opinion.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 535, 557.

the burden of proof there is no such substantial error as to necessitate the setting aside of the verdict.[76]

4. Defenses and Objections — a. In General. Defendant may in general interpose by a proper pleading any valid objections to the condemnation existing in point of fact, but not appearing on the petition.[77] That the use is not a public one may be raised as a defense by any person interested,[78] even by a taxpayer;[79] and that the petitioner has placed illegal structures in the street in which it seeks to condemn a right of way is a defense which may be raised by any abutting owner who is affected by such structures.[80] But it is not a good defense that the condemnation will benefit a foreign corporation;[81] nor that it is sought in the same proceedings to condemn other land in which defendant is not interested;[82] nor that the assessment of other lands in order to raise the fund to pay for the improvement was irregular;[83] nor that there had been a prior grant or license, or even a prior condemnation.[84] The propriety of granting the petition, however, can be objected to only by those whose lands are described in the petition or in reference to lands which are so described.[85]

b. That Taking Is Not Necessary. The object of the constitutional and statutory provisions that the necessity for the taking shall be ascertained is to prevent abuses in the shape of needless public works.[86] In some states, however, the determination by the proper authority that there is a necessity for that appropriation is conclusive,[87] while in others the owner may controvert the existence of

76. St. Louis, etc., R. Co. *v.* North, 31 Mo. App. 345, 351; Neff *v.* Cincinnati, 32 Ohio St. 215.

Refusing permission to open and conclude in proceedings to condemn a right of way is not reversible error. McDonald *v.* Texas, etc., R. Co., 1 Tex. Unrep. Cas. 191.

Where there is a portion of the burden of proof on one party and a portion on the other, the denial to the owners of the right to open and close is not such substantial and prejudicial error as to warrant a reversal. Warner *v.* Gunnison, 2 Colo. App. 430, 31 Pac. 238.

77. St. Joseph Terminal R. Co. *v.* Hannibal, etc., R. Co., 94 Mo. 535, 6 S. W. 691; Oregon Cent. R. Co. *v.* Wait, 3 Oreg. 91.

78. Union Pac. R. Co. *v.* Colorado Postal Tel. Cable Co., 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106; Farneman *v.* Mt. Pleasant Cemetery Assoc., 135 Ind. 344, 35 N. E. 271; Kansas, etc., Coal R. Co. *v.* Northwestern Coal, etc., Co., 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L. R. A. 936; Stratford *v.* Greensboro, 124 N. C. 127, 32 S. E. 394. *Compare* Powers *v.* Hazelton, etc., R. Co., 33 Ohio St. 429.

79. Stratford *v.* Greensboro, 124 N. C. 127, 32 S. E. 394.

80. *In re* Metropolitan El. R. Co., 12 N. Y. Suppl. 506; *In re* Brooklyn El. R. Co., 11 N. Y. Suppl. 161.

81. Matter of Staten Island R. Co., 3 N. Y. St. 48.

82. Denver Power, etc., Co. *v.* Denver, etc., R. Co., 30 Colo. 204, 69 Pac. 568; Chicago, etc., Coal Co. *v.* Streator, 172 Ill. 435, 50 N. E. 167.

83. Alameda *v.* Cohen, 133 Cal. 5, 65 Pac. 127; Heffernan *v.* San Francisco Super. Ct., (Cal. 1893) 33 Pac. 725; San Francisco *v.* Kiernan, 98 Cal. 614, 33 Pac. 720; New York, etc., R. Co. *v.* Wheeler, 72 Conn. 481, 45 Atl. 14.

84. *California.*— Moran *v.* Ross, 79 Cal. 159, 21 Pac. 547; Moran *v.* Farley, (1889) 21 Pac. 549.

Connecticut.— McArthur *v.* Morgan, 49 Conn. 347.

Kansas.— Wabaunsee County *v.* Bisby, 37 Kan. 253, 15 Pac. 241.

Maine.— Graham *v.* Virgin, 78 Me. 338, 5 Atl. 532.

Missouri.— Cape Girardeau, etc., Macadamized Road Co. *v.* Dennis, 67 Mo. 438; Rogers *v.* St. Charles, 54 Mo. 229.

New York.— New York, etc., R. Co. *v.* Kip, 46 N. Y. 546, 7 Am. Rep. 385 [*affirming* 11 Abb. Pr. N. S. 90]; *In re* New York, etc., R. Co., 33 Hun 270.

United States.— Arkansas, etc., R. Co. *v.* St. Louis, etc., R. Co., 103 Fed. 747.

See 18 Cent. Dig. tit. "Eminent Domain," § 468.

An allegation by defendant that it "intends" to make use of lands appropriated by it and that the use which plaintiff seeks to condemn over them will materially interfere with its business is not a good defense. Kansas, etc., Coal R. Co. *v.* Northwestern Coal, etc., Co., 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L. R. A. 936.

85. *In re* St. Paul, etc., R. Co., 34 Minn. 227, 25 N. W. 345, holding that where the proceeding is by a railroad company, lands not embraced in its petition and constituting separate lots and parcels are not to be deemed affected by the proceedings so as to entitle their owners to appear and make opposition. And see Frick Coke Co. *v.* Painter, 198 Pa. St. 468, 48 Atl. 302.

86. People *v.* Brighton, 20 Mich. 57.

87. *California.*—San Francisco, etc., R. Co. *v.* Leviston, 134 Cal. 412, 66 Pac. 473; Los

the necessity,[88] and it then becomes a question to be determined on the hearing.[89] But the right of the owner to controvert the necessity may be waived.[90]

c. That No Effort at Agreement Was Made.[91] The fact that the petitioner has been unable to agree with the owner being a jurisdictional fact, the objection that it does not appear of record that the parties cannot agree may be raised by either party.[92] But if the petition alleges such inability, and the owner takes no issue on the averment, the objection cannot be raised at a later stage of the proceeding.[93] When the issue is raised the fact is not one of which judicial notice can be taken,[94] but it must be proved in such form as to be matter of record.[95]

d. Objections to Corporate Existence, Etc. It has been held that when a railroad company or other private corporation seeks to condemn land and its existence as a corporation is attacked, it must show that it is a corporation *de jure*;[96] but in most states it is held sufficient if it is a corporation *de facto*,[97] although it seems

Angeles *v.* Waldron, 65 Cal. 283, 1 Pac. 883, 3 Pac. 890.

Illinois.— Schuster *v.* Chicago Sanitary Dist., 177 Ill. 626, 52 N. E. 855.

North Carolina.— Stratford *v.* Greensboro, 124 N. C. 127, 32 S. E. 394.

Ohio.— Powers *v.* Hazelton, etc., R. Co., 33 Ohio St. 429.

Texas.— Crary *v.* Port Arthur Channel, etc., Co., 92 Tex. 275, 47 S. W. 967; Palmer *v.* Harris County, 29 Tex. Civ. App. 340, 69 S. W. 229.

See 18 Cent. Dig. tit. "Eminent Domain," § 531. See also *supra*, IX.

88. Bennett *v.* Marion, 106 Iowa 628, 76 N. W. 844; *In re* Minneapolis R., etc., Co., 38 Minn. 157, 36 N. W. 105.

A selection and designation of depot grounds by the general manager of a railroad company is *prima facie* decisive as to what grounds the company needs for those purposes. Dietrichs *v.* Lincoln, etc., R. Co., 13 Nebr. 361, 13 N. W. 624.

89. *Kansas.*—Kansas Cent. R. Co. *v.* Allen, 22 Kan. 285, 31 Am. Rep. 190.

Louisiana.— Jefferson, etc., R. Co. *v.* Hazeur, 7 La. Ann. 182.

Michigan.—Arnold *v.* Decatur, 29 Mich. 77.

New York.— Erie R. Co. *v.* Steward, 170 N. Y. 172, 63 N. E. 118 [*affirming* 61 N. Y. App. Div. 480, 70 N. Y. Suppl. 698]; Water Com'rs *v.* Clark, 3 N. Y. Suppl. 347.

Wisconsin.— Wisconsin Cent. R. Co. *v.* Kneale, 79 Wis. 89, 48 N. W. 248.

90. Union Pac. R. Co. *v.* Colorado Postal Tel. Cable Co., 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106; Thompson *v.* De Weese-Dye Ditch, etc., Co., 25 Colo. 243, 53 Pac. 507.

Where the owner goes to trial before a jury on the question of compensation, without indicating that he desires the question of necessity to be tried, he will be held to have waived the latter. Sand Creek Lateral Irr. Co. *v.* Davis, 17 Colo. 326, 29 Pac. 742.

It is held in Louisiana, however, that the objection that a railroad company already has sufficient lands for its purposes is not waived by a failure to resist the proceedings on that ground; and it is held that the court may itself of its own motion dismiss the proceedings because of such fact. Jefferson, etc., R. Co. *v.* Hazeur, 7 La. Ann. 182.

91. See XI, D, 3.

92. Kansas City, etc., R. Co. *v.* Campbell, 62 Mo. 585.

93. Chicago, etc., R. Co. *v.* Randolph Town-Site Co., 103 Mo. 451, 15 S. W. 437; State *v.* Trenton, 53 N. J. L. 178, 20 Atl. 738; Doughty *v.* Somerville, etc., R. Co., 21 N. J. L. 442.

94. Morseman *v.* Ionia, 32 Mich. 283.

95. Detroit, etc., Short Line R. Co. *v.* Hall, (Mich. 1903) 94 N. W. 1066; Morseman *v.* Ionia, 32 Mich. 283.

96. Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21; Atlantic, etc., R. Co. *v.* Sullivant, 5 Ohio St. 276.

97. *Colorado.*— Union Pac. R. Co. *v.* Colorado Postal Tel. Cable Co., 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106.

Illinois.— Brown *v.* Calumet River R. Co., 125 Ill. 600, 18 N. E. 283; Henry *v.* Centralia, etc., R. Co., 121 Ill. 264, 12 N. E. 744; Ward *v.* Minnesota, etc., R. Co., 119 Ill. 287, 10 N. E. 365; Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 112 Ill. 589; Peoria, etc., Union R. Co. *v.* Peoria, etc., R. Co., 105 Ill. 110; McAuley *v.* Columbus, etc., R. Co., 83 Ill. 348.

Indiana.— Aurora, etc., R. Co. *v.* Miller, 56 Ind. 88; Aurora, etc., R. Co. *v.* Lawrenceburgh, 56 Ind. 80.

Kansas.— Reisner *v.* Strong, 24 Kan. 410.

Kentucky.— Portland, etc., Turnpike Co. *v.* Bobb, 88 Ky. 226, 10 S. W. 794, 10 Ky. L. Rep. 796.

Minnesota.— *In re* Minneapolis, etc., R. Co., 36 Minn. 481, 32 N. W. 556.

Missouri.— Orrick School Dist. *v.* Dorton, 125 Mo. 439, 28 S. W. 765; Roosa *v.* St. Joseph, etc., R. Co., 114 Mo. 508, 21 S. W. 1124; Hopkins *v.* Kansas City, etc., R. Co., 79 Mo. 98 [all *overruling* West End Narrow Gauge R. Co. *v.* Almeroth, 13 Mo. App. 91], all holding that since a railroad company must be incorporated before it can condemn land for its right of way, its corporate existence is an issue which may be raised in such a proceeding.

New Jersey.— National Docks R. Co. *v.* Central R. Co., 32 N. J. Eq. 755.

New York.— Matter of Central Park, 16 Abb. Pr. 56.

North Carolina.— Wellington, etc., R. Co. *v.* Cashie, etc., R., etc., Co., 114 N. C. 690, 19 S. E. 646.

that it may be shown that the consent of the local authorities has not been given as required by statute.[98] When an association has so far complied with the statute as to acquire corporate existence, its failure to comply with provisions as to organizations which are merely conditions subsequent cannot defeat its right to maintain condemnation proceedings.[99] Nor can it be shown as a defense that the petitioner was improperly exercising its franchises;[1] or that it has done some act which is a cause of forfeiture in its charter, unless by statute its corporate existence thereby ceases;[2] or that it was insolvent,[3] unless its charter has been forfeited.[4]

5. Evidence — a. Presumptions and Burden of Proof. The burden of proof rests upon the one having the affirmative of the issue, and therefore is placed as to some questions upon the petitioner,[5] and as to others upon the owner,[6] or the owner may assume the burden of proof by leave of court.[7] Thus the burden is on the petitioner to show all facts necessary to its right to condemn,[8] and to prove

Pennsylvania.— Farnham *v.* Delaware, etc., Canal Co., 61 Pa. St. 265.

Utah.— Postal Tel. Cable Co. *v.* Oregon Short-Line R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

United States.— Oregon Short Line R. Co. *v.* Idaho Postal Tel. Cable Co., 111 Fed. 842, 49 C. C. A. 663 [*affirming* 104 Fed. 623].

See also Corporations, 10 Cyc. 254, 259.

Fraudulent incorporation.—That a railroad charter was a fraud, in that the railroad was not intended for the conveyance of freight and passengers, but merely to operate as a lumber road, cannot be considered in a proceeding by the railroad to condemn land for a right of way. Holly Shelter R. Co. *v.* Newton, 133 N. C. 132, 136, 45 S. E. 549, 98 Am. St. Rep. 701.

98. Harrisburg, etc., Electric R. Co. *v.* Harrisburg, etc., Turnpike Co., 4 Pa. Dist. 17, 15 Pa. Co. Ct. 389.

99. Brown *v.* Wyandotte, etc., R. Co., 68 Ark. 134, 56 S. W. 862; Plecker *v.* Rhodes, 30 Gratt. (Va.) 795; Arkansas, etc., R. Co. *v.* St. Louis, etc., R. Co., 103 Fed. 747, under Arkansas statute.

1. Denver Power, etc., Co. *v.* Denver, etc., R. Co., 30 Colo. 204, 69 Pac. 568, 60 L. R. A. 383; Thomas *v.* St. Louis, etc., R. Co., 164 Ill. 634, 46 N. E. 8; *In re* Brooklyn El. R. Co., 11 N. Y. Suppl. 161; Powers *v.* Hazleton, etc., R. Co., 33 Ohio St. 429; Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 6 Ohio Cir. Ct. 362.

2. Thus it has been held that one whose land is to be appropriated by a railroad company may show that the company has lost its corporate rights and powers by reason of the non-performance of a condition of its charter, the charter providing that in case of non-performance "its corporate existence and powers shall cease" (*In re* Brooklyn, etc., R. Co., 72 N. Y. 245); but a railroad company cannot be attacked for a cause of forfeiture which does not *per se* divest the company of its franchise without a suit instituted for that purpose, such as a failure to commence and complete its road in accordance with the charter requirements (*In re* Brooklyn El. R. Co., 11 N. Y. Suppl. 161).

3. McArthur *v.* Morgan, 49 Conn. 347; Pocantico Water-Works Co. *v.* Brombacher, 17 N. Y. Suppl. 661; Lester *v.* Ft. Worth, etc., R. Co., (Tex. Civ. App. 1894) 26 S. W. 166.

4. Lester *v.* Ft. Worth, etc., R. Co., (Tex. Civ. App. 1894) 26 S. W. 166.

Admissibility of evidence.— In proceedings by a railroad company, where the averment in the petition that the company could not agree was directly denied in the answer, and it was further averred that the land was sought to be taken for steamboat purposes, and both parties relied on one witness to prove the averments of their respective pleadings, it was held error not to allow the owners to ask such witness whether he did not say at the time he was trying to buy the property that it was wanted for steamboat purposes, since it was essential to the jurisdiction to show the inability of the company to obtain it for railroad purposes. New York, etc., R. Co. *v.* Long, 69 Conn. 424, 37 Atl. 1070.

5. Terre Haute, etc., R. Co. *v.* Flora, 29 Ind. App. 442, 64 N. E. 648; St. Louis, etc., R. Co. *v.* North, 31 Mo. App. 345; Ft. Worth, etc., R. Co. *v.* Culver, (Tex. App. 1889) 14 S. W. 1013.

6. Chicago, etc., R. Co. *v.* Cook, 43 Kan. 83, 22 Pac. 988; Minneapolis, etc., R. Co. *v.* Hartland, 85 Minn. 76, 88 N. W. 423; *In re* New York Bridge Co., 67 Barb. (N. Y.) 295, holding that N. Y. Laws (1850), c. 140, § 15, puts upon the owner of the land the burden of proving that the facts alleged in the petition are not true.

Cross petition.— If other property than that described in the petition is brought in by a cross petition, it is incumbent on the party thus bringing it in to show that it was taken or damaged, and the petitioner is entitled to give evidence in rebuttal. Hyde Park *v.* Dunham, 85 Ill. 569.

7. St. Louis, etc., R. Co. *v.* North, 31 Mo. App. 345.

8. Terre Haute, etc., R. Co. *v.* Flora, 29 Ind. App. 442, 64 N. E. 648; Kountze *v.* Morris Aqueduct, 58 N. J. L. 303, 33 Atl. 252; Carolina, etc., R. Co. *v.* Pennearden Lumber, etc., Co., 132 N. C. 644, 44 S. E. 358; Cleveland, etc., R. Co. *v.* Ohio Postal Tel. Cable Co., 68 Ohio St. 303, 67 N. E. 890, 62 L. R. A. 941.

all averments made by it in the petition which have been brought into issue,[9] as that the proposed taking is proper and necessary,[10] that the proposed use is a public one,[11] that it endeavored but was unable to agree with the owner,[12] and that it intends to complete the improvement.[13]

b. Admissibility — (i) *In General.* The rules governing the admission of evidence in condemnation proceedings do not materially differ from those in

The incorporation of the petitioner must be shown by it if denied. Peoria, etc., R. Co. *v.* Peoria, etc., R. Co., 105 Ill. 110; Chicago, etc., R. Co. *v.* Porter, 43 Minn. 527, 46 N. W. 75; Atlantic, etc., R. Co. *v.* Sullivant, 5 Ohio St. 276. *Compare,* however, *In re* Metropolitan El. R. Co., 12 N. Y. Suppl. 506. An admission on the trial that the officers of plaintiff corporation are as stated in the petition is not an admission that plaintiff is a corporation, so as to dispense with the necessity of proving that fact. Matter of Broadway, etc., R. Co., 73 Hun (N. Y.) 7, 25 N. Y. Suppl. 1080.

Failure to agree must be alleged and proved (Ells *v.* Pacific R. Co., 51 Mo. 200; Oregon R., etc., Co. *v.* Oregon Real Estate Co., 10 Oreg. 444), unless no issue is tendered on that point (Chicago, etc., R. Co. *v.* Randolph Town-Site Co., 103 Mo. 451, 15 S. W. 437). It is not necessary that the averment in the petition of a failure to agree should be sustained by oral evidence (Chicago, etc., R. Co. *v.* Randolph Town-Site Co., 103 Mo. 451, 15 S. W. 437; Cory *v.* Chicago, etc., R. Co., 100 Mo. 282, 13 S. W. 346), but it must appear at least by affidavit that the effort was made (O'Hara *v.* Pennsylvania R. Co., 25 Pa. St. 445).

An answer denying each material allegation of the petition except the ownership of the land does not enlarge or restrict the burden which rests on the petitioner to make out its case. Reed *v.* Ohio, etc., R. Co., 126 Ill. 48, 17 N. E. 807.

9. Rochester R. Co. *v.* Robinson, 133 N. Y. 242, 30 N. E. 1008; Syracuse *v.* Benedict, 86 Hun (N. Y.) 343, 33 N. Y. Suppl. 944; Water Com'rs *v.* Clark, 3 N. Y. Suppl. 347.

Special allegations respecting the purposes for which the land is required must be proven by the petitioner. *In re* New York Cent. R. Co., 66 N. Y. 407 [*affirming* 5 Hun 86].

But under N. Y. Laws (1850), c. 140, § 15, it is held that where a petition, full and complete in all its statements, and containing all the requisite averments, is presented by the petitioner, the fact that the owners appear and show cause, denying some of the allegations in the petition and objecting to the legality of the proceedings, does not create issues which render it obligatory upon the petitioners to prove the facts alleged in the petition. *In re* New York Bridge Co., 67 Barb. 295.

10. *California.*— Spring Valley Water-Works *v.* Drinkhouse, 92 Cal. 528, 28 Pac. 681.

Louisiana.—Jefferson, etc., R. Co. *v.* Hazeur, 7 La. Ann. 182.

Minnesota.— Minneapolis, etc., R. Co. *v.* Hartland, 85 Minn. 76, 88 N. W. 423.

New York.— *In re* New York Cent. R. Co., 66 N. Y. 407 [*affirming* 5 Hun 86]; Water Com'rs *v.* Clark, 3 N. Y. Suppl. 347; *In re* Metropolitan El. R. Co., 12 N. Y. Suppl. 506; Matter of Staten Island R. Co., 3 N. Y. St. 48.

Pennsylvania.— Robinson *v.* Pennsylvania R. Co., 161 Pa. St. 561, 29 Atl. 268; Hays *v.* Briggs, 3 Pittsb. 504.

Wisconsin.— Wisconsin Cent. R. Co. *v.* Kneale, 79 Wis. 89, 48 N. W. 248; Wisconsin Cent. R. Co. *v.* Cornell University, 52 Wis. 537, 8 N. W. 491.

See 18 Cent. Dig. tit. "Eminent Domain," § 530.

The burden is not changed because the statute requires the owner to be designated as plaintiff, and the corporation as defendant. Minneapolis, etc., R. Co. *v.* Hartland, 85 Minn. 76, 88 N. W. 423.

When one railway company seeks to cross another, it is for the company seeking the crossing to show that a grade crossing cannot be avoided. Moosic Mountain, etc., R. Co. *v.* Delaware, etc., R. Co., 4 C. Pl. (Pa.) 189.

11. St. Louis *v.* Franks, 9 Mo. App. 579 [*affirmed* in 78 Mo. 41]; Hays *v.* Briggs, 3 Pittsb. (Pa.) 504.

But in case of a taking by the state, since the state has the general power to take private property for public use, it devolves upon one objecting to such taking in any particular case to show that it is an exception to the general power. Gilmer *v.* Lime Point, 18 Cal. 229.

12. Contra Costa Coal Mines R. Co. *v.* Moss, 23 Cal. 323; *In re* Lockport, etc., R. Co., 77 N. Y. 557; *In re* Metropolitan El. R. Co., 12 N. Y. Suppl. 506. But see *In re* Metropolitan El. R. Co., 2 N. Y. Suppl. 278, holding that N. Y. Laws (1850), c. 140, § 15, which provides that owners whose interests are to be affected may show cause against granting the petition, and may disprove any facts alleged in it, requires the owners to disprove such averments of the petition as are capable of disproof, except those which are peculiarly within the knowledge of the petitioner; and as the averment of the petition concerning an offer to purchase involves matters as much within the knowledge of the owners as of the company, it is for the owners to show that they did not in fact receive an offer, or if they did receive it, why they did not accept it, or make a counter offer, and that there was reasonable ground to believe that further negotiations might have resulted in an agreement.

13. *In re* Metropolitan El. R. Co., 12 N. Y. Suppl. 506; Matter of Staten Island R. Co., 3 N. Y. St. 48.

ordinary civil cases, except so far as the nature of the proceedings may require a departure from those rules.[14] It may be said generally that any evidence is admissible which tends to show compliance or non-compliance with conditions precedent to the maintenance of the proceeding;[15] or which tends to show the necessity of the taking.[16] But the opinions of experts are not admissible on the question of necessity.[17] In some instances parol evidence is admissible to affect a writing,[18] or to identify the land with that described.[19] Admissions are properly received against the party making them.[20]

(II) *Maps, Plans, and Surveys.* A map or plan of the premises sought to be appropriated is admissible in evidence, if proved to be correct;[21] but it is not the only evidence to show what land is to be appropriated.[22] Such plat or plan, if received in evidence, should be preserved in the record, so that it may thereafter be known upon what the damages were assessed;[23] and its production for such purpose may be compelled.[24]

14. Ball *v.* Keokuk, etc., R. Co., 71 Iowa 306, 32 N. W. 354; *In re* Thompson, 12 N. Y. Suppl. 182.

Irrelevant evidence is inadmissible. Denver Power, etc., Co. *v.* Denver, etc., R. Co., 30 Colo. 204, 69 Pac. 568, 60 L. R. A. 383; Montgomery County *v.* Schuylkill Bridge Co., 110 Pa. St. 54, 20 Atl. 407.

Evidence of possession under prior proceedings which were void by reason of noncompliance with the statute is inadmissible in subsequent proceedings to condemn the same property. Seattle *v.* Fidelity Trust Co., 22 Wash. 154, 60 Pac. 133, 79 Am. St. Rep. 939.

15. *California.*—Sutter County *v.* McGriff, 130 Cal. 124, 62 Pac. 412.

Illinois.—Miller *v.* Sterling, 198 Ill. 523, 65 N. E. 132.

Michigan.—Grand Rapids, etc., R. Co. *v.* Weiden, 69 Mich. 572, 37 N. W. 872.

New York.—*In re* Metropolitan Transit Co., 1 N. Y. Suppl. 114.

Ohio.—Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 6 Ohio Cir. Ct. 362, 3 Ohio Cir. Dec. 493.

Rhode Island.—Howland *v.* Little Compton School Dist. No. 3, 16 R. I. 257, 15 Atl. 74.

Evidence to show want of jurisdiction must be such as to clearly establish that fact. Buell *v.* Lockport, 8 N. Y. 55 [*affirming* 11 Barb. 602].

Where the proceeding was for the purpose of appropriating land for a change of the route of a railroad through a city, the ordinance authorizing the change is admissible to show the consent of the city, even though it is objectionable on the ground that the rights it purports to grant are invalid, no question of the company's right to use any street by virtue of the ordinance being involved. Fletcher *v.* Chicago, etc., R. Co., 67 Minn. 339, 69 N. W. 1085.

16. Santa Ana *v.* Brunner, 132 Cal. 234, 64 Pac. 287; Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604; People *v.* Brighton, 20 Mich. 57.

That the petitioner already has a right of way by another route is admissible on the question of the necessity of the road. Boyd *v.* Negley, 40 Pa. St. 377.

17. Pontiac *v.* Lull, 111 Mich. 509, 69 N. W. 1110; Grand Rapids *v.* Bennett, 106 Mich. 528, 64 N. W. 585.

The admission of such testimony, however, is not a substantial error, warranting a reversal of the judgment, if the facts on which it was based, and the other facts bearing on the question, were fully shown, and the jury viewed the premises. Pontiac *v.* Lull, 111 Mich. 509, 69 N. W. 1110.

18. Bushwick Highway Com'rs *v.* Meserole, 10 Wend. (N. Y.) 122; U. S. *v.* Inlots, 26 Fed. Cas. No. 15,441*a* [*affirmed* in 91 U. S. 267, 23 L. ed. 449].

19. Kohlhepp *v.* West Roxbury, 120 Mass. 596.

20. *Kansas.*—Leroy, etc., R. Co. *v.* Butts, 40 Kan. 159, 19 Pac. 625.

Massachusetts.—Stone *v.* Com., 181 Mass. 438, 63 N. E. 1074.

Michigan.—Cincinnati, etc., R. Co. *v.* Bay City, etc., R. Co., 106 Mich. 473, 64 N. W. 471.

Minnesota.—Rippe *v.* Chicago, etc., R. Co., 23 Minn. 18.

New York.—Matter of Broadway, etc., R. Co., 73 Hun 7, 25 N. Y. Suppl. 1080.

21. *Kansas.*—Chicago, etc., R. Co. *v.* Grovier, 41 Kan. 685, 21 Pac. 779.

Massachusetts.—Drury *v.* Midland R. Co., 127 Mass. 571.

Michigan.—Detroit *v.* Bruder, 104 Mich. 221, 62 N. W. 350.

Nebraska.—Chicago, etc., R. Co. *v.* Buel, 56 Nebr. 205, 76 N. W. 571.

New York.—Stillwater, etc., R. Co. *v.* Slade, 36 N. Y. App. Div. 587, 55 N. Y. Suppl. 966.

Where a railroad is located through suburban property, a map showing the premises divided into city lots, which is contrary to the existing conditions, is not admissible. Myers *v.* Schuylkill River East Side R. Co., 5 Pa. Co. Ct. 634.

22. Chicago, etc., R. Co. *v.* Grovier, 41 Kan. 685, 21 Pac. 779.

23. Illinois, etc., R. Co. *v.* Switzer, 117 Ill. 399, 7 N. E. 664, 57 Am. Rep. 875.

24. Tedens *v.* Chicago Sanitary Dist., 149 Ill. 87, 36 N. E. 1033; Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 112 Ill. 589.

c. Sufficiency. The general rules applicable to the sufficiency of evidence in civil cases apply in condemnation proceedings.[25] These rules apply to the sufficiency of evidence to show inability to agree with the owner,[26] right to take,[27] necessity of the taking,[28] or to show title.[29] To prove the fact of incorporation of the petitioners, no other proof is needed than the charter and the fact that the company is exercising the franchise granted by it.[30]

6. Orders, Verdicts, and Findings. The court will make the necessary findings and orders preliminary to the appointment of viewers or commissioners to assess the damages,[31] and the court, jury, or commissioners should make such verdicts or findings as may be required by the issues raised or submitted.[32] Where a jury

25. See, generally, Evidence. And see Carlile *v.* Des Moines, etc., R. Co., 99 Iowa 345, 68 N. W. 784.

The ordinance under which condemnation proceedings are had and which is set out in the petition need not be offered in evidence. Cahill *v.* Norwood Park, 149 Ill. 156, 36 N. E. 606.

Neither the answer itself nor affidavits in support of it is sufficient to disprove the allegation of the petition, where the burden of disproving such is on defendant. *In re* New York Bridge Co., 4 Hun (N. Y.) 635; Buffalo, etc., R. Co. *v.* Reynolds, 6 How. Pr. (N. Y.) 96.

Public use.— Evidence that a strip of land sought to be condemned by a railroad company as a team track, to accommodate the public in loading and unloading cars, is not a convenient width for the purpose proposed, is not sufficient to show the track is not intended for a public use. Hodgerson *v.* St. Louis, etc., R. Co., 160 Ill. 430, 43 N. E. 614.

26. Todd *v.* Austin, 34 Conn. 78 (holding that evidence that one owner refused to state any amount, and another stated a very large sum, which was rejected, warrants a finding that the parties failed to agree); Grand Rapids, etc., R. Co. *v.* Weiden, 70 Mich. 390, 38 N. W. 294.

The inability of a private corporation to agree with the owners is sufficiently shown by evidence of *bona fide* attempts on the part of the officers of the corporation to reach an agreement, but without success. Lake Shore, etc., R. Co. *v.* Baltimore, etc., R. Co., 149 Ill. 272, 37 N. E. 91; Booker *v.* Venice, etc., R. Co., 101 Ill. 333; Toledo Electric St. R. Co. *v.* Toledo Consol. St. R. Co., 11 Ohio Dec. (Reprint) 365, 26 Cinc. L. Bul. 172.

The affidavit of the engineer of the company (Doughty *v.* Somerville, etc., R. Co., 21 N. J. L. 442), of one of the water commissioners of a city (Dyckman *v.* New York, 5 N. Y. 434), or even of the petitioner's attorney (Tucker *v.* Erie, etc., R. Co., 27 Pa. St. 281) is sufficient *prima facie* evidence of inability to agree.

27. Holt County School Dist. No. 25 *v.* Hodgins, 180 Mo. 70, 79 S. W. 148, holding evidence sufficient to show corporate capacity.

28. Santa Ana *v.* Brunner, 132 Cal. 234, 64 Pac. 287; Detroit *v.* Daly, 68 Mich. 503, 37 N. W. 11; Chicago, etc., R. Co. *v.* Richardson, 86 Wis. 154, 56 N. W. 741.

The necessity of the land for the purposes of the condemning company is not disproved by the fact that the company might use other land which could be acquired by purchase or otherwise. Matter of New York, etc., R. Co., 11 Abb. Pr. N. S. (N. Y.) 90. And see California Cent., etc., R. Co. *v.* Hooper, 76 Cal. 404, 18 Pac. 599. And where the waters of the creeks from which a water company receives its supply are insufficient in summer time to supply the present wants of the inhabitants of a growing city to whom the company furnishes water, the city shows a necessity for condemning the water of a stream sufficient in quantity and superior in quality, all other streams near the city being used by the water company (Santa Cruz *v.* Enright, 95 Cal. 105, 30 Pac. 297); but no such necessity exists for the condemnation of land by a water company to secure an additional source or supply, where it is shown by its own evidence that it already owns sources which would if utilized increase its supply to a practically unlimited extent (Spring Valley Water Works *v.* San Mateo Water Works, 64 Cal. 123, 28 Pac. 447).

29. Sacramento Valley R. Co. *v.* Moffatt, 7 Cal. 577; St. Paul, etc., R. Co. *v.* Matthews, 16 Minn. 341; Kansas City, etc., R. Co. *v.* Norcross, 137 Mo. 415, 38 S. W. 299, all of which cases hold that possession is *prima facie* evidence of title.

30. Peoria, etc., R. Co. *v.* Peoria, etc., R. Co., 105 Ill. 110; Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 6 Ohio Cir. Ct. 362, 3 Ohio Cir. Dec. 493.

31. Alameda County *v.* Crocker, 125 Cal. 101, 57 Pac. 766; Los Angeles *v.* Pomeroy, 124 Cal. 597, 57 Pac. 585; *In re* New York Cent., etc., R. Co., 77 N. Y. 248; Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812.

32. Cummings *v.* Peter, 56 Cal. 593, holding that in a proceeding in which the proposed public use is alleged by defendant to be a mere pretense, he is entitled to a special finding of the jury upon that issue.

Where the pleadings involve matters triable by a jury with other matters which are cognizable only by the commissioners, a finding by the jury as to the latter part will be rejected as surplusage. Axtell *v.* Coombs, 4 Me. 322.

The report of commissioners attempting to regulate the mode in which the tracks of one road may cross those of another should definitely state the style and pattern of crossing

is called upon to pass upon the necessity of the improvement, their verdict must distinctly state that the taking is necessary for the public use and benefit.[33] So they may find that a part of the land be condemned and the remainder not,[34] but they cannot condemn more land than can be reasonably required for the use.[35]

M. Assessing Damages — 1. In General. Where private property is taken for public use it is only necessary that the proceedings to ascertain the value of the property and the compensation to be made to the owner be conducted in some equitable and fair mode to be provided by law, either with or without the intervention of a jury, opportunity being allowed to the parties interested in the property to present evidence respecting its value and to be heard thereon.[36] A condemnation proceeding is judicial in its character and should be had before an impartial tribunal;[37] but it is not necessary that the property-owner should have a voice in choosing the tribunal.[38] The method prescribed must not conflict with an express constitutional provision.[39] And where a method of assessing damages is prescribed by statute, the statute must be strictly followed.[40] Since provisions as to the mode of ascertaining the compensation are generally for the benefit of the property-owner he may waive them.[41] But a provision that the compensation shall be ascertained by a jury or by commissioners cannot be waived by a landowner where the compensation is to be paid by the public, for the public as a party in interest has a right to the prescribed proceedings.[42]

2. By Whom Assessed — a. By Jury — (I) *Right to Jury* — (A) *In General.* In the absence of a special constitutional or statutory provision there is no right to

frogs. *In re* New York, etc., R. Co., 35 Hun (N. Y.) 232.

Location.— In proceedings for the appointment of commissioners, under Minn. Laws (1879), § 3, c. 35, the district court is not confined to the precise location mentioned in the petition but may change or modify it. State *v.* Hennepin County Dist. Ct., 35 Minn. 461, 29 N. W. 60.

33. Morgan *v.* Chicago, etc., R. Co., 39 Mich. 675; East Saginaw, etc., R. Co. *v.* Benham, 28 Mich. 459; Mansfield, etc., R. Co. *v.* Clark, 23 Mich. 519.

A finding "that it was and is necessary to take and use said land for the purpose of operating and constructing said railroad by said company" is not such a finding of the necessity for taking said property for the public use, either in form or substance, as is required by the Michigan statute (Grand Rapids, etc., R. Co. *v.* Van Driele, 24 Mich. 409), nor is a finding that the taking is to be for the public use sufficient (McClary *v.* Hartwell, 25 Mich. 139).

If the pleadings show upon their face that the use is a public one, a finding of such fact is not necessary to sustain a judgment for the petitioner. Ellinghouse *v.* Taylor, 19 Mont. 462, 48 Pac. 757.

34. Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812.

35. Chesapeake, etc., Canal Co. *v.* Mason, 5 Fed. Cas. No. 2,650, 4 Cranch C. C. 123.

36. People *v.* Blake, 19 Cal. 579; Koppikus *v.* State Capitol Com'rs, 16 Cal. 248; U. S. *v.* Jones, 109 U. S. 513, 27 L. ed. 1015. See also St. Louis, etc., R. Co. *v.* Mollet, 59 Ill. 235.

Same mode for urban and suburban property.— The fact that land is more valuable in cities than in the country does not warrant different modes for assessing the damages in the two localities. *In re* Ruan St., 132 Pa. St. 257, 19 Atl. 219, 7 L. R. A. 193.

37. Rhine *v.* McKinney, 53 Tex. 354.

38. Branson *v.* Gee, 25 Oreg. 462, 36 Pac. 527, 24 L. R. A. 355. And see *infra*, XI, M, 2, a, (III); XI, M, 2, b, (II).

39. Tripp *v.* Overocker, 7 Colo. 72, 1 Pac. 695. A statute authorizing the court to increase or reduce the amount of damages reported by commissioners violates the New York constitutional provision requiring assessment by a jury or commissioners and is therefore invalid. Rochester Water-Works Co. *v.* Wood, 41 How. Pr. (N. Y.) 53. See also *In re* Middletown, 82 N. Y. 196. And a statute leaving the final determination of compensation to grade-crossing commissioners violates the same constitutional provision. Myer *v.* Adams, 169 N. Y. 605, 62 N. E. 1098 [*affirming* 63 N. Y. App. Div. 540, 71 N. Y. Suppl. 707].

40. Nelson *v.* Harlan County, (Nebr. 1902) 89 N. W. 458 (holding that the matter of compensation cannot be referred to the bridge committee of a board of supervisors when the statute provides that damages must be appraised by three disinterested electors); Union Pac., etc., R. Co. *v.* Burlington, etc., R. Co., 19 Nebr. 386, 27 N. W. 238 (holding that it is not sufficient that the jury or appraisers are possessed of all the qualifications by law, but they must have been elected in the manner provided by the statute authorizing the appropriation). See also Bald Eagle Boom Co. *v.* Sanderson, 81 Pa. St. 402.

41. Matter of Hand St., 55 Hun (N. Y.) 132, 8 N. Y. Suppl. 610; Colby *v.* Toledo, 22 Ohio Cir. Ct. 732, 12 Ohio Cir. Dec. 347. See also Plott *v.* Western North Carolina R. Co., 65 N. C. 74.

42. Hanlon *v.* Westchester County, 57 Barb. (N. Y.) 383.

trial by jury in condemnation proceedings.[43] It is frequently prescribed, however, either by constitutional or statutory provisions that damages in condemnation proceedings shall be assessed by a jury.[44] But however this may be, it is well

43. *Iowa.*— *In re* Bradley, 108 Iowa 476, 79 N. W. 280.

Missouri.— St. Joseph *v.* Geiwitz, 148 Mo. 210, 49 S. W. 1000; Kansas City Suburban Belt R. Co. *v.* Kansas City, etc., R. Co., 118 Mo. 599, 24 S. W. 478.

Oregon.— Kendall *v.* Post, 8 Oreg. 141.

Texas.— Rhine *v.* McKinney, 53 Tex. 354.

Vermont.— Gold *v.* Vermont Cent. R. Co., 19 Vt. 478.

United States.—Bauman *v.* Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. ed. 270.

See 18 Cent. Dig. tit. "Eminent Domain," § 545.

A general constitutional provision guaranteeing the right of trial by jury does not apply to condemnation proceedings.

California.— People *v.* Blake, 19 Cal. 579; Koppikus *v.* State Capitol Com'rs, 16 Cal. 248.

Minnesota.— Bruggerman *v.* True, 25 Minn. 123; Ames *v.* Lake Superior, etc., River Co., 21 Minn. 241.

New York.— See People *v.* Smith, 21 N. Y. 595.

North Carolina.— See Chowan, etc., R. Co. *v.* Parker, 105 N. C. 246, 11 S. E. 328.

Pennsylvania.— Pennsylvania R. Co. *v.* Pittsburg First German Lutheran Cong., 53 Pa. St. 445.

Texas.— Houston Tap, etc., R. Co. *v.* Milburn, 34 Tex. 224; Buffalo Bayou, etc., R. Co. *v.* Ferris, 26 Tex. 588.

United States.— Postal Tel. Co. *v.* Southern R. Co., 122 Fed. 156.

See 18 Cent. Dig. tit. "Eminent Domain," § 545.

But see Armstrong *v.* Jackson, 1 Blackf. (Ind.) 374.

Right upon appeal.— The general rule is that where a jury trial is a matter of constitutional right it is a sufficient compliance with this guarantee that the statute provides a jury trial on appeal. Shively *v.* Lankford, 174 Mo. 535, 74 S. W. 835. A constitutional provision "that the right of trial by jury shall remain inviolate," secures the right of a jury trial, in all cases in the trial of which a jury was necessary, according to the principles of the common law. Upon an appeal to the circuit court by the owner, from the inquest of a jury assessing the damages accruing from the use and occupation of his land by a railroad company, either party has the right to demand that the issues of fact arising in the cause shall be submitted to and tried by a jury. Isom *v.* Mississippi Cent. R. Co., 36 Miss. 300. See also Tharp *v.* Witham, 65 Iowa 566, 22 N. W. 677.

44. *Alabama.*— Davis *v.* Tuscumbia, etc., R. Co., 4 Stew. & P. 421.

Arkansas.— *Ex p.* Reynolds, 52 Ark. 330, 12 S. W. 570.

Illinois.— Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 97 Ill. 506; People *v.* Stuart, 97 Ill. 123; Haslan *v.* Galena, etc., R. Co., 64 Ill. 353; Rich *v.* Chicago, 59 Ill. 286.

Maryland.— Pennsylvania R. Co. *v.* Baltimore, etc., R. Co., 60 Md. 263.

Massachusetts.— Fairbanks *v.* Com., 183 Mass. 373, 67 N. E. 335; *In re* Hinckley, 15 Pick. 447. See also Charles *v.* Porter, 10 Metc. 37.

Michigan.— Fort St. Union Depot Co. *v.* Backus, 103 Mich. 556, 61 N. W. 787; Fort St. Union Depot Co. *v.* Backus, 92 Mich. 33, 52 N. W. 790; Grand Rapids, etc., R. Co. *v.* Chesebro, 74 Mich. 466, 42 N. W. 66; Port Huron, etc., R. Co. *v.* Callinan, 61 Mich. 12, 27 N. W. 717.

New York.— Clark *v.* Miller, 54 N. Y. 528 [*affirming* 42 Barb. 255]; People *v.* Ulster County, 3 Barb. 332. See also Johnson *v.* Herkimer Sup'rs, 19 Johns. 272.

North Dakota.— Bigelow *v.* Draper, 6 N. D. 152, 69 N. W. 570.

Ohio.— *In re* Wells County Road, 7 Ohio St. 16.

Oregon.— Oregonian R. Co. *v.* Hill, 9 Oreg. 377.

Pennsylvania.— Bachler's Apppeal, 90 Pa. St. 207; *In re* Musgrove St., 10 Pa. Co. Ct. 180; Chester Rolling Mills *v.* Granahan, 1 Del. Co. 379.

Rhode Island.— *In re* Condemnation of Certain Land, 19 R. I. 326, 33 Atl. 448.

South Carolina.—Atlantic Coast Line R. Co. *v.* South Bound R. Co., 57 S. C. 317, 35 S. E. 553.

United States.— U. S. *v.* Honolulu Plantation Co., 122 Fed. 581, 58 C. C. A. 279 (construing Hawaiian statute); Bonaparte *v.* Camden, 3 Fed. Cas. No. 1,617, Baldw. 205 (New Jersey statute).

See 18 Cent. Dig. tit. "Eminent Domain," §§ 545, 548.

Nature of right to jury.— The statutory provision for assessment by jury upon demand is a substantial right which should not be trifled with. The exercise of this right ought not to be prevented by mere technicalities. Port Huron, etc., R. Co. *v.* Callinan, 61 Mich. 12, 27 N. W. 717.

Number of jurors.— Unless the constitution prescribes that the jury shall consist of twelve the legislature may fix any number. McManus *v.* McDonough, 107 Ill. 95 [*affirming* 4 Ill. App. 180]; Springfield *v.* Whitlock, 34 Mo. App. 642; Pearson *v.* Yewdall, 95 U. S. 294, 24 L. ed. 436.

Contents of order for jury.— A judge's order to strike a jury to assess damages need not set out prior proceedings. Patterson, etc., Turnpike Co. *v.* Van Orden, 3 N. J. L. 534.

Seal unnecessary.— An application for a jury made by a corporation need not be under the corporate seal. Patterson, etc., Turnpike Co. *v.* Van Orden, 3 N. J. L. 534.

Right restricted to property-owner.—Where the constitution provides for a trial by jury,

settled that the right to have damages assessed by a jury may be lost by a failure to demand a jury.[45]

(B) *After Assessment by Commissioners.* In some jurisdictions, when the damages are in the first instance assessed by commissioners, there is a provision giving to the party aggrieved by the report of the commissioners the right to have the damages determined by a jury.[46] There must be a demand made for a jury,[47] and it is necessary that the demand be made within the time fixed by

"when required by the owner of the property," a statute providing that either party may demand a jury of freeholders is in contravention of such constitutional provision. Southwestern Land Co. *v.* Hickory Jackson Ditch Co., 18 Colo. 489, 33 Pac. 275.

45. Beynom *v.* Brandywine, etc., Turnpike Co., 39 Ind. 129; Chowan, etc., R. Co. *v.* Parker, 105 N. C. 246, 11 S. E. 328.

46. *Maine.*— Bryant *v.* Glidden, 36 Me. 36; Kimball *v.* Kennebec, etc., R. Co., 35 Me. 255.

Massachusetts.— Wamesit Power Co. *v.* Lowell, etc., R. Co., 139 Mass. 173, 29 N. E. 652; Wyman *v.* Eastern R. Co., 128 Mass. 346; Ætna Mills *v.* Waltham, 126 Mass. 422; Fall River R. Co. *v.* Chase, 125 Mass. 483; Taylor *v.* Plymouth County Com'rs, 13 Metc. 449. See also Carpenter *v.* Bristol County Com'rs, 21 Pick. 258.

Mississippi.— See Yazoo, etc., Delta Levee Com'rs *v.* Nelms, 82 Miss. 416, 34 So. 149.

Missouri.— Nishnabotna Drainage Dist. *v.* Campbell, 154 Mo. 151, 55 S. W. 276; St. Louis, etc., R. Co. *v.* Donovan, 149 Mo. 93, 50 S. W. 286; Chicago, etc., R. Co. *v.* McGrew, 113 Mo. 390, 21 S. W. 201; Chicago, etc., R. Co. *v.* Randolph Town-Site Co., 103 Mo. 451, 15 S. W. 437; Chicago, etc., R. Co. *v.* Baker, 102 Mo. 553, 15 S. W. 64; Kansas City, etc., R. Co. *v.* Story, 96 Mo. 611, 10 S. W. 203.

New Hampshire.— Upper Coos R. Co. *v.* Parsons, 66 N. H. 181, 19 Atl. 10; Concord R. Co. *v.* Greely, 20 N. H. 157.

New Jersey.— See Leeds *v.* Camden, etc., R. Co., 53 N. J. L. 229, 23 Atl. 168; Henderson *v.* Orange, 9 N. J. L. J. 71.

Pennsylvania.— *In re* Towanda Bridge Co., 91 Pa. St. 216; *In re* Horner, etc., Lateral R. Co., 37 Pa. St. 333; Chester Rolling Mills *v.* Grannan, 1 Del. Co. 379.

West Virginia.— Grafton, etc., R. Co. *v.* Foreman, 24 W. Va. 662.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 548, 615.

Acceptance of report of commissioners pending assessment of damages by a jury.—A statute prohibiting the appropriation of land for a highway until the damages assessed therefor are paid or assessed does not forbid the acceptance of the report of the commissioners laying out a highway before the jury assess the damages of a landowner who is dissatisfied with the damages awarded to him by the commissioners. Lyman's Bridge Co. *v.* Lebanon, 59 N. H. 196.

In Massachusetts it has been held that if the proceedings of the county commissioners in estimating damages are irregular, the remedy is to be sought by an application to the supreme court for a certiorari, and not by an application to the county commissioners for a jury to revise the damages. Fitchburg R. Co. *v.* Boston, etc., R. Co., 3 Cush. 58. And it has also been decided in this state that, when parties whose damages have not been estimated are summoned in, their damages are first to be estimated by the commissioners before the case is sent to a jury. Fitchburg R. Co. *v.* Boston, etc., R. Co., 3 Cush. 58.

In Missouri it has been decided that in order to obtain an assessment of damages by a jury, it is not necessary to make the demand for a jury a part of the exceptions. The party desiring a jury may make his demand orally to the court as in ordinary actions before entering on a trial. The right to demand a jury is not part of the exceptions which are taken to the action of the commissioners. Kansas City, etc., R. Co. *v.* Cox, 41 Mo. App. 499.

In Pennsylvania it has been held that where an application for a jury trial and exceptions to the report of commissioners are filed at the same time, the court will require the party to elect upon which he stands and will dismiss the other proceeding. Bechtel *v.* Bechtelsville Borough, 3 Pa. Dist. 713. An owner who has had his day in court on exceptions to the commissioners' award cannot petition the court for a jury. *In re* West Whiteland Road, 4 Pa. Co. Ct. 511.

In Rhode Island the right to demand a jury is restricted to the landowner. *In re* Condemnation of Certain Land, 19 R. I. 326, 37 Atl. 448.

Land taken for highway purposes.— It is sometimes provided that when the damages to land taken for highway purposes have been awarded by municipal authorities, the landowner may upon demand have a jury to assess them.

Iowa.— Sigafoos *v.* Talbot, 25 Iowa 214.

Massachusetts.— Thorndike *v.* Norfolk County Com'rs, 117 Mass. 566; Riley *v.* Lowell, 117 Mass. 76 (holding that the damages must be estimated by the county commissioners in the first instance); Bennett *v.* Worcester County Com'rs, 4 Gray 359; Smith *v.* Boston, 1 Gray 72; Harding *v.* Medway, 10 Metc. 465. See also Stone *v.* Heath, 135 Mass. 561; *In re* Endicott, 24 Pick. 339.

New York.— People *v.* Lewis, 26 How. Pr. 378.

Rhode Island.— Sweet *v.* Cranston, 23 R. I. 466, 50 Atl. 851.

Wisconsin.—Burns *v.* Spring Green, 56 Wis. 239, 14 N. W. 72.

See 18 Cent. Dig. tit. "Eminent Domain," § 615.

47. Nishnabotna Drainage Dist. *v.* Campbell, 154 Mo. 151, 55 S. W. 276; Chicago, etc.,

statute,[48] or the right will be waived. When the assessment is submitted to a jury after a prior assessment by commissioners, the nature of the proceedings and the questions to be determined by the jury depend upon statutory provisions.[49] As to the effect of a demand for a jury, it has been held that such demand does not vacate the award of the commissioners.[50] And the verdict of a jury on exceptions to the report of commissioners *ipso facto* annuls or sets aside their award.[51]

(II) *Drawing and Summoning.* The jurors are generally drawn in the manner usual in courts of civil jurisdiction.[52] The warrant or venire[53] must issue to

R. Co. *v.* Randolph Town-Site Co., 103 Mo. 451, 15 S. W. 437.

48. Childs *v.* Franklin County, 128 Mass. 97; Roberts *v.* Boston, etc., R. Corp., 115 Mass. 57; Bennett *v.* Worcester County Com'rs, 4 Gray (Mass.) 359; Monagle *v.* Bristol County Com'rs, 8 Cush. (Mass.) 360; Walker *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 1; Porter *v.* Norfolk County Com'rs, 13 Metc. (Mass.) 479; Upper Coos R. Co. *v.* Parsons, 66 N. H. 181, 19 Atl. 10; People *v.* See, 29 Hun (N. Y.) 216. See also Chicago, etc., R. Co. *v.* McGrew, 113 Mo. 390, 21 S. W. 201.

Time fixed by court.— When no time is fixed by statute for taking the appeal, it is to be under such regulations for bringing the matter to a trial in due course of law by a jury as the court may prescribe. *In re* Towanda Bridge Co., 91 Pa. St. 216.

49. Nature of proceeding.— An application under the New York highway act of 1847 (Laws of (1847), c. 455), by landowners, over whose land a highway has been laid, for a reassessment of damages by a jury, is not an appeal, in any sense; but is like a motion for a reargument of the same matter before another tribunal. It is a continuation of the same proceeding not before a higher, but a different, forum or body; and one is in nowise a review of the other. People *v.* White, 59 Barb. 666.

Whether a trial de novo.— An appeal from the award of viewers to lay out a public road and assess damages and benefits brings the whole case *de novo* before the court; the jury on an appeal has all the powers which the viewers had. Hibberd's Appeal, 2 Pa. Dist. 28. But see Terre Haute, etc., R. Co. *v.* Flora, 29 Ind. App. 442, 64 N. E. 648, holding that on an appeal in proceedings by a town to appropriate land for a street the trial is not *de novo*, but, under the express terms of Burns Rev. St. (1901) § 4409, no questions can be determined thereon except those of the regularity of the proceedings and of the amount of damages sustained.

No view by the jury.— The jury is not to make the valuation upon a view of the premises. Hord *v.* Nashville, etc., R. Co., 2 Swan (Tenn.) 497.

Not tried upon exceptions.— When the report of commissioners is set aside and the case comes on for trial by a jury, it is not to be tried on the exceptions filed, but on the petition for the assessment of damages. Chicago, etc., R. Co. *v.* Baker, 102 Mo. 553, 15 S. W. 64.

Question of damages.— The only question to be considered by the jury is the amount of compensation to be awarded. *In re* Horner, etc., Lateral R. Co., 37 Pa. St. 333. See also *In re* Yazoo, etc., Delta Levee Com'rs *v.* Nelms, 82 Miss. 416, 34 So. 149, and the jury are not limited to the amount fixed by the commissioners, but may give higher damages. North Eastern R. Co. *v.* Sineath, 8 Rich. (S. C.) 185.

50. Fall River R. Co. *v.* Chase, 125 Mass. 483; People *v.* Lewis, 26 How. Pr. (N. Y.) 378. *Contra*, Morss *v.* Boston, etc., R. Co., 2 Cush. (Mass.) 536 (holding that an application for a jury when made and allowed does vacate such award); Chicago, etc., R. Co. *v.* Randolph Town-Site Co., 103 Mo. 451, 15 S. W. 437.

Suspension of award.—Under a statute giving to a party desiring to have his damages assessed by a jury the right to appeal from the report of commissioners, it has been held that the award of the commissioners is merely suspended by the appeal. Upper Coos R. Co. *v.* Parsons, 66 N. H. 181, 19 Atl. 10.

51. Kansas City, etc., R. Co. *v.* Cox, 41 Mo. App. 499.

52. Colorado Fuel, etc., Co. *v.* Four Mile R. Co., 29 Colo. 90, 66 Pac. 902; People *v.* Haverstraw, 151 N. Y. 75, 45 N. E. 384 [*reversing* 80 Hun 385, 30 N. Y. Suppl. 325]. The proceedings are not invalidated by the accidental omission from the list of jurors of the name of one whose name should have been thereon, if it is not shown that any injury was caused by the mistake. People *v.* Potter, 36 Hun (N. Y.) 181.

A Maine statute requiring the names of the jurors summoned to be placed separately in a box and drawn does not apply to juries summoned in condemnation proceedings. Davis *v.* Bangor, etc., R. Co., 60 Me. 303.

In Tennessee the jury must be summoned by the sheriff, and if the court appoints them by name a condemnation of land under their report will be void. Tipton *v.* Miller, 3 Yerg. 423.

Notice.— Reasonable notice of the drawing of the jury must be given to the parties interested. Polly *v.* Saratoga, etc., R. Co., 9 Barb. (N. Y.) 449, written notice not necessary. See also People *v.* Tallman, 36 Barb. (N. Y.) 222; People *v.* Columbia First Judge, 2 Hill (N. Y.) 398.

53. The warrant need not direct from what county the jurors are to be summoned, it being sufficient if it requires the sheriff to summon them "according to law." Mitchell *v.* Bridgewater, 10 Cush. (Mass.) 411. Un-

the proper officer,[54] commanding him to summon the jury in the manner prescribed by statute.[55] Such warrant must set forth with sufficient certainty the subject-matter into which the jury is to inquire,[56] and must describe with reasonable certainty the land sought to be appropriated.[57] It must specify the day and the place when and where the jury is to meet.[58] The warrant must be made returnable to the proper tribunal.[59] The return of the warrant is of the substance of the proceedings, and must be free from error.[60] The fact that the number of jurors summoned is more[61] or less than the number prescribed by statute does not necessarily avoid the proceeding, if the jury impaneled consists of the proper number.[62]

(III) *SELECTING.* A person interested in a condemnation proceeding has a right to be present when the jury is selected and to participate in its selection.[63] He may challenge for cause[64] or peremptorily.[65]

(IV) *QUALIFICATIONS.* As respects the statutory requirements as to the qualifications of jurors[66] it is very frequently provided that such jurors shall be free-

der a Massachusetts statute, directing that when two or more persons apply at the same time for a jury, the commissioners shall cause all such applications to be considered and determined by the same jury, the proper course is to issue a single warrant, reciting all the cases that are to be heard by the jury. But if notwithstanding separate warrants for each case be issued, yet the officer summons a single jury which hears and determines all the cases, the verdicts will not be set aside because several warrants were irregularly issued. Wyman *v.* Lexington, etc., R. Co., 13 Metc. (Mass.) 316.

54. Brown *v.* Beatty, 34 Miss. 227, 69 Am. Dec. 389; Tipton *v.* Miller, 3 Yerg. (Tenn.) 423. See also Wyman *v.* Lexington, etc., R. Co., 13 Metc. (Mass.) 316.

Constable a proper officer.— Meacham *v.* Fitchburg R. Co., 4 Cush. (Mass.) 291; Com. *v.* Norfolk County, 5 Mass. 435, unless it is otherwise provided by statute.

Service by deputy sheriff.— In New York the summons may be served by a deputy sheriff. Brooklyn *v.* Patchen, 8 Wend. 47.

Served by applicant.— It has been held that the fact that the sheriff intrusted the serving of the summons to the applicant, that it was served by him, and that the jury attended is not reversible error, in the absence of any statutory provision prescribing the service. Folmar *v.* Folmar, 71 Ala. 136.

In Massachusetts a deputy sheriff who is an inhabitant of the town through which a highway is to be laid out is incompetent by reason of interest. Merrill *v.* Berkshire, 11 Pick. 269. Where county commissioners in taking land for a highway give the precept for summoning the jury to an officer residing in the town in which the highway is laid out, if no objection is made by the owner at the trial because of his residence, the commissioners cannot themselves afterward object to the verdict because of such officer's interest in the proceeding. Tripp *v.* Bristol County Com'rs, 2 Allen 556.

55. People *v.* Haverstraw, 20 N. Y. Suppl. 7; Finn *v.* Providence Gas, etc., R. Co., 99 Pa. St. 631.

56. Folmar *v.* Folmar, 68 Ala. 120; Childs *v.* New Haven, etc., Co., 133 Mass. 253.

57. Walker *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 1.

Under the English Lands Clauses Act (8 & 9 Vict. c. 18) the land described in the precipe to summon a jury must be neither less nor more than that for which the owner has by the notice been required to treat. Stone *v.* Commercial R. Co., 4 Myl. & C. 122, 1 R. & Can. Cas. 375, 18 Eng. Ch. 122.

58. Folmar *v.* Folmar, 68 Ala. 120.

59. Cassidy *v.* Kennebec, etc., R. Co., 45 Me. 263; Hampshire, etc., Canal Co. *v.* Ashley, 15 Pick. (Mass.) 496.

60. Cassidy *v.* Kennebec, etc., R. Co., 45 Me. 263; Hampshire, etc., Canal Co. *v.* Ashley, 15 Pick. (Mass.) 496.

61. Hosmer *v.* Warner, 15 Gray (Mass.) 46. See also Fitchburg R. Co. *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 58; Com. *v.* Middlesex County Justices, 9 Mass. 388.

62. Polly *v.* Saratoga, etc., R. Co., 9 Barb. (N. Y.) 449.

63. Dixon *v.* Baltimore, etc., R. Co., 1 Mackey (D. C.) 78; Fitzpatrick *v.* Joliet, 87 Ill. 58; Anderson *v.* St. Louis, 47 Mo. 479. See also *In re* Detroit, etc., R. Co., 2 Dougl. (Mich.) 367. But see *In re* Still, 2 Chest. Co. Rep. (Pa.) 233, holding that the parties are not entitled to notice, as they could not interfere with the tribunal in the appointment of a jury of view.

Who may take advantage of irregularities. If the jury is properly selected as to one landowner, he cannot take advantage of irregularities as to the other landowners with whom he has no privity or connection. Patterson, etc., Turnpike Co. *v.* Van Orden, 3 N. J. L. 534.

64. Converse *v.* Grand Rapids, etc., R. Co., 18 Mich. 459.

65. Fitzpatrick *v.* Joliet, 87 Ill. 58; St. Louis, etc., R. Co. *v.* Lux, 63 Ill. 523. But see Converse *v.* Grand Rapids, etc., R. Co., 18 Mich. 459. The right of peremptory challenge in condemnation proceedings is one of privilege and not one of right. Ohio Southern R. Co. *v.* Kloeb, 5 Ohio S. & C. Pl. Dec. 217.

66. Statutes must be complied with. *Colorado.*— Colorado Cent. R. Co. *v.* Humphrey, 16 Colo. 34, 26 Pac. 165.

holders of the vicinage,[67] disinterested,[68] and not related to either of the parties,[69] nor a stock-holder in a petitioning corporation,[70] and that they have not previously served as jurors in the same proceeding.[71] The objection that jurors are not

Missouri.— State *v.* St. Louis, 52 Mo. 574.
New York.— People *v.* Haverstraw, 151 N. Y. 75, 45 N. E. 384 [*reversing* 80 Hun 385, 30 N. Y. Suppl. 325].
Tennessee.— Tipton *v.* Miller, 3 Yerg. 423.
Wisconsin.— U. S. *v.* Summit, 1 Pinn. 566.

Qualifications shown by record.— It has been held that it should appear by the record that the jurors possess the requisite qualifications. Tipton *v.* Miller, 3 Yerg. (Tenn.) 423. *Contra*, Gay *v.* Coldwell, Hard. (Ky.) 63. It is sufficient, however, if their competency appears anywhere in the record of the proceedings required to be kept. Louisville, etc., R. Co. *v.* Postal Tel. Co., 68 Miss. 806, 10 So. 74. And it has been decided that, if a jury is appointed at the request of the landowner and he makes no objections to the persons selected, it will be presumed that they are competent jurors, although the fact is not shown by the record. Long *v.* Commissioners' Ct., 18 Ala. 482.

67. *Alabama.*— Folmar *v.* Folmar, 68 Ala. 120.
Colorado.— Colorado Cent. R. Co. *v.* Humphrey, 16 Colo, 34, 26 Pac. 165.
Michigan.— Chatterton *v.* Parrott, 46 Mich. 432, 9 N. W. 482.
Mississippi.— New Orleans, etc., R. Co. *v.* Hemphill, 35 Miss. 17.
Missouri.— State *v.* St. Louis, 52 Mo. 574.
Pennsylvania.— *In re* Pennsburg Alley, 2 Pa. Dist. 136, 12 Pa. Co. Ct. 213.
Tennessee.— Tipton *v.* Miller, 3 Yerg. 423.
West Virginia.— Charleston, etc., Bridge Co. *v.* Comstock, 36 W. Va. 263, 15 S. E. 69.
Wisconsin.— U. S. *v.* Summit, 1 Pinn. 566.
See 18 Cent. Dig. tit. "Eminent Domain," § 553.

What amounts to violation of rule.—Where the constitution requires that the jury shall consist of freeholders of the vicinage, this provision is violated by a selection of the jury from the regular panel, since the jurors on the regular panel may not possess the constitutional qualifications. Mt. Clemens *v.* Macomb Cir. Judge, 119 Mich. 293, 77 N. W. 936.

In Illinois, where the case is tried before a jury chosen from the regular panel, it is not an essential qualification of a juror that he be a freeholder. Indiana, etc., R. Co. *v.* Stauber, 185 Ill. 9, 56 N. E. 1079.

Reputable householders required.— Louisville, etc., Air R. Line Co. *v.* Dryden, 39 Ind. 393.

The Louisiana code requires that the jury shall have a personal knowledge of real estate in the vicinage. Remy *v.* Municipality No. 2, 12 La. Ann. 500.

68. Folmar *v.* Folmar, 68 Ala. 120; Tide Water Canal Co. *v.* Archer, 9 Gill & J. (Md.) 479; Brooklyn *v.* Patchen, 8 Wend. (N. Y.) 47; Georgetown Turnpike Road Co. *v.* Curtis, 10 Fed. Cas. No. 5,348, 1 Cranch C. C. 585.

What does not amount to interest.— In a condemnation proceeding a juror is not incompetent because he resides in a county or city in which is the land which is taken, although such county or town is interested in the proceeding. Johnston *v.* Rankin, 70 N. C. 550; Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812. *Compare* Patchin *v.* Brooklyn, 2 Wend. (N. Y.) 377.

Under the Indiana statute of 1852 no person owning land within one mile of a contemplated railroad was competent to act as a juror. McMahon *v.* Cincinnati, etc., Short-Line R. Co., 5 Ind. 413.

In Massachusetts it is provided by statute that jurors for the assessment of damages caused by laying out a highway or a railroad shall be taken from the three nearest towns not interested. This means the three towns nearest to that in which the land lies over which the road is laid out and excludes the town in which the land lies. Reed *v.* Hanover Branch R. Co., 105 Mass. 303; Meacham *v.* Fitchburg R. Co., 4 Cush. 291; Walker *v.* Boston, etc., R. Co., 3 Cush. 1; Brown *v.* Boston, etc., R. Corp., 13 Metc. 327 note; Wyman *v.* Lexington, etc., R. Co., 13 Metc. 316.

69. Tide Water Canal Co. *v.* Archer, 9 Gill & J. (Md.) 479.

70. Peninsular R. Co. *v.* Howard, 20 Mich. 18. The fact that a juror was one of the subscribers to a fund for the benefit of another railroad company, which proposed to take a perpetual lease of the projected new road, does not render him incompetent on the ground of interest. Detroit, etc., R. Co. *v.* Crane, 50 Mich. 182, 15 N. W. 73.

Who is a stock-holder.— One who has subscribed for stock in the company, but who did not pay the instalment required at the time of subscribing, and who has never been required to pay any of the instalments called for by the company, and whose shares another person had agreed to take, cannot be considered a stock-holder so as to disqualify him to serve as a juror. Chesapeake, etc., Canal Co. *v.* Binney, 5 Fed. Cas. No. 2,645, 4 Cranch C. C. 68.

Stock-holder in another railroad competent.— People *v.* Columbia First Judge, 2 Hill (N. Y.) 398.

71. Folmar *v.* Folmar, 68 Ala. 120; *In re* Detroit, etc., R. Co., 2 Dougl. (Mich.) 367; Hunter *v.* Matthews, 12 Leigh (Va.) 228. Under a statute requiring that it shall be the duty of the court on the return-day of the venire to excuse from service any jurors who have served during the preceding three years a juror is not incompetent in a street opening case because he has served in a similar case within three years. Detroit *v.* Heineman, 128 Mich. 537, 87 N. W. 618. It is no objection that a juror has been an appraiser on another railroad in the same county. People

competent may be waived as by failure to object in apt time, by acceptance of compensation, and the like.[72]

(v) *Oath.* The jury must be sworn, and a failure so to do has been held to be a fatal irregularity.[73] Where the form of the oath is not expressly prescribed it is sufficient to swear the jury in the usual form in which petit jurors are sworn for the trial of civil actions;[74] but where the form of oath is prescribed it must be substantially followed.[75] A mere irregularity in the manner of administering the oath or in its form may be waived.[76] The fact that the jury was properly sworn must appear from the record.[77]

(vi) *Conduct of Proceedings.* The hearing before a jury may be presided over by a judge,[78] by a sheriff,[79] or by a court commissioner.[80] The official presiding is sometimes required to certify the proceedings and verdict.[81] The officer presiding at the hearing has power to continue the hearing by adjournment, although such power is not expressly granted by the statute.[82] While the jury of inquest should usually hold it in the day mentioned in the writ, yet if the inquest is held on a subsequent day, and the parties are present, the proceedings are not invalidated.[83] A statute providing that in condemnation proceedings by a city

v. Columbia First Judge, 2 Hill (N. Y.) 398.

72. Waived by failure to object in apt time. — Tide Water Canal Co. *v.* Archer, 9 Gill & J. (Md.) 479; Fowler *v.* Middlesex County Com'rs, 6 Allen (Mass.) 92; Walker *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 1; Smith *v.* Milton School Dist. No. 2, 40 Mich. 143; *In re* Pennsburg Alley, 2 Pa. Dist. 136, 12 Pa. Co. Ct. 213. *Compare* Peninsula R. Co. *v.* Howard, 20 Mich. 18, holding that an objection that jurors are interested is not waived by failure to take advantage of it at the first opportunity.

Objection first raised on appeal.— In condemnation proceedings an objection that the jurors were not residents of the county where the land was situated cannot be first raised on appeal. Benton Harbor Terminal R. Co. *v.* King, 131 Mich. 377, 91 N. W. 641.

Waiver by accepting compensation.— Chatterton *v.* Parrott, 46 Mich. 432, 9 N. W. 482.

73. Molett *v.* Keenan, 22 Ala. 484. Under the Maryland act of 1827 it was not necessary that the jury should be sworn on the lot to be appraised, it being sufficient if they met on the lot. Baltimore, etc., R. Co. *v.* Van Ness, 2 Fed. Cas. No. 830, 4 Cranch C. C. 595.

74. Knauft *v.* St. Paul, etc., R. Co., 22 Minn. 173; Wilkin *v.* St. Paul, etc., R. Co., 22 Minn. 177.

75. Molett *v.* Keenan, 22 Ala. 484; Bowler *v.* Perrin, 47 Mich. 154, 10 N. W. 180; East Saginaw, etc., R. Co. *v.* Benham, 28 Mich. 459. See also Law *v.* Chicago Sanitary Dist., 197 Ill. 523, 64 N. E. 536.

76. Cahill *v.* Norwood Park, 149 Ill. 156, 36 N. E. 606; Rock Island, etc., R. Co. *v.* McKinley, 64 Ill. 338; Roberts *v.* Central Pass. R. Co., 1 Brewst. (Pa.) 538; Grafton, etc., R. Co. *v.* Foreman, 24 W. Va. 662.

77. *Alabama.*— Owen *v.* Jordan, 27 Ala. 608.

Kentucky.— Parker *v.* Lexington, etc., R. Co., 2 Dana 272.

Maryland.— Tide-Water Canal Co. *v.* Archer, 9 Gill & J. 479.

Massachusetts.— Spring *v.* Lowell, 1 Mass. 422.

Michigan.— Bowler *v.* Perrin, 47 Mich. 154, 10 N. W. 180.

Mississippi.— See New Orleans, etc., R. Co. *v.* Hemphill, 35 Miss. 17.

See 18 Cent. Dig. tit. "Eminent Domain," § 555.

78. Fort St. Union Depot Co. *v.* Backus, 103 Mich. 556, 61 N. W. 787.

Functions of judges.— Grand Rapids, etc., R. Co. *v.* Chesebro, 74 Mich. 466, 42 N. W. 66; Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456, 11 N. W. 271.

79. Pittsfield, etc., R. Corp. *v.* Foster, 1 Cush. (Mass.) 480; Tripp *v.* Bristol County Com'rs, 2 Allen (Mass.) 556. It is not a sufficient cause for a new trial before a sheriff's jury that the sheriff himself put a question to a witness on a material matter. Fowler *v.* Middlesex County Com'rs, 6 Allen (Mass.) 92.

80. Fort St. Union Depot Co. *v.* Backus, 92 Mich. 33, 52 N. W. 790.

81. Allen *v.* Androscoggin R. Co., 60 Me. 494; Pittsfield, etc., R. Corp. *v.* Foster, 1 Cush. (Mass.) 480; People *v.* Ulster County, 34 N. Y. 268 [*reversing* 32 Barb. 473]. The provision of the Maryland statute, relating to the condemnation of land in that state by the United States, which requires the sheriff's jury to reduce to writing and to return to the clerk of the court the testimony taken before them, has no application to a trial before the court itself under the federal statute relating to condemnation proceedings. Chappell *v.* U. S., 160 U. S. 499, 16 S. Ct. 397, 40 L. ed. 510. The return of the official who presides at the view, when made and filed in court, is conclusive and cannot be amended. Gay *v.* Gardiner, 54 Me. 477.

82. Colorado Midland R. Co. *v.* Bowles, 14 Colo. 85, 23 Pac. 467; Polly *v.* Saratoga, etc., R. Co., 9 Barb. (N. Y.) 449. See also Ann Arbor R. Co. *v.* Beach, 110 Mich. 209, 68 N. W. 124.

83. Vogle *v.* Bridges, 22 S. W. 82, 15 Ky. L. Rep. 6.

the city attorney may attend and give to the jury legal advice and counsel concerning their duties is void, as violating the rule that juries must be free from the influence of a party or his counsel.[84]

(VII) *VIEWING THE PROPERTY* — (A) *In General.* In some cases it is made the duty of the jury to view the premises to be condemned,[85] and when this is so the parties interested may demand as a matter of right that it be done.[86] Generally, however, this is a matter which is left to the discretion of the court.[87] Even where the right to demand a view exists it may be waived.[88] Only the land to be affected is to be viewed;[89] but the jury should view the premises from such standpoint and in such a manner as will give them an accurate knowledge of the considerations that go to make up the damages.[90] When there are several pieces of land belonging to different persons, the jury may view all the pieces of land at one time.[91] A day certain should be fixed for the view,[92] the time being within

84. Paul *v.* Detroit, 32 Mich. 108.

85. Des Moines *v.* Layman, 21 Iowa 153; *In re* Williams, etc., Sts., 19 Wend. (N. Y.) 678. See also Remy *v.* Municipality No. 2, 12 La. Ann. 500; Andrews *v.* Johnson, 4 N. C. 26.

86. Kankakee, etc., R. Co. *v.* Straut, 102 Ill. 666; Charleston, etc., Bridge Co. *v.* Comstock, 36 W. Va. 263, 15 S. E. 69.

Time for demanding.— In Pennsylvania the view should be demanded as soon as the jury is sworn, and it is too late if not made until after the evidence has been taken on both sides. Denniston *v.* Philadelphia Co., 1 Pa. Super. Ct. 599, 38 Wkly. Notes Cas. 332. But in Illinois it may be demanded even after the evidence is in and the arguments made. Kankakee, etc., R. Co. *v.* Straut, 102 Ill. 666.

87. *Iowa.*— Clayton *v.* Chicago, etc., R. Co., 67 Iowa 238, 25 N. W. 150; Close *v.* Samm, 27 Iowa 503.

Maine.— Snow *v.* Boston, etc., R. Co., 65 Me. 230.

New Hampshire.— See Dearborn *v.* Boston, etc., R. Co., 24 N. H. 179.

Ohio.— See Lamb *v.* Lane, 4 Ohio St. 167.

Washington.— Bellingham Bay, etc., R. Co. *v.* Strand, 4 Wash. 311, 30 Pac. 114.

Wisconsin.— Pick *v.* Rubicon Hydraulic Co., 27 Wis. 433.

See 18 Cent. Dig. tit. "Eminent Domain," § 558.

Review for abuse of discretion.— Pick *v.* Rubicon Hydraulic Co., 27 Wis. 433. See also Chicago, etc., R. Co. *v.* Winslow, 27 Ind. App. 316, 60 N. E. 466; Chicago, etc., R. Co. *v.* Loer, 27 Ind. App. 245, 60 N. E. 319.

View on appeal from award.— On appeal from the award of appraisers fixing damages for the condemnation of a railroad right of way, neither party is entitled as a matter of right to have the jury view the premises, but such matter is entirely within the discretion of the court and its action thereon is not cause for reversal, unless an abuse of discretion is shown. Chicago, etc., R. Co. *v.* Curless, 27 Ind. App. 306, 60 N. E. 467. On the trial of an appeal from the report of a jury of view assessing damages for the change of grade of a street, it is not error to send the jury out to view the premises, if such action will enable them better to determine the merits of the varying opinions of witnesses and if the jury are properly cautioned by the court as to what they should do and a representative of each party attends them. Zug *v.* Pittsburg, 194 Pa. St. 367, 45 Atl. 61. See also Traut *v.* New York, etc., R. Co., (Pa. 1888) 15 Atl. 678. It is a matter resting in the court's discretion. Lafean *v.* York County, 20 Pa. Super. Ct. 573. The Pennsylvania statute which provides that either party may demand and have the jury engaged in trying an action to ascertain damages visit and view the land and premises only applies to such actions as are brought directly to recover damages without the intervention of viewers to assess the damages. Where the case arises by appeal from the award of viewers neither party can demand as of right that the jury shall visit and view the premises. Frazee *v.* Manufacturers Light, etc., Co., 20 Pa. Super. Ct. 420.

In Texas all laws authorizing a trial by view were repealed, and after such repeal a request that the jury be permitted to view the land was properly denied. Gainesville, etc., R. Co. *v.* Waples, 3 Tex. App. Civ. Cas. § 409.

88. Rockford, etc., R. Co. *v.* Coppinger, 66 Ill. 510; Knauft *v.* St. Paul, etc., R. Co., 22 Minn. 173.

89. Tedens *v.* Chicago Sanitary Dist., 149 Ill. 87, 36 N. E. 1033; U. S. *v.* Freeman, 113 Fed. 370. A statute providing that the jury shall go on the ground and examine it does not require them to go along the entire line of a railroad on whose right of way a telegraph line is to be condemned, if there is no showing that the right of way in other places differs from that which the jury actually views. St. Louis, etc., R. Co. *v.* Postal Tel. Co., 173 Ill. 508, 51 N. E. 382.

90. Wakefield *v.* Boston, etc., R. Co., 63 Me. 385.

91. Jameson *v.* Androscoggin R. Co., 52 Me. 412.

92. Chesapeake, etc., Canal Co. *v.* Key, 5 Fed. Cas. No. 2,649, 3 Cranch C. C. 599. If the writ commands the sheriff to make his return thereon, with the proceedings had under it within ten days from its date, this is a sufficient compliance with the requirement of the statute that the jury shall view the premises at a time not exceeding ten days from the issuing of the writ, although the

the discretion of the court.[93] The jury while making the view should be in charge of a sworn officer,[94] or a representative of each party should be present.[95]

(B) *Effect of the View as Evidence.* While as it is said in some of the cases the jury views the premises that they may better understand the testimony of the witnesses and thereby the more intelligently apply it to the issues on trial before them,[96] yet this is not the only use they may make of the information thus acquired, for they may consider the facts as they appeared to them upon the view and draw their conclusions from their own observations as well as from the testimony.[97] Such information is not, however, to be alone considered and the testimony of the witnesses wholly disregarded. The verdict must be supported by the testimony of sworn witnesses and cannot rest solely upon the personal examination of the premises by the jury.[98]

writ specifies no day for the summoning of the jury. Burden *v.* Stein, 25 Ala. 455.

93. Galena, etc., R. Co. *v.* Haslam, 73 Ill. 494. See also Traut *v.* New York, etc., R. Co., (Pa. 1888) 15 Atl. 678.

94. Colorado Fuel, etc., Co. *v.* Four Mile R. Co., 29 Colo. 90, 66 Pac. 902.

95. Zug *v.* Pittsburg, 194 Pa. St. 367, 45 Atl. 61.

96. Petzel *v.* Chicago, etc., R. Co., 103 Ill. App. 210; Close *v.* Samm, 27 Iowa 503; Chicago, etc., R. Co. *v.* Mouriquand, 45 Kan. 170, 25 Pac. 567; Besuden *v.* Hamilton County, 7 Ohio Cir. Ct. 237, 4 Ohio Cir. Dec. 575. See also De Gray *v.* New York, etc., Telephone Co., 68 N. J. L. 454, 53 Atl. 200.

Conflicting testimony.— The knowledge which a jury has acquired by a view of the premises may be used by them in determining the weight of conflicting testimony, respecting value and damage, but no further. Laflin *v.* Chicago, etc., R. Co., 33 Fed. 415.

97. *Illinois.*— Illinois, etc., R. Co. *v.* Humiston, 208 Ill. 100, 69 N. E. 880; Groves, etc., R. Co. *v.* Herman, 206 Ill. 34, 69 N. E. 36; Rock Island, etc., R. Co. *v.* Gordon, 184 Ill. 456, 56 N. E. 810; Chicago, etc., R. Co. *v.* Blake, 116 Ill. 163, 4 N. E. 488; McReynolds *v.* Baltimore, etc., R. Co., 106 Ill. 156; Chicago, etc., R. Co. *v.* Hopkins, 90 Ill. 316; Mitchell *v.* Illinois, etc., R. Co., 85 Ill. 566. See also Culberson, etc., Packing, etc., Co. *v.* Chicago, 111 Ill. 651.

Louisiana.— See Remy *v.* Municipality No. 2, 12 La. Ann. 500.

Maryland.— Tide Water Canal Co. *v.* Archer, 9 Gill & J. 479.

Massachusetts.— Parks *v.* Boston, 15 Pick. 198, holding that if the jury know of any fact they must disclose it and testify to it in open court.

Missouri.— Kansas City *v.* Street, 36 Mo. App. 666.

Ohio.— Israel *v.* Zanesville, etc., R. Co., 10 Ohio Dec. (Reprint) 219, 19 Cinc. L. Bul. 258.

Pennsylvania.—Gorgas *v.* Philadelphia, etc., R. Co., 144 Pa. St. 1, 22 Atl. 715; Hartman *v.* Reading, etc., R. Co., (1888) 13 Atl. 774; Pinneo *v.* Lackawanna, etc., R. Co., 43 Pa. St. 361; Hartman *v.* Pennsylvania Schuylkill Valley R. Co., 22 Wkly. Notes Cas. 84; Griffin *v.* Pennsylvania Schuylkill Valley R. Co., 2 Del. Co. 425.

United States.— Lehigh Valley Coal Co. *v.* Chicago, 26 Fed. 415. See also U. S. *v.* Seufert Bros. Co., 87 Fed. 35.

See 18 Cent. Dig. tit. "Eminent Domain," § 559.

Rule when part of jury not present.— If only a part of the jury have viewed the premises, the jurors who were present at the view may take into consideration and inform the other jurors of the result of their observations. If, however, upon any vital point those who have seen the land differ from those who have not, the latter need pay no attention to what is said by the former, but may find the facts from the testimony of the witnesses. Finn *v.* Providence Gas, etc., Co., 99 Pa. St. 631.

98. *Illinois.*— Peoria Gaslight, etc., Co. *v.* Peoria Terminal R. Co., 146 Ill. 372, 34 N. E. 550, 21 L. R. A. 373.

Kansas.— Chicago, etc., R. Co. *v.* Parsons, 51 Kan. 408, 32 Pac. 1083. See also Topeka *v.* Martineau, 42 Kan. 387, 22 Pac. 419, 5 L. R. A. 775.

Michigan.— Grand Rapids *v.* Perkins, 78 Mich. 93, 43 N. W. 1037.

Missouri.— Kansas City *v.* Hill, 80 Mo. 523.

Pennsylvania.— Hoffman *v.* Bloomsburg, etc., R. Co., 143 Pa. St. 503, 22 Atl. 823; Flower *v.* Baltimore, etc., R. Co., 132 Pa. St. 524, 19 Atl. 274. But see *In re* Antoinette St., 8 Phila. 461.

Washington.— Seattle, etc., R. Co. *v.* Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864.

Wisconsin.—Seefeld *v.* Chicago, etc., R. Co., 67 Wis. 96, 29 N. W. 904; Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364, 18 N. W. 328.

See 18 Cent. Dig. tit. "Eminent Domain," § 559.

Compare Kiernan *v.* Chicago, etc., R. Co., 23 Ill. 188, 14 N. E. 18 [*quoted* and *approved* in Guyer *v.* Davenport, etc., R. Co., 196 Ill. 370, 63 N. E. 732, and Chicago Gen. R. Co. *v.* Murray, 114 Ill. 259, 51 N. E. 245], holding that the result of a jury's personal view of the land over which a railroad is sought to be laid is evidence proper to be acted upon by them; and if they believe from the whole evidence that they have from such view arrived at a more accurate judgment as to the value of the

(VIII) *FINDINGS AND VERDICT.* When the findings which are to be incorporated in the verdict are prescribed by statute, the jury should be instructed as to such requirements and should be told that their verdict must comply therewith.[99] It is not necessary that the verdict should find that every step in the proceedings was taken as provided in the statute. It is to be presumed that all the statutory requirements have been complied with.[1] When the bill of exceptions contains no evidence every presumption will be indulged in favor of the correctness of the verdict.[2] It has been held that the verdict must be unanimous and that a verdict in writing which is not signed by all the jurors is a nullity.[3] The verdict need not be under seal.[4] Where special questions are submitted to the jury they should be answered in their verdict.[5] The verdict should describe the land which is the subject-matter of the proceeding.[6] The verdict must show specifically the amount of damages awarded,[7] or that no damages are awarded,[8] and should show the basis on which the damages are assessed.[9] Arbitrary and lumping methods should not be resorted to in arriving at the verdict.[10] The extent and duration of the interest taken should be stated.[11] In the absence of a statutory requirement to that

premises sought to be taken and of the damages than that shown by the evidence in open court, they may upon the evidence rightfully fix the value of the land taken and the damages at the amount so approved by their judgment formed from the personal examination, even though it differed from the amount testified to, and the weight of testimony given by witnesses in open court.

The verdict must be within the limits of the evidence. Atchison, etc., R. Co. *v.* Schneider, 127 Ill. 144, 20 N. E. 41, 2 L. R. A. 422; Bigelow *v.* Draper, 6 N. D. 152, 69 N. W. 570.

99. Denver, etc., R. Co. *v.* Stark, 16 Colo. 291, 26 Pac. 779. The return of the inquest of the jury must show that the jury was charged as the law required. Bibb *v.* Montjoy, 2 Bibb (Ky.) 1.

1. Ætna Mills *v.* Waltham, 126 Mass. 422.

2. Peoria, etc., R. Co. *v.* Barnum, 107 Ill. 160.

3. Chicago, etc., R. Co. *v.* Sanford, 23 Mich. 418. But see Mississippi R. Co. *v.* McDonald, 12 Heisk. (Tenn.) 54.

4. Georgetown Turnpike Road Co. *v.* Custis, 10 Fed. Cas. No. 5,348, 1 Cranch C. C. 585.

5. Cummings *v.* Peters, 56 Cal. 593; Ottawa, etc., R. Co. *v.* Adolph, 41 Kan. 600, 21 Pac. 643. See also Grant *v.* Hyde Park, 67 Ohio St. 166, 65 N. E. 891. Whether a jury should be required to return a special finding rests in the discretion of the court. Colorado Fuel, etc., Co. *v.* Four Mile R. Co., 29 Colo. 90, 66 Pac. 902.

If there is no statutory provision for the submission of special questions to the jury, error cannot be predicated upon their not answering such questions. Toledo, etc., R. Co. *v.* Campau, 83 Mich. 31, 46 N. W. 1026.

6. *Colorado.*— Denver, etc., R. Co. *v.* Stark, 16 Colo. 291, 26 Pac. 779; Norris *v.* Pueblo, 12 Colo. App. 290, 55 Pac. 747.

Illinois.— Law *v.* Chicago Sanitary Dist., 197 Ill. 523, 64 N. E. 536; Gage *v.* Chicago, 146 Ill. 499, 34 N. E. 1034.

Kentucky.— Kentucky, etc., R. Co. *v.* Harrison, 4 Ky. L. Rep. 448.

Michigan.— See Bay City Belt-Line R. Co. *v.* Hitchcock, 90 Mich. 533, 51 N. W. 808.

Pennsylvania.— Pennsylvania R. Co. *v.* Bruner, 55 Pa. St. 318. *Compare* Philadelphia, etc., R. Co. *v.* Trimble, 4 Whart. 47.

Texas.— See Kopechy *v.* Daniels, 9 Tex. Civ. App. 305, 29 S. W. 533.

United States.— Chesapeake, etc., Canal Co. *v.* Union Bank, 5 Fed. Cas. No. 2,653, 4 Cranch C. C. 75.

See 18 Cent. Dig. tit. "Eminent Domain," § 568.

Description by metes and bounds is not necessary. Tide Water Canal Co. *v.* Archer, 9 Gill & J. (Md.) 479.

Failure of verdict to describe will not be ground for reversal, if from the record a judgment can be entered sufficiently describing the land. St. Paul, etc., R. Co. *v.* Matthews, 16 Minn. 341.

Sufficiency of description.— A reference to the description of the land in the warrant (Chesapeake, etc., Canal Co. *v.* Binney, 5 Fed. Cas. No. 2,645, 4 Cranch C. C. 68) or petition (Suver *v.* Chicago, etc., R. Co., 123 Ill. 293, 14 N. E. 12. See also Law *v.* Chicago Sanitary Dist., 197 Ill. 523, 64 N. E. 536) is sufficient.

7. Illinois Western Extension R. Co. *v.* Mayrand, 93 Ill. 591; Bate *v.* Philadelphia, etc., R. Co., 1 Montg. Co. Rep. (Pa.) 47. See also Gammell *v.* Potter, 2 Iowa 562; Oregon R. Co. *v.* Bridwell, 11 Oreg. 282, 3 Pac. 684; Coleman *v.* Moody, 4 Hen. & M. (Va.) 1.

8. Burden *v.* Stein, 25 Ala. 455; Chace *v.* Fall River, 2 Allen (Mass.) 533. See also Com. *v.* Middlesex County, 9 Mass. 388. A verdict that a party is entitled to damages in the sum of $—— is a sufficient finding that he is entitled to no damages. Forsyth *v.* Wilcox, 143 Ind. 144, 41 N. E. 371.

9. St. Louis, etc., R. Co. *v.* Mitchell, 47 Ill. 165; Robinson *v.* Robinson, 1 Duv. (Ky.) 162.

10. Kansas City, etc., R. Co. *v.* Story, 96 Mo. 611, 10 S. W. 203.

11. Kentucky, etc., R. Co. *v.* Harrison, 4 Ky. L. Rep. 448; Chesapeake, etc., Canal

effect,[12] it is not necessary that the jury should itemize the damages.[13] The jury are not required to state separately the value of the land taken and the damages to that not taken,[14] unless it is so provided by statute.[15] It is not necessary that the sum allowed for improvements should be stated separately from that allowed for the land.[16] It is sometimes provided by statute that the sum of the damages and the sum of the benefits must be stated separately.[17] After the verdict has been signed and delivered the jury has no further control over it and cannot afterward act judicially in reference to it.[18] A verdict which is void for uncertainty[19] or insufficient as to the description of the land taken[20] cannot be amended. The verdict of a jury in a condemnation proceeding cannot be amended after the jury has been discharged and the term at which the verdict was rendered has expired.[21] Mandamus will lie to compel the acceptance by municipal authorities of a verdict of a jury which has estimated the damages occasioned by the location of a highway, if such verdict is rejected improperly and without good cause.[22] Officials who preside over an assessment of damages and whose duty it is to make a proper delivery of the verdict may be compelled to do so by mandamus.[23]

(IX) *NOTICE OF PROCEEDINGS.* The parties interested are entitled to due notice of the empaneling of the jury and of the subsequent proceedings before them.[24]

Co. *v.* Union Bank, 5 Fed. Cas. No. 2,653, 4 Cranch C. C. 75.

12. See Grand Rapids *v.* Bennett, 106 Mich. 528, 64 N. W. 585.

13. *Kansas.*— Le Roy, etc., R. Co. *v.* Hollis, 39 Kan. 646, 18 Pac. 947; Le Roy, etc., R. Co. *v.* Crum, 39 Kan. 642, 18 Pac. 944; Le Roy, etc., R. Co. *v.* Hawk, 39 Kan. 638, 18 Pac. 943, 7 Am. St. Rep. 566. See also Missouri, etc., R. Co. *v.* Dulaney, 38 Kan. 246, 16 Pac. 343.

Maine.— See Bradstreet *v.* Erskine, 50 Me. 407.

Massachusetts.— Fitchburg R. Co. *v.* Boston, etc., R. Co., 3 Cush. 58, holding that they may do so if they deem proper.

Michigan.— Grand Rapids *v.* Bennett, 106 Mich. 328, 64 N. W. 585; Michigan Air-Line R. Co. *v.* Barnes, 44 Mich. 222, 66 N. W. 651.

Pennsylvania.— Delaware, etc., R. Co. *v.* Burson, 61 Pa. St. 396; Western Pennsylvania R. Co. *v.* Hill, 56 Pa. St. 460; Lodge *v.* Frankford, etc., R. Co., 9 Phila. 543. See also Kossler *v.* Pittsburgh, etc., R. Co., 208 Pa. St. 50, 57 Atl. 66, holding that in condemnation proceedings the jury cannot allow damages for distinct items, and reach the total amount by adding them together.

United States.— See Chesapeake, etc., Canal Co. *v.* Union Bank, 5 Fed. Cas. No. 2,653, 4 Cranch C. C. 75.

Compare Chesapeake, etc., Canal Co. *v.* Hoye, 2 Gratt. (Va.) 511, holding that under the charter of the Chesapeake & Ohio Canal Company, it is necessary that the verdict should state specially and separately the value of the land which is condemned in perpetuity and the quantity and quality of that which is condemned for temporary purposes, and should also state separately the damages estimated on each separate source of damage.

Assessing damages to different subdivisions. — It has been held that there is no objection to arriving at the amount of damages to the whole property by estimating the damage to different subdivisions of it, whether such portion be divided from the rest by a railroad or a highway, or by its nature, as if one portion be upland, another pasture, and another plowland. Colvill *v.* St. Paul, etc., R. Co., 19 Minn. 240.

14. Wabash, etc., R. Co. *v.* McDougall, 126 Ill. 111, 18 N. E. 291, 9 Am. St. Rep. 539, 1 L. R. A. 207; Packard *v.* Bergen Neck R. Co., 54 N. J. L. 553, 25 Atl. 506; *In re* Devine, 29 Leg. Int. (Pa.) 220. See also Asher *v.* Louisville, etc., R. Co., 87 Ky. 391, 8 S. W. 854, 10 Ky. L. Rep. 185, holding that these items may be separated.

15. Denver, etc., R. Co. *v.* Stark, 16 Colo. 291, 26 Pac. 779.

16. Tehama County *v.* Bryan, 68 Cal. 57, 8 Pac. 673.

17. Butte County *v.* Boydston, 64 Cal. 110, 29 Pac. 511; Denver, etc., R. Co. *v.* Griffith, 17 Colo. 598, 31 Pac. 171; Denver, etc., R. Co. *v.* Stark, 16 Colo. 291, 26 Pac. 779; Norris *v.* Pueblo, 12 Colo. App. 290, 55 Pac. 747; Detroit *v.* More, 76 Mich. 515, 43 N. W. 600; Duffield *v.* Detroit, 15 Mich. 474.

Under the Oregon statute if the verdict shows the sum of the difference between the damages and the benefits it is sufficient. Portland *v.* Lee Sam, 7 Oreg. 397; Portland *v.* Kamm, 5 Oreg. 362.

18. West *v.* West, etc., R. Co., 61 Miss. 536.

19. Connecticut River R. Co. *v.* Clapp, 1 Cush. (Mass.) 559.

20. Tide Water Canal Co. *v.* Archer, 9 Gill & J. (Md.) 479.

21. Ayer *v.* Chicago, 149 Ill. 262, 37 N. E. 57.

22. Com. *v.* Norfolk County, 5 Mass. 435.

23. *In re* Williamsburgh, 1 Barb. (N. Y.) 34.

24. Barre Turnpike Corp. *v.* Appleton, 2 Pick. (Mass.) 430; Anderson *v.* St. Louis, 47 Mo. 479; People *v.* Tallman, 36 Barb. (N. Y.) 222; Muire *v.* Falconer, 10 Gratt. (Va.) 12;

b. By Commissioners or Arbitrators — (I) *In General.* In the absence of a constitutional provision forbidding it, the legislature may provide that the compensation may be assessed by commissioners[25] or arbitrators.[26]

(II) *Appointment.* The power of appointing commissioners is sometimes delegated to courts of record,[27] but does not exist independently of statute.[28] The power is sometimes delegated to justices of the peace,[29] to sheriffs,[30] and municipal boards.[31] It is sometimes provided that they shall be selected by the parties to

Baltimore, etc., R. Co. *v.* Van Ness, 2 Fed. Cas. No. 830, 4 Cranch C. C. 595; Chesapeake, etc., Canal Co. *v.* Union Bank, 5 Fed. Cas. No. 2,653, 4 Cranch C. C. 75.

25. *Maine.*— Eastman *v.* Stowe, 37 Me. 86.

Missouri.— Kansas City Suburban Belt R. Co. *v.* Kansas City, etc., R. Co., 118 Mo. 599, 24 S. W. 478.

Montana.— Butte, etc., R. Co. *v.* Montana Union R. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298.

New Jersey.— Doughty *v.* Somerville, etc., R. Co., 21 N. J. L. 442; Ross *v.* Elizabethtown, etc., R. Co., 20 N. J. L. 230.

New York.— *In re* Middletown, 82 N. Y. 196; Clark *v.* Miller, 54 N. Y. 528 [*affirming* 42 Barb. 255]; Matter of New York, 52 N. Y. App. Div. 478, 67 N. Y. Suppl. 77; Matter of Folts St., 18 N. Y. App. Div. 568, 46 N. Y. Suppl. 43; Schneider *v.* Rochester, 90 Hun 171, 35 N. Y. Suppl. 786; Hanlon *v.* Westchester County, 57 Barb. 383; *In re* Hamilton Ave., 14 Barb. 405; People *v.* Ulster County, 3 Barb. 332; Menges *v.* Albany, 47 How. Pr. 244.

North Carolina.— See Austin *v.* Helms, 65 N. C. 560.

Pennsylvania.— *In re* Brooklyn St., 118 Pa. St. 640, 12 Atl. 664, 4 Am. St. Rep. 618; *In re* Magnolia Ave., 117 Pa. St. 56, 11 Atl. 405; Pittsburgh Nat. Bank of Commerce *v.* Shoenberger, 111 Pa. St. 95, 2 Atl. 190; *In re* Baldwin, etc., Road, 3 Grant 62. See also *In re* Fleetwood St., 8 Pa. Co. Ct. 210.

Texas.— Sullivan *v.* Missouri, etc., R. Co., 29 Tex. Civ. App. 429, 68 S. W. 745.

Wisconsin.— Powers *v.* Bears, 12 Wis. 213, 78 Am. Dec. 733.

United States.— Gage *v.* Judson, 111 Fed. 350.

See 18 Cent. Dig. tit. "Eminent Domain," § 549.

Number of commissioners fixed by law.— Shively *v.* Lankford, 174 Mo. 535, 74 S. W. 835; North Missouri R. Co. *v.* Gott, 25 Mo. 540; Kramer *v.* Cleveland, etc., R. Co., 5 Ohio St. 140; Pittsburgh Nat. Bank of Commerce *v.* Shoenberger, 111 Pa. St. 95, 2 Atl. 190.

26. McMahon *v.* Cincinnati, etc., Short-Line R. Co., 5 Ind. 413; Centreville, etc., Turnpike Co. *v.* Jarrett, 4 Ind. 213; Wood *v.* Auburn, etc., R. Co., 8 N. Y. 160; La Crosse, etc., R. Co. *v.* Seeger, 4 Wis. 268.

Submission by municipality.— An agreement by which a city undertakes with owners of land taken for a street to submit the assessment of damages and betterments to arbitration is *ultra vires* and void. Somerville *v.* Dickerman, 127 Mass. 272 [*distinguishing* Boston *v.* Brazer, 11 Mass. 447]. See also Paret *v.* Bayonne, 40 N. J. L. 333. *Compare* Tunbridge *v.* Tarbell, 19 Vt. 453.

A United States district attorney has no authority to submit to arbitration in a proceeding brought to condemn land for a government building. Gage *v.* Judson, 111 Fed. 350.

Arbitration under general statute.— A submission may be made under the general provisions of a statute allowing a submission to arbitrators in any pending suit. Marion *v.* Ganby, 68 Iowa 142, 26 N. W. 40; Miller *v.* E. & W. V. R. Co., 2 C. Pl. (Pa.) 10. But see Eastman *v.* Stowe, 37 Me. 86.

27. *Minnesota.*— Warren *v.* First Div. St. Paul, etc., R. Co., 18 Minn. 384; Wilkin *v.* First Div. St. Paul, etc., R. Co., 16 Minn. 271.

New Jersey.— Readington Tp. *v.* Dilley, 24 N. J. L. 209.

New York.— Menges *v.* Albany, 56 N. Y. 374.

Ohio.— Gregory *v.* Cleveland, etc., R. Co., 4 Ohio St. 675.

West Virginia.— Herron *v.* Carson, 26 W. Va. 62.

In Wisconsin under a statute providing that findings of facts and conclusions of law shall be filed upon the trial of a question of fact by the court, it is not necessary that the court should state its findings of fact and its conclusions of law when making an order appointing commissioners. Gill *v.* Milwaukee, etc., R. Co., 76 Wis. 293, 45 N. W. 23.

Remedy not lost because judge fails to appoint within the prescribed time. State *v.* Miller, 23 N. J. L. 383.

28. Penniman *v.* St. Johnsbury, 54 Vt. 306.

Consent of the owner to the appointment of commissioners does not give power to the court in a case which does not fall within the statute. State *v.* New York, etc., Telephone Co., 51 N. J. L. 83, 16 Atl. 188.

Commissioners appointed by agreement.— Where commissioners appointed by the court are not appointed pursuant to a statute, but under an agreement of the parties, they constitute a judicial body controlled by the same rules which control the conduct of juries and other bodies of like character. Pueblo *v.* Shutt Invest. Co., 28 Colo. 524, 67 Pac. 162.

29. Crane *v.* Camp, 12 Conn. 464; Columbia, etc., Bridge Co. *v.* Geise, 34 N. J. L. 268.

30. Norfolk, etc., R. Co. *v.* Warren, 92 N. C. 62.

31. Bass *v.* Ft. Wayne, 121 Ind. 389, 23 N. E. 259. See also *In re* Franklin St., 14 York Leg. Rec. (Pa.) 115. Under Wis. Rev. St. § 1237, town supervisors have no power

the proceeding.[32] When commissioners are to be appointed by a judge or other person, the parties interested should be given an opportunity to be heard as to their selection.[33] The application for the appointment of commissioners must conform to the statute,[34] and it must be shown that all the prerequisites have been complied with.[35] The appointment will then be made as a matter of course.[36] The order appointing commissioners should follow the statute in defining their powers and duties.[37] The appointment need not be in writing unless the statute so requires.[38] It is within the power of the court for good cause to revoke or set aside the appointment of commissioners,[39] and it also has power to appoint

to appoint commissioners to determine the damage occasioned by constructing a ditch for the preservation of a highway, except upon application by the owner or occupant of the land entered upon or used. State *v.* Leon, 68 Wis. 502, 32 N. W. 228.

32. Columbia, etc., Bridge Co. *v.* Geise, 34 N. J. L. 268; Troy, etc., R. Co. *v.* Cleveland, 6 How. Pr. (N. Y.) 238.

Selection of umpire.— A statute of Georgia provided that in a case of street opening the mayor should select two freeholders, the lot owners two, and, after they had taken an oath to faithfully and impartially perform their duties, they should select a fifth to act as umpire. It was held that the selection of such an umpire before the others had taken the oath was not lawful, and the board thus constituted could take no valid action. Austell *v.* Atlanta, 100 Ga. 182, 27 S. E. 983.

33. Abney *v.* Clark, 87 Iowa 727, 55 N. W. 6; Union Pac. R. Co. *v.* Leavenworth, etc., R. Co., 29 Fed. 728. See also *In re* New York, 1 Cai. (N. Y.) 507. But see Weir *v.* St. Paul, etc., R. Co., 18 Minn. 155 (holding that a statute is not unconstitutional because it does not provide for allowing the landowners to be heard upon the appointment of the commissioners); Menges *v.* Albany, 56 N. Y. 374 [*approved* in Matter of New York, 20 Misc. (N. Y.) 520, 46 N. Y. Suppl. 640] (holding that the action of the court must be independent and untrammeled).

Time of making decision.— If the parties appear before the judge at the time and place designated, and are fully heard on the matter of the appointment, the judge may take time for his decision, and an order of appointment subsequently made and signed by him is valid. Lehigh Valley R. Co. *v.* Dover, etc., R. Co., 43 N. J. L. 528.

Notice.— It is not necessary that a notice as to the time and place of the appointment of commissioners should contain a description of the land to be taken. Doughty *v.* Somerville, etc., R. Co., 21 N. J. L. 442.

By whom sufficiency determined.— The sufficiency of the notice is a question for the tribunal to which the application for appointment of commissioners was made. Coster *v.* New Jersey R., etc., Co., 23 N. J. L. 227.

Time when objection may be made.—Where the landowners have no notice of the application for the appointment of viewers, the objection to the preliminary proceedings and to the petition are in time if made after the report of viewers is returned. O'Hara *v.* Pennsylvania R. Co., 25 Pa. St. 445.

34. West Jersey, etc., R. Co. *v.* Ocean City R. Co., 61 N. J. L. 506, 39 Atl. 1024; *In re* Quigley, 3 Penr. & W. (Pa.) 139; Moore *v.* Superior, etc., R. Co., 34 Wis. 173.

Necessity for written application.— In Indiana the application need not be in writing (Swinney *v.* Ft. Wayne, etc., R. Co., 59 Ind. 205); but in New Jersey it must (Vail *v.* Morris, etc., R. Co., 21 N. J. L. 189).

35. Coster *v.* New Jersey R., etc., Co., 23 N. J. L. 227; Vail *v.* Morris, etc., R. Co., 21 N. J. L. 189; *In re* Cleveland, etc., R. Co., 2 Pittsb. Leg. J. (Pa.) 348. Where an act authorizing a city to condemn lands for street purposes required that the common council should declare by resolution, adopted by a two-thirds vote, that the city has determined to take such lands, it was held that unless it appeared that the resolution was adopted by a two-thirds vote the court had no jurisdiction to appoint commissioners. *In re* Buffalo, 78 N. Y. 362.

36. Ætna Mills *v.* Waltham, 126 Mass. 422; West Jersey, etc., R. Co. *v.* Ocean City R. Co., 61 N. J. L. 506, 39 Atl. 1024; Hays *v.* Risher, 32 Pa. St. 169; Graff's Case, 23 Pa. Co. Ct. 349. On an application for the appointment of commissioners as a general rule the only inquiry that will be made is whether the applicant has the *prima facie* right. Morris, etc., R. Co. *v.* Hudson Tunnel R. Co., 38 N. J. L. 548; Delaware, etc., R. Co. *v.* Hudson Tunnel R. Co., 38 N. J. L. 17.

If the court finds that the land sustains no injury for which the owner would be entitled to compensation, the application should be denied, since the appointment would be useless. *In re* Grade Crossing Com'rs, 166 N. Y. 69, 59 N. E. 706.

Mandamus.— The proper remedy for the refusal to appoint the commissioners upon a proper application being made therefor is mandamus. Illinois Cent. R. Co. *v.* Rucker, 14 Ill. 353; Western Union R. Co. *v.* Dickson, 30 Wis. 389.

37. Doughty *v.* Somerville, etc., R. Co., 21 N. J. L. 442.

38. Dallas, etc., R. Co. *v.* Day, 3 Tex. Civ. App. 353, 22 S. W. 538. *Compare* Swinney *v.* Ft. Wayne, etc., R. Co., 59 Ind. 205.

39. *In re* Buffalo, 78 N. Y. 362; *In re* New York, etc., Midland R. Co., 40 How. Pr. (N. Y.) 335. See also *In re* New York, etc., R. Co., 102 N. Y. 704, 2 N. E. 559 [*reversing* 40 Hun 130]. *Compare In re* New York, 1 Cai. (N. Y.) 507.

Failure to name true owner.— On a certiorari, if it appear that the petitioning company

others.[40] If commissioners die,[41] or refuse to serve,[42] or cannot agree upon the damages, others may be appointed.[43] The same persons may be appointed to act on several distinct applications in connection with the same improvement.[44] It is too late to raise the question of the legality of the appointment of a commissioner after the report of the commissioners has been confirmed by a competent tribunal.[45]

(III) *QUALIFICATIONS.* All provisions as to the qualifications of commissioners must be strictly observed.[46] The commissioners should be fair and impartial men, disinterested, and indifferently chosen and appointed between the parties.[47] That

knew the name of the owner of the land and in its application for appointment of commissioners did not give the name of such owner, but named as owner another person known by it not to have any interest in the land, the order appointing commissioners will be set aside, at the instance of the real owner and the person named as owner. Chambers *v.* Carteret, etc., R. Co., 54 N. J. L. 85, 22 Atl. 995.

40. Vail *v.* Morris, etc., R. Co., 21 N. J. L. 189.

41. State *v.* National Docks, etc., Connecting R. Co., 54 N. J. L. 180, 23 Atl. 686.

42. Cincinnati, etc., R. Co. *v.* Sundry Persons, 1 Ohio Dec. (Reprint) 326, 7 West. L. J. 265; Spring Grove Cemetery *v.* Cincinnati, etc., R. Co., 1 Ohio Dec. (Reprint) 316, 7 West. L. J. 251.

Notice.— If one of the commissioners fails to accept the appointment and another person is chosen in his place, the parties interested should have notice of the new appointment. State *v.* Plainfield, 41 N. J. L. 138.

43. Hay *v.* U. S. Pipe Line, 8 Kulp (Pa.) 112.

44. Readington Tp. *v.* Dilley, 24 N. J. L. 209.

45. Astor *v.* New York, 62 N. Y. 588; Morris *v.* New York, 55 Hun (N. Y.) 476, 8 N. Y. Suppl. 763.

46. Fore *v.* Hoke, 48 Mo. App. 254.

Application of rule.— Where a statute requires that the commissioners shall belong to different political parties, this requirement must be observed. Loucheim *v.* Hemsley, 59 N. J. L. 149, 35 Atl. 795.

47. *California.*— Reclamation Dist. No. 542 *v.* Turner, 104 Cal. 334, 37 Pac. 1038.

Illinois.—Rock Island, etc., R. Co. *v.* Lynch, 23 Ill. 645.

Indiana.— See McMahon *v.* Cincinnati, etc., Short Line R. Co., 5 Ind. 413.

Mississippi.— Madden *v.* Louisville, etc., R. Co., 66 Miss. 258, 6 So. 181; White *v.* Memphis, etc., R. Co., 64 Miss. 566, 1 So. 730.

New Jersey.— State *v.* Jersey City, 25 N. J. L. 309.

New York.— *In re* Buffalo Terminal R. Co., 16 N. Y. App. Div. 515, 44 N. Y. Suppl. 1012; *In re* Rochester, 10 N. Y. Suppl. 436.

Wisconsin.— Powers *v.* Bears, 12 Wis. 213, 78 Am. Dec. 733.

See 18 Cent. Dig. tit "Eminent Domain," § 581.

Who are disinterested.— Where the statute makes the viewers of a proposed road merely advisory to the county commissioners, and the owner may appeal to the district court and have there a trial by jury, the fact that one of the viewers was a petitioner for the opening of the road does not affect the validity of the proceedings. Crowley *v.* Gallatin County Com'rs, 14 Mont. 292, 36 Pac. 313. So one is not disqualified as a commissioner because he is the brother-in-law of the member of a firm who owns land affected by the proceedings (*In re* Ogden St., 63 Hun (N. Y.) 188, 17 N. Y. Suppl. 744, 22 N. Y. Civ. Proc. 12 [*reversing* 16 N. Y. Suppl. 464, 21 N. Y. Civ. Proc. 201]; or because he is a trustee for infant children who owned a small piece of the land taken (*In re* South Seventh St., 48 Barb. (N. Y.) 12); or because he was formerly a stock-holder in the petitioning company (*In re* Brooklyn El. R. Co., 32 N. Y. App. Div. 221, 52 N. Y. Suppl. 997); or because he was formerly in the employ of the city which is seeking to condemn the land, and that he is now sometimes employed by it (Matter of New York, 20 Misc. (N. Y.) 520, 46 N. Y. Suppl. 640). So it has been held that a commissioner appointed by special statute to award damages for property taken in laying out a highway is not rendered incompetent from the fact of his owning land which has been taken for the improvement. A commissioner is a quasi-judicial officer only and is not within the application of the maxim precluding a person from acting as judge in his own case (Matter of Southern Boulevard, 3 Abb. Pr. N. S. (N. Y.) 447); and it is no objection that a commissioner is in favor of the improvement, advocates having it made, and that he will in common with the public generally derive some indirect benefit from it (State *v.* Hennepin County Dist. Ct., 50 Minn. 14, 52 N. W. 222). A statute requiring that the commissioners shall be disinterested freeholders of the city means that they shall be freeholders having no particular interest in the property to be affected by the improvement, and not that they shall be wholly free from any interest as taxpayers. Bridgeport *v.* Giddings, 43 Conn. 304.

Who are considered disqualified because of interest. Persons having pecuniary interests in the land affected by the proceedings (Kings Lake Drainage, etc., Dist. *v.* Jamison, 176 Mo. 557, 75 S. W. 679); the father-in-law of a person financially interested (Bradley *v.* Frankfort, 99 Ind. 417); one who has a sister-in-law or niece who has adjacent land (High *v.* Big Creek Ditching Assoc., 44 Ind. 356); or one who has formerly par-

a person has expressed an opinion on the question of the damages is ordinarily a disqualification.[48] It is usually provided that commissioners shall be freeholders.[49] It should appear in the record of the proceedings that the commissioners possessed the prescribed qualifications.[50] A party having knowledge of the disqualification of a commissioner must object to his acting as such when informed of such disqualification or else he will thereafter be considered as having waived the same.[51]

(IV) *OATH.* Commissioners must usually be sworn,[52] and when the form of

ticipated in appraising the value of the identical property as a member of a real estate board (State *v.* Hennepin County Dist. Ct., 87 Minn. 268, 91 N. W. 1111); a stock-holder in a corporation which is a party to a condemnation proceeding (Rock Island, etc., R. Co. *v.* Lynch, 23 Ill. 645. *Compare* Stacey *v.* Beloit, etc., R. Co., 16 Wis. 635); one who after being appointed a commissioner and entering upon his duties was retained by one of the parties to the proceeding as attorney, to defend a suit against him, even though the attorney for the other party has known the fact, and did not complain until the report was filed (Douglass *v.* Byrnes, 63 Fed. 16); so a resident of a municipality seeking to condemn land although not a taxpayer is disqualified (*In re* Rochester, 10 N. Y. Suppl. 436. See also Haverhill Bridge *v.* Essex County, 103 Mass. 120, 4 Am. Rep. 518); unless the legislature has provided that the commissioners shall be residents of the municipality in which the land lies which is taken for municipal purposes (Bridgeport *v.* Giddings, 43 Conn. 304; Minneapolis *v.* Wilkin, 30 Minn. 140, 14 N. W. 581; Loucheim *v.* Hemsley, 59 N. J. L. 149, 35 Atl. 795; Green *v.* Perth Amboy, 57 N. J. L. 351, 31 Atl. 980).

48. Readington Tp. *v.* Dilley, 24 N. J. L. 209; *In re* Albany St., 6 Abb. Pr. (N. Y.) 273. In a Pennsylvania case it is held that, although a viewer expressed an opinion in another somewhat similar case that no man ought to have a cent of damages on account of the railroad passing over his land, this does not render him incompetent to serve. Gingrich *v.* Harrisburg, etc., R. Co., 1 Pearson 74.

49. *Connecticut.*— Bridgeport *v.* Giddings, 43 Conn. 304.

Indiana.— Louisville, etc., R. Co. *v.* Dryden, 39 Ind. 393.

Minnesota.— Minneapolis *v.* Wilkin, 30 Minn. 140, 14 N. W. 581.

Mississippi.— White *v.* Memphis, etc., R. Co., 64 Miss. 566, 1 So. 730; Cage *v.* Trager, 60 Miss. 563.

Missouri.— Fore *v.* Hoke, 48 Mo. App. 254.

New Jersey.— Readington Tp. *v.* Dilley, 24 N. J. L. 209.

Pennsylvania.— Mulholland *v.* Rush Brook Water Co., 7 Lack. Leg. N. 1.

West Virginia.— Charleston, etc., Bridge Co. *v.* Comstock, 36 W. Va. 263, 15 S. E. 69; Doddridge County Sup'rs *v.* Stout, 9 W. Va. 703.

Wisconsin.— State *v.* Wilson, 17 Wis. 687.

See 18 Cent. Dig. tit. "Eminent Domain," § 581.

Although the constitution provides for assessment by freeholders a statute is not void because it provides for an assessment by householders, since it may be enforced by requiring the commissioners to be freeholders. Shively *v.* Lankford, 174 Mo. 535, 74 S. W. 835.

50. Fore *v.* Hope, 48 Mo. App. 254; Loucheim *v.* Hemsley, 59 N. J. L. 149, 39 Atl. 795; Green *v.* Perth Amboy, 57 N. J. L. 351, 31 Atl. 980; Harris *v.* Jersey City, 38 N. J. L. 85; Bramhall *v.* Bayonne, 35 N. J. L. 476. *Contra*, Chicago, etc., R. Co. *v.* Chamberlane, 84 Ill. 333; American Cannel Coal Co. *v.* Huntington, etc., R. Co., 130 Ind. 98, 29 N. E. 566, qualifications presumed.

The affidavits of the viewers cannot be resorted to in order to supply defects in the record. Northern Pac. Terminal Co. *v.* Portland, 14 Oreg. 24, 13 Pac. 705.

In Mississippi the rule is that if the proceeding is before a ministerial officer, it must appear of record that the commissioners were duly qualified. Madden *v.* Louisville, etc., R. Co., 66 Miss. 258, 6 So. 181; White *v.* Memphis, etc., Traction Co., 64 Miss. 550, 1 So. 730; Board of Levee Com'rs *v.* Allen, 60 Miss. 93. But it is otherwise where the proceeding is before a judicial tribunal. Cage *v.* Trager, 60 Miss. 563.

51. *Indiana.*— Bradley *v.* Frankfort, 99 Ind. 417.

Minnesota.— State *v.* Hennepin County Dist. Ct., 50 Minn. 14, 52 N. W. 222.

New Hampshire.— Crowell *v.* Londonderry, 63 N. H. 42.

New York.— Matter of Gilroy, 85 Hun 424, 32 N. Y. Suppl. 891; *In re* New York, etc., R. Co., 35 Hun 575; Matter of Summit Ave., 35 Misc. 59, 71 N. Y. Suppl. 207.

Pennsylvania.— Gingrich *v.* Harrisburg, etc., R. Co., 1 Pearson 74; Mulholland *v.* Rush Brook Water Co., 7 Lack. Leg. N. 1.

West Virginia.— Doddridge County Sup'rs *v.* Stout, 9 W. Va. 703.

See 18 Cent. Dig. tit. "Eminent Domain," § 581.

52. Keenan *v.* Dallas County Com'rs Ct., 26 Ala. 568; Ohio, etc., R. Co. *v.* Barker, 134 Ill. 470, 25 N. E. 785; Matter of Nicetown Lane, 11 Phila. (Pa.) 377; Dallas, etc., R. Co. *v.* Day, 3 Tex. Civ. App. 353, 22 S. W. 538.

Where a statute does not require commissioners to be sworn it is not necessary. Miller *v.* Craig, 11 N. J. Eq. 175.

Time for taking oath.— In Cory *v.* Chicago, etc., R. Co., 100 Mo. 282, 13 S. W. 346, it was decided that it is not requisite that the oath be taken before commissioners enter

the oath is prescribed[53] it must be substantially followed.[54] It has been held that the report must show that the commissioners were properly sworn,[55] and there is a decision that the form of oath prescribed must be fully set out and that a recital in the return that they were duly sworn before acting is insufficient.[56]

(v) *Powers.* Commissioners have no powers other than those conferred by the statute under which they are proceeding.[57] When commissioners make and file their report all their powers and functions are ended, unless the court on a proper application refers the matter back to them for further action.[58]

(vi) *Notice of Time of Meeting and of Filing Report.* It is essential to the validity of the proceedings that a notice of the time and place when and where the commissioners will meet to view the property and assess the damages shall be given to the parties interested.[59] The court appointing the commissioners

upon their duties, if their affidavit is attached to their return. But see *In re* Cambria St., 75 Pa. St. 357, holding that the rule in Pennsylvania is that they must be sworn before they view the premises.

By whom sworn.— A justice of the peace who has removed from the district for which he was elected thereby vacates his office and cannot administer the oath. *In re* Clinton Tp. Road, 3 Pa. Co. Ct. 170; *In re* East Penn Tp. Road, 2 Pa. Co. Ct. 453. Although a statute authorizes the viewers to administer the oath to each other, one viewer cannot swear himself, nor can he authorize another person, who is not a viewer, to swear him. *In re* Clinton Tp. Road, 3 Pa. Co. Ct. 170.

53. Bohlman *v.* Green Bay, etc., R. Co., 40 Wis. 157.

Proper form when oath not prescribed.— Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170.

54. Wilkinson *v.* Trenton, 35 N. J. L. 485; Matter of Gilroy, 85 Hun (N. Y.) 424, 32 N. Y. Suppl. 891.

Oath held sufficient under statute.— Under a statute requiring viewers to make oath to perform their duties impartially, and according to the best of their judgment, it was held that an oath binding them "to the faithful discharge of their duties" was sufficient. *In re* Cambria St., 75 Pa. St. 357. *Compare* Matter of Nicetown Lane, 11 Phila. (Pa.) 377.

55. Matter of Nicetown Lane, 11 Phila. (Pa.) 377. But see Dallas, etc., R. Co. *v.* Day, 3 Tex. Civ. App. 353, 22 S. W. 538 (holding that if the statute does not require the oath to be in writing parol evidence is admissible to show that the commissioners were sworn); Sutter County *v.* McGrill, 130 Cal. 124, 62 Pac. 412 (holding that in an action brought by a county to condemn lands for a highway, the burden of proof is on the owner of the land to show that the jurors were not duly sworn).

56. Keenan *v.* Dallas County, 26 Ala. 567. But see Hannibal, etc., R. Co. *v.* Morton, 27 Mo. 317, holding that it will be presumed that the oath was in proper form and duly administered.

57. Wabash R. Co. *v.* Fort Wayne, etc., Traction Co., 161 Ind. 295, 67 N. E. 674; *In re* Hamilton Ave., 14 Barb. (N. Y.) 405; Penniman *v.* St. Johnsbury, 54 Vt. 306. See also Bennett *v.* Boyle, 40 Barb. (N. Y.) 551; Boston, etc., R. Co. *v.* Troy, etc., R. Co., 58 How. Pr. (N. Y.) 167; Rutland-Canadian R. Co. *v.* Central Vermont R. Co., 72 Vt. 128, 47 Atl. 399. Commissioners appointed in one county have no power to assess damages to lands lying in another county. Pendleton, etc., Turnpike Co. *v.* Barnard, 40 Ind. 146, construing Indiana act of March 11, 1867.

58. *In re* New York, etc., R. Co., 35 Hun (N. Y.) 232.

Powers not exhausted by void appraisal.— Appraisers appointed to assess damages for the location of a railway made their assessment when only the center line of the road had been designated, and before its width had been defined. The center line was subsequently relocated by the company, and a road six rods wide was staked out, whereupon the appraisers reassessed the damages. It was held that as the first appraisal was void the appraisers had not thereby exhausted their powers. Williams *v.* Hartford, etc., R. Co., 13 Conn. 397.

59. *Connecticut.*— Williams *v.* Hartford, etc., R. Co., 13 Conn. 397.

Indiana.— See Columbia, etc., R. Co. *v.* Richardson, 7 Ind. 543.

Maine.— Coleman *v.* Andrews, 48 Me. 562.

Minnesota.— Minneapolis, etc., R. Co. *v.* Kanne, 32 Minn. 174, 19 N. W. 975; Lohman *v.* St. Paul, etc., R. Co., 18 Minn. 174.

Missouri.— Roosa *v.* St. Joseph, etc., R. Co., 114 Mo. 508, 21 S. W. 1124; Thompson *v.* Chicago, etc., R. Co., 110 Mo. 147, 19 S. W. 77; St. Joseph, etc., R. Co. *v.* Shambaugh, 106 Mo. 557, 17 S. W. 581.

New Jersey.— Wilkinson *v.* Trenton, 35 N. J. L. 485.

Texas.— Gulf, etc., R. Co. *v.* Southwestern Tel., etc., Co., 18 Tex. Civ. App. 500, 45 S. W. 151; Adams *v.* San Angelo Water-Works Co., (Civ. App. 1894) 25 S. W. 165.

See 18 Cent. Dig. tit. "Eminent Domain," § 586.

Time of notice.— A notice given the day before to the party interested who resides within eighty rods of the place of meeting and who instead of requesting delay returned an answer protesting against the authority of the commissioners is sufficient in point of time. Williams *v.* Hartford, etc., R. Co., 13 Conn. 397.

should fix the time and place for their meeting,[60] but the court has no power to shorten the time prescribed by statute.[61] It should distinctly appear upon the face of the proceedings that reasonable notice of the time and place of meeting was given,[62] and a recital in the report of the commissioners that it was given is not sufficient proof of the fact.[63] It is sometimes provided that the parties interested shall have notice of the filing of the report.[64]

(VII) *Conduct of Proceedings.* It has been said that proceedings of this class are special and bear little resemblance to ordinary legal trials. The law contemplates simplicity as far as possible in regard to the practice.[65] Commissioners have the right to hear the proofs and allegations in such order as they may deem most conducive to justice between the parties and to decide which party shall open and close the argument.[66] Commissioners should act without unreasonable delay,[67] although they may after legally convening adjourn for a reasonable

Contents.— If the notice states the substance of the petition and the order it is sufficient. Harvey *v.* Lloyd, 3 Pa. St. 331. See also Wilkinson *v.* Trenton, 35 N. J. L. 485.

Certainty as to place.— The notice must be precise as to the place of meeting. A notice appointing the meeting to be held at a village embracing two square miles of territory does not properly fix the place. Minnesota, etc., R. Co. *v.* Kanne, 32 Minn. 174, 19 N. W. 975.

Notice after adjournment.— Where, after notice to all persons interested, highway commissioners view the route for the highway, and then adjourn to a certain time and place to locate the way and assess the damages, it is not necessary to give a new notice as to the time and place to which the adjournment was had. Commonwealth *v.* Berkshire County Com'rs, 8 Pick. (Mass.) 343.

Notice to each owner is necessary. Reitenbaugh *v.* Chester Valley R. Co., 21 Pa. St. 100.

Notice given by posting in public places.— Wagner *v.* Salzburg Tp., 132 Pa. St. 636, 19 Atl. 294.

Mode of service.— Matter of New York, etc., R. Co., 40 How. Pr. (N. Y.) 335.

60. Chicago, etc., R. Co. *v.* Chamberlain, 84 Ill. 333; Spring Grove Cemetery *v.* Cincinnati, etc., R. Co., 1 Ohio Dec. (Reprint) 343, 7 West. L. J. 392. See also Gill *v.* Milwaukee, etc., R. Co., 76 Wis. 293, 45 N. W. 23.

61. Manhattan R. Co. *v.* Stroub, 68 Hun (N. Y.) 90, 22 N. Y. Suppl. 602.

62. Woodruff *v.* Orange, 32 N. J. L. 49. See also Coleman *v.* Andrews, 48 Me. 562. *Compare* Imler *v.* Springfield, 30 Mo. App. 669, holding that where it is conceded that the sum adjudged as damages is not too large the judgment will not be reversed, because the record fails to show that proper notice was given of the condemnation proceedings.

63. Adams *v.* San Angelo Water-Works Co., (Tex. Civ. App. 1894) 25 S. W. 165.

64. New Orleans, etc., R. Co. *v.* Bougere, 23 La. Ann. 803; *In re* Exchange Alley, 4 La. Ann. 4; *In re* Albany St., 6 Abb. Pr. (N. Y.) 273.

A tenant whose name does not appear in the commissioners' report because he failed to make his interest known to them is not entitled to notice. Whalen *v.* Bates, 19 R. I. 274, 33 Atl. 224.

Constructive notice.— Owners are not chargeable with constructive notice of the filing of a report which was not filed until after the expiration of the time fixed by the court. *In re* New Orleans, 11 La. Ann. 458.

Second notice.— Where there has been a reconsideration, a correction, and a redeposit of the report, a second notice need not be given, unless new parties have been brought in. *In re* William, etc., Sts., 19 Wend. (N. Y.) 678.

Posting notice in clerk's office sufficient as to non-residents.— Chicago, etc., R. Co. *v.* Swan, 120 Mo. 30, 25 S. W. 534; Mississippi River, etc., R. Co. *v.* Jones, 54 Mo. App. 529, under Missouri statute.

Notice of motion to confirm.— The party moving for a confirmation of the report is required to give notice of such motion. *In re* Metropolitan El. R. Co., 22 N. Y. Suppl. 128. A failure to give notice of such motion does not deprive the court of jurisdiction. Allen *v.* Utica, etc., R. Co., 15 Hun (N. Y.) 80, construing N. Y. Laws (1850), c. 140, § 17.

In New Jersey a judge who appoints commissioners to condemn land is required by statute to fix a day in the order of appointment on or before which the report of the commissioners shall be filed. Bray *v.* Ocean City R. Co., 60 N. J. L. 91, 36 Atl. 879.

65. Port Huron, etc., R. Co. *v.* Voorheis, 50 Mich. 506, 15 N. W. 882; Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456, 11 N. W. 271. See also Sullivan *v.* Lafayette Co., 61 Miss. 271.

66. Albany, etc., R. Co. *v.* Lansing, 16 Barb. (N. Y.) 68.

67. Matter of Gilroy, 11 N. Y. App. Div. 65, 42 N. Y. Suppl. 640, holding that commissioners cannot be removed on the ground that they unnecessarily delayed to decide the matter submitted to them, where the delay was caused by the election and qualification of one of them as a justice of the supreme court, and there is nothing to show that the remaining commissioners wilfully neglected to have the vacancy filled.

Action should not be delayed by a stay of proceedings. In proceedings by a railroad company to condemn easements of which it is already in possession, a stay of proceedings

length of time.[68] In the absence of a contrary showing it will be presumed that the proceedings of the commissioners were correct and regular.[69] All the commissioners should qualify, meet, and consult,[70] but all need not concur as to the assessment. The decision of a majority and a report made in accordance therewith are valid and binding.[71]

(VIII) *VIEWING THE PROPERTY.* It is the duty of the commissioners or viewers to go upon the premises and examine the property,[72] and it is perfectly proper

by the commissioners will not be granted, since the owner's rights may be protected by an application for a stay pending an appeal from the commissioners' report. Metropolitan El. R. Co. *v.* Siefke, 60 Hun (N. Y.) 584, 15 N. Y. Suppl. 224.

68. Leavenworth, etc., R. Co. *v.* Meyer, 50 Kan. 25, 31 Pac. 700.

69. Leavenworth, etc., R. Co. *v.* Meyer, 50 Kan. 25, 31 Pac. 700. See also Metropolitan R. Co. *v.* Quincy R. Co., 12 Allen (Mass.) 262.

70. *Illinois.*— Ohio, etc., R. Co. *v.* Barker, 134 Ill. 470, 25 N. E. 785.

Massachusetts.— Plymouth *v.* Plymouth County Com'rs, 16 Gray 341.

Ohio.— *In re* Wells County Road, 7 Ohio St. 16.

Oregon.— Beekman *v.* Jackson County, 18 Oreg. 283, 22 Pac. 1074.

Pennsylvania.— *In re* Baltimore Turnpike, 5 Binn. 481. See also *In re* Paschall St., 81 Pa. St. 818.

See 18 Cent. Dig. tit. "Eminent Domain," § 589.

Absence from meetings.— The fact that one of the commissioners was not present at most of the meetings does not invalidate the proceeding (Matter of Riverside Ave., 83 Hun (N. Y.) 50, 31 N. Y. Suppl. 735); nor does the fact that while the commissioners were viewing the premises one of them was separated from the others (Matter of New York, etc., R. Co., 63 How. Pr. (N. Y.) 265).

Consent to assessment by part of commissioners.— In Minnesota it is held that a statutory provision for the appointment of three commissioners is for the benefit of the landowner is not jurisdictional, and may be waived, and that the owner may consent to an assessment by two of the three commissioners. Minneapolis *v.* Wilkin, 30 Minn. 140, 14 N. W. 581.

In New Jersey the rule is that if the statute requires the appointment of three, a report of two is void, if it does not show that the third was present and sworn, or his absence is accounted for. Smith *v.* Trenton Delaware Falls Co., 17 N. J. L. 5.

71. *Illinois.*— Ohio, etc., R. Co. *v.* Barker, 134 Ill. 470, 25 N. E. 785.

Indiana.— American Cannel Coal Co. *v.* Huntingburg, etc., R. Co., 130 Ind. 98, 29 N. E. 566; Beynon *v.* Brandywine, etc., Turnpike Co., 39 Ind. 129; Piper *v.* Connersville, etc., Turnpike Co., 12 Ind. 400.

Maine.— *In re* Vassalborough, 19 Me. 338.

Massachusetts.— Plymouth *v.* Plymouth County Com'rs, 16 Gray 341.

Missouri.— St. Francois County *v.* Marks, 14 Mo. 537.

New York.— Matter of Brooklyn, 3 How. Pr. (N. Y.) 25.

North Carolina.— Austin *v.* Helms, 65 N. C. 560.

Ohio.— Young *v.* Buckingham, 5 Ohio 485.

Oregon.— Beekman *v.* Jackson County, 18 Oreg. 283, 22 Pac. 1074.

Pennsylvania.— Moore *v.* Green, etc., R. Co., 3 Phila. 417; *In re* Baltimore Turnpike, 5 Binn. 481.

United States.— Union Pac. R. Co. *v.* Burlington, etc., R. Co., 3 Fed. 106, 1 McCrary 452.

See 18 Cent. Dig. tit. "Eminent Domain," § 589.

A committee agreed on and appointed instead of a jury to assess the damages occasioned by the location of a county road cannot act by a majority; but their proceedings will be void, unless they all concur in the result arrived at. McLellan *v.* County Com'rs, 31 Me. 390.

In New York by statute if all the commissioners are notified, a majority may act, and in the absence of proof to the contrary the giving of notice will be presumed. Astor *v.* New York, 62 N. Y. 580. And a statute providing that the acts of two out of three commissioners shall be valid as the acts of all are not repugnant to the constitutional provision that the damage is to be assessed by not less than three commissioners. *In re* New York, 99 N. Y. 569, 2 N. E. 642 [*affirming* 34 Hun 441]; *In re* Broadway Widening, 63 Barb. 572 [*distinguishing* Water Com'rs *v.* Lansing, 45 N. Y. 19]. See also Van Steenbergh *v.* Bigelow, 3 Wend. 42.

When a vacancy occurs.— It has been held that a statute authorizing a majority of a board of three to act contemplates a full board, and that therefore if a vacancy occurs in a board of three commissioners, provision being made by law for filling the vacancy, the two remaining commissioners cannot make a valid award and report. Leavenworth, etc., R. Co. *v.* Meyer, 58 Kan. 305, 49 Pac. 89 [*distinguishing* Quayle *v.* Missouri, etc., R. Co., 63 Mo. 465, on the ground that in that case no provision was made by statute for filling the vacancy]. *Compare* People *v.* Syracuse, 63 N. Y. 291, holding that where one of three commissioners dies after the award of damages is made, but before the final assessment of benefits, the power to make the assessment is not extinguished, but may be exercised by the surviving commissioners, if there is no provision in the statute for filling the vacancy.

72. *California.*— Western Pac. R. Co. *v.* Reed, 35 Cal. 621; Spring Valley Water Works *v.* San Francisco, 22 Cal. 434.

for them to act upon the knowledge thus obtained,[73] as well as upon the testimony of witnesses.[74]

(IX) *FINDINGS AND REPORT*— (A) *In General.* Requirements as to the findings and reports of commissioners depend largely upon particular statutes, and this must be considered in connection with the following statements, which, although general in form, depend in some instances for their correctness upon such statutes. The report of commissioners should show upon its face that they have acted within their statutory powers.[75] It must show that they met at the proper time and place and that they were duly sworn.[76] An award to be good should settle and determine every matter that is submitted.[77] It should be definite and certain and fix beyond doubt or question the rights and obligations of the parties.[78] It should be as broad as the submission. If it is not, or if it goes outside of and beyond the submission, it is not binding on the parties.[79] Commissioners in making their award should have regard to valid stipulations entered into by the parties.[80] A separate report is not required for each tract of land belonging to the same owner,[81] and one report may embrace awards to different owners,[82]

New Jersey.— Readington Tp. *v.* Dilley, 24 N. J. L. 209.

New York.— Matter of Riverside Ave., 83 Hun 50, 31 N. Y. Suppl. 735; *In re* Kings County El. R. Co., 15 N. Y. Suppl. 516; *In re* New York El. R. Co., 8 N. Y. Suppl. 707; Matter of Central Park Com'rs, 54 How. Pr. 313; *In re* William, etc., Sts., 19 Wend. 678.

Pennsylvania.— Pennsylvania R. Co. *v.* Keiffer, 22 Pa. St. 356.

Vermont.— Lyman *v.* Burlington, 22 Vt. 131. Where the statute provides that the view shall be made by three viewers, a majority of whom shall concur, all the viewers must attend and be sworn. *In re* East Penn Tp. Road, 2 Pa. Co. Ct. 453.

73. Readington Tp. *v.* Dilley, 24 N. J. L. 209; Matter of Guilford, 85 N. Y. App. Div. 207, 83 N. Y. Suppl. 312; Daly *v.* Smith, 18 N. Y. App. Div. 194, 45 N. Y. Suppl. 785; Matter of Public Parks, 53 Hun (N. Y.) 280, 6 N. Y. Suppl. 750; Matter of New York, 33 Misc. (N. Y.) 648, 68 N. Y. Suppl. 965; Pecksport Connecting R. Co. *v.* West, 45 N. Y. Suppl. 644; *In re* Rochester, 20 N. Y. Suppl. 506; *In re* Kings County El. R. Co., 15 N. Y. Suppl. 516, 517; *In re* New York El. R. Co., 12 N. Y. Suppl. 857; *In re* New York El. R. Co., 8 N. Y. Suppl. 707; Matter of Buffalo, 1 N. Y. St. 742; Matter of Central Park Com'rs, 54 How. Pr. (N. Y.) 313; Lyman *v.* Burlington, 22 Vt. 131; Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170.

In Pennsylvania the report of the viewers appointed in the condemnation of land for railroad purposes must be based upon the personal observation of the viewers, and their report will be set aside if the view was made while the ground was covered with snow, and the viewers determined the character, quality, and value of the land from the testimony of witnesses. Jeffries *v.* Tuscarora R. Co., 9 Pa. Dist. 17.

74. Western Pac. R. Co. *v.* Reed, 35 Cal. 621; Lehigh Valley R. Co. *v.* Dover, etc., R. Co., 43 N. J. L. 528; Matter of Buffalo, Sheld. (N. Y.) 423; *In re* William, etc., Sts., 19 Wend. (N. Y.) 678; Pennsylvania R. Co. *v.* Keiffer, 22 Pa. St. 356. If the commissioners hear no testimony, but act on a view of the premises and on their knowledge of it and its surroundings, their determination that the benefits equal the damages will not be disturbed. *In re* Newland Ave., 15 N. Y. Suppl. 63.

75. New Jersey R., etc., Co. *v.* Suydam, 17 N. J. L. 25.

76. Central Pac. R. Co. *v.* Pearson, 35 Cal. 247; Virginia, etc., R. Co. *v.* Lovejoy, 8 Nev. 100.

77. Alfred *v.* Kankakee, etc., R. Co., 92 Ill. 609; *In re* New York, etc., R. Co., 35 Hun (N. Y.) 232; *In re* Germantown, etc., Turnpike Road Co., 4 Rawle (Pa.) 191. See also Neal *v.* Railroad Com'rs, 85 Me. 62, 26 Atl. 994.

78. McCord *v.* Sylvester, 32 Wis. 451. See also Winchester, etc., R. Co. *v.* Washington, 1 Rob. (Va.) 67.

79. Alfred *v.* Kankakee, etc., R. Co., 92 Ill. 609. See also Crangle *v.* Harrisburg, 1 Pa. St. 132. It is error for commissioners to provide in their report that all taxes which are a lien on the premises shall be deducted from the award. *In re* South St. Paul St., 85 Hun (N. Y.) 473, 33 N. Y. Suppl. 141.

80. *In re* New York, etc., R. Co., 102 N. Y. 704, 7 N. E. 559 [*reversing* 2 How. Pr. N. S. 225 (*affirmed* in 40 Hun 130)]; Matter of New York El R. Co., 76 Hun (N. Y.) 384, 28 N. Y. Suppl. 110.

81. Doddridge County Sup'rs *v.* Stout, 9 W. Va. 703.

82. Troy, etc., R. Co. *v.* Cleveland, 6 How. Pr. (N. Y.) 238; Tucker *v.* Erie, etc., R. Co., 27 Pa. St. 281. But see Doddridge County Sup'rs *v.* Stout, 9 W. Va. 703.

There should be but one appraisal and but one report, although different persons are vested with different interests in any particular tract taken. Fitzpatrick *v.* Pennsylvania R. Co., 10 Phila. (Pa.) 107.

Lands in different counties.— Appraisers having been appointed to assess damages for land taken by a corporation in one county, the parties by agreement submitted the question of value and damages to land in another county to men "mutually chosen" by the

but the amount due each must appear.[83] Where different matters are considered by the same commissioners they should make separate reports as to each of these matters.[84]

(B) *Form and Contents.* A report is not necessarily invalid because informal,[85] if it complies in substance with the prescribed requisites.[86] A statutory requirement that the report be under seal is directory only.[87] It has been held that the provisions of a statute prescribing what shall be contained in the report of commissioners are mandatory.[88] The report should set forth the quantity,[89] quality,[90] and value of the land taken;[91] and it is also essential that it must contain a specific description of the property for which damages are assessed.[92] So it has been held that it should state the amount of the damages[93] and to whom

parties, and the same persons were chosen as those who had been previously appointed. It was held that they acted in distinct capacities in respect to the lands in the different counties, and that separate reports were necessary. Smith *v.* Trenton Delaware Falls Co., 17 N. J. L. 5.

83. Jacobus *v.* Oakland, 42 Cal. 21. See also Tucker *v.* Erie, etc., R. Co., 27 Pa. St. 281.

84. Where a proceeding to acquire property for opening a new street and a proceeding for the discontinuance of an existing one are consolidated by statutory authority, and the same commissioners are appointed to determine both matters, it is the better practice for such commissioners to make a separate report as to each matter. Matter of New York, 87 N. Y. App. Div. 177, 84 N. Y. Suppl. 18.

85. See Herron *v.* Carson, 26 W. Va. 62.

86. Morgan *v.* Chicago, etc., R. Co., 39 Mich. 675. A statute requiring a copy of the appointment of the commissioners to be recited in the report is complied with if the appointment is attached to the report and made a part of it. Low *v.* Galena, etc., R. Co., 18 Ill. 324.

87. Hanes *v.* North Carolina R. Co., 109 N. C. 490, 13 S. E. 896.

88. Otero Canal Co. *v.* Fosdick, 20 Colo. 522, 39 Pac. 332.

89. Reitenbaugh *v.* Chester Valley R. Co., 21 Pa. St. 100. See also C. G. Larned Mercantile, etc., Co. *v.* Omaha, etc., R. Co., 56 Kan. 174, 42 Pac. 712.

The report need not state the whole quantity in the tract of which a part is taken. Com. *v.* McAllister, 2 Watts (Pa.) 190.

90. New Jersey R., etc., Co. *v.* Suydam, 17 N. J. L. 25; O'Hara *v.* Pennsylvania R. Co., 25 Pa. St. 445; Zack *v.* Pennsylvania R. Co., 25 Pa. St. 394; Reitenbaugh *v.* Chester Valley R. Co., 21 Pa. St. 100.

91. Zack *v.* Pennsylvania R. Co., 25 Pa. St. 394; Reitenbaugh *v.* Chester Valley R. Co., 21 Pa. St. 100.

92. *Maine.*— Littlefield *v.* Rockland, 91 Me. 449, 40 Atl. 424.

Minnesota.— Lumbermen's Ins. Co. *v.* St. Paul, 85 Minn. 234, 88 N. W. 749; Siman *v.* Rhoades, 24 Minn. 25.

Missouri.— Chicago, etc., R. Co. *v.* Randolph Town Site Co., 103 Mo. 451, 15 S. W. 437; Missouri Pac. R. Co. *v.* Carter, 85 Mo. 448.

New Hampshire.— Northern R. Co. *v.* Concord, etc., R. Co., 27 N. H. 183.

New Jersey.— Vail *v.* Morris, etc., R. Co., 21 N. J. L. 189.

North Carolina.—See Hanes *v.* North Carolina R. Co., 109 N. C. 490, 13 S. E. 896.

Wisconsin.— Strang *v.* Beloit, etc., R. Co., 16 Wis. 635.

See 18 Cent. Dig. tit. "Eminent Domain," § 594.

Objections for insufficient description.— Where the objection was "that the writ of assessment did not contain a sufficient description of the real estate to be taken," it was held that while deficient in form it should be accepted as a demurrer to the writ. Marion, etc., R. Co. *v.* Ward, 9 Ind. 123.

A report referring to the road as "located over, through, or upon the land in question," accompanied by a plat which, together with the plat and profile filed in the county clerk's office, fully shows the location, is sufficiently definite. Kansas City, etc., R. Co. *v.* Story, 96 Mo. 611, 10 S. W. 203.

In the case of a street opening the report should not only specifically set forth the lines of the street, but each lot from which a part is taken should have the part taken specifically described, and a draft should be attached showing the lot as originally located and as affected by the street opening (*In re* Harbaugh Ave., 10 Pa. Co. Ct. 440); but it need not set forth the width of a road which is opened (Stouffer *v.* Stouffer, 1 Pa. Super. Ct. 534, 38 Wkly. Notes Cas. (Pa.) 352).

Where the damages are to be assessed for the laying and repairing of village waterpipes, it is not necessary that the report should fix and specify the width within which the right shall be exercised. Childs *v.* Newport, 70 Vt. 62, 39 Atl. 627.

93. Reitenbaugh *v.* Chester Valley R. Co., 21 Pa. St. 100. See also New Milford Water Co. *v.* Watson, 75 Conn. 237, 52 Atl. 947, 53 Atl. 57; Pennsylvania Highway Com'rs *v.* Durham, 43 Ill. 86; State *v.* Hennepin County Dist. Ct., 87 Minn. 268, 91 N. W. 1111. Where the officers charged with the duty of making an assessment of the damages to the owner of land taken for a highway executed a paper stating that by agreement between them and such owner his damages were liquidated at a specified sum, it was

awarded.[94] The names of the persons to whom damages are awarded should be specifically stated in the report.[95] It is not proper to make the award to the estate of a deceased person,[96] or to his heirs or devisees;[97] it should be by name to the persons who are the heirs or devisees.[98] But the award may be made to "unknown owners," if the commissioners or the jury are unable to ascertain with certainty the names of the owners of any particular parcels.[99] The commissioners need not state the various items which go to make up the aggregate of their award.[1] Their report must show, however, that the benefits were considered,[2] although the assessment for damages and benefits need not be separately set forth,[3] unless it is required by statute.[4] The report should contain a full statement of the proceedings of the commissioners.[5]

held a sufficient assessment of damages. People *v.* Richmond County, 20 N. Y. 252.

The omission to state any damages is equivalent to a finding that the owner has suffered no damage. Monagle *v.* Bristol County, 8 Cush. (Mass.) 360; *In re* Kingston Tp. Road, 134 Pa. St. 409, 19 Atl. 750.

94. Reitenbaugh *v.* Chester Valley R. Co., 21 Pa. St. 100.

Effect of naming owners of property.— While the names of the owners of the property taken are generally given, such action upon the part of the commissioners does not amount to a judicial determination that the persons named have title to the property assessed. Jarvis *v.* Lynch, 91 Hun (N. Y.) 349, 36 N. Y. Suppl. 220.

Mistake.— This requirement is not met by showing that an award was made to an occupant having the same surname as the owner, although by mistake and intended for the latter. Hood *v.* Finch, 8 Wis. 381.

95. Combs *v.* Blauvelt, 33 N. J. L. 36; State *v.* Fischer, 26 N. J. L. 129; State *v.* Oliver, 24 N. J. L. 129. *Compare* Granger *v.* Syracuse, 38 How. Pr. (N. Y.) 308, holding that the name of the owner need not be mentioned, but that it is sufficient if he is clearly referred to or described.

If the report fails to set out the names, they may be set out in a draft attached to and made a part thereof. *In re* Pringle St., 7 Kulp (Pa.) 346.

96. Washington *r.* Fisher, 43 N. J. L. 377; Woodruff *v.* Orange, 32 N. J. L. 49. Where a widow is entitled to dower in land required for a street, and the fact is known to the commissioners, it is their duty to award to her in her own name the value of her life-estate in the premises. It is erroneous in such case to award the damage to the estate of her late husband. *In re* William, etc., Sts., 19 Wend. (N. Y.) 678.

97. Adams *r.* Rulon, 50 N. J. L. 526, 14 Atl. 881; Combs *r.* Blauvelt, 33 N. J. L. 36.

98. Woodruff *r.* Orange, 32 N. J. L. 49. *Quære* in Thompson *r.* Trowe, 82 Minn. 471, 85 N. W. 169.

Description of reversionary interest.— Under a statute relating to condemnation proceedings by railroad companies, and providing that the inquisition shall in all cases describe the property taken, or the bounds of the land condemned, and the quality or duration of interest in the same, valued for the company, proceedings to condemn land bordering on a street will not include the owner's reversionary interest to the center of the street, unless it is affirmatively described. Shipley *v.* Western Maryland Tidewater R. Co., (Md. 1904) 56 Atl. 968.

99. Matter of New York, 74 N. Y. App. Div. 343, 77 N. Y. Suppl. 566; Matter of Board of Education, 24 N. Y. App. Div. 117, 48 N. Y. Suppl. 1061; Jarvis *r.* Lynch, 91 Hun (N. Y.) 349, 36 N. Y. Suppl. 220; Matter of East One Hundred and Thirty-Fifth St., 36 Misc. (N. Y.) 427, 73 N. Y. Suppl. 727; Matter of Washington Ave., 34 Misc. (N. Y.) 655, 70 N. Y. Suppl. 599.

1. *Indiana.*— American Cannel Coal Co. *r.* Huntington, etc., R. Co., 130 Ind. 98, 29 N. E. 566.

Michigan.— Flint, etc., R. Co. *v.* Detroit, etc., R. Co., 64 Mich. 350, 31 N. W. 281.

New Jersey.— Trenton Water Power Co. *v.* Chambers, 13 N. J. Eq. 199.

New York.— People *v.* Gilon, 76 Hun 346, 27 N. Y. Suppl. 704; *In re* Thompson, 45 Hun 261; *In re* Campbell, 1 N. Y. St. 768.

Pennsylvania.— Tucker *r.* Erie, etc., R. Co., 27 Pa. St. 281; Shirk *v.* Pennsylvania R. Co., 9 Lanc. Bar 198; Keen *v.* Pennsylvania R. Co., 9 Lanc. Bar 103. *Compare* Feree *v.* Meily, 3 Yeates (Pa.) 153, holding that if anything beyond the value of the land is included in the estimate of damages the amount allowed therefor should be expressly stated.

Wisconsin.— Darge *v.* Horicon Iron Mfg. Co., 22 Wis. 691.

See 18 Cent. Dig. tit. "Eminent Domain," § 598.

2. Pueblo, etc., R. Co. *v.* Rudd, 5 Colo. 270; Wilkinson *v.* Trenton, 35 N. J. L. 485; Philadelphia, etc., R. Co. *r.* Cake, 95 Pa. St. 139. See also *In re* Moyer St., 6 Phila. (Pa.) 81.

3. Wilkinson *v.* Trenton, 35 N. J. L. 485.

4. Terre Haute, etc., R. Co. *r.* Horn, 29 Ind. App. 442, 64 N. E. 648; Ohio, etc., R. Co. *r.* Wallace, 14 Pa. St. 245.

5. "The report should show that the commissioners met at the time and place designated in the order of the Court; that they were sworn before entering upon the discharge of their duties; that they viewed in person the land sought to be condemned; that at times and places of which the several parties in interest had notice, they

(c) *Time of Making.* The time within which the report must be made is ordinarily prescribed by statute,[6] as is also the official with whom the report is to be filed.[7]

(d) *Amending.* Until the report has been filed it is within the control of the commissioners, although written out and signed, and may be changed by a majority of them;[8] but after the report has been duly filed it cannot be amended,[9] except by leave of the officer or body to whom the report was made.[10] The court has power to compel commissioners to amend their report,[11] when it is merely irregular[12] or incomplete.[13] But the award cannot be amended as to radical defects,[14] or so as to change the parties affected by the award.[15] The report may be amended by order of court, so as to conform to the state of facts which existed.[16] When the report of commissioners is recommitted for the correction of an irregularity, the amended report, when filed by them, relates back to the filing of the original report.[17] After the report has been confirmed it cannot as a general rule

heard the allegations and proofs of the parties, and to that end issued subpœnas for all witnesses which the parties or any of them desired to call. The report should also contain minutes of the testimony and rulings of the commissioners upon all points made by counsel or parties as to the admission or rejection of testimony; and, generally, all matters which are necessary to show the rules or principles by which the Commissioners were governed in making their appraisal." Central Pac. R. Co. *v.* Pearson, 35 Cal. 247, 258. *Compare* Pennsylvania R. Co. *v.* Porter, 29 Pa. St. 165, holding that it is unnecessary that the report should show affirmatively the presence of the parties at the time the view is had, or that witnesses were regularly called and sworn, the presumption in this respect being in favor of the regularity of the proceedings.

Unnecessary to state adjournments.— The report need not state the various adjournments after their first meeting. Leavenworth, etc., R. Co. *v.* Meyer, 50 Kan. 25, 31 Pac. 700; *In re* Royersford Toll Bridge, 2 Montg. Co. Rep. (Pa.) 21.

6. *Kansas.*— Chicago, etc., R. Co. *v.* Abbott, 44 Kan. 170, 24 Pac. 52.

Maine.— Webb *v.* County Com'rs, 77 Me. 180.

Missouri.— Anderson *v.* Pemberton, 89 Mo. 61, 1 S. W. 216.

Pennsylvania.— *In re* Royersford Toll Bridge, 2 Montg. Co. Rep. 21.

Washington.— Seattle *v.* Fidelity Trust Co., 22 Wash. 154, 60 Pac. 133.

See 18 Cent. Dig. tit. "Eminent Domain," § 593.

The Greater New York City Charter, § 991, authorizes the court to make such order in respect to time and manner of completing the report as will enable or require the commissioners to complete the proceedings with reasonable despatch. Matter of New York, 46 N. Y. App. Div. 510, 62 N. Y. Suppl. 32.

A statute of Ohio requiring the appraisers to forthwith return their assessment to the clerk does not require them to return their award instanter but within a reasonable time. Cincinnati, etc., R. Co. *v.* Sundry Persons, 1 Ohio Dec. (Reprint) 326, 7 West. L. J. 265.

Filing at next term.— If the statute prescribes that the viewers shall proceed with as little delay as possible to view the ground, and after apportioning the damages shall file the apportionment and assessment in the said court, it is not essential that the report should be filed at the next term. *In re* Pennsylvania Ave., 2 Pittsb. (Pa.) 1.

Provision is directory only. *In re* Broadway, 63 Barb. (N. Y.) 572. But see *Ex p.* Teese, 4 Pa. St. 69; Seattle *v.* Fidelity Trust Co., 22 Wash. 154, 60 Pac. 133.

Filing before required time.— The report may be filed before the term to which it is returnable. *In re* Royersford Toll Bridge, 2 Montg. Co. Rep. (Pa.) 21.

The objection that the report was not filed within the statutory time cannot be raised for the first time on appeal. Virginia, etc., R. Co. *v.* Elliott, 5 Nev. 358.

7. Cincinnati, etc., R. Co. *v.* Sundry Persons, 1 Ohio Dec. (Reprint) 326, 7 West. L. J. 265; Plumer *v.* Wausau Boom Co., 49 Wis. 449, 5 N. W. 232.

8. Leavenworth, etc., R. Co. *v.* Meyer, 58 Kan. 305, 49 Pac. 89.

9. People *v.* Mott, 60 N. Y. 649.

10. Chicago *v.* Walker, 24 Ill. 493.

11. Central Pac. R. Co. *v.* Pearson, 35 Cal. 247; Long *v.* Talley, 91 Mo. 305, 3 S. W. 389.

12. *In re* Washington St., 19 R. I. 156, 33 Atl. 516.

13. *In re* Cambria St., 75 Pa. St. 357; *In re* Clinton Tp. Road, 3 Pa. Co. Ct. 170; Greenville, etc., R. Co. *v.* Nunnamaker, 4 Rich. (S. C.) 107. If the report does not show that the owner was heard or notified to appear when as a matter of fact he was so notified, the report should be amended. Coleman *v.* Andrews, 48 Me. 562.

14. *In re* Cambria St., 75 Pa. St. 357.

15. Littlefield *v.* Boston, etc., R. Co., 65 Me. 248. Where an award was made to one who was subsequently declared a lunatic, the award cannot be so amended as to make it payable to his committee. *In re* Abbotsford Ave., 7 Pa. Dist. 74, 20 Pa. Co. Ct. 506.

16. New York, etc., R. Co. *v.* Corey, 5 How. Pr. (N. Y.) 177.

17. *In re* Washington St., 19 R. I. 156, 33 Atl. 516.

be amended;[18] and after an appeal has been taken from the award of commissioners, their report cannot be amended so as to relate back to the time of its filing.[19]

(x) *Compensation.* Where the statute does not itself fix the compensation of the commissioners, its amount is in most cases to be determined by the court,[20] and if the provision is that they are to be allowed a reasonable compensation, it is for the court and not the condemning party to determine what is reasonable.[21] Where a statutory compensation is in the nature of a *per diem* allowance, the commissioners are entitled to the *per diem* only for the days on which it can be fairly said they were engaged in the work.[22] They are not entitled to mileage unless the statute expressly gives it to them.[23] They can be allowed for clerk hire only when the statute so provides, and not then unless a clerk is actually employed.[24] If the statute provides that the compensation shall be paid by the party appropriating the land,[25] the fact that the proceeding for the assessment of damages was instituted by the landowner does not change the rule.[26]

c. By Officials or Boards. Statutes have been sustained which conferred upon certain officials or official boards the power to assess the damages.[27]

3. What to Be Determined. In a proceeding to assess damages jurors or commissioners are to ascertain and determine the compensation to which property

18. *In re* Lexington Ave., 18 N. Y. Suppl. 828; *In re* Salem Tp., 7 Kulp (Pa.) 305.

Clerical errors or evident mistakes.— The report of commissioners appointed in proceedings to acquire private property for a public purpose can be reconsidered by the court after confirmation, and ordered to be amended in respect to clerical errors or evident or conceded mistakes, which would have been corrected on the hearing of the report, and confirmed as amended *nunc pro tunc.* Matter of Buffalo, Sheld. (N. Y.) 425.

19. Northern R. Co. *v.* Concord, etc., R. Co., 27 N. H. 183.

20. *Maine.*— Atlantic, etc., R. Co. *v.* Cumberland County Com'rs, 28 Me. 112.

Massachusetts.— Richardson *v.* Curtis, 2 Gray 497.

Minnesota.— State *v.* Hennepin County Dist. Ct., 87 Minn. 268, 91 N. W. 1111.

New Jersey.— Lehigh Valley R. Co. *v.* Dover, etc., R. Co., 43 N. J. L. 528.

Wisconsin.— Taylor *v.* Chicago, etc., R. Co., 81 Wis. 82, 51 N. W. 93.

See 18 Cent. Dig. tit. "Eminent Domain," § 584.

21. Green *v.* St. Louis, 106 Mo. 454, 17 S. W. 496.

Fixing amount by agreement.— It is not illegal or improper for the commissioners to agree with the condemning party on a just and equitable compensation, although there is a statutory provision for judicial allowance. Lehigh Valley R. Co. *v.* Dover, etc., R. Co., 43 N. J. L. 528.

22. Matter of Collis, 80 N. Y. App. Div. 287, 80 N. Y. Suppl. 307; Wallace *v.* Pittsburgh, etc., R. Co., 6 Pa. Co. Ct. 400; Delong *v.* Allentown R. Co., 1 Woodw. (Pa.) 195. They are not entitled to compensation for the days on which nothing was done by them at their meetings, notwithstanding their failure to take action on those days was due to the action of the counsel for the petitioners. Matter of New York, 77 N. Y. App. Div. 433, 79 N. Y. Suppl. 192. Where the viewers are entitled to a *per diem* allowance for the time necessarily employed, and not for the days in attendance, if they were employed three days, but could not reach their homes until the next day, they were properly allowed for four days. Where three distinct orders are issued to view three separate properties not adjoining each other, and there are three separate reports, the viewers are entitled to a *per diem* on each distinct report. Shirk *v.* Pennsylvania R. Co., 10 Lanc. Bar (Pa.) 70.

Compensation in excess of statutory amount.— The report of the commissioners will not necessarily be set aside because they charged and received from the condemning party more than the statutory rate of compensation. *In re* Staten Island Rapid Transit R. Co., 41 Hun (N. Y.) 392.

The affidavit of the commissioners to the number of days is *prima facie* evidence of the fact. Matter of Collis, 80 N. Y. App. Div. 287, 80 N. Y. Suppl. 307 [*distinguishing* Matter of New York, 77 N. Y. App. Div. 433, 79 N. Y. Suppl. 192].

23. Wallace *v.* Pittsburgh, etc., R. Co., 6 Pa. Co. Ct. 400; Delong *v.* Allentown R. Co., 1 Woodw. (Pa.) 195.

24. New York *v.* Downs, 77 N. Y. App. Div. 351, 78 N. Y. Suppl. 1024.

25. Lehigh Valley R. Co. *v.* Dover, etc., R. Co., 43 N. J. L. 528; *In re* Staten Island Rapid Transit R. Co., 41 Hun (N. Y.) 392.

26. Taylor *v.* Chicago, etc., R. Co., 81 Wis. 82, 51 N. W. 93.

27. This power has been delegated to selectmen (Cousens *v.* Lyman School Dist. No. 4, 67 Me. 280), to county commissioners (Eden *v.* Hancock County, 84 Me. 52, 24 Atl. 461), to a board of supervisors (Bruggerman *v.* True, 25 Minn. 123 [*distinguishing* Langford *v.* Ramsey County Com'rs, 16 Minn. 375]; People *v.* Ulster County, 3 Barb. (N. Y.) 332, decided prior to present New

owners are entitled,[28] and nothing else.[29] Neither the question of title,[30] of necessity,[31] nor of expediency is to be considered,[32] and if the owner retains possession after the appropriation of the land conformably to law, the rights of the parties growing out of such possession are not to be settled in the proceeding to assess the damages occasioned by the appropriation of the land.[33] But viewers or commissioners are sometimes appointed for the express purpose of determining the necessity.[34]

4. LIMITATION AS TO SUBJECT-MATTER. Damages can be assessed only to the property described in the petition.[35]

5. EXTENT OF ASSESSMENT. The rule in condemnation proceedings is that all damages, present or prospective, that are the natural or reasonable incident of the improvement to be made, or work to be constructed, not including such as may arise from negligence or unskilfulness, or from the wrongful acts of those engaged in the work, must be assessed and there can be but one assessment of such dam-

York constitution), to surveyors of highways (Washington *v.* Fisher, 43 N. J. L. 377; Dunham *v.* Runyon, 24 N. J. L. 256), to street commissioners (Patch *v.* Boston, 146 Mass. 52, 14 N. E. 770), to a road jury (Matter of Girard Ave., 10 Phila. (Pa.) 312), to a board of public works (State *v.* Leon, 66 Wis. 199, 28 N. W. 140), and to railroad commissioners (Maine Cent. R. Co. *v.* Bangor, etc., R. Co., 89 Me. 555, 36 Atl. 1050).

The legislative body of a city may be authorized by the city charter to prescribe the method by which compensation shall be ascertained for the use by one street railroad company of the tracks of another. Union Depot R. Co. *v.* Southern R. Co., 105 Mo. 562, 16 S. W. 620; St. Louis R. Co. *v.* Southern R. Co., (Mo. Sup. 1891) 15 S. W. 1013.

28. *Colorado.*— Colorado Fuel, etc., Co. *v.* Four Mile R. Co., 29 Colo. 90, 66 Pac. 902.

Delaware.— Vandegrift *v.* Delaware R. Co., 2 Houst. 287.

Illinois.— Thomas *v.* Chicago, 204 Ill. 611, 68 N. E. 653; Rock Island, etc., R. Co. *v.* Gordon, 184 Ill. 456, 56 N. E. 810.

Pennsylvania.— *In re* Conshohocken Ave., 1 Walk. 424.

South Dakota.— Board of Education *v.* Prior, 11 S. D. 292, 77 N. W. 106, where there are no adverse claimants.

See 18 Cent. Dig. tit. "Eminent Domain," § 546.

29. Atlantic, etc., R. Co. *v.* Penny, 119 Ga. 479, 46 S. E. 665 (whether land proper for the purpose); Pingery *v.* Cherokee, etc., R. Co., 78 Iowa 438, 43 N. W. 285 (keeping railroad track in proper condition); Long Island R. Co. *v.* Garvey, 159 N. Y. 334, 54 N. E. 60 [*affirming* 11 N. Y. App. Div. 626, 42 N. Y. Suppl. 155] (whether there has been a taking); Matter of Girard Ave., 11 Phila. (Pa.) 449 (legal effect); Vermont Cent. R. Co. *v.* Baxter, 22 Vt. 365 (liability for tort).

30. *California.*— Spring Valley Water Works *v.* San Francisco, 22 Cal. 434.

Illinois.— Thomas *v.* Chicago, 204 Ill. 611, 68 N. E. 653; Peoria, etc., R. Co. *v.* Laurie, 63 Ill. 264. See also Chicago, etc., R. Co. *v.* Ward, 128 Ill. 349, 18 N. E. 828, 21 N. E. 562.

Michigan.— Port Huron, etc., R. Co. *v.* Voorheis, 50 Mich. 506, 15 N. W. 882; Mansfield, etc., R. Co. *v.* Clark, 2 Mich. N. P. Suppl. 119.

Minnesota.— St. Paul, etc., R. Co. *v.* Matthews, 16 Minn. 341.

Pennsylvania.— *In re* Conshohocken Ave., 1 Walk. 424.

Texas.— Galveston, etc., R. Co. *v.* Mud Creek, etc., Co., 1 Tex. App. Civ. Cas. 393.

See 18 Cent. Dig. tit. "Eminent Domain," § 546.

Contra.— Jones *v.* Barclay, 2 J. J. Marsh. (Ky.) 73; Pennell *v.* Card, 96 Me. 392, 52 Atl. 801 [*approving* Minot *v.* Cumberland County Com'rs, 28 Me. 121], in the former of which it is said that "whether or not the petitioner is the owner of the land described and the extent of his ownership are questions of fact to be determined by the commissioners. *Compare* Winebiddle *v.* Pennsylvania R. Co., 2 Grant (Pa.) 32, holding that viewers of damages for a right of way may pass upon the title to land taken so far as to determine who are entitled to damages.

Conflicting claims.— Neither commissioners nor jurors have power to pass upon conflicting claims. *In re* Lefevre, 32 Cal. 565; *In re* William, etc., Sts., 19 Wend. (N. Y.) 678; Brandon *v.* Brandon, 2 Dr. & Sm. 305, 11 Jur. N. S. 30, 34 L. J. Ch. 333, 11 L. T. Rep. N. S. 658, 13 Wkly. Rep. 251.

31. De Buol *v.* Freeport, etc., R. Co., 111 Ill. 499; Reed *v.* Louisville Bridge Co., 8 Bush (Ky.) 69; Powers *v.* Hazelton, etc., R. Co., 33 Ohio St. 429. For determination of necessity and extent of appropriation see *supra*, IX.

32. *In re* William, etc., Sts., 19 Wend. (N. Y.) 678; Lansing *v.* Caswell, 4 Paige (N. Y.) 519.

33. Imbescheid *v.* Old Colony R. Co., 171 Mass. 209, 50 N. E. 609.

34. Detroit *v.* Moesta, 91 Mich. 149, 51 N. W. 903; Morgan *v.* Chicago, etc., R. Co., 39 Mich. 675; *In re* Brooklyn St., 118 Pa. St. 640, 12 Atl. 664, 4 Am. St. Rep. 618; *In re* Magnolia Ave., 117 Pa. St. 56, 11 Atl. 405; Hays *v.* Risher, 32 Pa. St. 169; Shick *v.* Pennsylvania R. Co., 1 Pearson (Pa.) 259; Coffman *v.* Griffin, 17 W. Va. 178.

35. Jones *v.* Chicago, etc., R. Co., 68 Ill. 360; Thayer *v.* Worcester County, 10 Cush. (Mass.) 151.

ages.[36] The property-owner must submit his whole claim for damages, for if he neglects to submit any part of it, he will be deemed to have waived his right to that part and no second process can be had for its recovery.[37] An action at law cannot be maintained because all the items which may produce injury have not been considered or because a mistake has been made in rendering the award whereby the property-owner is prejudiced,[38] or when damages are not awarded for unforeseen injuries.[39] An injury resulting from negligent construction or from wilful misconduct in construction is a tort for which an action at law will lie, notwithstanding the property has been regularly condemned and compensation awarded.[40]

6. SEPARATE TRIAL AND ASSESSMENT. In some jurisdictions where several lots of land are condemned each owner of a separate lot is entitled to a separate trial, although all the lots are embraced in the same application.[41] Where several tracts of land belonging to different owners separately are embraced in one proceeding,

36. *Arkansas.*— Russell *v.* St. Louis Southwestern R. Co., 71 Ark. 451, 75 S. W. 725.

Illinois.— Chicago, etc., R. Co. *v.* Loeb, 118 Ill. 203, 8 N. E. 460, 59 Am. St. Rep. 341; Illinois Cent. R. Co. *v.* Ferrell, 108 Ill. App. 659; Metropolitan West Side El. R. Co. *v.* Goll, 100 Ill. App. 323.

Indiana.— Chicago, etc., R. Co. *v.* Hunter, 128 Ind. 213, 27 N. E. 477; Lafayette Plankroad Co. *v.* New Albany, etc., R. Co., 13 Ind. 90, 74 Am. Dec. 246.

Maine.—See Joy *v.* Grindstone-Neck Water Co., 85 Me. 109, 26 Atl. 1052.

Massachusetts.— See Spaulding *v.* Arlington, 126 Mass. 492.

Pennsylvania.— *In re* Chatham St., 16 Pa. Super. Ct. 103; Robinson *v.* Pennsylvania R. Co., 6 Pa. Super. Ct. 383.

See 18 Cent. Dig. tit. "Eminent Domain," § 546.

Damages arising from time to time.— Commissioners have no authority to assess damages for injuries arising from time to time. Denslow *v.* New Haven, etc., Co., 16 Conn. 98.

It will be presumed that all proper damages were considered in making the assessment. Doyle *v.* Baughman, 24 Ill. App. 614.

Damages for a previous entry or appropriation cannot be included. Leber *v.* Minneapolis, etc., R. Co., 29 Minn. 256, 13 N. W. 31; Proetz *v.* St. Paul Water Co., 17 Minn. 163; Rudolph *v.* Pennsylvania R. Co., 186 Pa. St. 541, 40 Atl. 1083, 47 L. R. A. 782; Eppes *v.* Cralle, 1 Munf. (Va.) 258.

Elements of damage not included in the petition of the property-owner cannot be considered in making the assessment. Worcester *v.* Lake Side Mfg. Co., 174 Mass. 299, 54 N. E. 833.

Speculative damages.— In a proceeding to condemn a strip of land adjoining a river for railroad purposes, where it is shown that it is the intention of the railroad company to erect an embankment along the river, the owner is not entitled to speculative damages, based on an assumed state of facts as to the water rising above the embankment and thus washing out his lands. St. Louis, etc., R. Co. *v.* Vaughan, 71 Ark. 643, 72 S. W. 575.

37. Pusey *v.* Allegheny, 98 Pa. St. 522. The landowner cannot be permitted to divide his cause of action into two parts and have two separate adjudications, when in the proceeding for condemnation, compensation and damages for land taken and for that injured by such condemnation are properly before the court for adjudication and determination. Allen *v.* Haley, 169 Ill. 532, 48 N. E. 478; Lewis *v.* Boston, 130 Mass. 339.

38. Ward *v.* Marietta, etc., Turnpike, etc., Co., 6 Ohio St. 15.

39. Van Schoick *v.* Delaware, etc., Canal Co., 20 N. J. L. 249. See also Butman *v.* Vermont Cent. R. Co., 27 Vt. 500.

40. *California.*— Turpen *v.* Turlock Irr. Dist., 141 Cal. 1, 74 Pac. 295.

Indiana.— Chicago, etc., R. Co. *v.* Hunter, 128 Ind. 213, 27 N. E. 477.

Iowa.— Miller *v.* Keokuk, etc., R. Co., 63 Iowa 680, 16 N. W. 567.

Kansas.— Leavenworth, etc., R. Co. *v.* Herley, 45 Kan. 535, 26 Pac. 23; Leavenworth, etc., R. Co. *v.* Usher, 42 Kan. 637, 22 Pac. 734.

Missouri.— Edmondson *v.* Moberly, 98 Mo. 523, 11 S. W. 990.

North Carolina.— Mullen *v.* Lake Drummond Canal, etc., Co., 130 N. C. 496, 41 S. E. 1027, 61 L. R. A. 833.

Pennsylvania.— Stork *v.* Philadelphia, 195 Pa. St. 101, 45 Atl. 678, 49 L. R. A. 600; Pittsburg, etc., R. Co. *v.* Gilleland, 56 Pa. St. 445, 94 Am. Dec. 97; Marshall *v.* Telegraph, etc., Co., 16 Pa. Super. Ct. 615; *In re* Chatham St., 16 Pa. Super. Ct. 103.

Texas.— See Gregory *v.* Gulf, etc., R. Co., 21 Tex. Civ. App. 598, 54 S. W. 617; Missouri, etc., R. Co. *v.* Hopson, 15 Tex. Civ. App. 126, 39 S. W. 384.

Virginia.— Southside R. Co. *v.* Daniel, 20 Gratt. 344.

41. Giesy *v.* Cincinnati, etc., R. Co., 4 Ohio St. 308; Charleston, etc., Bridge Co. *v.* Comstock, 36 W. Va. 263, 15 S. E. 69; Abrahams *v.* London, L. R. 6 Eq. 625, 37 L. J. Ch. 732, 18 L. T. Rep. N. S. 811.

Under the Illinois statute providing that compensation for each parcel of property shall be assessed separately by the same jury or different juries, it has been decided that the granting of separate trials is discretion-

a separate assessment should be made for each tract.[42] Where separate parcels of land not lying in one body, but belonging to the same owner, are affected by condemnation proceedings, the damages should be awarded separately for each parcel.[43] Separate assessments need not, however, be made for each of several adjoining tracts or lots owned by the same person and occupied by him as an entire property.[44] The proper mode of assessing the damages where two or more persons have distinct interests or estates in any particular parcel of land is either to ascertain first, the damage to the fee as if it were owned entire and unencumbered by one person and then to apportion that amount among all the estates and interests which such persons have in the property,[45] or in the first instance to appraise the value of each separate interest and thus ascertain the entire value. In any event the value of each interest must be separately appraised.[46] Where a single parcel

ary with the court. Toluca, etc., R. Co. *v.* Haws, 194 Ill. 92, 62 N. E. 312; Braum *v.* Metropolitan West Side El. R. Co., 166 Ill. 434, 46 N. E. 974; Concordia Cemetery Assoc. *v.* Minnesota, etc., R. Co., 121 Ill. 199, 12 N. E. 536.

Under the Ohio statute the court is not required to allow a separate trial to each owner of an estate or interest in each parcel. Kohl *v.* U. S., 91 U. S. 367, 23 L. ed. 449; U. S. *v.* Inlots, 26 Fed. Cas. No. 15,441. Nor are property-owners entitled to separate juries for each separate lot or parcel of land. Cincinnati *v.* Neff, 10 Ohio Dec. (Reprint) 279, 19 Cinc. L. Bul. 404.

42. *Illinois.*— Suver *v.* Chicago, etc., R. Co., 123 Ill. 293, 14 N. E. 12; Grayville, etc., R. Co. *v.* Christy, 92 Ill. 337. See also Hamilton *v.* Lovejoy Tp. Highway Com'rs, 203 Ill. 269, 67 N. E. 792, so provided by statute.

Massachusetts.—See Lanesborough *v.* Berkshire County Com'rs, 22 Pick. 278.

Minnesota.— Brennan *v.* St. Paul, 44 Minn. 464, 47 N. W. 55.

New York.— Matter of Daly, 23 N. Y. App. Div. 232, 48 N. Y. Suppl. 731.

Wisconsin.— Rusch *v.* Milwaukee, etc., R. Co., 54 Wis. 136, 11 N. W. 253.

43. Bay City Belt-Line R. Co. *v.* Hitchcock, 90 Mich. 533, 51 N. W. 808. See also Union Depot Co. *v.* Frederick, 117 Mo. 138, 21 S. W. 1118, 1130, 26 S. W. 350.

44. Sherwood *v.* St. Paul, etc., R. Co., 21 Minn. 122; St. Paul, etc., R. Co. *v.* Matthews, 16 Minn. 341; Minnesota Valley R. Co. *v.* Doran, 15 Minn. 230; Winona, etc., R. Co. *v.* Denman, 10 Minn. 267; *In re* Williams, etc., Sts., 19 Wend. (N. Y.) 678. Two contiguous lots abutting on the street and belonging to the same owner may be considered as one tract in assessing damages, although they may not have been used in connection with each other. Lamm *v.* Chicago, etc., R. Co., 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268.

45. *In re* New York, etc., Bridge, 137 N. Y. 95, 32 N. E. 1054; Matter of Daly, 29 N. Y. App. Div. 286, 51 N. Y. Suppl. 576; Wiggin *v.* New York, 9 Paige (N. Y.) 16. See also Schuster *v.* Chicago Sanitary Dist., 177 Ill. 626, 52 N. E. 855; Tide Water Canal Co. *v.* Archer, 9 Gill & J. (Md.) 479; Matter of Trinity Ave., 81 N. Y. App. Div. 215, 80 N. Y. Suppl. 732; Getz *v.* Philadelphia, etc., R. Co., 15 Wkly. Notes Cas. (Pa.) 357.

Cannot adjust equitable interests.— Commissioners in proceedings to condemn lands have nothing to do with an assessment of damages to one who claims an equitable interest in the land, their province being to estimate the value of the land and the damages by reason of the taking of it; all claims of equitable estates or liens in or on the land must be left to be disposed of by the proper tribunal. McIntyre *v.* Easton, etc., R. Co., 26 N. J. Eq. 425. Commissioners should not undertake to adjust equities between heirs owning the fee of land and a widow with a contingent right of dower. They should leave the equities between these parties to be adjusted between themselves. Todemeir *v.* Aspinwall, 43 Ill. 401.

In Massachusetts it is provided by statute that when claimants for damages sustained by laying out or discontinuing highways have different interests in the property damaged, so that an estate for a term of years belongs to one person and a remainder or reversion in fee belongs to another, the entire damages or indemnity shall be paid to a trustee, and it is further provided that parties having other or different interests than those previously mentioned may go to the same jury who shall apportion their damages. Stark *v.* Mansfield, 178 Mass. 76, 59 N. E. 643; Turner *v.* Robbins, 133 Mass. 207; Boston *v.* Robbins, 126 Mass. 384, 121 Mass. 453; Edmands *v.* Boston, 108 Mass. 535. And it has been held in this state that damages for the taking of land leased to several tenants are to be assessed as if the owner were the only person interested in the land. Edmands *v.* Boston, *supra*.

46. *In re* New York, etc., Bridge, 137 N. Y. 95, 32 N. E. 1054; Coutant *v.* Catlin, 2 Sandf. Ch. (N. Y.) 485. See also *In re* Park Com'rs, 1 N. Y. Suppl. 763.

Failure to apportion is an irregularity. It has been held that a failure on the part of the commissioners to apportion the damages to each of several parties claiming distinct interests in the same land is a mere irregularity. *In re* Washington St., 19 R. I. 156, 33 Atl. 516. See also Thornton *v.* North Providence, 6 R. I. 433.

Under the English statute known as the City Improvement Act (1847), where separate interests are claimed in the same property it is the right of every person making

of land is owned by tenants in common, there is no necessity for making a separate award of damages to each of such tenants.[47] Notwithstanding the fact that a tract of land condemned lies in two counties, compensation for the entire farm should be assessed in one proceeding.[48]

7. MONEY AWARD. It is the duty of the jury or commissioners to award compensation to the property-owner in money,[49] and they cannot in lieu thereof impose conditions upon the party condemning the property,[50] or require the property-owner to accept certain privileges.[51]

8. ASSESSMENT IN FAVOR OF OWNERS NOT MAKING A CLAIM. In some jurisdictions it has been held that if any owner claims damages and a proceeding is had to assess them, the damages sustained by all landowners whether they claim damages or not shall be assessed.[52]

9. BURDEN OF PROOF AND EVIDENCE — a. Burden of Proof. The burden of showing necessity and public use is upon the petitioner.[53] The burden of showing the damages which the owner will suffer rests on him,[54] while it is for the petitioner

a separate claim to have a separate assessment by a separate jury of the amount of compensation payable to him. Abrahams *v.* London, L. R. 6 Eq. 625, 37 L. J. Ch. 732, 18 L. T. Rep. N. S. 811.

47. *California.*— Spring Valley Water Works *v.* San Francisco, 22 Cal. 434.

Illinois.— Suver *v.* Chicago, etc., R. Co., 123 Ill. 293, 14 N. E. 12; Grayville, etc., R. Co. *v.* Christy, 92 Ill. 337.

Kentucky.— Paducah, etc., R. Co. *v.* Dipple, 16 Ky. L. Rep. 62.

Michigan.— East Saginaw, etc., R. Co. *v.* Benham, 28 Mich. 459.

New York.—Dyckman *v.* New York, 7 Barb. 498.

Pennsylvania.— Pittsburg, etc., R. Co. *v.* Hall, 25 Pa. St. 336.

Wisconsin.— Watson *v.* Milwaukee, etc., R. Co., 57 Wis. 332, 15 N. W. 468.

But see Ruppert *v.* Chicago, etc., R. Co., 43 Iowa 490.

The verdict is not insufficient because a gross sum is awarded to two owners, since in the absence of any testimony to the contrary it will be presumed that they owned the land in common. Suver *v.* Chicago, etc., R. Co., 123 Ill. 293, 14 N. E. 12; Union Depot Co. *v.* Fredericks, 117 Mo. 138, 21 S. W. 1118, 1130, 26 S. W. 350; Musick *v.* Kansas City, etc., R. Co., 114 Mo. 309, 21 S. W. 491; Snoddy *v.* Pettis County, 45 Mo. 361. But in New Jersey it has been held that an award of damages to A and B jointly, not stating how much to each, is bad, unless it appears by the record that they are joint tenants or tenants in common. Kellogg *v.* Fischer, 26 N. J. L. 129. See also State *v.* Blauvelt, 33 N. J. L. 36.

Where the interests in lands are undivided ones of several different owners and there are adverse conflicting claims by tax titles, attachments, and judgment liens, it is proper for the commissioners to ascertain and report the compensation to which the owners of each particular lot are entitled, leaving it for the court to determine in regard to the rights of the respective claimants to the money awarded. Chicago, etc., R. Co. *v.* Chamberlain, 84 Ill. 333.

Assessment to joint owners separately.— There is no impropriety in assessing the damages to joint owners separately. Thayer *v.* Worcester County, 10 Cush. (Mass.) 151. But see Watson *v.* Milwaukee, etc., R. Co., 57 Wis. 332, 15 N. W. 488.

48. Atchison, etc., R. Co. *v.* Gough, 29 Kan. 94.

49. Matter of Cincinnati, etc., R. Co., 1 Ohio Dec. (Reprint) 269, 6 West. L. J. 350. See also Kramer *v.* Cleveland, etc., R. Co., 1 Ohio Dec. (Reprint) 474, 10 West. L. J. 138.

50. Chicago, etc., R. Co. *v.* Melville, 66 Ill. 329. See also Alfred *v.* Kankakee, etc., R. Co., 92 Ill. 609 [*reversing* 3 Ill. App. 511]; New Orleans, etc., R. Co. *v.* Murrell, 34 La. Ann. 536; Pennsylvania R. Co. *v.* Reichert, 58 Md. 261; Toledo, etc., R. Co. *v.* Munson, 57 Mich. 42, 23 N. W. 455. *Quære* in McCord *v.* Sylvester, 32 Wis. 451.

51. Chicago, etc., R. Co. *v.* McGrew, 104 Mo. 282, 15 S. W. 931; Central Ohio R. Co. *v.* Holler, 7 Ohio St. 220; Chesapeake, etc., R. Co. *v.* Halstead, 7 W. Va. 301. *Compare* Omaha, etc., R. Co. *v.* Menk, 4 Nebr. 21.

52. Quackenbush *v.* District of Columbia, 20 D. C. 300; Washington *v.* Fisher, 43 N. J. L. 377; State *v.* Runyon, 24 N. J. L. 256.

53. Seattle, etc., R. Co. *v.* Murphine, 4 Wash. 448, 30 Pac. 720. See also *In re* New York Cent. R. Co., 66 N. Y. 407. The burden of showing that the construction of a ditch would benefit a highway and be a public utility is upon the petitioners for the construction of such ditch. Neff *v.* Reed, 98 Ind. 341.

54. *California.*— Los Angeles County *v.* Reyes, (1893) 32 Pac. 233; Monterey County *v.* Cushing, 83 Cal. 507, 23 Pac. 700.

Colorado.— Colorado Cent. R. Co. *v.* Allen, 13 Colo. 229, 22 Pac. 605.

Connecticut.— New Milford Water Co. *v.* Watson, 75 Conn. 237, 52 Atl. 947, 53 Atl. 57.

Indiana.— Evansville, etc., R. Co. *v.* Miller, 30 Ind. 209.

Texas.— Dallas *v.* Chenault, (App. 1890) 16 S. W. 173.

See 18 Cent. Dig. tit. "Eminent Domain," § 540.

to show that benefits will accrue to the owner and the amount of such benefits.[55] One who files a claim for damages, alleging that he is the owner in fee simple of the land taken, must prove his interest, as the amount of his damages depends on the extent of his interest in the land.[56] If other property than that described in the petition is brought into the case on cross petition, it is incumbent on the party thus bringing it in to show in the first instance that it was taken or damaged.[57] Where the question involved is the damage sustained by the abutting owner by reason of an excavation or embankment made in a street by a railroad company, the burden is upon such company to show that there is an established grade of the street and that the company has conformed to it.[58]

b. Evidence.[59] As a general rule in assessing damages witnesses as to such facts as are pertinent may be examined and all relevant evidence heard,[60] and it has been said that this should be done.[61] On the other hand it is said that an award may be made upon the personal knowledge and observation of the persons making the assessment, without taking testimony,[62] and in a few cases it has been held that witnesses cannot be sworn and examined.[63] A wide discretion must be allowed as to the kind of evidence which will be deemed helpful and which will be received.[64] The artificial rules which govern the admissibility and effect of evidence in courts of justice have no application to proceedings of this character.[65] Information may be collected in all the ways which a prudent man usually takes to satisfy his own mind, concerning matters of the like kind, where his own

In Washington, however, it is held that the burden of establishing the value of the land which it is sought to condemn is on the corporation, and that it is not shifted to the owner by the fact that he filed a pleading, purporting to be an answer, but which was not required by law, and which alleged no fact that could not be proved in its absence. Seattle, etc., R. Co. *v.* Murphine, 4 Wash. 448, 30 Pac. 720.

55. St. Louis, etc., R. Co. *v.* Knapp, 160 Mo. 396, 60 S. W. 300; Bennett *v.* Woody, 137 Mo. 377, 38 S. W. 972.

56. Costello *v.* Burke, 63 Iowa 361, 19 N. W. 247.

57. Hyde Park *v.* Dunham, 85 Ill. 569.

58. Pittsburg, etc., R. Co. *v.* Rose, 74 Pa. St. 362.

59. See, generally, EVIDENCE.

60. *Minnesota.*— Minneapolis *v.* Wilkin, 30 Minn. 140, 13 N. W. 581.

New Jersey.— Lehigh Valley R. Co. *v.* Dover, etc., R. Co., 43 N. J. L. 528.

New York.— Rondout, etc., R. Co. *v.* Deyo, 5 Lans. 296; *In re* John, etc., Sts., 19 Wend. 659.

Vermont.— Lyman *v.* Burlington, 22 Vt. 131.

United States.— Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170.

Books and papers may be examined. Columbia Delaware Bridge Co. *v.* Geisse, 36 N. J. L. 537; Coster *v.* New Jersey R., etc., Co., 24 N. J. L. 730.

61. Central Pac. R. Co. *v.* Pearson, 35 Cal. 247; Pennsylvania R. Co. *v.* Keiffer, 22 Pa. St. 356; Washington, etc., R. Co. *v.* Switzer, 26 Gratt. (Va.) 661.

62. Piper *v.* Connersville, etc., Turnpike Road Co., 12 Ind. 400; Lyman *v.* Burlington, 22 Vt. 131. See also *In re* New York, 34 Hun (N. Y.) 441.

63. Coster *v.* New Jersey R., etc., Co., 24 N. J. L. 730.

In Tennessee under a statute providing that the jury should go upon the premises and assess the damages, and making no provision for the examination of witnesses, it was held that jurors are themselves the witnesses respecting the facts in question and their report must be based upon their own estimate of the damages after a personal inspection of the premises. Clarksville, etc., Turnpike Co. *v.* Atkinson, 1 Sneed 426; Stevens *v.* Duck River Nav. Co., 1 Sneed 237.

64. Gage *v.* Judson, 111 Fed. 350. See also *In re* Clarkson, 15 N. Y. Suppl. 909; *In re* New York El. R. Co., 8 N. Y. Suppl. 707; *In re* Spring Garden St., 4 Rawle (Pa.) 192.

65. *Dakota.*— St. Paul, etc., R. Co. *v.* Covell, 2 Dak. 483, 11 N. W. 106.

Michigan.— Port Huron, etc., R. Co. *v.* Voorheis, 50 Mich. 506, 15 N. W. 882; Michigan Air-Line R. Co. *v.* Barness, 44 Mich. 222, 6 N. W. 651.

New Jersey.— Columbia Delaware Bridge Co. *v.* Geisse, 36 N. J. L. 537.

New York.— Matter of Guilford, 85 N. Y. App. Div. 207, 83 N. Y. Suppl. 312; Matter of White Plains Water Com'rs, 71 N. Y. App. Div. 544, 76 N. Y. Suppl. 11.

Oregon.— Portland *v.* King, (1891) 26 Pac. 376.

Contra.— Central Pac. R. Co. *v.* Pearson, 35 Cal. 247; Washington, etc., R. Co. *v.* Switzer, 26 Gratt. (Va.) 661.

Testimony of witnesses not controlling.— The judgment of commissioners based upon their own personal observation and experience is not to be controlled or outweighed by the opinions of any number of witnesses. *In re* Guilford, 85 N. Y. App. Div. 207, 83 N. Y. Suppl. 312; Rondout, etc., R. Co. *v.* Deyo, 5

interests are involved in the inquiry.[66] Evidence as to value,[67] as to damages,[68] as a diagram or plan for increasing the value of property in the market. Cincinnati, etc., R. Co. *v.* Longworth, 30 Ohio St. 108. See also Hartshorn *v.* Burlington, etc., R. Co., 52 Iowa 613, 3 N. W. 648.

Purpose for which property adopted.— Where the owner of land taken for railway purposes had testified to the value of the tract before and after the right of way had been appropriated, he may show the basis of his estimate by testifying further that the property before the appropriation was adapted to residence purposes, but that it was not so adapted afterward. McClean *v.* Chicago, etc., R. Co., 67 Iowa 568, 25 N. W. 782.

Inadmissible evidence as to value.— *Arkansas.*— Texas, etc., R. Co. *v.* Cella, 42 Ark. 528.

California.—San Jose, etc., R. Co. *v.* Mayne, 83 Cal. 566, 23 Pac. 522.

Illinois.— Oran *v.* Hoblit, 19 Ill. App. 259.

Kansas.— Dickinson County *v.* Hogan, 39 Kan. 606, 18 Pac. 611.

Massachusetts.— Cobb *v.* Boston, 112 Mass. 181.

Minnesota.—Carli *v.* Stillwater, etc., R. Co., 16 Minn. 260.

New York.— Matter of Rochester, etc., R. Co., 50 Hun 29, 2 N. Y. Suppl. 457; *In re* Thompson, 12 N. Y. Suppl. 182.

Pennsylvania.— Montgomery County *v.* Schuylkill Bridge Co., 110 Pa. St. 54, 20 Atl. 407; Pennsylvania, etc., R. Co. *v.* Roberts, 2 Walk. (Pa.) 482.

Texas.— Cane Belt R. Co. *v.* Hughes, 72 Tex. Civ. App. 565, 72 S. W. 1020.

Virginia.— Richmond, etc., R. Co. *v.* Humphreys, 90 Va. 425, 18 S. E. 901.

See 18 Cent. Dig. tit. "Eminent Domain," § 541.

66. Columbia Delaware Bridge Co. *v.* Geisse, 36 N. J. L. 537; Matter of White Plains Water Com'rs, 71 N. Y. App. Div. 544, 76 N. Y. Suppl. 11; Troy, etc., R. Co. *v.* Lee, 13 Barb. (N. Y.) 169; *In re* Furman St., 17 Wend. (N. Y.) 649.

67. *Georgia.*— Cincinnati, etc., R. Co. *v.* Mims, 71 Ga. 240.

Illinois.— Rock Island, etc., R. Co. *v.* Gordon, 184 Ill. 456, 56 N. E. 810; Dupuis *v.* Chicago, etc., R. Co., 115 Ill. 97, 3 N. E. 720; De Buol *v.* Freeport, etc., R. Co., 111 Ill. 499.

Iowa.— Doud *v.* Mason City, etc., R. Co., 76 Iowa 438, 41 N. W. 65.

Kansas.— Missouri River, etc., R. Co. *v.* Owen, 8 Kan. 409.

Kentucky.—Louisville, etc., R. Co. *v.* Asher, 10 Ky. L. Rep. 1021.

Louisiana.— Shreveport, etc., R. Co. *v.* Hinds, 50 La. Ann. 781, 24 So. 287.

Massachusetts.— Stone *v.* Com., 181 Mass. 438, 63 N. E. 1074; Fales *v.* Easthampton, 162 Mass. 422, 38 N. E. 1129.

Nebraska.— Burlington, etc., R. Co. *v.* Schluntz, 14 Nebr. 421, 16 N. W. 439.

New York.— College Point *v.* Dennett, 5 Thomps. & C. 217.

Pennsylvania.— Schuylkill, etc., R. Co. *v.* Stocker, 128 Pa. St. 233, 18 Atl. 399; Pennsylvania, etc., R. Co. *v.* Cleary, 125 Pa. St. 442, 17 Atl. 468, 11 Am. St. Rep. 913; Baltimore, etc., R. Co. *v.* Springer, (Pa. 1888) 13 Atl. 76.

Washington.—Seattle, etc., R. Co. *v.* Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864.

See 18 Cent. Dig. tit. "Eminent Domain," § 541.

Maps and diagrams.— On a trial before a court and jury on an appeal from an assessment by commissioners, a landowner while testifying as a witness in his own behalf may introduce in evidence as a part of his testimony, a map or diagram drawn by himself, showing the location of his various improvements on the land, his house, barn, orchard, meadow, cultivated ground, etc., and relative location of the railroad over the land with respect to these improvements. Chicago, etc., R. Co. *v.* Dill, 41 Kan. 736, 21 Pac. 778. In offering testimony on this issue the owner is not limited to any preëxisting use of the land. If it was of little value as a farm, or for common uses, and was of great value as mineral land or as a town site, that fact might be shown, although it had never been so used. If it was more valuable in the particular mode in which it had been subdivided into lots, that fact might also be shown, and in connection with such a proof a diagram or plat of such subdivision was admissible, although unrecorded, not as a town plat, but

68. *Illinois.*— Pittsburgh, etc., R. Co. *v.* Lyons, 159 Ill. 576, 43 N. E. 377; Lieberman *v.* Chicago, etc., R. Co., 141 Ill. 140, 30 N. E. 544; Chicago, etc., R. Co. *v.* Greiney, 137 Ill. 628, 25 N. E. 798; Kiernan *v.* Chicago, etc., R. Co., 123 Ill. 188, 14 N. E. 18; Illinois, etc., R., etc., Co. *v.* Switzer, 117 Ill. 399, 7 N. E. 664, 57 Am. Rep. 875; Chicago *v.* McDonough, 112 Ill. 85; St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144; Rockford, etc., R. Co. *v.* McKinley, 64 Ill. 338; Jacksonville, etc., R. Co. *v.* Kidder, 21 Ill. 131.

Indiana.—Chicago, etc., R. Co. *v.* Huncheon, 130 Ind. 529, 30 N. E. 636; State *v.* Beackmo, 6 Blackf. 488; Indiana, etc., R. Co. *v.* Rinehart, 14 Ind. App. 588, 43 N. E. 238.

Iowa.— Ellsworth *v.* Chicago, etc., R. Co., 91 Iowa 386, 59 N. W. 78.

Kansas.— Chicago, etc., R. Co. *v.* Cosper, 42 Kan. 561, 22 Pac. 634; Kansas City, etc., R. Co. *v.* Kregelo, 32 Kan. 608, 5 Pac. 15.

Massachusetts.—Butchers' Slaughtering, etc., Assoc. *v.* Com., 163 Mass. 386, 40 N. E. 176; Shattuck *v.* Stoneham Branch R. Co., 6 Allen 115; Boston, etc., R. Co. *v.* Middlesex County, 1 Allen 324; Hosmer *v.* Warner, 15 Gray 46; Dickenson *v.* Fitchberg, 13 Gray 546; Plympton *v.* Woburn, 11 Gray 415.

and as to benefits is generally to be admitted and considered.[69] Where an appeal is taken from an assessment of damages by jurors or commissioners, as the case may be, their award is held not to be admissible on the subject of damages.[70] The

Minnesota.— Cedar Rapids, etc., R. Co. *v.* Raymond, 37 Minn. 204, 33 N. W. 704.

Montana.— Gallatin Canal Co. *v.* Lay, 10 Mont. 528, 26 Pac. 1001.

Nebraska.— Fremont, etc., R. Co. *v.* Bates, 40 Nebr. 381, 58 N. W. 959; Omaha Southern R. Co. *v.* Todd, 39 Nebr. 818, 58 N. W. 289.

New Hampshire.— March *v.* Portsmouth, etc., R. Co., 19 N. H. 372.

New York.— *In re* New York Cent., etc., R. Co., 6 Hun 149.

Pennsylvania.—Leiby *v.* Clear Spring Water Co., 205 Pa. St. 634, 55 Atl. 782; Gamble *v.* Philadelphia, 162 Pa. St. 413, 29 Atl. 739; Wilson *v.* Equitable Gas Co., 152 Pa. St. 566, 25 Atl. 635 [*distinguishing* Pennsylvania, etc., R. Co. *v.* Cleary, 125 Pa. St. 442, 17 Atl. 468, 1 Am. St. Rep. 913]; Ehret *v.* Schuylkill River East Side R. Co., 151 Pa. St. 158, 24 Atl. 1068; Davis *v.* Jefferson Gas Co., 147 Pa. St. 130, 23 Atl. 218; Rees *v.* Schuylkill River East Side R. Co., 135 Pa. St. 629, 20 Atl. 149; Reading, etc., R. Co. *v.* Balthaser, 126 Pa. St. 1, 17 Atl. 518; Pennsylvania Schuylkill Valley R. Co. *v.* Keller, (1887) 11 Atl. 381; Danville, etc., R. Co. *v.* Gearhart, 81* Pa. St. 260; Barclay R., etc., Co. *v.* Ingham, 36 Pa. St. 194.

Vermont.— Wead *v.* St. Johnsbury, etc., R. Co., 64 Vt. 52, 24 Atl. 361.

Washington.— Oregon R., etc., Co. *v.* Owsley, 3 Wash. Terr. 38, 13 Pac. 186.

Wisconsin.— Parks *v.* Wisconsin Cent. R. Co., 33 Wis. 413.

See 18 Cent. Dig. tit. "Eminent Domain," § 542.

Inadmissible evidence as to damages.—*California.*— Heffernan *v.* San Francisco Super. Ct., (1893) 33 Pac. 725; San Francisco *v.* Kiernan, 98 Cal. 614, 33 Pac. 720.

Colorado.— Colorado Midland R. Co. *v.* Brown, 15 Colo. 193, 25 Pac. 87.

Illinois.— Indiana, etc., R. Co. *v.* Conness, 184 Ill. 178, 56 N. E. 402; Wabash, etc., R. Co. *v.* McDougall, 126 Ill. 111, 18 N. E. 291, 9 Am. St. Rep. 539, 1 L. R. A. 207; Lafayette, etc., R. Co. *v.* Winslow, 66 Ill. 219.

Iowa.— Pingrey *v.* Cherokee, etc., R. Co., 78 Iowa 438, 43 N. W. 285; Ball *v.* Keokuk, etc., R. Co., 71 Iowa 306, 32 N. W. 354.

Massachusetts.— Howe *v.* Weymouth, 148 Mass. 605, 20 N. E. 316; Drury *v.* Midland R. Co., 127 Mass. 571.

Missouri.— St. Louis, etc., R. Co. *v.* Clark, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751.

Pennsylvania.— Boyd *v.* Negley, 40 Pa. St. 377; Hays *v.* Risher, 32 Pa. St. 169.

Texas.— Karnes County *v.* Nichols, (Civ. App. 1899) 54 S. W. 656; Morris *v.* Coleman County, (Civ. App. 1894) 28 S. W. 380.

See 18 Cent. Dig. tit. "Eminent Domain," § 542.

A trust deed given to secure the purchase-price of a majority of the lots condemned having been received in evidence by the court upon a hearing to determine the question of title and interest of the various parties before submitting the case to the jury is not competent to go to the jury on the question of damages. Schuster *v.* Chicago Sanitary Dist., 177 Ill. 626, 52 N. E. 855.

A bond given by a city to a property-owner to secure payment of such damages as he may sustain from opening a street through his property is not admissible. Bigelow *v.* Pittsburg, 189 Pa. St. 455, 42 Atl. 110.

69. Hayes *v.* Ottawa, etc., R. Co., 54 Ill. 373; Beale *v.* Boston, 166 Mass. 53, 43 N. E. 1029; Shattuck *v.* Stoneham Branch R. Co., 6 Allen 115; Dickenson *v.* Fitchburg, 13 Gray 546; Chicago, etc., R. Co. *v.* Williams, 8 Ohio Dec. (Reprint) 736, 9 Cinc. L. Bul. 253; Reading, etc., R. Co. *v.* Balthaser, 126 Pa. St. 1, 17 Atl. 518; Danville, etc., R. Co. *v.* Gearhart, 81* Pa. St. 260.

Inadmissible evidence as to benefits.— Cushing *v.* Nantasket Beach R. Co., 143 Mass. 77, 9 N. E. 22; Brown *v.* Providence, etc., R. Co., 5 Gray (Mass.) 35; Reading, etc., R. Co. *v.* Balthaser, 119 Pa. St. 472, 13 Atl. 294; Pittsburg, etc., R. Co. *v.* Robinson, 95 Pa. St. 426; Pittsburg, etc., R. Co. *v.* Rose, 74 Pa. St. 362; Lullamire *v.* Kaufman County, 3 Tex. App. Civ. Cas. § 325; Seattle, etc., R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738.

70. *Illinois.*— Oran *v.* Hoblit, 19 Ill. App. 259.

Indiana.— See Chicago, etc., R. Co. *v.* Winslow, 27 Ind. App. 316, 60 N. E. 466.

Kansas.— Chicago, etc., R. Co. *v.* Broquet, 47 Kan. 571, 28 Pac. 717.

Kentucky.— Louisville, etc., R. Co. *v.* Thompson, 18 B. Mon. 735.

Massachusetts.— Wellington *v.* Boston, etc., R. Co., 158 Mass. 185, 33 N. E. 393; Brown *v.* Providence, etc., R. Co., 5 Gray 35. *Compare* Chapin *v.* Boston, etc., R. Corp., 6 Cush. 422; White *v.* Boston, etc., R. Corp., 6 Cush. 420.

Minnesota.— Northern Pac. R. Co. *v.* Duncan, 87 Minn. 91, 91 N. W. 271; Sherman *v.* St. Paul, etc., R. Co., 30 Minn. 227, 15 N. W. 239.

Rhode Island.— Daigneault *v.* Woonsocket, 18 R. I. 378, 28 Atl. 346; Ennis *v.* Wood River Branch R. Co., 12 R. I. 73.

Texas.— Giersa *v.* Dennison, etc., R. Co., (Civ. App. 1898) 45 S. W. 925; Southern Cotton Press, etc., Co. *v.* Galveston Wharf Co., 3 Tex. App. Civ. Cas. § 256.

Wisconsin.— Wooster *v.* Sugar River Valley R. Co., 57 Wis. 311, 15 N. W. 401.

United States.— Sharpe *v.* U. S., 191 U. S. 341, 24 S. Ct. 114, 48 L. ed. 211 [*affirming* 112 Fed. 893, 50 C. C. A. 597, 57 L. R. A. 932].

See 18 Cent. Dig. tit. "Eminent Domain," § 679.

Purposes for which admissible.— A report of commissioners is admissible on appeal to—

commissioners may themselves be witnesses.[71] They cannot be asked whether their award correctly expresses their judgment, but they may be asked for their judgment at the time of the trial on appeal.[72] The verdict and judgment rendered in prior proceedings to condemn the same land cannot be admitted.[73]

10. INSTRUCTIONS[74] — a. Necessity. There are decisions which hold that it is not necessary to instruct commissioners or jurors in proceedings to assess damages,[75] but in such proceedings instructions are sometimes given.[76]

b. Rules Applicable. When instructions are given, the rules which obtain in ordinary civil actions are generally applicable. Thus if a party desires a particular instruction he should ask for it; non-direction is not error.[77] The instructions given must be within the issues,[78] must be applicable to the evidence,[79] and

show that the statute requiring the making thereof has been complied with. Terre Haute, etc., R. Co. *v.* Flora, 29 Ind. App. 442, 64 N. E. 648. A report of commissioners, and an accompanying map, are legal evidence on appeal for the purpose of showing what land was condemned. St. Joseph, etc., R. Co. *v.* Orr, 8 Kan. 419; Missouri River, etc., R. Co. *v.* Owen, 8 Kan. 409. An award is admissible on appeal to explain the location of a proposed road and to describe the situation of the premises. Northern Pac. R. Co. *v.* Duncan, 87 Minn. 91, 91 N. W. 271. See also Sherman *v.* St. Paul, etc., R. Co., 30 Minn. 227, 15 N. W. 239. Where it is necessary for the jury to know the amount of the commissioners' award, in order that credit may be given the petitioner for the amount paid, and interest may be awarded the property-owner for the excess, in case damages found by the jury should exceed those awarded by the commissioners, it is not error to admit in evidence the report of the commissioners, but the jury must be instructed that they should not allow the amount awarded by the commissioners to influence their judgment. Kansas City Suburban Belt R. Co. *v.* McElroy, 161 Mo. 584, 61 S. W. 871.

In Indiana it has been held that on a trial in the circuit court of an appeal from an award of a board of turnpike directors to a landowner for the removal of gravel from his land, all pleadings and papers in the transcript on appeal are a part of the record and may be considered by the jury without being formally introduced into evidence. Bell *v.* Pavey, 7 Ind. App. 19, 33 N. E. 1011.

In Massachusetts on a hearing before a sheriff's jury to estimate the damages of an owner of land taken for a railroad, the order of the county commissioners estimating the damages and directing the making of a passageway for draining the petitioner's premises, the wetting of which was one principal ground of his claim for damages, may properly go to the jury with the other papers in the case. Chapin *v.* Boston, etc., R. Co., 6 Cush. (Mass.) 422. See also White *v.* Boston, etc., R. Co., 6 Cush. (Mass.) 420.

71. Frosard *v.* St. Landry Police Jury, 3 La. Ann. 560; Perrysville, etc., Plank-Road Co. *v.* Thomas, 20 Pa. St. 91; Philadelphia, etc., R. Co. *v.* Rogers, 2 Walk. (Pa.) 275. See also St. Louis *v.* Abeln, 170 Mo. 318, 70 S. W. 708, on hearing of exceptions to report. The commissioner must speak from his own knowledge, and not give any opinion founded on evidence heard as a viewer. Dorlan *v.* East Brandywine, etc., R. Co., 46 Pa. St. 520.

72. Winklemans *v.* Des Moines Northwestern R. Co., 62 Iowa 11, 17 N. W. 82.

73. Kansas City *v.* Mulkey, 176 Mo. 229, 75 S. W. 973.

74. See, generally, TRIAL.

75. Baltimore, etc., R. Co. *v.* Hennessy, 21 D. C. 489; Flint, etc., R. Co. *v.* Detroit, etc., R. Co., 64 Mich. 350, 31 N. W. 281.

Failure to request.— The award will not be set aside for the failure of the court to instruct the commissioners as to their duties, if neither party requests that instructions be given. Chicago, etc., R. Co. *v.* Randolph Town-Site Co., 103 Mo. 451, 15 S. W. 437.

Under Me. Rev. St. c. 25, § 16, the person who presides over a jury called to assess damages, on an appeal from the award of county commissioners for land taken by a railroad company has no authority to instruct the jury in matters of law (McKenney *v.* Penobscot County Com'rs, 40 Me. 136), but under Rev. St. c. 18, § 12, it is the duty of the person presiding at the view and hearing by a jury in assessing damages for land taken by a railroad company to instruct the jury upon any question of law, when requested by either party (Allen *v.* Androscoggin R. Co., 60 Me. 494).

In New York in a statutory proceeding before a justice of the peace, under the laws of 1847, chapter 455, for the reassessment of damages for laying out a highway, the justice may properly refuse to charge the jury, although a charge is requested which properly states the law. People *v.* Eldridge, 6 Thomps. & C. 20.

76. Molett *v.* Keenan, 22 Ala. 484; Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 107.

77. Cole *v.* Boston, 181 Mass. 374, 63 N. E. 1061; Kansas City, etc., R. Co. *v.* Shoemaker, 160 Mo. 425, 61 S. W. 205; Doyle *v.* Kansas City, etc., R. Co., 113 Mo. 280, 20 S. W. 970; March *v.* Portsmouth, etc., R. Co., 19 N. H. 372.

78. Chicago, etc., R. Co. *v.* Atterbury, 156 Ill. 281, 40 N. E. 826; Chicago, etc., R. Co. *v.* Patterson, 26 Ind. App. 295, 59 N. E. 688; Ragan *v.* Kansas City, etc., R. Co., 144 Mo. 623, 46 S. W. 602.

79. Chicago, etc., R. Co. *v.* Cosper, 42

authorized thereby.[80] Misleading instructions must not be given.[81] The court should not in its instructions submit a question of law upon which it should pass.[82] If the instructions taken all together present the proper rule for the guidance of the jury they are not objectionable.[83] It is not necessary to repeat an instruction already given in substance and with sufficient fulness.[84] An instruction as to the form of the verdict is proper.[85] Legal terms should be explained by the court.[86]

c. What Instructions Proper. Instructions are often given as to the injuries for which damages may be recovered and the compensation which should be allowed therefor,[87] but the court should not express its opinion as to the amount

Kan. 561, 22 Pac. 634; Leroy, etc., R. Co. *v.* Ross, 40 Kan. 598, 20 Pac. 197, 2 L. R. A. 217; Fitz *v.* Nantasket Beach R. Co., 148 Mass. 35, 18 N. E. 592; Bockoven *v.* Lincoln Tp., 13 S. D. 317, 83 N. W. 335.

80. Pittsburgh, etc., R. Co. *v.* Wolcott, (Ind. 1904) 69 N. E. 451.

81. *Alabama.*— Mobile, etc., R. Co. *v.* Hester, 122 Ala. 249, 25 So. 220.

Illinois.— De Buol *v.* Freeport, etc., R. Co., 111 Ill. 499; Mix *v.* Lafayette, etc., R. Co., 67 Ill. 319.

Indiana.— Fifer *v.* Ritter, 159 Ind. 8, 64 N. E. 463; Pittsburgh, etc., R. Co. *v.* Swinney, 59 Ind. 100.

Kansas.— Leroy, etc., R. Co. *v.* Ross, 40 Kan. 598, 20 Pac. 197, 2 L. R. A. 217.

Missouri.— Chicago, etc., R. Co. *v.* McGrew, 104 Mo. 282, 15 S. W. 931.

Nebraska.— Otoe County *v.* Heye, 19 Nebr. 289, 27 N. W. 145.

Illustrations.— An instruction which intimates that there is no damage to the property of the landowner is erroneous. Chicago, etc., R. Co. *v.* Naperville, 166 Ill. 87, 47 N. E. 734. See also Illinois Cent. R. Co. *v.* Mattoon Highway Com'rs, 161 Ill. 647, 43 N. E. 1100; Chicago, etc., R. Co. *v.* Cicero, 154 Ill. 656, 39 N. E. 574. An instruction should not intimate that the jury may arbitrarily disregard unimpeached evidence as to damages. Kiernan *v.* Chicago, etc., R. Co., 123 Ill. 188, 14 N. E. 18. An instruction is erroneous which directs the attention of the jury to every element detracting from the value of the property taken and which omits everything showing that such property is valuable. Dupuis *v.* Chicago, etc., R. Co., 115 Ill. 97, 3 N. E. 720. Instructions are objectionable when they are of such a character as to afford a probable presumption that the jury were misled by them.

Illinois.— Chicago, etc., R. Co. *v.* Goff, 158 Ill. 453, 41 N. E. 1112; Chicago, etc., R. Co., *v.* Dooling, 95 Ill. 202.

Indiana.— Goodwine *v.* Evans, 134 Ind. 262, 33 N. E. 1031.

Minnesota.— Sigafoos *v.* Minneapolis, etc., R. Co., 39 Minn. 8, 38 N. W. 627.

New Hampshire.— March *v.* Portsmouth, etc., R. Co., 19 N. H. 372.

Pennsylvania.— Royer *v.* Ephrata Borough, 171 Pa. St. 429, 33 Atl. 361.

Texas.— Ft. Worth, etc., R. Co. *v.* Pearce, 75 Tex. 281, 12 S. W. 864.

82. Trotier *v.* St. Louis, etc., R. Co., 180 Ill. 471, 54 N. E. 487; Elgin, etc., R. Co. *v.* Fletcher, 128 Ill. 619, 21 N. E. 577; Kiernan *v.* Chicago, etc., R. Co., 123 Ill. 188, 14 N. E. 18; Davidson *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 91.

83. Twin Lakes Hydraulic Gold Min. Syndicate *v.* Colorado Midland, etc., R. Co., 16 Colo. 1, 27 Pac. 258; Board of Trade Telephone Co. *v.* Blume, 176 Ill. 247, 52 N. E. 258; Cook *v.* Chicago, etc., R. Co., 83 Iowa 278, 49 N. W. 92; Dreher *v.* Iowa South Western R. Co., 59 Iowa 599, 13 N. W. 754. Chicago, etc., R. Co. *v.* Vivian, 33 Mo. App. 583.

84. Centralia, etc., R. Co. *v.* Rixman, 121 Ill. 214, 12 N. E. 685; Concordia Cemetery Assoc. *v.* Minnesota, etc., R. Co., 121 Ill. 199, 12 N. E. 536; Chicago, etc., R. Co. *v.* Patterson, 26 Ind. App. 295, 59 N. E. 688; Pingery *v.* Cherokee, etc., R. Co., 78 Iowa 438, 43 N. W. 285.

85. Harvey *v.* Lackawanna, etc., R. Co., 47 Pa. St. 428.

86. Kansas City, etc., R. Co. *v.* Dawley, 50 Mo. App. 480.

87. *Illinois.*— Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 112 Ill. 589.

Iowa.— Diamond Jo Line Steamers *v.* Davenport, etc., R. Co., 115 Iowa 480, 88 N. W. 959.

Maryland.— Baltimore, etc., R. Co. *v.* Boyd, (1890) 20 Atl. 902.

Massachusetts.— Teele *v.* Boston, 165 Mass. 88, 42 N. E. 506.

New Jersey.— Sullivan *v.* North Hudson County R. Co., 51 N. J. L. 518, 18 Atl. 689.

Pennsylvania.— Wallace *v.* Jefferson Gas Co., 147 Pa. St. 205, 23 Atl. 416.

Texas.— Dallas, etc., R. Co. *v.* Chenault, (App. 1890) 16 S. W. 173.

United States.— Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 107.

Fancy of the jury.— An instruction should not be given which leaves the jury to their own fancy as to the damages which should be recovered. Louisville, etc., R. Co. *v.* Hennen, 14 Ky. L. Rep. 526.

Instructions as to the limits of the injuries to be considered.— Hodgerson *v.* St. Louis, etc., R. Co., 160 Ill. 430, 43 N. E. 614; Sater *v.* Burlington, etc., Plank Road Co., 1 Iowa 386; Chesapeake, etc., R. Co. *v.* Smith, 51 S. W. 12, 21 Ky. L. Rep. 175; Gulf, etc., R. Co. *v.* Brugger, 24 Tex. Civ. App. 367, 59 S. W. 556.

Instructions as to the proper elements of damage.— Fayetteville, etc., R. Co. *v.* Combs, 51 Ark. 324, 11 S. W. 418; Mix *v.* Lafayette, etc., R. Co., 67 Ill. 319; Atchison, etc., R. Co. *v.* Lenz, 35 Ill. App. 330; Indiana, etc., R.

of the damages to be awarded.[88] The question of market value is a proper subject for instructions.[89] The jury should be instructed as to the circumstances under which benefits may be allowed, and the character of the benefits to be allowed.[90] Instructions as to injuries to property not taken are properly given.[91]

11. REVIEW OF AND ACTION UPON REPORT BY THE COURT — a. Confirmation. After the report of the commissioners or the verdict of the jury has been made, it must, by the usual practice, be brought before the court and made subject to review.[92] As when reviewing the verdict of a jury or report of referees on a question of fact, the court will confirm the report of the commissioners unless there is a plain and decided preponderance of evidence against the finding thereof.[93] If it appears that the commissioners have been regular in their proceedings and that due notice of the motion for confirmation has been given[94] it is a

Co. v. Cook, 102 Ind. 133, 26 N. E. 203; Louisville, etc., R. Co. v. Thompson, 18 B. Mon. (Ky.) 735; Otoe County v. Heye, 19 Nebr. 289, 27 N. W. 145.

Instructions as to the use to which the property is put.— Chicago, etc., R. Co. v. Chicago, etc., R. Co., 112 Ill. 589; Bennett v. Marion, 106 Iowa 628, 76 N. W. 844; Teele v. Boston, 165 Mass. 88, 42 N. E. 506; Whitman v. Boston, etc., R. Co., 7 Allen (Mass.) 313; Miller v. Windsor Water Co., 148 Pa. St. 429, 23 Atl. 1132.

88. Schuylkill River East Side R. Co. v. Stocker, 128 Pa. St. 233, 18 Atl. 399; Cresson, etc., Short Route R. Co. v. Aunsman, (Pa. 1887) 11 Atl. 561; Weyer v. Chicago, etc., R. Co., 68 Wis. 180, 31 N. W. 710.

89. Paducah v. Allen, 111 Ky. 361, 63 S. W. 981, 23 Ky. L. Rep. 701, 98 Am. St. Rep. 422; Kansas City, etc., R. Co. v. Shoemaker, 160 Mo. 425, 61 S. W. 205; Frick Coke Co. v. Painter, 198 Pa. St. 468, 48 Atl. 302.

90. *Colorado.*— Rio Grande Southern R. Co. v. Knight, 1 Colo. App. 219, 28 Pac. 19.

Illinois.— Chicago, etc., R. Co. v. Aldrich, 134 Ill. 9, 24 N. E. 763; Concordia Cemetery Assoc. v. Minnesota, etc., R. Co., 121 Ill. 199, 12 N. E. 536; Hyde Park v. Washington Ice Co., 117 Ill. 233, 7 N. E. 523. See also Washington Ice Co. v. Chicago, 147 Ill. 327, 35 N. E. 378, 37 Am. St. Rep. 222.

Indiana.— Fifer v. Ritter, 159 Ind. 8, 64 N. E. 463. See also Grand Rapids, etc., R. Co. v. Horn, 41 Ind. 479.

Iowa.— Ball v. Keokuk, etc., R. Co., 74 Iowa 132, 37 N. W. 110; Brooks v. Davenport, etc., R. Co., 37 Iowa 99.

Massachusetts.—Cross v. Plymouth County, 125 Mass. 557.

North Carolina.— Haislip v. Wilmington, etc., R. Co., 102 N. C. 376, 8 S. E. 926.

Pennsylvania.— See Robinson v. Pittsburg, etc., R. Co., 27 Pittsb. Leg. J. 137.

Texas.— Morris v. Coleman County, (Civ. App. 1894) 28 S. W. 380.

See 18 Cent. Dig. tit. "Eminent Domain," § 567.

91. *Colorado.*— Denver, etc., R. Co. v. Schmitt, 11 Colo. 56, 16 Pac. 842.

Illinois.— Hercules Iron Works v. Elgin, etc., R. Co., 141 Ill. 491, 30 N. E. 1050; Chicago, etc., R. Co. v. Bowman, 122 Ill. 595, 13 N. E. 814; Chicago, etc., R. Co. v. Hopkins, 90 Ill. 316.

Iowa.— Cook v. Chicago, etc., R. Co., 83 Iowa 278, 49 N. W. 92; Brooks v. Davenport, etc., R. Co., 37 Iowa 99.

Kansas.— Central Branch Union Pac. R. Co. v. Andrews, 41 Kan. 370, 21 Pac. 276.

Massachusetts.— Bemis v. Springfield, 122 Mass. 110.

Minnesota.— Redmond v. St. Paul, etc., R. Co., 39 Minn. 248, 40 N. W. 64; Carli v. Stillwater, etc., R. Co., 16 Minn. 260; Minnesota Valley R. Co. v. Doran, 15 Minn. 230.

Pennsylvania.— Mahaffey v. Beech Creek R. Co., 163 Pa. St. 158, 29 Atl. 881.

Texas.— Ft. Worth, etc., R. Co. v. Dowie, 82 Tex. 383, 17 S. W. 620; Roy v. Missouri, etc., R. Co., (Civ. App. 1895) 32 S. W. 72.

92. *Maine.*— See Bryant v. Knox, etc., R. Co., 61 Me. 300.

Michigan.— Fort St. Union Depot Co. v. Backus, 92 Mich. 33, 52 N. W. 790.

Missouri.—Hannibal Bridge Co. v. Schauerbacker, 49 Mo. 555.

New York.— *In re* Guilford, 85 N. Y. App. Div. 207, 93 N. Y. Suppl. 312.

Vermont.— Lyman v. Burlington, 22 Vt. 131.

See 18 Cent. Dig. tit. "Eminent Domain," § 614.

Review by what court.—Usually the review of the report or inquisition for its confirmation or setting aside as the case may be must be made by the court to which it is returnable. Burr v. Bucksport, etc., R. Co., 64 Me. 131; New Cent. Coal Co. v. George's Creek Coal, etc., Co., 37 Md. 537.

Nebr. Comp. St. c. 16, § 97, provides that for the purpose of locating a railroad right of way the county judge shall appoint six freeholders to assess the damages and report in writing to the county judge, who shall certify it to the county clerk for record, and it is held that the proceedings are not in the county court as such, so as to give the court jurisdiction to set them aside in a suit in equity. Mattheis v. Fremont, etc., R. Co., 53 Nebr. 681, 74 N. W. 30.

93. *In re* Pearl St., 19 Wend. (N. Y.) 651. See *infra*, XI, M, 11, b.

94. See *infra*, XI, M, 11, f, (II).

matter of course to confirm the report.[95] Under some statutes, however, it is the duty of the court before confirming the report to see that the damages awarded have been paid or tendered and brought into court.[96] If the report is confirmed after the exceptions filed by the condemning company, the confirmation relates to the time of filing the report, that interest on the award may be carried from that date.[97] No rights vest either in the land condemned[98] or in the damages assessed[99] until the inquisition or the report of the commissioners is finally ratified or confirmed.

b. Setting Aside — (i) *In General.* The report of commissioners or viewers is regarded with as much[1] or even greater respect than the verdict of a jury rendered in an ordinary case at law, for commissioners are usually selected with special reference to their fitness for their duties and they generally have opportunities to obtain information from all available sources in as ample a manner as a private individual when his own interests are involved.[2] The court's power to set aside the award of commissioners or of a jury is in some instances governed by statutes relating particularly to condemnation proceedings rather than by the general rules of practice.[3] Under some statutes the usual power possessed by the court[4] is limited or altogether denied.[5] It is a common statutory provision that

95. *In re* New York El. R. Co., 35 Hun (N. Y.) 414; New York, etc., R. Co. *v.* Corey, 5 How. Pr. (N. Y.) 177.

Whether the report of the viewers or of the reviewers must be confirmed. — Where the viewers and reviewers report the same location for a road, but with a different amount of damages, the court has no discretion as to which report it must approve; it is bound to accept the award of the reviewers. *In re* Lewistown, 84 Pa. St. 410; *In re* Bensalem Tp., 38 Pa. St. 368, 3 Grant (Pa.) 321, where the court said that it was only in the case where the two juries reported different locations for the same road that the court had any discretion as to which one it would accept.

96. *In re* Leet Tp., (Pa. 1887) 7 Atl. 801. But see *In re* Reed St., 19 Leg. Int. (Pa.) 141, where it was held that in a street opening proceeding the court would leave it to the municipal authorities to provide for the damages when the actual use of the street was required.

97. Pennsylvania R. Co. *v.* Cooper, 58 Pa. St. 408.

98. New Cent. Coal Co. *v.* George's Creek Coal, etc., Co., 37 Md. 537; Fort St. Union Depot Co. *v.* Backus, 92 Mich. 33, 52 N. W. 790; Heyl *v.* Philadelphia, 4 Leg. Gaz. (Pa.) 317.

99. Schneider *v.* Rochester, 90 Hun (N. Y.) 171, 35 N. Y. Suppl. 786; *In re* Anthony St., 20 Wend. (N. Y.) 618, 32 Am. Dec. 608.

1. *In re* East Franklin Tp. Road, 8 Pa. Co. Ct. 590. See Matter of Rogers Ave., 22 N. Y. Suppl. 27, 29 Abb. N. Cas. (N. Y.) 361.

2. Manhattan R. Co. *v.* Comstock, 74 N. Y. App. Div. 341, 77 N. Y. Suppl. 416; *In re* Staten Island Rapid Transit R. Co., 47 Hun (N. Y.) 396. *Compare* Texas, etc., R. Co. *v.* Southern Development Co., 52 La. Ann. 535, 27 So. 101.

All the presumptions are in favor of the correctness of the report, in the absence of any illegality or irregularity appearing upon its face. New Orleans, etc., R. Co. *v.* Rabasse, 44 La. Ann. 178, 10 So. 708. See Matter of Grade Crossing Com'rs, 52 N. Y. App. Div. 27, 64 N. Y. Suppl. 769. And see Crawford *v.* Valley R. Co., 25 Gratt. (Va.) 467.

3. Central Pac. R. Co. *v.* Pearson, 35 Cal. 247; Inge *v.* Tensas Police Jury, 14 La. Ann. 117; Swan *v.* Chicago, etc., R. Co., 38 Mo. App. 588; U. S. *v.* Freeman, 113 Fed. 370; U. S. *v.* Tennant, 93 Fed. 613.

In construing such a statute the court will not apply the rules and doctrines applicable to new trials nor those applicable to reports and awards of referees and arbitrators. Bennet *v.* Camden, etc., R., etc., Co., 14 N. J. L. 145.

4. **Upon other bodies than courts this power is sometimes conferred by statute.** See McKee *v.* St. Louis, 17 Mo. 184 (where by statute the mayor had power to set aside a street opening inquest and to cause a new inquest to be made); Schneider *v.* Rochester, 160 N. Y. 165, 54 N. E. 721 (where by statute common council had authority to confirm or set aside the report); People *v.* Gardner, 24 N. Y. 583; People *v.* Canal Bd., 7 Lans. (N. Y.) 220 (both cases holding that the canal board had under the authority of the statute the power to revise the assessments of the canal appraisers).

5. Albany Northern R. Co. *v.* Cramer, 7 How. Pr. (N. Y.) 164 (where under the act of April 2, 1850, the report cannot be set aside on motion, since the act provided an exclusive method of review by appeal); Stafford *v.* Albany, 7 Johns. (N. Y.) 541 (where it was held that the mayor's court under the act of April 4, 1801, acted as commissioners and not judicially as the court, and that after the court has confirmed the assessment made under the act it could not set it aside for any cause but was bound to pay the money according to the assessments). See *In re* South St. Paul St., 85 Hun (N. Y.) 473, 33 N. Y. Suppl. 141, holding that the provision of the

the report may be set aside for good cause shown.[6] As used in this connection "good cause" means something clear and indubitable amounting to error in law, or in fact, or both, intentional or unintentional on the part of the commissioners.[7] Such good cause exists where mistake of law or fact intervened on the part of the commissioners as to their powers or duties, or in relation to the quantity or value of the land.[8] The award may be set aside for defects appearing upon the face of the report;[9] where the commissioners have exceeded their authority,[10] or have failed to conduct their proceedings according to the requirements of the statute;[11] where the jury has made a wrong estimate of the land necessary to be condemned;[12] where condemnation has been abandoned and the cause of injury removed, if these facts are established at any time before final judgment upon the report by evidence of a character to bind the company granted the power of condemnation;[13] where fraud or serious irregularities are shown;[14] or where the

Rochester charter that the county court shall appoint the commissioners and have power to amend defects or informalities in the proceedings does not give the court power to set aside the appraisal and report of the commissioners, for errors committed by them. The court distinguishes *In re* New York Cent., etc., R. Co., 64 N. Y. 60, where the report under the provision of the General Railroad Act was made to the court and the matter of its confirmation was for the court's determination.

6. *California.*—Central Pac. R. Co. *v.* Pearson, 35 Cal. 247.

Massachusetts.— Brown *v.* Ipswich Mfg. Co., 5 Gray 460.

Nevada.— Virginia, etc., R. Co. *v.* Henry, 8 Nev. 165.

New Jersey.— Bennet *v.* Camden, etc., R., etc., Co., 14 N. J. L. 145.

New York.— Schneider *v.* Rochester, 160 N. Y. 165, 54 N. E. 721; *In re* New York Cent., etc., R. Co., 64 N. Y. 60; Matter of Elmwood Ave., 10 N. Y. St. 272; Matter of New York, etc., R. Co., 63 How. Pr. 265.

Virginia.— Crawford *v.* Valley R. Co., 25 Gratt. 467; Chesapeake, etc., Canal Co. *v.* Hoye, 2 Gratt. 511.

See 18 Cent. Dig. tit. "Eminent Domain," § 608.

Not limited to jurisdictional defects.— Howell Annot. St. Mich. c. 93, § 10, provides that the court shall on motion confirm the report, unless for good cause shown by either party, and that the court shall as to the confirmation of the report have the powers usual in other cases. It was held that the court was not limited to a rejection of the report for defects of jurisdiction. Fort St. Union Depot Co. *v.* Backus, 92 Mich. 33, 52 N. W. 790 [*overruling* Backus *v.* Wayne County Cir. Judge, 89 Mich. 209, 50 N. W. 646].

Questions of law not certified.— The court may in its discretion set aside the verdict of a sheriff's jury when questions of law have been reserved, and by reason of the death of the presiding officer are not certified for review. Wamesit Power Co. *v.* Lowell, etc., R. Co., 130 Mass. 455.

7. Virginia, etc., R. Co. *v.* Henry, 8 Nev. 165. See also Vanwickle *v.* Camden, etc., R. Co., 14 N. J. L. 162, holding that an objection that there was a mistake in locating a part of the land in a wrong township or that the railroad engineer did not specify all the lands taken cannot be considered as a ground for setting aside the report.

8. McMahon *v.* Cincinnati, etc., Short Line R. Co., 5 Ind. 413; Cadmus *v.* New Jersey Cent. R. Co., 31 N. J. L. 179; Williamson *v.* East Amwell, 28 N. J. L. 270; Coster *v.* New Jersey, R., etc., Co., 23 N. J. L. 227; Bennet *v.* Camden, etc., R., etc., Co., 14 N. J. L. 145; Matter of Chapin, 84 Hun (N. Y.) 490, 32 N. Y. Suppl. 361.

9. *California.*—Central Pac. R. Co. *v.* Pearson, 35 Cal. 247.

Colorado.— Pueblo, etc., Valley R. Co. *v.* Rudd, 5 Colo. 270, where the report failed to show the amount and value of benefits to the landowners as the statute required.

Maryland.— Tide Water Canal Co. *v.* Archer, 9 Gill & J. (Md.) 480.

Pennsylvania.— *In re* Chatham St., 16 Pa. Super. Ct. 103; Poffenberger *v.* Susquehanna R. Co., 1 Pearson 45 (where the report failed to find the value of land taken as required by statute); Keen *v.* Pennsylvania R. Co., 9 Lanc. Bar 103; Henry *v.* Reading, etc., R. Co., 3 Lanc. Bar 52.

United States.— See Chesapeake, etc., Canal Co. *v.* Mason, 5 Fed. Cas. No. 2,650, 4 Cranch C. C. 123.

But the fact that the report does not show in what the benefits consist is not ground for setting it aside when no objection was taken to the report when it was submitted. Wilmington, etc., R. Co. *v.* Smith, 99 N. C. 131, 5 S. E. 237.

10. Smith *v.* Trenton Delaware Falls Co., 17 N. J. L. 5. The fact that the commissioners allowed no damages to one through whose land the road was laid out, or that the owner was prevented by sickness from appearing before the commissioners, shows no transcending of their authority. Bourgeois *v.* Mills, 60 Tex. 76.

11. Matter of Brooklyn El. R. Co., 80 Hun (N. Y.) 355, 30 N. Y. Suppl. 131.

12. Whitworth *v.* Puckett, 2 Gratt. (Va.) 528; Chesapeake, etc., Canal Co. *v.* Mason, 5 Fed. Cas. No. 2,650, 4 Cranch C. C. 123.

13. Stevens *v.* Duck River Nav. Co., 1 Sneed (Tenn.) 237.

14. *Massachusetts.*— Wood *v.* Quincy, 11 Cush. 487.

commissioners have been guilty of any misconduct, or have put themselves in a position which raises the suspicion that they have been subject to improper influences.[15] Even this will furnish no ground for setting aside the award unless it appears that the party complaining of it has been prejudiced.[16] A verdict which is not responsive to the issues,[17] or a special verdict which reports facts and submits to the court whether upon such facts damages should be given,[18]

Michigan.— Goodell *v.* Kalamazoo, 63 Mich. 416, 29 N. W. 880.

New Jersey.— Bennett *v.* Camden, etc., R., etc., Co., 14 N. J. L. 145.

New York.— Matter of Chapin, 84 Hun 490, 32 N. Y. Suppl. 361; Matter of Southern Boulevard R. Co., 20 N. Y. Suppl. 769.

Pennsylvania.— Turner's Appeal, 2 Walk. 229.

South Carolina.— Walker *v.* Charleston, Bailey Eq. 443.

Virginia.— Richmond Traction Co. *v.* Murphy, 98 Va. 104, 34 S. E. 982.

Mistake, irregularity, or even fraud in the proceeding previous to the appointment of the commissioners, or in their appointment, is not good cause for setting aside the report. Bennett *v.* Camden, etc., R., etc., Co., 14 N. J. L. 145.

15. See New York, etc., R. Co. *v.* Townsend, 36 Hun (N. Y.) 630 (where the son of one of the commissioners was appointed, pending the proceedings, to a position in the railroad company which was condemning the land, and where the court for this reason set the award aside); Stephenson *v.* Oatman, 3 Lea (Tenn.) 462 (where some of the commissioners were kinsmen of the mortgagee of the landowner's land and where the railroad had no actual notice of the mortgage); Hunter *v.* Matthews, 1 Rob. (Va.) 194. But the fact that one of the viewers had a claim against the company for damages (Newbecker *v.* Susquehanna R. Co., 1 Pearson (Pa.) 57), or that two of the freeholders selected had signed the remonstrance against a public improvement to be made (Readington *v.* Dilley, 24 N. J. L. 209), or that the sheriff who summoned the jury may have been prejudiced in favor of one of the parties (Tide Water Canal *v.* Archer, 9 Gill & J. (Md.) 479), has been held not sufficient to set aside the report or inquisition.

That the commissioners charged and received from the railroad company more than the statutory rate of compensation is not necessarily a ground for setting aside their report, where the charge was a fair and adequate compensation for their services and where the person attacking the report knew, while the hearing was going on, the facts about the extra compensation. *In re* Staten Island Rapid Transit R. Co., 41 Hun (N. Y.) 392. But see *In re* Buffalo, etc., R. Co., 32 Hun (N. Y.) 289, where the commissioners received compensation from the owner for extra time and were guilty of other misconduct and where the report was set aside.

That the commissioners were entertained with meat and drink by the applicant while they were examining the premises is not sufficient to set aside their verdict or report, although their act is one which is not in good taste and might justly be considered as exposing them to a suspicion of bias. Lehigh Valley R. Co. *v.* Dover, etc., R. Co., 43 N. J. L. 528. See also Coleman *v.* Moody, 4 Hen. & M. (Va.) 1.

Obtaining information privately.— In the Matter of New York Cent., etc., R. Co., 5 Hun (N. Y.) 105, the report was set aside because the commissioners talked privately with the person from whom they obtained information discrediting the testimony of the claimant and it appeared from the evidence that the award was greatly inadequate. In Pueblo *v.* Shutt Invest. Co., 28 Colo. 524, 67 Pac. 162, the report was set aside because the commissioners individually obtained the unsworn opinions of various persons as to the damages without notice to the parties. In Ohio Southern R. Co. *v.* Rawlins, 4 Ohio S. & C. Pl. Dec. 483, 29 Cinc. L. Bul. 260, the court refused to set aside the report because two of the jurors without the knowledge of the parties examined the premises after the regular view.

That the commissioners had prejudged his case and that proof before them would have been useless, had it been offered by the owner, should be considered by the county court upon a motion to confirm the report of the commissioners and the refusal of the court to receive such evidence is error. Cole *v.* Peoria, 18 Ill. 301.

16. *Kentucky.*— Louisville, etc., R. Co. *v.* Barrett, 91 Ky. 487, 16 S. W. 278, 13 Ky. L. Rep. 57.

Maryland.— Tide Water Canal Co. *v.* Archer, 9 Gill & J. 479.

Massachusetts.— Tripp *v.* Bristol County Com'rs, 2 Allen 556, where the officer in charge of the jury furnished the jury at the house of the landowner with a pitcher of cider and some other refreshments belonging to the owner, but without his knowledge.

Michigan.— Port Huron, etc., R. Co. *v.* Callanan, 61 Mich. 22, 34 N. W. 678.

New York.— New York, etc., R. Co. *v.* Church, 31 Hun 440.

Pennsylvania.— Mulholland *v.* Rush Brook Water Co., 7 Lack. Leg. N. 1 (where the applicant furnished a conveyance for the viewers from the nearest railroad station to the place of the view several miles distant); Shirk *v.* Pennsylvania, etc., R. Co., 9 Lanc. Bar 198.

Virginia.— Roanoke City *v.* Berkowitz, 80 Va. 616; Harwell *v.* Bennett, 1 Rand. 282.

See 18 Cent. Dig. tit. "Eminent Domain," § 610.

17. Kownslar *v.* Ward, Gilm. (Va.) 127.

18. *In re* Northern Liberties' Case, 2 Serg. & R. (Pa.) 277.

or a verdict void for uncertainty,[19] should be set aside. The award may be set aside for errors of law in the proceedings before the commissioners.[20] Thus the erroneous rejection or admission of testimony affecting the rights of the parties is sufficient ground to set aside the report;[21] but in some jurisdictions commissioners have a wider range and a larger discretion in the reception of evidence than courts.[22] Technical errors therefore in the admission of evidence will not affect the appraisal, if it does not appear that the commissioners have erred in the principles which ought to guide them in making their appraisal,[23] or unless it appears that substantial injustice has been done.[24] The report may be set aside as to the owner of one piece of land, without affecting owners of other pieces of land,[25] or as to one of several persons having interests in the same piece of land, without affecting other persons having interests therein.[26]

(II) *Inadequate or Excessive Damages.* The general rule is that unless the award is palpably excessive or inadequate it will not be set aside on that ground.[27] Where the verdict or finding is within the range of the evidence sub-

19. Connecticut River R. Co. *v.* Clapp, 1 Cush. (Mass.) 559, where the jury assessed the damages at a certain sum, "with interest thereon from the time when the said railroad company took possession of the land."

20. N. Y. Code Civ. Proc. § 3371.

21. See Fort St. Union Depot Co. *v.* Backus, 92 Mich. 33, 52 N. W. 790. See Postal Tel. Cable Co. *v.* Alabama, etc., R. Co., 68 Miss. 314, 315, 8 So. 375, construing a statute providing that the award of the commissioners appointed to assess damages cannot be set aside by the circuit judge, unless he "shall be of the opinion that the commissioners acted upon testimony that was irrelevant or incompetent, and that their award was contrary to the law and such evidence as was competent and relevant, and that injustice has been done." *Compare In re* Chambersburg, etc., Turnpike Road, 20 Pa. Super. Ct. 173, holding that under the Pennsylvania statute relating to turnpikes exceptions may bring up for review the instructions given to the jurors on matters of law, but not questions as to the admissibility of evidence or issuing of subpœnas, or compelling of witnesses or the production of papers.

22. See *supra*, XI, M, 9.

23. St. Paul, etc., R. Co. *v.* Covell, 2 Dak. 483, 11 N. W. 106 (holding that it must affirmatively appear that the evidence in question was the foundation of the award or that the party complaining was prejudiced thereby); New York Cent. R. Co. *v.* Marvin, 11 N. Y. 276; Matter of Buffalo Grade Crossing Com'rs, 52 N. Y. App. Div. 122, 64 N. Y. Suppl. 1074 [*affirmed* in 164 N. Y. 575, 58 N. E. 1087]; *In re* New York, etc., R. Co., 27 Hun (N. Y.) 116; Matter of Speedway, 29 Misc. (N. Y.) 519, 62 N. Y. Suppl. 424; Port Henry *v.* Kidder, 57 N. Y. Suppl. 102; Newton *v.* Armstrong, 19 N. Y. Suppl. 573; *In re* New York El. R. Co., 15 N. Y. Suppl. 909.

24. *In re* New York El. R. Co., 15 N. Y. Suppl. 909; *In re* New York El. R. Co., 8 N. Y. Suppl. 707.

25. McKee *v.* St. Louis, 17 Mo. 184.

26. Stubbings *v.* Evanston, 136 Ill. 37, 26 N. E. 577, 29 Am. St. Rep. 300, 11 L. R. A. 839, where the verdict was set aside as to the tenant, but not as to the landlord.

Under a statutory provision that the parties may move "to set aside the report to have a new trial as to any tract of land" the condemning company cannot move to set aside the report as to an undivided interest in any tract of land, but the motion if made must be to set aside the report as to the whole tract in which the undivided interest is owned. Southern Pac. R. Co. *v.* Wilson, 49 Cal. 396.

27. *Georgia.*— Cincinnati, etc., R. Co. *v.* Nettles, 77 Ga. 576.

Illinois.— Braun *v.* Metropolitan West Side El. R. Co., 166 Ill. 434, 46 N. E. 974.

Indiana.—Peck *v.* Renselaer, 8 Blackf. 312; Chapman *v.* Groves, 8 Blackf. 308.

Kentucky.— Covington Short Route Transfer Co. *v.* Piel, 87 Ky. 267, 8 S. W. 449, 10 Ky. L. Rep. 146.

Louisiana.— Kansas City, etc., R. Co. *v.* Smith, 51 La. Ann. 1079, 25 So. 955; Postal Tel. Cable Co. *v.* Louisville, etc., R. Co., 43 La. Ann. 522, 9 So. 119.

Michigan.— See Fort St. Union Depot Co. *v.* Backus, 92 Mich. 33, 42, 52 N. W. 790.

New York.—Matter of Collis, 76 N. Y. App. Div. 368, 78 N. Y. Suppl. 495; Manhattan R. Co. *v.* Comstock, 74 N. Y. App. Div. 341, 77 N. Y. Suppl. 416; Matter of White Plains Water Com'rs, 71 N. Y. App. Div. 544, 76 N. Y. Suppl. 11; Harlem River, etc., R. Co. *v.* Reynolds, 50 N. Y. App. Div. 575, 64 N. Y. Suppl. 199; *In re* New York, etc., R. Co., 27 Hun 116; Newton *v.* Armstrong, 19 N. Y. Suppl. 573; *In re* Thompson, 12 N. Y. Suppl. 182. See Rochester, etc., R. Co. *v.* Budlong, 6 How. Pr. 467.

Pennsylvania.— Shirk *v.* Pennsylvania R. Co., 9 Lanc. Bar 198. See also Taylor *v.* Baltimore, etc., R. Co., 3 Del. Co. 545; Clayton *v.* Baltimore, etc., R. Co., 3 Del. Co. 167. But see Pennsylvania R. Co. *v.* Heister, 8 Pa. St. 445.

Virginia.— See Richmond Traction Co. *v.* Murphy, 98 Va. 104, 34 S. E. 982.

United States.— Oregon Short Line R. Co. *v.* Idaho Postal Tel. Cable Co., 111 Fed. 842, 49 C. C. A. 663 [*affirming* 104 Fed. 623].

mitted, the courts show great hesitation in setting aside the verdict or finding,[28] especially where there has been a personal view of the premises,[29] even though

See 18 Cent. Dig. tit. "Eminent Domain," §§ 577 and 612.

That the award exceeds the sum of the values of the different parts of the property, taking each part separately, is not necessarily a reason for setting aside the award as excessive for the owner is entitled to the value of the whole taken together. King *v.* Minneapolis Union R. Co., 32 Minn. 224, 20 N. W. 135.

28. *California.*— Western Pac. R. Co. *v.* Reed, 35 Cal. 621; *In re* Piper, 32 Cal. 530.

Connecticut.— See Bridgeport *v.* Eisenman, 47 Conn. 34.

Illinois.— Illinois Cent. R. Co. *v.* Normal, 175 Ill. 562, 51 N. E. 781; Chicago, etc., R. Co. *v.* Wolf, 137 Ill. 360, 27 N. E. 78; Calumet River R. Co. *v.* Moore, 124 Ill. 329, 15 N. E. 764; Goudy *v.* Lake View, 33 Ill. App. 245.

Indiana.— Chicago, etc., R. Co. *v.* Loer, 27 Ind. App. 245, 60 N. E. 319.

Iowa.— See Ball *v.* Keokuk, etc., R. Co., 74 Iowa 132, 37 N. W. 110.

Kentucky.— Richmond, etc., Turnpike Road Co. *v.* Madison County Fiscal Ct., 70 S. W. 1044, 24 Ky. L. Rep. 1260.

Michigan.— Detroit, etc., Shore Line R. Co. *v.* Hall, (1903) 94 N. W. 1066; Marquette, etc., R. Co. *v.* Longyear, (1903) 94 N. W. 670.

Montana.— Helena, etc., Smelting, etc., Co. *v.* Lynch, 25 Mont. 497, 65 Pac. 919.

New York.— Manhattan R. Co. *v.* Comstock, 74 N. Y. App. Div. 341, 77 N. Y. Suppl. 416.

Texas.— See Owens *v.* Missouri Pac. R. Co., 67 Tex. 679, 4 S. W. 593.

United States.— Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170; Benedict *v.* New York, 98 Fed. 789, 39 C. C. A. 290.

That the court might have arrived at a different conclusion is not ground for setting aside the award. Manhattan R. Co. *v.* Comstock, 74 N. Y. App. Div. 341, 77 N. Y. Suppl. 416; Meuser *v.* Palmer Tp., 7 Northam. Co. Rep. (Pa.) 202; *In re* Berks St., 15 Phila. (Pa.) 381. See also Philadelphia, etc., R. Co. *v.* Gesner, 20 Pa. St. 240. *Compare* Kansas City, etc., R. Co. *v.* Ryan, 49 Kan. 1, 30 Pac. 108.

That the verdict was based on the lowest estimate of the witnesses instead of the highest is no ground for setting it aside. Nebraska, etc., R. Co. *v.* Scott, 31 Nebr. 571, 48 N. W. 390; Clarke *v.* Chicago, etc., R. Co., 23 Nebr. 613, 37 N. W. 484.

That the verdict was greater than the average of the witnesses' estimate is not ground for setting the verdict aside as excessive. Metropolitan West Side El. R. Co. *v.* Dickinson, 161 Ill. 22, 43 N. E. 706.

29. *Arkansas.*— Springfield, etc., R. Co. *v.* Rhea, 44 Ark. 258.

Colorado.— Denver, etc., R. Co. *v.* Bourne, 11 Colo. 59, 16 Pac. 839.

Illinois.— East Illinois, etc., R. Co. *v.* Miller, 201 Ill. 413, 66 N. E. 275; Sexton *v.* Union Stock Yard, etc., Co., 200 Ill. 244, 65 N. E. 638; Conness *v.* Indiana, etc., R. Co., 193 Ill. 464, 62 N. E. 221; Indiana, etc., R. Co. *v.* Stauber, 185 Ill. 9, 56 N. E. 1079; Chicago Terminal Transfer R. Co. *v.* Bugbee, 184 Ill. 353, 56 N. E. 386; West Chicago St. R. Co. *v.* Chicago, 172 Ill. 198, 50 N. E. 185; Davis *v.* Northwestern El. R. Co., 170 Ill. 595, 48 N. E. 1058; Lyon *v.* Hammond, etc., R. Co., 167 Ill. 527, 47 N. E. 775; Chicago, etc., R. Co. *v.* Naperville, 166 Ill. 87, 47 N. E. 734; Pittsburgh, etc., R. Co. *v.* Lyons, 159 Ill. 576, 43 N. E. 377; Metropolitan West Side El. R. Co. *v.* Johnson, 159 Ill. 434, 42 N. E. 871; Chicago, etc., R. Co. *v.* Wolf, 137 Ill. 360, 27 N. E. 78; Calumet River R. Co. *v.* Moore, 124 Ill. 329, 15 N. E. 764; Chicago, etc., R. Co. *v.* Catholic Bishop, 119 Ill. 525, 10 N. E. 372; Chicago *v.* Spoor, 91 Ill. App. 472.

Indiana.— Chicago, etc., R. Co. *v.* Loer, 27 Ind. App. 245, 60 N. E. 319.

Louisiana.— Natchitoches R., etc., Co. *v.* Henry, 109 La. 669, 33 So. 725; Texas, etc., R. Co. *v.* Wilson, 108 La. 1, 32 So. 173; New Orleans, etc., R. Co. *v.* Morere, 48 La. Ann. 1273, 20 So. 733.

Michigan.— Detroit, etc., Shore Line R. Co. *v.* Hall, (1903) 94 N. W. 1066; Marquette, etc., R. Co. *v.* Longyear, (1903) 94 N. W. 670.

Missouri.— St. Louis *v.* Brown, 155 Mo. 545, 56 S. W. 298.

Nebraska.— Fink *v.* Republican Valley R. Co., 27 Nebr. 660, 43 N. W. 418.

New York.— *In re* Buffalo Grade Crossing Com'rs, 165 N. Y. 605, 58 N. E. 1088 [*affirming* 52 N. Y. App. Div. 27, 64 N. Y. Suppl. 769]; Matter of Washington Ave., 34 Misc. 655, 70 N. Y. Suppl. 599; Rochester, etc., R. Co. *v.* Myers, 17 N. Y. Suppl. 311; *In re* Board of St. Opening, 1 N. Y. Suppl. 145.

United States.— U. S. *v.* Seufert Bros. Co., 87 Fed. 35.

See *supra* XI, M, 2, a, (VII); XI, M, 2, b, (VIII).

Presumptions in favor of verdict.— Where the jury at the request of both parties view the premises and no other evidence is offered, every presumption will be indulged in favor of the correctness of the verdict. Peoria, etc., R. Co. *v.* Barnum, 107 Ill. 160.

A certificate of a juror and the opinion of witnesses that the estimate is too high is not sufficient to set aside an award. Carrollton R. Co. *v.* Avart, 11 La. 190.

That the verdict of the same jury was greater for an adjoining lot, the conditions of the two lots being different, is not ground for setting the verdict aside as excessive. Metropolitan West Side El. R. Co. *v.* Dickinson, 161 Ill. 22, 43 N. E. 706.

Where the commissioners refused to hear testimony, but relied solely upon their own estimate from a view of the premises and

the commissioners differ from the witnesses in their estimate,[30] and their conclusions appear to be contrary to the preponderance of evidence.[31] But if it does appear that the verdict or finding is clearly excessive[32] or inadequate[33] it will be set aside. The cases in which awards are held to be inadequate[34] or not inadequate[35] or those in which they have been held to be excessive[36] or not excessive[37]

from information obtained by them, the report will not be set aside under a statute which makes no provision for taking testimony, but simply directs the commissioners to "proceed to view the premises and make the appraisal." Lyman *v.* Burlington, 22 Vt. 131.

30. *In re* Bushwick Ave., 48 Barb. (N. Y.) 9; *In re* William, etc., Sts., 19 Wend. (N. Y.) 678. See also Thompson *v.* De Weese-Dye Ditch, etc., Co., 25 Colo. 243, 53 Pac. 507.

As where the award is somewhat less than the lowest valuation given by the witnesses. Matter of Daly, 26 N. Y. App. Div. 326, 49 N. Y. Suppl. 795.

31. Lanquist *v.* Chicago, 200 Ill. 69, 65 N. E. 681.

32. *Illinois.*— Atchison, etc., R. Co. *v.* Schneider, 127 Ill. 144, 20 N. E. 41, 2 L. R. A. 422; Chicago, etc., R. Co. *v.* Catholic Bishop, 119 Ill. 525, 10 N. E. 372.

Louisiana.— Morgan's Louisiana, etc., R., etc., Co. *v.* Barton, 51 La. Ann. 1338, 26 So. 271.

Minnesota.— Whitely *v.* Mississippi Water-Power, etc., Co., 38 Minn. 523, 38 N. W. 753.

Missouri.— Doyle *v.* Kansas City, etc., R. Co., 113 Mo. 280, 20 S. W. 970; Kansas City, etc., R. Co. *v.* Campbell, 62 Mo. 585.

New York.— Bon *v.* Kings County El. R. Co., 46 N. Y. App. Div. 626, 61 N. Y. Suppl. 675; Matter of Armory Bd., 35 Misc. 548, 72 N. Y. Suppl. 37; Moss *v.* Manhattan R. Co., 13 N. Y. Suppl. 46.

Pennsylvania.— Arthur *v.* Pennsylvania R. Co., 27 Leg. Int. 237; Clayton *v.* Baltimore, etc., R. Co., 3 Del. Co. 167; Shirk *v.* Pennsylvania R. Co., 9 Lanc. Bar 198. See also Pennsylvania R. Co. *v.* Heister, 8 Pa. St. 445.

South Carolina.— Eddings *v.* Seabrook, 12 Rich. 504, where an acre was taken, and the evidence was that land was worth about seventy dollars an acre, while the award was for three thousand dollars, it was held that the award was without evidence to sustain it.

Virginia.— See Washington, etc., R. Co. *v.* Switzer, 26 Gratt. 661.

See 18 Cent Dig. tit. "Eminent Domain," § 577.

33. *California.*—Los Angeles, etc., R. Co. *v.* Rumpp, 94 Cal. 432, 29 Pac. 872.

Illinois.— Cahill *v.* Norwood Park, 149 Ill. 156, 36 N. E. 606.

Louisiana.— Abney *v.* Texarkana, etc., R. Co., 105 La. 446, 29 So. 890.

Michigan.— Grand Rapids, etc., R. Co. *v.* Weiden, 70 Mich. 390, 38 N. W. 294.

Nebraska.— Fink *v.* Republican Valley R. Co., 27 Nebr. 660, 43 N. W. 418.

New York.— Lenhart *v.* State, 75 N. Y. App. Div. 162, 77 N. Y. Suppl. 397; Matter of Metropolitan El. R. Co., 76 Hun 375, 27 N. Y. Suppl. 756; Matter of Armory Bd., 35 Misc. 548, 72 N. Y. Suppl. 37; *In re* Thompson, 2 N. Y. Suppl. 35.

Texas.— Palmer *v.* Harris County, 29 Tex. Civ. App. 340, 69 S. W. 229.

Virginia.— Cranford Pav. Co. *v.* Baum, 97 Va. 501, 24 S. E. 906. See Washington, etc., R. Co. *v.* Switzer, 26 Gratt. 661.

34. *California.*— San Jose *v.* Reed, 65 Cal. 241, 3 Pac. 806.

Iowa.— Adkins *v.* Smith, 94 Iowa 758, 64 N. W. 761.

Louisiana.—Postal Tel. Cable Co. *v.* Louisiana Western R. Co., 49 La. Ann. 1270, 22 So. 219.

Michigan.— Grand Rapids, etc., R. Co. *v.* Chesebro, 74 Mich. 466, 42 N. W. 66.

New York.— *In re* Fordham Road, 74 N. Y. App. Div. 343, 77 N. Y. Suppl. 566; Jones *v.* Metropolitan El. R. Co., 59 N. Y. Super. Ct. 437, 14 N. Y. Suppl. 632; Matter of Summit Ave., 35 Misc. 59, 71 N. Y. Suppl. 207.

Texas.— Palmer *v.* Harris County, 29 Tex. Civ. App. 340, 69 S. W. 229.

35. Hire *v.* Kniseley, 130 Ind. 295, 29 N. E. 1132; Detroit *v.* Bruder, 104 Mich. 221, 62 N. W. 350; St. Louis, etc., R. Co. *v.* Knapp, etc., R. Co., 160 Mo. 396, 61 S. W. 300; Matter of Daly, 45 N. Y. App. Div. 622, 61 N. Y. Suppl. 480; Lewis *v.* New York, etc., R. Co., 40 N. Y. App. Div. 343, 57 N. Y. Suppl. 1053 [*affirming* 25 Misc. 13, 54 N. Y. Suppl. 434].

36. *Illinois.*— Mutual Union Tel. Co. *v.* Katkamp, 103 Ill. 420.

Kentucky.—Louisville, etc., R. Co. *v.* Asher, 15 S. W. 517, 12 Ky. L. Rep. 815.

Mississippi.— Yazoo, etc., R. Co. *v.* Adams, (1901) 31 So. 427.

New Jersey.— Morris, etc., R. Co. *v.* Bonnell, 34 N. J. L. 474.

New York.— Matter of Trinity Ave., 81 N. Y. App. Div. 215, 80 N. Y. Suppl. 732; Kent *v.* Manhattan R. Co., 4 N. Y. App. Div. 93, 38 N. Y. Suppl. 981; Matter of New York, etc., R. Co., 29 Hun 646; Thompson *v.* Manhattan R. Co., 16 Daly 64, 8 N. Y. Suppl. 641.

Pennsylvania.— Danner *v.* York, 14 York Leg. Rec. 10.

Texas.— Bexar County *v.* Herff, (Civ. App. 1893) 23 S. W. 409; Gulf, etc., R. Co. *v.* Fink, (Sup. 1892) 18 S. W. 492.

37. *Colorado.*— G. B., etc., R. Co. *v.* Haggart, 9 Colo. 346, 12 Pac. 215.

Connecticut.— Nicholson *v.* New York, etc., R. Co., 22 Conn. 74, 56 Am. Dec. 390.

Illinois.— Phillips *v.* Scales Mound, 195 Ill. 353, 63 N. E. 180; Snodgrass *v.* Chicago, 152 Ill. 600, 38 N. E. 790; Indianapolis, etc., R. Co. *v.* Hartley, 67 Ill. 439, 16 Am. Rep. 624; Peoria, etc., R. Co. *v.* Birkett, 62 Ill. 332.

are various and numerous and depend very much upon the facts of each particular case. So too there are many cases where the courts have directly held the damages awarded by the commissioners to be reasonable.[38]

(III) *Corruption, Passion, or Prejudice.* If it clearly appears that the jury were influenced by corrupt motives or by passion or prejudice the award will be set aside.[39]

Iowa.— Dudley *v.* Minnesota, etc., R. Co., 77 Iowa 408, 42 N. W. 359.

Kentucky.— Louisville, etc., R. Co. *v.* Whitley County Ct., 95 Ky. 215, 24 S. W. 604, 15 Ky. L. Rep. 734, 44 Am. St. Rep. 220; Richmond, etc., Turnpike Road Co. *v.* Madison County Fiscal Ct., 70 S. W. 1044, 24 Ky. L. Rep. 1260.

Massachusetts.— Springfield *v.* Connecticut River R. Co., 4 Cush. 63.

Minnesota.— St. Paul, etc., R. Co. *v.* Matthews, 16 Minn. 341.

Nebraska.— Omaha Belt R. Co. *v.* Johnson, 24 Nebr. 707, 40 N. W. 134.

New York.— Mahon *v.* New York Cent. R. Co., 24 N. Y. 658; Morrison *v.* Metropolitan El. R. Co., 49 N. Y. App. Div. 633, 63 N. Y. Suppl. 206; Manhattan R. Co *v.* O'Sullivan, 6 N. Y. App. Div. 571, 40 N. Y. Suppl. 326; Livingston *v.* Manhattan R. Co., 4 N. Y. App. Div. 165, 38 N. Y. Suppl. 751; *In re* New York, etc., R. Co., 21 Hun 250.

Pennsylvania.— State Line R. Co. *v.* Playford, (1888) 14 Atl. 355; Matter of Market St., 11 Phila. 409.

Rhode Island.— Johnston *v.* Old Colony R. Co., 18 R. I. 642, 29 Atl. 594, 49 Am. St. Rep. 800.

South Dakota.— Chicago, etc., R. Co. *v.* Brink, (1903) 94 N. W. 422.

Texas.— Gulf, etc., R. Co. *v.* Necco, (Sup. 1891) 15 S. W. 1102.

Virginia.— Cranford Pac. Co. *v.* Baum, (1896) 24 S. E. 906.

Washington.— Seattle, etc., R. Co. *v.* Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864.

38. *Georgia.*— Cincinnati, etc., R. Co. *v.* Nettles, 77 Ga. 576.

Illinois.— Chicago *v.* Jackson, 196 Ill. 496, 63 N. E. 1013, 1135 [*affirming* 88 Ill. App. 130]; O'Hare *v.* Chicago, etc., R. Co., 139 Ill. 151, 28 N. E. 923; Becker *v.* Chicago, etc., R. Co., 126 Ill. 436, 18 N. E. 564.

Kentucky.— Shelbyville, etc., Turnpike Co. *v.* Louisville, etc., R. Co., 51 S. W. 805, 21 Ky. L. Rep. 548; Ohio Valley R., etc., Co. *v.* Kuhn, 5 S. W. 419, 9 Ky. L. Rep. 467.

Mississippi.— Postal Tel. Cable Co. *v.* Alabama, etc., R. Co., 68 Miss. 314, 8 So. 375.

Nebraska.— Sioux City, etc., R. Co. *v.* Weimer, 16 Nebr. 272, 20 N. W. 349.

New York.— Long Island R. Co. *v.* Garvey, 159 N. Y. 334, 54 N. E. 60 [*affirming* 11 N. Y. App. Div. 626, 42 N. Y. Suppl. 155]; Cohen *v.* New York El. R. Co., 56 N. Y. App. Div. 623, 67 N. Y. Suppl. 752; Shepard *v.* Metropolitan El. R. Co., 48 N. Y. App. Div. 452, 62 N. Y. Suppl. 977; Lewis *v.* New York, etc., R. Co., 40 N. Y. App. Div. 343, 57 N. Y. Suppl. 1053 [*affirming* 25 Misc. 13, 54 N. Y. Suppl. 434]; Oesterling *v.* Manhattan R. Co., 25 Misc. 28, 54 N. Y. Suppl. 440; Lindheim *v.* New York El. R. Co., 5 Misc. 585, 25 N. Y. Suppl. 85; Struthers *v.* New York El. R. Co., 5 Misc. 239, 25 N. Y. Suppl. 81; Knapp *v.* New York El. R. Co., 4 Misc. 408, 24 N. Y. Suppl. 324; Kingsland *v.* New York, 4 N. Y. Suppl. 682.

39. *Illinois.*— Rock Island, etc., R. Co. *v.* Leisy Brewing Co., 174 Ill. 547, 51 N. E. 572; West Chicago St. R. Co. *v.* Chicago, 172 Ill. 198, 50 N. E. 185.

Kentucky.—Ludlow *v.* Mackintosh, 53 S. W. 524, 21 Ky. L. Rep. 924.

Louisiana.— Kansas City, etc., R. Co. *v.* Smith, 51 La. Ann. 1079, 25 So. 955.

Maine.— See Bryant *v.* Glidden, 36 Me. 36.

Michigan.— Marquette, etc., R. Co. *v.* Houghton County Probate Judge, 53 Mich. 217, 18 N. W. 788.

Missouri.— Cape Girardeau, etc., Macadamized Road Co. *v.* Dennis, 67 Mo. 438.

Nebraska.— Nebraska, etc., R. Co. *v.* Scott, 31 Nebr. 571, 48 N. W. 390.

New York.— Manhattan R. Co. *v.* Comstock, 74 N. Y. App. Div. 341, 77 N. Y. Suppl. 416; Matter of New York, 40 N. Y. App. Div. 281, 58 N. Y. Suppl. 58; Matter of Chapin, 84 Hun 490, 32 N. Y. Suppl. 361; Bartlett *v.* Tarrytown, 55 Hun 492, 8 N. Y. Suppl. 739. *In re* Prospect Park, etc., R. Co., 24 Hun 199.

West Virginia.— Norfolk, etc., R. Co. *v.* Nighbert, 46 W. Va. 202, 32 S. E. 1032.

United States.— See Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170; U. S. *v.* Seufert Bros. Co., 87 Fed 35.

If the jury rely on the uncontradicted testimony of respectable men, experienced in the matter about which they were testifying, it is not within the province of the court to say that the jury acted corruptly, perversely, or erroneously. Doyle *v.* Maine Shore Line R. Co., 80 Me. 136, 13 Atl. 275.

Award increased by jury.— The fact that the jury found the land to be of greater value than that fixed by the commissioners, and that they rendered a verdict for damages to the amount of one thousand one hundred dollars, although the commissioners adjudged there were none, does not indicate that the jury were influenced by passion and prejudice. Helena, etc., Smelting, etc., Co. *v.* Lynch, 25 Mont. 497, 65 Pac. 919.

The mere fact that prejudice against corporations may have influenced the jury to return a large verdict is no ground for setting the verdict aside, where the trial judge fairly tried by proper rulings and instructions to counteract such prejudice. Hamil-

(iv) *Erroneous Principle Adopted.* If commissioners have adopted an erroneous principle in arriving at the damages the award will be set aside.[40]

c. Remitting to Commissioners. Under many statutes the court may, instead of setting aside the report absolutely, send it back, in a proper case, to the same or new commissioners for reconsideration or for correction or amendment.[41] Such action has been taken by the court for irregularities of proceedings of the commissioners,[42] where their report left questions of fact undecided.[43] So the report has frequently been remitted where the award was clearly excessive or inadequate,[44] or where the rule for estimating damages has been based on wrong

ton *v.* Pittsburg, etc., R. Co., 194 Pa. St. 1, 45 Atl. 67.

40. *Kentucky.*— See Richmond, etc., Turnpike Co. *v.* Madison County Fiscal Ct., 70 S. W. 1044, 24 Ky. L. Rep. 1044, where the chancellor made the finding.

Missouri.— St. Joseph *v.* Crowther, 142 Mo. 155, 43 S. W. 786.

New Jersey.— State *v.* Pierson, 37 N. J. L. 363; New Jersey R., etc., Co. *v.* Suydam, 17 N. J. L. 25.

New York.— Matter of Collis, 76 N. Y. App. Div. 368, 78 N. Y. Suppl. 495; Manhattan R. Co. *v.* Comstock, 74 N. Y. App. Div. 341, 77 N. Y. Suppl. 416; *In re* New York, 40 N. Y. App. Div. 281, 58 N. Y. Suppl. 58; Matter of Chapin, 84 Hun 490, 32 N. Y. Suppl. 361; Bartlett *v.* Tarrytown, 55 Hun 492, 8 N. Y. Suppl. 739; Matter of Public Parks, 53 Hun 280, 6 N. Y. Suppl. 750; People *v.* Eldredge, 3 Hun 541; *In re* Central Park Com'rs, 51 Barb. 277; *In re* Bushwick Ave., 48 Barb. 9; Matter of Buffalo, Sheld. 408; Pecksport Connecting R. Co. *v.* West, 45 N. Y. Suppl. 644 [*affirmed* on this point in 20 N. Y. App. Div. 636, 47 N. Y. Suppl. 230]; Silver Creek, etc., R. Co. *v.* Baker, 18 N. Y. Suppl. 331 (holding that the award will not be set aside as excessive on the ground that witnesses for the landowners were permitted to estimate the damages on the assumption that the lands at some future day might be divided into city lots and sold for greatly advanced prices, where the report of the commissioners shows that such testimony had no weight with them, in so far as it appeared to be speculative, and no erroneous principle is shown to have been adopted by the commissioners in estimating damages); Rochester, etc., R. Co. *v.* Myers, 17 N. Y. Suppl. 311; *In re* Metropolitan El. R. Co., 13 N. Y. Suppl. 159; *In re* Central Park Com'rs, 35 How. Pr. 255.

United States.— See Benedict *v.* New York, 98 Fed. 789, 39 C. C. A. 290.

That the commissioners averaged the amounts which each one thought should be assessed and which each one had previously announced as what he thought the amount should be and where there was no previous agreement that they would average the amounts is no reason for setting aside the award. Marquette, etc., R. Co. *v.* Houghton County Probate Judge, 53 Mich. 217, 18 N. W. 788.

If they have not misconceived the law, and have fully considered all the essential elements of damage presented to them by the petition and the testimony, the verdict should stand. Port Huron, etc., R. Co. *v.* Voorheis, 50 Mich. 506, 15 N. W. 882.

41. *Colorado.*—Pueblo, etc., R. Co. *v.* Rudd, 5 Colo. 270.

Maryland.— George's Creek Coal, etc., Co., *v.* New Cent. Coal Co., 40 Md. 425.

Minnesota.— See St. Paul *v.* Nickl, 42 Minn. 262, 44 N. W. 59.

Missouri.— Hannibal, etc., R. Co. *v.* Rowland, 29 Mo. 337.

New York.— Matter of Summit Ave., 84 N. Y. App. Div. 455, 82 N. Y. Suppl. 1027; Matter of Central New York Telephone, etc., Co., 36 N. Y. App. Div. 553, 55 N. Y. Suppl. 729; New York, etc., R. Co. *v.* Coburn, 6 How. Pr. 223; Code Civ. Proc. § 3371. See also Clark *v.* Miller, 54 N. Y. 528, holding that the provision of the constitution limiting the modes of ascertaining the compensation for the taking of land to two, namely, by a jury, or by not less than three commissioners does not prohibit a reassessment, nor does it prevent the legislature if it has fixed upon one of the prescribed methods for the original assessment from resorting to the other upon a reassessment.

Pennsylvania.— Pennsylvania R. Co. *v.* Heister, 8 Pa. St. 445.

Contra.— See Union Terminal R. Co. *v.* Railroad Com'rs, 54 Kan. 352, 38 Pac. 290, holding that after a hearing on an application to condemn the crossing of one railroad by another, and a determination by the railroad commissioners of its necessity, the manner of the crossing, and the terms on which it shall be made, the authority of the commissioners is at an end, and they cannot rehear the same.

Where the right of appeal is taken away by statute, the court should not set aside the report without ordering a new view, otherwise the petitioner will be left without a remedy. Turner's Appeal, 2 Walk. (Pa.) 229.

If the aspect and conditions of the property has been greatly changed, as where the improvements on the property have been torn down, etc., it would not be fair to re-refer the damages to another jury, as a new jury could not determine by a view of the premises its former condition and value. *In re* Market St., 11 Phila. (Pa.) 409.

42. Lyman *v.* Burlington, 22 Vt. 131.

43. McArthur *v.* Morgan, 49 Conn. 347.

44. St. Paul *v.* Nickl, 42 Minn. 262, 44 N. W. 59; Hannibal, etc., R. Co. *v.* Rowland, 29 Mo. 337; Rochester Water Works Co. *v.* Wood, 60 Barb. (N. Y.) 137.

principles;[45] where the owner or the person having an interest in the land has not had proper notice of the proceedings,[46] or has shown a good excuse for his failure to appear;[47] where the commissioners have omitted to properly apportion the damages among the different interests in the land taken.[48] In many cases it is a matter of discretion with the court whether it will remit the report to the commissioners.[49] In exercising the discretion the court will not send back the report or grant a new trial on merely technical grounds.[50] When a matter is recommitted to the same commissioners the proceeding is not a new one[51] and the commissioners do not have to be resworn;[52] the court has power to accept the new report,[53] and when it is filed it relates back to the filing of the original report and the amended awards contained in it become in legal effect the same as if contained in the original report.[54] In some statutes it is provided that the second report of commissioners shall be final and conclusive.[55] Such a provision does not prevent the court from inquiring into the fairness and regularity of the proceedings before the commissioners and from setting aside their report for fraud or misconduct;[56] nor does it deprive the landowner of due process of law if the right of appeal from the first report is allowed.[57]

d. Modification of Award. In some jurisdictions the court's power is limited to the right to confirm, to set aside, or to remit to the commissioners the report; the court not having any power to modify the award.[58] In other jurisdictions the court will modify the award,[59] unless in case of excessive damages the owner

45. Matter of Kingsbridge Road, 34 Misc. (N. Y.) 729, 70 N. Y. Suppl. 1029; *In re* Kings County El. R. Co., 12 N. Y. Suppl. 198. See also Wilcox *v.* Meriden, 57 Conn. 120, 17 Atl. 366; *In re* Washington St., 19 R. I. 156, 33 Atl. 516.

To specify in a supplementary report such particulars as will indicate the elements of damages they have awarded or the persons upon which the award proceeded, or both, the court will send the report back to the commissioners, where there is probable cause to believe that the commissioners had made a material error which neither their reports nor their minutes disclosed. Matter of White Plains Water Com'rs, 55 N. Y. App. Div. 77, 66 N. Y. Suppl. 1005. See *In re* Philmont Water Com'rs, 25 N. Y. App. Div. 22, 49 N. Y. Suppl. 319.

46. Matter of Buffalo Grade Crossing Com'rs, 32 Misc. (N. Y.) 99, 66 N. Y. Suppl. 442.

47. *In re* Minneapolis R. Terminal Co., 38 Minn. 157, 36 N. W. 105. See also Green *v.* East Haddam, 51 Conn. 547.

If the owner's default is unexplained, his motion to open his default should not be granted except on payment of costs. *In re* Brownell St., 17 N. Y. Suppl. 747.

48. *In re* Chapin, 34 N. Y. Suppl. 1058; *In re* Washington St., 19 R. I. 156, 3 Atl. 516.

49. *Connecticut.*— Wilcox *v.* Meriden, 57 Conn. 120, 17 Atl. 366.

Georgia.— Georgia Southern, etc., R. Co. *v.* Jones, 90 Ga. 292, 15 S. E. 824.

Massachusetts.— Teele *v.* Boston, 165 Mass. 88, 42 N. E. 506.

Mississippi.— Louisville, etc., R. Co. *v.* Postal Tel., etc., Co., 68 Miss. 806, 10 So. 74.

New York.— *In re* Prospect Park, etc., R. Co., 85 N. Y. 489.

Wisconsin.— Allen *v.* Milwaukee, 72 Wis. 182, 39 N. W. 347.

50. Watson *v.* Van Meter, 43 Iowa 76.

51. See Hannibal, etc., R. Co. *v.* Rowland, 29 Mo. 327.

52. Low *v.* Galena, etc., R. Co., 18 Ill. 324.

53. Lyman *v.* Burlington, 22 Vt. 131.

54. *In re* Washington St., 19 R. I. 156, 33 Atl. 516. *Compare* Metropolitan R. Co. *v.* Broadway R. Co., 99 Mass. 238.

55. See Brown *v.* MacFarland, 19 App. Cas. (D. C.) 525; *In re* Southern Boulevard R. Co., 20 N. Y. Suppl. 769.

56. *In re* Buffalo, etc., R. Co., 32 Hun (N. Y.) 289.

57. *In re* State Reservation Com'rs, 37 Hun (N. Y.) 537.

58. Rawlings *v.* Biggs, 85 Ky. 251, 3 S. W. 147, 8 Ky. L. Rep. 919; *In re* Old Colony R. Co., 163 Mass. 356, 40 N. E. 198; Connecticut River R. Co. *v.* Clapp, 1 Cush. (Mass.) 559; Matter of Guilford, 85 N. Y. App. Div. 207, 83 N. Y. Suppl. 312; Matter of Central New York Telephone, etc., Co., 36 N. Y. App. Div. 553, 55 N. Y. Suppl. 729 (under Code Civ. Proc. § 3371); Hanes *v.* North Carolina R. Co., 109 N. C. 490, 13 S. E. 896.

59. Florence, etc., R. Co. *v.* Pember, 45 Kan. 625, 26 Pac. 1; Postal Tel. Cable Co. *v.* Louisiana Western R. Co., 49 La. Ann. 1270, 22 So. 219; *In re* Forbes St., 70 Pa. St. 125.

The power to modify is not authority to increase the amount found by the commissioners under charter of a railroad company providing that on the report of commissioners in expropriation proceedings, the judge of the district court should confirm the report, modify it, or refer it back to the commissioners. Louisiana Western R. Co. *v.* Crossman, 111 La. 611, 35 So. 784.

sees fit to remit a portion of the amount;[60] and such remittitur will be allowed only in cases where there is no showing of passion or prejudice.[61]

e. Waiver of Irregularities. As a general rule if a party appears at the hearing or trial and is heard as to his damages and the issue of damages is submitted to the jury or commissioners, he waives the irregularities which have occurred in the proceedings preliminary to the trial of the issue.[62] It has been held in New York that after an owner has petitioned for the appointment of a certain person as commissioner and after the said person has been appointed, it is too late to object that the law under which the proceeding was commenced is unconstitutional;[63] but an objection to the appointment of commissioners on the ground that the land was sought for private purposes is not waived by the objectant's consent to the appointment of certain persons as commissioners and by his failure to appeal from the decision that the purposes of the condemnation were public.[64] Inasmuch as all parties have the right to except to the report upon the motion for its confirmation, an objection to an award which is not made until after the order of confirmation is waived,[65] unless good excuse is shown for the failure to make the objection before confirmation.[66] In some cases if the objectant goes ahead without intimating his objection to some portion of the proceedings until after the award has been made a waiver will be inferred.[67] The right to have a report set aside may be lost by the laches of the party claiming to have been injured.[68] If the statute fixes a certain time within which objections must be

60. Meckes *v.* Pocono Mountain Water Supply Co., 203 Pa. St. 13, 52 Atl. 16; *In re* Wharton St., 48 Pa. St. 487; Watson *v.* Railroad Co., 15 Phila. (Pa.) 224; Springer *v.* Baltimore, etc., R. Co., 3 Del. Co. (Pa.) 132; Ohio River R. Co. *v.* Blake, 38 W. Va. 718, 18 S. E. 957.

It is within the discretion of the court to put plaintiff to an election of reducing the verdict or submitting to a new trial. Selma, etc., R. Co. *v.* Redwine, 51 Ga. 470; Meckes *v.* Pocono Mountain Water Supply Co., 203 Pa. St. 13, 52 Atl. 16.

61. Parsons, etc., R. Co. *v.* Montgomery, 46 Kan. 120, 26 Pac. 403, holding that generally in such case the verdict will be set aside and the questions in issue submitted to the judgment of another jury.

62. Defects in the summons or warrant are waived by a general appearance. Wilmarth *v.* Knight, 7 Gray (Mass.) 294; St. Louis, etc., R. Co. *v.* Donovan, 149 Mo. 93, 50 S. W. 286.

Irregularities in the proceedings for the appointment of the commissioners are waived by the appearance of the landowner before the commissioners and by his being heard in respect to his damages. Whitely *v.* Mississippi Water-Power, etc., Co., 38 Minn. 523, 38 N. W. 753, where besides the landowner appealed from the award.

An objection that the petitioner has not located its road as required by law comes too late after trial. Lieberman *v.* Chicago, etc., R. Co., 141 Ill. 140, 30 N. E. 544.

That the petitioner and owner were unable to agree as to compensation was not shown and that therefore the petitioner had not the right to institute proceedings is a preliminary issue which must be settled before submitting the issue of damages to the jury. Brown *v.* Calumet River Co., 125 Ill. 600, 18 N. E. 283. See also Water Com'rs *v.* Lawrence, 3 Edw. (N. Y.) 582.

Defects in the complaint objected to after defendant defaulted and commissioners were appointed are too late. Coleman *v.* Andrews, 48 Me. 562.

An objection to any person as being unqualified to serve as juror or commissioner should be made at the time when the jury is being impaneled (Tide Water Canal Co. *v.* Archer, 9 Gill & J. (Md.) 479; Smith *v.* Milton School Dist. No. 2, 40 Mich. 143; Mansfield, etc., R. Co. *v.* Clark, 23 Mich. 519), or upon the hearing of the application for the appointment of the commissioners (*In re* Southern Boulevard, 3 Abb. Pr. N. S. (N. Y.) 447).

63. Matter of Cooper, 93 N. Y. 507.

64. *In re* Niagara Falls, etc., R. Co., 4 N. Y. Suppl. 485.

65. *In re* Morning-Side Park, 10 Abb. Pr. N. S. (N. Y.) 338. See also *In re* Metropolitan El. R. Co., 25 N. Y. Suppl. 399.

An objection that one of the commissioners had been appointed ex parte and that such appointment was a nullity comes too late after the report has been confirmed by a competent tribunal. Astor *v.* New York, 62 N. Y. 580; Morris *v.* New York, 55 Hun (N. Y.) 476, 8 N. Y. Suppl. 763.

66. *In re* New York Cent., etc., R. Co., 5 Hun (N. Y.) 105.

67. Matter of One Hundred and Eighty-First St., 17 N. Y. Suppl. 917, where the objection was that one of the commissioners was absent at the time of summing up by counsel after all the testimony was in. See Wilkinson *v.* Trenton, 35 N. J. L. 485, holding that when a landowner does not complain objections by others should be made before the commissioners have acted, provided that the notice required by a charter has been given.

68. Mattheis *v.* Fremont, etc., R. Co., 53 Nebr. 681, 74 N. W. 30.

Right not lost before confirmation.— Mat-

filed they will be deemed waived, unless filed within the prescribed time,[69] or unless sufficient excuse is given for the failure to file within the prescribed time.[70] Under a statute which provides that a motion to set aside a report must be based upon some exception reserved before the commissioners, an objection to the mode of appraisal will not be heard by the court, unless the objection has first been made to the commissioners themselves.[71] An acceptance of the award is a waiver of objections to the proceedings[72] and of the right to claim additional damages.[73]

f. Motions and Exceptions — (i) *In General.* The modes for bringing up the report or verdict for review are by motion to confirm,[74] or to set aside,[75] that there be a reassessment,[76] or by filing exceptions.[77] For opposing confirmation it is commonly provided by statute that when the report is returned to the court any party to the proceedings may show cause.[78] Those persons and only those whose property is affected or who are parties to the proceedings have the right to except.[79] A corporation to which has been given the right of condemnation can-

ter of New York, 36 Misc. (N. Y.) 463, 73 N. Y. Suppl. 761.

After the improvement has been completed at public expense an objection to the report comes too late. Rettinger *v.* Passaic, 45 N. J. L. 146.

69. *In re* One Hundred and Sixty-Third St., 131 N. Y. 569, 30 N. E. 66 [*affirming* 61 Hun 365, 16 N. Y. Suppl. 120]; *In re* Lexington Ave., 16 N. Y. Suppl. 113; Cotter *v.* Sunbury, etc., R. Co., 15 Leg. Int. (Pa.) 180.

70. Matter of Lexington Ave., 18 N. Y. Suppl. 828.

71. *In re* Clear Lake Water Co., 48 Cal. 586, 587, where the objection was that the commissioners had not assessed compensation for each piece of land, for each source of damage separately, and where the court held that "it was the intention of the Legislature that a party purposing to object to the mode of procedure pursued by the Commissioners, should first make his objection to the Commissioners themselves, and thus afford them an opportunity to obviate it, if possible; and should they refuse to do so, then put his objection and exception of record, and on return of the report to renew his objection by means of a motion made to set aside the report."

72. Chatterton *v.* Parrott, 46 Mich. 432, 9 N. W. 482.

73. Twombly *v.* Chicago, etc., R. Co., (Tex. Civ. App. (1895) 31 S. W. 81.

74. *In re* New York, etc., R. Co., 93 N. Y. 385 [*affirming* 29 Hun 602]. See Matter of Buffalo, Sheld. (N. Y.) 408; *In re* New York, etc., R. Co., 21 How. Pr. (N. Y.) 434.

75. *California.*— See Western Pac. R. Co. *v.* Reed, 35 Cal. 621; Central Pac. R. Co. *v.* Pearson, 35 Cal. 247.

Iowa.— See Gammell *v.* Potter, 6 Iowa 548.

Maine.— See Burr *v.* Bucksport, etc., R. Co., 64 Me. 131.

Michigan.— Marquette, etc., R. Co. *v.* Houghton Probate Judge, 53 Mich. 217, 18 N. W. 788.

New Jersey.— Wilson *v.* Longstreet, 38 N. J. L. 312.

Virginia.— See Muire *v.* Falconer, 10 Gratt. 12.

76. *In re* Hopewell Tp. Road, 12 Pa. Co. Ct. 517.

77. See Chicago, etc., R. Co. *v.* Baker, 102 Mo. 553, 15 S. W. 64; *In re* Olyphant, 198 Pa. St. 534, 48 Atl. 487.

Remedy by appeal, not by exception.— The remedy of a railway company for an award of excessive damages by viewers (under the general act of Feb. 19, 1849, Brightly Dig. p. 839, § 13), is by appeal and not by exception (Brightly Dig. p. 840, § 16). Exceptions therefore for excessive damages must be dismissed, although the court should regard the damages as excessive. Roberts *v.* Central Pass. R. Co., 1 Brewst. (Pa.) 538.

An application for a review is the proper remedy under the act of 1845 which refers to condemnation of land for roads. An exception does not reach the case, for to sustain it would set aside the road, which would be giving it too much effect; or would set aside the part of it which is in favor of the exceptants, and that is not what they want. They want more damages, and ought therefore to have asked for a review at the second term. *In re* Chartiers Tp. Road, 34 Pa. St. 413.

An appeal to the common pleas for a jury trial and exceptions to the report of the viewers have nothing to do with each other; the hearing of the exceptions can go on and be completed before the case is actually tried before a jury and if the exceptions are decided favorably to the appellant, so as to defeat the proceeding, no trial will be necessary; if otherwise the trial can then proceed. There is no inconsistency in filing exceptions to the report of the viewers and at the same time entering an appeal to the common pleas under the act of June 13, 1874 (Pub. Laws 283). Bowers *v.* Braddock Borough, 172 Pa. St. 596, 33 Atl. 759. See also *In re* Fifty-Fifth St., 21 Pa. Co. Ct. 598. *Contra*, see *In re* Chestnut St., 128 Pa. St. 214, 18 Atl. 338; Bechtel *v.* Bechtelsville Borough, 3 Pa. Dist. 713.

78. Washington, etc., R. Co. *v.* Switzer, 26 Gratt. (Va.) 661; Matter of Armory Bd., 35 Misc. (N. Y.) 548, 72 N. Y. Suppl. 37; Camp *v.* Coal Creek, etc., R. Co., 11 Lea (Tenn.) 705, citing Tenn. Code, c. 11, § 1341. See also Chicago, etc., R. Co. *v.* Eubanks, 32 Mo. App. 184.

79. Chicago, etc., R. Co. *v.* Baker, 102 Mo. 553, 15 S. W. 64 (holding that a landowner

not complain that the rights of any persons whose interests have been affected have not been protected.[80] Any number of landowners, although holding by independent titles, may join in the same application for a reassessment.[81] The statutory requirements as to the form and requisites of the motion should be carefully observed.[82] Exceptions should be filed in proper time,[83] especially within the time prescribed by statute.[84] A release of an award by a person to whom as owner it was wrongfully granted removes the exceptions taken by the party exercising the right of condemnation.[85]

(II) *NOTICE OF MOTION.* Whether notice of the motion to confirm is necessary depends upon the statute under which the land has been condemned. It is a general practice to require notice.[86] But under some statutes it is necessary for the party objecting to the report to take action within a time limited, if he wishes to prevent confirmation, even though he has no notice.[87]

(III) *HEARING AND PROOF.* Upon a motion to confirm or set aside, the court will in many jurisdictions hear evidence on the question, either in the form of affidavits or oral examination, according as the practice of the particular jurisdiction may prescribe.[88] Nevertheless in other jurisdictions a different view prevails, and if the owner has appeared, or at least had an opportunity to appear before commissioners duly appointed, he cannot again offer evidence before the court.[89]

whose land is mortgaged may except to an award made in favor of the mortgagees); *In re* Olyphant, 198 Pa. St. 534, 48 Atl. 487; Culpeper County *v.* Gorrell, 20 Gratt. (Va.) 484.

That a release of damages has not been procured from other landowners is no ground for an exception by one who has been allowed damages. *In re* Clinton Tp. Road, 3 Pa. Co. Ct. 170.

80. Chicago, etc., R. Co. *v.* Baker, 102 Mo. 553, 15 S. W. 64.

81. People *v.* White, 59 Barb. (N. Y.) 666; Rand *v.* Townshend, 26 Vt. 670.

82. Bryant *v.* Knox, etc., R. Co., 61 Me. 300. See also Hannibal Bridge Co. *v.* Schaubacker, 49 Mo. 555.

83. Rettinger *v.* Passaic, 45 N. J. L. 146.

Filing nunc pro tunc.— It is within the discretion of the court to allow exceptions to be filed *nunc pro tunc* after the time for filing them has run. Cape Fear, etc., R. Co. *v.* King, 125 N. C. 454, 34 S. E. 541.

84. Kansas City *v.* Mastin, 169 Mo. 80, 68 S. W. 1037; Chicago, etc., R. Co. *v.* Ewbanks, 32 Mo. App. 184; Matter of Armory Bd., 35 Misc. (N. Y.) 548, 72 N. Y. Suppl. 37; Cotter *v.* Sunbury, etc., R. Co., 15 Leg. Int. (Pa.) 180; Shirk *v.* Pennsylvania, etc., R. Co., 9 Lanc. Bar (Pa.) 198.

85. Berry *v.* Hebron, 38 N. H. 196.

86. Bensley *v.* Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575; Tracy *v.* Elizabethtown, etc., R. Co., 80 Ky. 259 (holding that although notice to owners was not expressly required by the charter of a railroad, it was by necessary implication indispensable); Jones *v.* Barclay, 2 J. J. Marsh. (Ky.) 73. See also Harper *v.* Lexington, etc., R. Co., 2 Dana (Ky.) 227; Cowan *v.* Glover, 3 A. K. Marsh. (Ky.) 356; New York, etc., R. Co. *v.* Corey, 5 How. Pr. (N. Y.) 177, under N. Y. Code Civ. Proc. § 3371.

After a report has been reconsidered and corrected by the commissioners, to give a second notice of the deposit of the report is not necessary. If new parties have been brought in they, it seems, should have personal notice so as to enable them to state their objections, if any exist; if they have not had such notice the report will be remitted. *In re* William, etc., Sts., 19 Wend. (N. Y.) 678.

Sufficiency.— Where the description of the easement condemned had been correctly set out in the original notice and the board of public works had acquired jurisdiction to make the award, it was held immaterial in view of the court's finding that the description was defective in the notice of confirmation. Lumbermen's Ins. Co. *v.* St. Paul, 82 Minn. 497, 85 N. W. 525.

87. Heermans *v.* Jacksonville, etc., R. Co., 40 Fla. 85, 23 So. 587. See also Philadelphia, etc., R. Co. *v.* Shipley, 72 Md. 88, 19 Atl. 1.

88. *District of Columbia.*— Clapp *v.* Macfarland, 20 App. Cas. 224.

Illinois.— Cole *v.* Peoria, 18 Ill. 301.

Maryland.— Tide Water Canal Co. *v.* Archer, 9 Gill & J. 479.

Michigan.— Marquette, etc., R. Co. *v.* Houghton Probate Judge, 53 Mich. 217, 18 N. W. 788. See also Fort St. Union Depot Co. *v.* Backus, 92 Mich. 33, 52 N. W. 790.

Missouri.— Kansas City *v.* Bacon, 147 Mo. 259, 48 S. W. 860; St. Louis *v.* Abeln, 170 Mo. 318, 70 S. W. 708; St. Louis, etc., R. Co. *v.* Almeroth, 62 Mo. 343; Hannibal Bridge Co. *v.* Schaubacker, 49 Mo. 555.

North Carolina.— Hanes *v.* North Carolina R. Co., 109 N. C. 490, 13 S. E. 896.

Pennsylvania.— *In re* Forbes St., 70 Pa. St. 125.

89. Lennox *v.* Knox, etc., R. Co., 62 Me. 322; Matter of Public Parks, 53 Hun (N. Y.) 280, 6 N. Y. Suppl. 750. See also Central Pac. R. Co. *v.* Pearson, 35 Cal. 247, holding that the review by the court of the report of the commissioners is intended to be had upon the report itself so far as all matters which should

It has been held that the burden of establishing the exceptions is upon the exceptant.[90]

g. The Order — (I) *In General.* The issues of fact raised by exceptions must be disposed of before an order of confirmation can be made.[91] The court has no jurisdiction to order confirmation in any other way than that authorized by the statute under which condemnation has been made.[92] Under some statutes a conditional order of confirmation is not a compliance therewith;[93] but an illegal provision in the order need not render the order invalid if the provision is not made a condition of the payment of the award.[94] A statutory provision that the order setting aside or modifying an award shall state the grounds of the order,[95] or that the order should be made in pursuance of an exception taken and sustained,[96] is mandatory.

(II) *Setting Aside and Amending.* It has been decided that the determination of the court partakes of the character of a judgment and is entitled to the same consideration as a decision of a court from the report of a referee, and the proof required to set it aside should be such as would justify a court in setting aside a decision, or a report of a referee which has been confirmed.[97] The court has the power to modify its order for mistakes in a proper case, just as it has the power in an ordinary case to modify its decrees.[98]

N. Judgment[99] or Award — **1. In General.** The appropriation of the property is not complete until there is a judgment confirming the verdict or award,[1] although under some statutes the proceedings should terminate in a final order and not in a judgment.[2] The judgment is one entered on the verdict and not on the award.[3] Although the title which the condemning party gets is by virtue of

be stated there are concerned, and holding further that as to matters outside of the report itself, such as fraud or misconduct of the commissioners, affidavits or other competent evidence might be admitted.

The court may hear affidavits which were before the commissioners, but not new affidavits. *In re* John, etc., Sts., 19 Wend. (N. Y.) 659. *Compare In re* William, etc., Sts., 19 Wend. (N. Y.) 678, holding that affidavits as to facts which were not before the commissioners might be received to uphold the report, but not affidavits in opposition to the report.

90. New Milford Water Co. *v.* Watson, 75 Conn. 237, 52 Atl. 947, 53 Atl. 57. See also Gregory *v.* Gulf, etc., R. Co., 21 Tex. Civ. App. 598, 54 S. W. 617.

91. Wood *v.* Wilson, 12 Ind. 657. See also Werley *v.* Huntington Waterworks Co., 138 Ind. 148, 37 N. E. 582.

92. New Milford Water Co. *v.* Watson, 75 Conn. 237, 52 Atl. 947, 53 Atl. 57. See also *In re* Kings County El. R. Co., 78 N. Y. 383.

93. *In re* O'Hara Tp., 87 Pa. St. 356.

94. Morris *v.* New York, 55 Hun (N. Y.) 476, 8 N. Y. Suppl. 763.

95. People *v.* Gardner, 24 N. Y. 583; People *v.* Canal Bd., 7 Lans. (N. Y.) 220.

96. *In re* Spring Garden St., 61 Pa. St. 422.

97. State *v.* Hennepin County Dist. Ct., 83 Minn. 464, 86 N. W. 455; Matter of Elmwood Ave, 10 N. Y. St. 272, 273 [*citing* People *v.* Syracuse, 78 N. Y. 56; *In re* New York Cent., etc., R. Co., 64 N. Y. 60]. See also Hamersley *v.* New York, 56 N. Y. 533. But see Kanne *v.* Minneapolis, etc., R. Co., 33 Minn. 419, 421, 23 N. W. 854 [*citing* Simson *v.* Hart, 14 Johns. (N. Y.) 63].

98. Matter of Buffalo, Sheld. (N. Y.) 425 (where by clerical error in engrossing the report, the award had been made to the wrong person, to the husband of the landowner, instead of to the landowner herself); *In re* One Hundred and Eighty-First St., 12 N. Y. Suppl. 345.

99. **Judgments** generally see Judgments.

1. Wagner *v.* Railway Co., 38 Ohio St. 32; Cincinnati Southern R. Co. *v.* Banning, Ohio Prob. 114. See also State *v.* Mills, 29 Wis. 322.

It is not necessary that the statute should expressly confer upon the courts power to render such a judgment, since such power results from their general authority to render judgments in proceedings before them. Dietrichs *v.* Lincoln, etc., R. Co., 12 Nebr. 225, 10 N. W. 718.

2. *In re* Board of Education, 11 N. Y. Suppl. 780, 19 N. Y. Civ. Proc. 420.

3. Howes *v.* Belfast, 72 Me. 46; Ringle *v.* Hudson County, 56 N. J. L. 661, 29 Atl. 483; Ennis *v.* Wood River Branch R. Co., 12 R. I. 73; Mauldin *v.* Greenville, 64 S. C. 444, 42 S. E. 202. Where a railroad company appropriated lands for its road-bed, and four acres additional for a section house, the jury made special findings that the damage to the residue of the land not taken was one thousand seven hundred dollars, and that the damages for the four acres were two hundred dollars, but in entering the judgment the court included both amounts. It was held that the jury evidently intended the one thousand seven hundred dollars to be full compensation, and

the statute,[4] it is usual for the judgment to contain a provision for the appropriation of the land,[5] as well as for the payment of the compensation.[6] It need not contain a formal decree condemning the land for public use, and vesting the easement in the petitioner;[7] it is sufficient if it sets forth an appropriation of the land to the use of the petitioner upon payment of the damages,[8] the judgment being conditional, leaving the petitioner to pay the award and take the property,

therefore the special damage of two hundred dollars was improperly included in the judgment. Gulf, etc., R. Co. *v.* Poindexter, 70 Tex. 98, 7 S. W. 316.

The judgment must be entered on the verdict, although it be less in amount than the award appealed from. Ringle *v.* Hudson County, 56 N. J. L. 661, 29 Atl. 483.

An agreement by the parties may authorize the entry of a judgment upon such agreement. Howes *v.* Belfast, 72 Me. 46.

4. Indianapolis, etc., R. Co. *v.* Smythe, 45 Ind. 322. *Compare* Evansville, etc., R. Co. *v.* Miller, 30 Ind. 209.

5. San Luis Land, etc., Co. *v.* Kenilworth Canal Co., 3 Colo. App. 244, 32 Pac. 860; Ayer *v.* Chicago, 149 Ill. 262, 37 N. E. 57; Chicago, etc., R. Co. *v.* Chicago, 132 Ill. 372, 23 N. E. 1036; Lexington, etc., R. Co. *v.* Mockbee, 63 Mo. 348; Barnes *v.* Chicago, etc., R. Co., (Tex. Civ. App. 1895) 33 S. W. 601; Foster *v.* Chicago, etc., R. Co., 10 Tex. Civ. App. 476, 31 S. W. 529.

In Alabama the code provides that on the rendition of a verdict in a condemnation proceeding the court must order a condemnation in pursuance thereof upon payment of the compensation assessed. Mobile, etc., R. Co. *v.* Hester, 122 Ala. 249, 25 So. 220.

In Illinois a judgment fixing the amount of compensation, but not specifying the time for payment or for the giving of possession, will not be deemed final as to such details, and as to these matters may subsequently be made complete. Chicago, etc., R. Co. *v.* Guthrie, 192 Ill. 579, 61 N. E. 658.

6. *Illinois.*— Chicago, etc., R. Co. *v.* Guthrie, 192 Ill. 579, 61 N. E. 658; McCormick *v.* West Chicago Park Com'rs, 118 Ill. 655, 8 N. E. 818.

Maine.— Howes *v.* Belfast, 72 Me. 46; Billings *v.* Berry, 50 Me. 31.

Nebraska.— Dietrichs *v.* Lincoln, etc., R. Co., 12 Nebr. 225, 10 N. W. 718.

New Jersey.— Ringle *v.* Hudson County, 56 N. J. L. 661, 29 Atl. 483.

Ohio.— Wagner *v.* Railway Co., 38 Ohio St. 32.

Oregon.— McCall *v.* Marion County, 43 Oreg. 536, 73 Pac. 1031, 75 Pac. 140.

Rhode Island.—Ennis *v.* Wood River Branch R. Co., 12 R. I. 73.

Texas.— Dallas, etc., R. Co. *v.* Day, 3 Tex. Civ. App. 353, 22 S. W. 538.

Wisconsin.— State *v.* Mills, 29 Wis. 322.

See 18 Cent. Dig. tit. "Eminent Domain," § 621 *et seq.*

Where the judgment does not provide for compensation for the land taken, injunction will lie to prevent the petitioner from taking possession until payment is made, but the judgment is not invalid. Shute *v.* Chicago, etc., R. Co., 26 Ill. 436.

In Illinois it has been held that when the issue in condemnation proceedings is simply as to the damages resulting to a particular tract, which is claimed by one whose ownership is not challenged, and who offers no evidence as to the nature or extent of his interest, the judgment should secure to him personally the entire damages awarded, and an order directing the amount to be paid to the county treasurer for the benefit of the owners and parties interested is erroneous. Convers *v.* Atchison, etc., R. Co., 142 U. S. 671, 12 S. Ct. 351, 35 L. ed. 1153.

7. St. Louis, etc., R. Co. *v.* Donovan, 149 Mo. 93, 50 S. W. 286; Kansas City *v.* Knotts, 78 Mo. 356; Barnes *v.* Chicago, etc., R. Co., (Tex. Civ. App. 1895) 33 S. W. 601; Foster *v.* Chicago, etc., R. Co., 10 Tex. Civ. App. 476, 31 S. W. 529; Ft. Worth, etc., R. Co. *v.* Lamphear, 1 Tex. App. Civ. Cas. § 308.

A judgment awarding to a telegraph company the right to construct its line over a railroad right of way, which designates the height of the poles, the manner of their erection, and the minimum distance from the railroad track, and which requires the telegraph company on notice to remove the poles at its own expense from any portion of the right of way which may be needed by the railroad company, is not so indefinite as to require revision by an appellate court. Idaho Postal Tel. Cable Co. *v.* Oregon Short Line R. Co., 104 Fed. 623 [*affirmed* in 111 Fed. 842, 49 C. C. A. 663].

8. London *v.* Sample Lumber Co., 91 Ala. 606, 8 So. 281; Bloomington *v.* Miller, 84 Ill. 621; Evansville, etc., Straight Line R. Co. *v.* Fitzpatrick, 10 Ind. 120; Oregon R. Co. *v.* Bridwell, 11 Oreg. 282, 3 Pac. 684.

A judgment vesting a right of way in a railroad company for necessary railway purposes is too broad, and should in the interest of the owner be so corrected as to limit the exercise of the easement to the purposes defined in the Texas statute. Ft. Worth Ice Co. *v.* Chicago, etc., R. Co., 11 Tex. Civ. App. 600, 33 S. W. 159.

If the court finds the value of the land in dollars and cents, but does not state that the estimated value is in gold coin, it cannot render a judgment in gold coin. North Pac. R. Co. *v.* Reynolds, 50 Cal. 280.

If there is a valid mortgage on the land, a failure to provide in the judgment for the release of such mortgage from the rights to be conveyed by the owner to the company upon the payment of the damages, is erroneous. Woolsey *v.* New York El. R. Co., 134 N. Y. 323, 30 N. E. 387, 31 N. E. 891.

or abandon the proceedings and incur no liability for the sum awarded.[9] The judgment need not set forth the facts which entitle the petitioner to make the application.[10] If there are conflicting claims the judgment should recite all the facts necessary to show that the successful party is entitled to the money awarded.[11]

2. RECORDING. Since a judgment of condemnation necessarily affects the title to the real estate involved, it is necessary, although not as between the parties,[12] that the judgment should be recorded in the proper office for the registry of deeds in the county in which the land is situated.[13] Although the statute contains no provision for recording the judgment in any other county than that in which it is rendered, it may be recorded in other counties in which any part of the condemned lands lie.[14] If an award is recorded by mistake, no title passes so as to raise an implied contract on the part of the condemning party to pay the award.[15]

3. SUFFICIENCY OF RECORD TO SUPPORT JUDGMENT. To support the judgment it is necessary that all jurisdictional facts should appear of record.[16] Thus the record should show that the landowner was properly notified.[17] All reasonable presump-

In a proceeding to condemn a portion of a railroad right of way for a telegraph line, if the petition claims expropriation for the whole distance between two stated points, and the jury awards fifty dollars per mile, the judgment should be for that sum for each and every mile between the designated points, and not for each mile which the petitioner may take. Postal Tel. Cable Co. *v.* Louisville, etc., R. Co., 43 La. Ann. 522, 9 So. 119.

The owner is not prejudiced by the fact that the judgment does not in form require the payment of damages before appropriation of the land. Madera County *v.* Raymond Granite Co., 139 Cal. 128, 72 Pac. 915, 989.

Under the Alabama act of 1841 in a proceeding to ascertain the damages of a riparian proprietor occasioned by the withdrawal of water from a creek to be used for a city water-supply, if the jury renders a verdict that such proprietor has sustained no damages, a judgment that the lessee of the water privilege is entitled to the use of the waters of said creek for and during their continuance, without any compensation therefor to said owner, is not improper. Burden *v.* Stein, 25 Ala. 455.

9. Dolores No. 2 Land, etc., Co. *v.* Hartman, 17 Colo. 138, 29 Pac. 378; Bloomington *v.* Miller, 84 Ill. 621; Evansville, etc., Straight Line R. Co. *v.* Stringer, 10 Ind. 551; Evansville, etc., Straight Line R. Co. *v.* Fitzpatrick, 10 Ind. 120.

That the judgment may be such as to give the owner a vested right to the damages see *infra*, XI, N, 8, a.

10. Balch *v.* Essex County, 103 Mass. 106.

11. Grady *v.* Northwestern Loan, etc., Co., 93 Wis. 229, 67 N. W. 34.

12. Oberfelder *v.* Metropolitan El. R. Co., 138 N. Y. 181, 33 N. E. 937.

13. Morgan *v.* New York, etc., R. Co., 130 N. Y. 692, 29 N. E. 900 [*affirming* 7 N. Y. Suppl. 731]; Parker *v.* Ft. Worth, etc., R. Co., 84 Tex. 333, 19 S. W. 518; Svennes *v.* West Salem, 114 Wis. 650, 91 N. W. 121.

The New York statute does not require that the judgment should be recorded in the same book with conveyances, and a recording in the office of the county clerk is sufficient. Morgan *v.* New York, etc., R. Co., 7 N. Y. Suppl. 731.

14. St. Louis, etc., R. Co. *v.* Postal Tel. Co., 173 Ill. 508, 51 N. E. 382.

15. Dimmick *v.* Council Bluffs, etc., R. Co., 58 Iowa 637, 12 N. W. 710, also holding that no such contract would be implied by a failure of the company to correct the mistake, until the fact of the mistake had become known to the company, and a reasonable time had elapsed to enable the company to correct it.

16. *Alabama.*— Bottoms *v.* Brewer, 54 Ala. 288.

Kansas.— Junction City, etc., R. Co. *v.* Silver, 27 Kan. 741.

Kentucky.— Penny *v.* Tisdell, 7 Bush 571; Wooten *v.* Campbell, 7 Dana 204; McAfee *v.* Kennedy, 1 Litt. 92; Hamilton *v.* Adams, 7 J. J. Marsh. 248.

Maine.— Prentiss *v.* Parks, 65 Me. 559.

Michigan.— Morseman *v.* Ionia, 32 Mich. 283.

Mississippi.— Madden *v.* Louisville, etc., R. Co., 66 Miss. 258, 6 So. 181; White *v.* Memphis, etc., R. Co., 64 Miss. 566, 1 So. 730; Board of Levee Com'rs *v.* Allen, 60 Miss. 93.

Missouri.— Kansas City, etc., R. Co. *v.* Campbell, 62 Mo. 585; Cunningham *v.* Pacific R. Co., 61 Mo. 33.

New Jersey.— Bramhall *v.* Bayonne, 35 N. J. L. 476; Vail *v.* Morris, etc., R. Co., 21 N. J. L. 189.

New York.— Gilbert *v.* Columbia Turnpike Co., 3 Johns. Cas. 107.

Oregon.— Northern Pac. Terminal Co. *v.* Portland, 14 Oreg. 34, 13 Pac. 705.

Pennsylvania.— Pennsylvania R. Co. *v.* Bruner, 55 Pa. St. 318; Matter of Philadelphia, etc., R. Co., 7 Phila. 461.

Wisconsin.— U. S. *v.* Summit, 1 Pinn. 566.

See 18 Cent. Dig. tit. "Eminent Domain," § 622.

Necessity of showing failure to agree as to amount of damages see *supra*, XI, D, 3.

Necessity of showing qualifications of appraisers, commissioners, jurors, etc., **see** *supra*, XI, M, 2, a (IV), (V); XI, M, 2, b, (III).

17. The notice required to be given to the landowner is a jurisdictional fact which should affirmatively appear of record.

tions, however, will be indulged in favor of the validity of the judgment,[18] and the record need not show facts of which the court takes judicial notice.[19]

4. DESCRIPTION OF PROPERTY AND INTEREST TAKEN.[20] The property or interests sought to be condemned and taken should be described in the judgment[21] with sufficient certainty to enable a surveyor to find the place designated;[22] and it should follow the verdict or award.[23]

5. PERSONAL JUDGMENT FOR DAMAGES. In respect to the judgment rendered for the compensation it is uniformly held that a personal judgment is improper.[24]

Illinois.— Chicago, etc., R. Co. *v.* Chamberlain, 84 Ill. 333.

Kansas.— Junction City, etc., R. Co. *v.* Silva, 27 Kan. 741.

Missouri.— Taylor *v.* Todd, 48 Mo. App. 550.

Pennsylvania.— *In re* Boyer's Road, 37 Pa. St. 257. But *compare* Bryant *v.* New Castle Northern R. Co., 6 Pa. Co. Ct. 53.

Rhode Island.— Ross *v.* North Providence, 10 R. I. 461.

Texas.— Voght *v.* Bexar County, 5 Tex. Civ. App. 272, 26 S. W. 1044.

See 18 Cent. Dig. tit. "Eminent Domain," § 622.

18. *Alabama.*—Long *v.* Commissioner's Ct., 18 Ala. 482.

Massachusetts.— Reed *v.* Acton, 117 Mass. 384; Balch *v.* Essex County, 103 Mass. 106.

Mississippi.— Cage *v.* Trager, 60 Miss. 563.

Missouri.— Kansas City *v.* Vineyard, 128 Mo. 75, 30 S. W. 326; *In re* Gardner, 41 Mo. App. 589.

Pennsylvania.—Bryant *v.* New Castle Northern R. Co., 6 Pa. Co. Ct. 53.

Virginia.— Hunter *v.* Matthews, 1 Rob. 468.

See 18 Cent. Dig. tit. "Eminent Domain," § 622. And see American Cannel Coal Co. *v.* Huntington, etc., R. Co., 130 Ind. 98, 29 N. E. 566; Gay *v.* Caldwell, Hard. (Ky.) 63.

19. *In re* Independence Ave. Boulevard, 128 Mo. 272, 30 S. W. 773.

20. **Description of property:** In petition see *supra*, XI, J, 2, a, (VI). In process of notice see *supra*, XI, I, 3, b. In report of commissioners, appraisers, or viewers see *supra*, XI, M, 2, b, (IX). In verdict see *supra*, XI, M, 2, a, (VIII).

21. *Alabama.*— Macon *v.* Gwen, 3 Ala. 116.

Colorado.— Norris *v.* Pueblo, 12 Colo. App. 290, 55 Pac. 747; San Luis Land, etc., Co. *v.* Kenilworth Canal Co., 3 Colo. App. 244, 32 Pac. 860.

Connecticut.— New York, etc., R. Co. *v.* New York, etc., R. Co., 52 Conn. 274.

Illinois.— Galena, etc., R. Co. *v.* Pound, 22 Ill. 399.

Missouri.— Fore *v.* Hoke, 48 Mo. App. 254; Central R. Co. *v.* Merkel, 32 Tex. 723.

Texas.— Ft. Worth, etc., R. Co. Lamphear, 1 Tex. App. Civ. Cas. § 308.

See 18 Cent. Dig. tit. "Eminent Domain," § 623.

It has been held to be sufficient to describe the land by metes and bounds (Fore *v.* Hoke, 48 Mo. App. 254), or even to refer to the verdict wherein the land taken was properly described (Peoria, etc., R. Co. *v.* Mitchell, 74 Ill. 394).

A judgment is not void for uncertainty, in proceedings to condemn a railroad right of way for a telegraph line if, as is done in the petition, it locates the line in the alternative, as "at a distance of not less than twenty-five feet from the outer edge of said railroad track, . . . or at such points as may be agreed upon" by the parties. St. Louis, etc., R. Co. *v.* Postal Tel. Co., 173 Ill. 508, 51 N. E. 382.

Where land is condemned for a pipe-line, a description by lines running certain courses and distances, "or as near said description as practicable," is sufficient. Adams *v.* San Angelo Water Works Co., (Tex. Civ. App. 1894) 25 S. W. 165.

22. Macon *v.* Owen, 3 Ala. 116.

23. West Chicago St. R. Co. *v.* Chicago, 172 Ill. 198, 50 N. E. 185; Peoria, etc., R. Co. *v.* Mitchell, 74 Ill. 394; St. Louis, etc., R. Co. *v.* Donovan, 149 Mo. 93, 50 S. W. 286; Wooster *v.* Sugar River Valley R. Co., 57 Wis. 311, 15 N. W. 401.

If the judgment specifically refers to and confirms the report of the commissioners, it is unnecessary that the judgment should set out the names of the owners. Thompson *v.* Chicago, etc., R. Co., 110 Mo. 147, 19 S. W. 77.

As to amending the judgment nunc pro tunc see Ayer *v.* Chicago, 149 Ill. 262, 37 N. E. 57; Lexington, etc., R. Co. *v.* Mockbee, 63 Mo. 348.

24. Mobile, etc., R. Co. *v.* Hester, 122 Ala. 249, 25 So. 220; Kansas City, etc., R. Co. *v.* Kennedy, 49 Kan. 19, 30 Pac. 126; Lawrence, etc., R. Co. *v.* Moore, 24 Kan. 323; St. Louis, etc., R. Co. *v.* Wilder, 17 Kan. 239; Florence, etc., R. Co. *v.* Lilley, 3 Kan. App. 588, 43 Pac. 857; Louisville, etc., R. Co. *v.* Ryan, 64 Miss. 399, 8 So. 173; Chesapeake, etc., R. Co. *v.* Bradford, 6 W. Va. 220. *Compare*, however, State *v.* Humes, 34 Wash. 347, 75 Pac. 348, holding that where a judgment in condemnation proceedings was rendered in favor of the owners for a certain sum, the fact that such judgment, on payment of the money, passed the title to the real estate to the city did not limit its effect as a judgment for the recovery of money.

But that an owner has a vested right in the award see *infra*, XI, N, 8, a.

Against a county it has been held that no personal judgment should be entered for the amount of the award on an appeal from an assessment of damages in the matter of the location of a county road. McCall *v.* Marion County, 43 Oreg. 536, 73 Pac. 1031, 75 Pac. 140.

The only judgment which should be rendered is one in the nature of an award for damages.[25]

6. CONFORMITY TO RELIEF DEMANDED IN PETITION. The judgment and relief awarded petitioner in condemnation proceedings must conform to and not exceed the relief demanded in the petition.[26]

7. COLLATERAL ATTACK. A judgment of condemnation rendered by a competent court is not open to collateral attack[27] except for want of jurisdiction.[28]

The owner is not prejudiced, however, by the fact that the judgment is one *in personam*. Madera County *v.* Raymond Granite Co., 139 Cal. 128, 72 Pac. 915.

Under the Alabama code it is improper to render a money judgment and order execution thereon. Mobile, etc., R. Co. *v.* Hester, 122 Ala. 249, 25 So. 220.

Under Minn. Gen. St. (1866) c. 34, which requires the company to give a bond conditioned to pay as compensation whatever amount may be required by the judgment of the court, the owner is entitled to a personal judgment for the damages awarded. Robbins *v.* St. Paul, etc., R. Co., 24 Minn. 191; Curtis *v.* St. Paul, etc., R. Co., 21 Minn. 497.

25. Kansas City, etc., R. Co. *v.* Kennedy, 49 Kan. 19, 30 Pac. 126; Lawrence, etc., R. Co. *v.* Moore, 24 Kan. 323; St. Louis, etc., R. Co. *v.* Wilder, 17 Kan. 239; Florence, etc., R. Co. *v.* Lilley, 3 Kan. App. 588, 43 Pac. 857.

26. *Alabama.*— Brown *v.* Rome, etc., R. Co., 86 Ala. 206, 5 So. 195.

Illinois.— Chicago, etc., R. Co. *v.* Chicago, 132 Ill. 372, 23 N. E. 1036.

Kansas.— Dickinson County *v.* Hogan, 39 Kan. 606, 18 Pac. 611.

Massachusetts.— Chandler *v.* Jamaica Pond Aqueduct Corp., 125 Mass. 544; Hyde Park *v.* Norfolk County Com'rs, 117 Mass. 416; Fuller *v.* Chicopee Mfg. Co., 16 Gray 46; Boston First Church *v.* Boston, 14 Gray 214; Leonard *v.* Schenck, 3 Metc. 357; Stevens *v.* Fitch, 2 Metc. 507.

Michigan.—Bay City Belt-Line Co. *v.* Hitchcock, 90 Mich. 533, 51 N. W. 808.

North Carolina.— Bridgers *v.* Purcell, 23 N. C. 232.

Texas.— Houston Tap, etc., R. Co. *v.* Milburn, 34 Tex. 224; Barnes *v.* Chicago, etc., R. Co., (Civ. App. 1895) 33 S. W. 601; Foster *v.* Chicago, etc., R. Co., 10 Tex. Civ. App. 476, 31 S. W. 529; Lester *v.* Ft. Worth, etc., R. Co., (Civ. App. 1894) 26 S. W. 166.

Washington.— Northern Pac., etc., R. Co. *v.* Coleman, 3 Wash. 228, 28 Pac. 514.

See 18 Cent. Dig. tit. "Eminent Domain," § 625.

A judgment which condemns different land, or a different interest in the land, from that described in the petition, is erroneous. Chicago, etc., R. Co. *v.* Chicago, 132 Ill. 372, 23 N. E. 1036.

A railroad company cannot complain that, while a petition by a telegraph company asked for condemnation of the right of way for the entire distance between the two termini, the verdict and judgment did not give a right of way for the full distance. St. Louis, etc., R. Co. *v.* Postal Tel. Co., 173 Ill. 508, 51 N. E. 382.

Where a petition for a private railroad has been granted, and a survey accompanies the petition, and the courses, distances, grades, and the like are laid down on drafts which are put on file, if the view has been granted and the damages assessed upon the plan thus proposed, the location cannot be changed, except upon a new petition. Lance's Appeal, 55 Pa. St. 16, 93 Am. Dec. 722.

Where land is condemned for a ditch to drain a highway, the court should not by its judgment undertake to divest the title of the owner, but only to subject the land to the required use. Palmer *v.* Harris County, 29 Tex. Civ. App. 340, 69 S. W. 229.

27. *Illinois.*—Townsend *v.* Chicago, etc., R. Co., 91 Ill. 545; Chicago, etc., R. Co. *v.* Springfield, etc., R. Co., 67 Ill. 142; Galena, etc., R. Co. *v.* Pound, 22 Ill. 399.

Indiana.— Ney *v.* Swinney, 36 Ind. 454.

Iowa.— Carlile *v.* Des Moines, etc., R. Co., 99 Iowa 345, 68 N. W. 784.

Maryland.— Hamilton *v.* Annapolis, etc., R. Co., 1 Md. 553; Hamilton *v.* Annapolis, etc., R. Co., 1 Md. Ch. 107.

Michigan.— Tuller *v.* Detroit, 97 Mich. 597, 56 N. W. 1032.

Mississippi.— Cage *v.* Trager, 60 Miss. 563.

Missouri.— Evans *v.* Haefner, 29 Mo. 141; Sedalia *v.* Missouri, etc., R. Co., 17 Mo. App. 105.

Nevada.— Byrnes *v.* Douglass, 23 Nev. 83, 42 Pac. 798.

New York.— *In re* Public Parks, 73 N. Y. 560; Dyckman *v.* New York, 5 N. Y. 434; Betts *v.* Williamsburgh, 15 Barb. 255.

Texas.— Hopkins *v.* Cravey, 85 Tex. 189, 19 S. W. 1067; Davidson *v.* Texas, etc., R. Co., 29 Tex. Civ. App. 42, 67 S. W. 1093.

Virginia.— Chesapeake, etc., R. Co. *v.* Washington, etc., R. Co., 99 Va. 715, 40 S. E. 20.

United States.— Secombe *v.* Milwaukee, etc., R. Co., 23 Wall. 108, 23 L. ed. 67.

See 18 Cent. Dig. tit. "Eminent Domain," § 626.

28. Carlile *v.* Des Moines, etc., R. Co., 99 Iowa 345, 68 N. W. 784; Allen *v.* Utica, etc., R. Co., 15 Hun (N. Y.) 80.

The award of canal appraisers in New York cannot be attacked collaterally for mere error of judgment, while they keep within their jurisdiction; but, as they are officers of very special and limited jurisdiction, if they have acted outside of, or in excess of, their jurisdiction, this may be shown in defense of proceedings by mandamus to enforce the award. People *v.* Schuyler, 69 N. Y. 242.

None of the acts or proceedings which are preliminary to the judgment, and which do not go to the jurisdiction, can be attacked in a collateral proceeding,[29] nor can the judgment be attacked for any irregularity in such preliminary matters.[30] Such judgment cannot be attacked in a proceeding to assess benefits to pay the damages,[31] nor in an action to enforce the award.[32] It may be shown, however, that the record and its recitals are wholly untrue.[33]

8. CONCLUSIVENESS AND EFFECT OF AWARD OR JUDGMENT — a. In General. The judgment is not the source of the owner's right,[34] but only the means of ascer-

Where the proceedings are void for want of notice to the owner of the time and place of the commissioners' meeting to assess damages, he need not move to set aside the award, but may attack it collaterally in any action in which rights are claimed under it. Kanne v. Minneapolis, etc., R. Co., 33 Minn. 419, 23 N. W. 854. However, the question whether there had been service of a preliminary notice of the taking cannot be inquired into collaterally. Galena, etc., R. Co. v. Pound, 22 Ill. 399. If the judgment recites that the owner has been duly served with notice of the motion for confirmation of the commissioners' report, this is, in another action, conclusive of that fact, unless there is in some other part of the record that which plainly shows that the owner did not have notice, or the character of the proceedings is such as to require that the facts on which the court based its recital of notice must affirmatively appear in the record. Chesapeake, etc., R. Co. v. Washington, etc., R. Co., 99 Va. 715, 40 S. E. 20.

In Missouri two notices are required, the first a notice of the hearing of the petition, which must be served in the same manner as a summons, the second a notice of the commissioners' report. In a condemnation suit both notices were served on the owner, but no copy of the petition was given him, as is required in case of serving a summons. It was held that by service of the notices the court had acquired jurisdiction of the owner's person, and the judgment was not subject to collateral attack. Thompson v. Chicago, etc., R. Co., 110 Mo. 147, 19 S. W. 77.

Where the statute provides for notice by publication, in case the owners are unknown or non-residents, and notice is so given, it will be presumed, in a suit by an owner to enjoin the opening of the street across the land condemned, that all the facts necessary to give jurisdiction were found to exist, such proceeding being a collateral attack. Graves v. Middletown, 137 Ind. 400, 37 N. E. 157.

29. Sutter County v. Tisdale, 136 Cal. 474, 69 Pac. 141; Union Depot Co. v. Frederick, 117 Mo. 138, 21 S. W. 1118, 1130, 26 S. W. 350; Thompson v. Chicago, etc., R. Co., 110 Mo. 147, 19 S. W. 77; Colby v. Toledo, 22 Ohio Cir. Ct. 732, 12 Ohio Cir. Dec. 347; Chesapeake, etc., R. Co. v. Washington, etc., R. Co., 99 Va. 715, 40 S. W. 20.

For example the question of the power to condemn cannot be raised (New York v. Wright, 12 N. Y. Suppl. 20; Chesapeake, etc., R. Co. v. Washington, etc., R. Co., 99 Va. 715, 40 S. E. 20; South Chicago City R. Co. v. Chicago, 196 Ill. 490, 63 N. E. 1046; Foltz v. St. Louis, etc., R. Co., 60 Fed. 316, 8 C. C. A. 635), especially where it appears that the petitioner, a railroad company, exists under a valid charter (Chicago, etc., R. Co. v. Chicago, etc., R. Co., 112 Ill. 589). Neither the question of the necessity of the taking (Drouin v. Boston, etc., R. Co., 74 Vt. 343, 52 Atl. 957), the question whether any attempt was made by the petitioner to purchase the land (Chesapeake, etc., R. Co. v. Washington, etc., R. Co., 99 Va. 715, 40 S. E. 20; Dyckman v. New York, 5 N. Y. 434; Ney v. Swinney, 36 Ind. 454), the question whether the description in the instrument of appropriation was defective (St. Joseph Hydraulic Co. v. Cincinnati, etc., R. Co., 109 Ind. 172, 9 N. E. 727), nor any question as to whether the commissioners were freeholders or householders (Cage v. Trager, 60 Miss. 563; Huling v. Kaw Valley R., etc., Co., 130 U. S. 559, 9 S. Ct. 603, 32 L. ed. 1045), can be raised in a collateral proceeding.

30. *Illinois.*— Galena, etc., R. Co. v. Pound, 22 Ill. 399.

Kansas.— Chicago, etc., R. Co. v. Griesser, 48 Kan. 663, 29 Pac. 1082.

Missouri.— Union Depot Co. v. Frederick, 117 Mo. 138, 21 S. W. 1118, 1130, 26 S. W. 350; Thompson v. Chicago, etc., R. Co., 110 Mo. 147, 19 S. W. 77.

Nebraska.— Fremont, etc., R. Co. v. Matthies, 39 Nebr. 98, 57 N. W. 987.

New Hampshire.— Clement v. Burns, 43 N. H. 609.

New York.— Weinckie v. New York Cent., etc., R. Co., 15 N. Y. Suppl. 689; Van Steenbergh v. Bigelow, 3 Wend. 42.

United States.— Huling v. Kaw Valley R., etc., Co., 130 U. S. 559, 9 S. Ct. 603, 32 L. ed. 1045.

See 18 Cent. Dig. tit. "Eminent Domain," § 626.

31. Allen v. Chicago, 176 Ill. 113, 52 N. E. 33; Harris v. Chicago, 162 Ill. 288, 44 N. E. 437; Rhodes v. Piper, 40 Ind. 369; Michael v. St. Louis, 112 Mo. 610, 20 S. W. 666; St. Louis v. Excelsior Brewing Co., 96 Mo. 677, 10 S. W. 477; St. Louis v. Ranken, 96 Mo. 497, 9 S. W. 910.

32. Cottle v. New York, etc., R. Co., 27 N. Y. App. Div. 604, 50 N. Y. Suppl. 1008; Mercantile Trust Co. v. Pittsburg, etc., R. Co., 29 Fed. 732.

33. Adams v. Saratoga, etc., R. Co., 10 N. Y. 328 [*reversing* 11 Barb. 414].

34. Indianapolis, etc., R. Co. v. Smythe, 45 Ind. 322. See also Western Pennsylvania R. Co. v. Johnston, 59 Pa. St. 290, for a similar ruling.

taining the amount of his claim and of enforcing its payment;[35] his interest can be extinguished only by a payment or a release.[36] Where jurisdiction has attached by due service of the petition and notice, and an award is regularly made, and is not appealed from,[37] the rights of the respective parties become definitely fixed by the judgment, and it is conclusive and binding on all parties of record,[38] their privies and grantees,[39] including the successor of the petitioner, unless appealed from.[40] The parties and their privies are concluded as to all matters which were put in issue, or might have been put in issue, in the condemnation proceedings,[41]

35. McCormick *v.* West Chicago Park Com'rs, 118 Ill. 655, 8 N. E. 818; Western Pennsylvania R. Co. *v.* Johnston, 59 Pa. St. 290.

36. Shute *v.* Chicago, etc., R. Co., 26 Ill. 436; Western Pennsylvania R. Co. *v.* Johnston, 59 Pa. St. 290.

37. *Connecticut.*— Branch *v.* Lewerenz, 75 Conn. 319, 53 Atl. 658.

Illinois.— People *v.* Highway Com'rs, 188 Ill. 150, 58 N. E. 989.

Indiana.—Keicher *v.* Killbuck Turnpike Co., 33 Ind. 333.

Minnesota.— Trogden *v.* Winona, etc., R. Co., 22 Minn. 198.

New York.— *In re* Board of Education, 59 App. Div. 258, 69 N. Y. Suppl. 572; People *v.* Lewis, 26 How. Pr. 378.

Pennsylvania.— Pennsylvania R. Co. *v.* Gorsuch, 84 Pa. St. 411.

See 18 Cent. Dig. tit. "Eminent Domain," § 627.

Under the general railroad act of 1850 the determination of the supreme court at special term confirming the report of commissioners is a final determination, and no appeal can be taken to the court of appeals for error either of law or fact. *In re* Brooklyn El. R. Co., 147 N. Y. 344, 41 N. E. 704; *In re* Metropolitan El. R. Co., 128 N. Y. 600, 27 N. E. 1076.

Until condemnation proceedings are set aside by some other appropriate proceeding, they are admissible in evidence in an action to recover the condemned property, and are conclusive as to the right of recovery of the lands embraced therein. Chesapeake, etc., R. Co. *v.* Washington, etc., R. Co., 99 Va. 715, 40 S. E. 20.

38. *Maryland.*— Tide-Water Canal Co. *v.* Archer, 9 Gill & J. 479.

Massachusetts.— Hunt *v.* Whitney, 4 Metc. 603.

Minnesota.— Trogden *v.* Winona, etc., R. Co., 22 Minn. 198.

Missouri.— Burke *v.* Kansas City, 118 Mo. 309, 24 S. W. 48.

New York.— Schuchardt *v.* New York, 59 Barb. 295; Matter of Central Park, 41 How. Pr. 12.

Ohio.— Toledo *v.* Weber, 23 Ohio Cir. Ct. 564.

Pennsylvania.— Cummings *v.* Williamsport, 84 Pa. St. 472; Pennsylvania R. Co. *v.* Gorsuch, 84 Pa. St. 411.

Vermont.— State *v.* Vernon, 25 Vt. 244.

Virginia.— Chesapeake, etc., R. Co. *v.* Washington, etc., R. Co., 99 Va. 715, 40 S. E. 20.

See 18 Cent. Dig. tit. "Eminent Domain," § 627.

Persons not made parties to the proceedings are not bound. See *supra*, XI, H.

Under a statute such as that of Kansas, providing that notice of the proceedings shall be given by publication, the judgment not appealed from is conclusive upon all persons in interest, whether they actually appeared at the proceedings or not. Kansas, etc., R. Co. *v.* Phipps, 4 Kan. App. 252, 45 Pac. 926; Chicago, etc., R. Co. *v.* Selders, 4 Kan. App. 497, 44 Pac. 1012.

Where a railway charter required that notice should be given by publication to the owner or occupier or the unknown owners, and the company published such notice as to one who had held a life-estate only, but who was dead at the time, and did not name the remainder-man, the proceedings are not binding upon the remainder-man. Chicago, etc., R. Co. *v.* Smith, 78 Ill. 96.

Where the power of condemnation has been exercised in strict conformity to the statute the result is final, and the right to the use and occupation of the condemned property is conclusive. Kansas, etc., R. Co. *v.* Phipps, 4 Kan. App. 252, 45 Pac. 926.

39. *Connecticut.*— Branch *v.* Lewerenz, 75 Conn. 319, 53 Atl. 658.

Indiana.— Baltimore, etc., R. Co. *v.* State, 159 Ind. 510, 65 N. E. 508.

Maryland.— Tide-Water Canal Co. *v.* Archer, 9 Gill & J. 479.

Minnesota.— Trogden *v.* Winona, etc., R. Co., 22 Minn. 198.

Ohio.— Toledo *v.* Weber, 23 Ohio Cir. Ct. 564.

See 18 Cent. Dig. tit. "Eminent Domain," § 627.

It is not binding on the mortgagee if he does not have notice. Warwick Sav. Inst. *v.* Providence, 12 R. I. 144; Dodge *v.* Omaha, etc., R. Co., 20 Nebr. 276, 29 N. W. 936.

40. St. Louis, etc., R. Co. *v.* Needles, 85 Ill. 462; Doyle *v.* Kansas City, etc., R. Co., 113 Mo. 280, 20 S. W. 970; Martin *v.* Pittsburgh Southern R. Co., 28 Pittsb. Leg. J. (Pa.) 316.

Unless appealed from.— Omaha Bridge, etc., Co. *v.* Reed, (Nebr. 1903) 96 N. W. 276.

41. *Illinois.*— Higgins *v.* Chicago, 18 Ill. 276.

Indiana.— Keicher *v.* Killbuck Turnpike Co., 33 Ind. 333.

Iowa.— Stronsky *v.* Hickman, 116 Iowa 651, 88 N. W. 825.

Maryland.— Cumberland, etc., R. Co. *v.* Pennsylvania R. Co., 57 Md. 267.

such as the ownership of the land,[42] the amount of the value and damages[43] and by what the damages were caused,[44] the legality of the improvement,[45] and the necessity and the quantity of land required,[46] the presumption being indulged that in these particulars the proceedings were correct.[47] Such judgment is con-

New York.—Embury *v.* Conner, 3 N. Y. 511, 53 Am. Dec. 325.

Pennsylvania.— *In re* Second Ave., 7 Pa. Super. Ct. 55, 42 Wkly. Notes Cas. 101.

Texas.— Gulf, etc., R. Co. *v.* Ft. Worth, etc., R. Co., 86 Tex. 537, 26 S. W. 54; Muhle *v.* New York, etc., R. Co., (Civ. App. 1893) 23 S. W. 809 [*affirmed* in 86 Tex. 459, 25 S. W. 607].

Vermont.— Drouin *v.* Boston, etc., R. Co., 74 Vt. 343, 52 Atl. 957.

Virginia.— Foster *v.* Manchester, 89 Va. 92, 15 S. E. 497.

See 18 Cent. Dig. tit. "Eminent Domain," § 627.

Neither the necessity of the condemnation nor the quantity of land required is open for future litigation. Dillon *v.* Kansas City, etc., R. Co., 67 Kan. 687, 74 Pac. 251. See also *infra*, note 46.

In South Dakota, if the award in proceedings by a railway company is introduced in evidence by the company in defense of an ejectment suit by the owner, the latter may introduce the written order of the judge appointing commissioners, for the purpose of showing that one of the persons who signed the award was not appointed by the judge. Lewis *v.* St. Paul, etc., R. Co., 5 S. D. 148, 58 N. W. 580.

42. *Arkansas.*— Auditor *v.* Crise, 20 Ark. 540.

Illinois.— South Park Com'rs *v.* Todd, 112 Ill. 379.

New York.— People *v.* Lewis, 26 How. Pr. 378.

Ohio.— Kohl *v.* Hannaford, 5 Ohio Dec. (Reprint) 306, 4 Am. L. Rec. 372.

Virginia.— Calhoun *v.* Palmer, 8 Gratt. 88.

See 18 Cent. Dig. tit. "Eminent Domain," § 627.

If the award is made to a tenant for life, no damages being given to the reversioner, the petitioner cannot, when the tenant for life sues to recover the award, show, in order to defeat plaintiff's claim to a part of the award, that the award was intended to cover the entire interest in the estate. Sparhawk *v.* Walpole, 20 N. H. 317.

The owner of the ground-rent is not affected by proceedings against the tenant. Voegtly *v.* Pittsburg, etc., R. Co., 2 Grant (Pa.) 243.

Where an allowance is also made to a lessee in the award to the owners of the fee of a lot taken for a street, the latter cannot, in an action against his landlord, show that in the amount awarded to the landlord was included a sum intended for the benefit of the lessee to enable him to put the premises in repair. Turner *v.* Williams, 10 Wend. (N. Y.) 139.

Where the party in whose favor the judgment is rendered is the only one appearing in the proceedings to be the owner, it is too late, after the judgment is rendered, to ask that the damages be paid into court on the ground that the ownership was not wholly in said party; it would be otherwise if it had been shown to the court while the proceedings were pending that there was another party in interest. Wood *v.* State Insane Hospital, 16 Pa. Co. Ct. 667.

43. Chicago, etc., R. Co. *v.* Springfield, etc., R. Co. 67 Ill. 142; Brown *v.* Greenfield Tp. Bd., 109 Mich. 557, 67 N. W. 566; Viele *v.* Troy, etc., R. Co., 20 N. Y. 184 [*affirming* 21 Barb. 381]; People *v.* Lewis, 26 How. Pr. (N. Y.) 378; People *v.* Murray, 5 Hill (N. Y.) 468; Beatty *v.* Conner, 34 N. C. 341. See also Southport, etc., R. Co. *v.* Platt Land, 133 N. C. 266, 45 N. E. 589.

44. People *v.* Murray, 5 Hill (N. Y.) 468. The assessment of compensation for land taken for a railroad covers all damages, whether foreseen or not, which result from the proper construction of the road. Gilbert *v.* Savannah, etc., R. Co., 69 Ga. 396. See also Allen *v.* Haley, 169 Ill. 532, 48 N. E. 478; Robinson *v.* Pennsylvania R. Co., 6 Pa. Super. Ct. 383. No damages are included in the original condemnation, except such as would necessarily arise in the proper construction of the work. Mullen *v.* Lake Drummond Canal, etc., Co., 130 N. C. 496, 41 S. E. 1027. And see *supra*, X, E, 19, b. An adjudication of damages for the construction of a dam across a river is not an adjudication of injuries to riparian owners arising from the subsequent impeded navigation of the river. Sultan Water, etc., Co. *v.* Weyerhaeuser Timber Co., 31 Wash. 558, 72 Pac. 114. If land is granted to a corporation for railroad purposes, the consideration is presumed to include not only the value of the land conveyed, but also compensation for all injuries to the owner's remaining land from the use by the railroad company, in any legitimate manner, of the part conveyed. Chicago, etc., R. Co. *v.* Hogan, 105 Ill. App. 136.

Damages to land caused by the seepage of water from a canal, due to faulty construction, are not included in the damages awarded the landowner in proceedings to condemn the land. Turpen *v.* Turlock Irr. Dist., 141 Cal. 1, 74 Pac. 295.

45. Dillon *v.* Kansas City, etc., R. Co., 67 Kan. 687, 74 Pac. 251; Chesapeake, etc., R. Co. *v.* Rison, 99 Va. 18, 37 S. E. 320.

46. Dillon *v.* Kansas City, etc., R. Co., 67 Kan. 687, 74 Pac. 351.

47. *Illinois.*—Chicago, etc., R. Co. *v.* Chamberlain, 84 Ill. 333.

Indiana.— Graves *v.* Middletown, 137 Ind. 400, 37 N. E. 157.

Maine.— Pennell *v.* Card, 96 Me. 392, 52 Atl. 801.

clusive as against a second proceeding to condemn the same land.[48] The final order takes effect when entered.[49] Where a consent decree is entered conferring an easement on a railroad company for a right of way over the land described, such decree has the same effect as a deed of such right of way.[50] Where there is a specific finding as to the ownership of all the lands involved in the proceeding, this necessarily excludes the idea of any ownership in a defendant not thus specifically mentioned, and is in effect a finding against him;[51] but as to such as are found or admitted to be owners, the judgment gives them a vested right to the compensation and damages awarded.[52] If a telephone pole has been adjudged a nuisance prior to the statute permitting condemnation, the judgment of condemnation does not nullify the adjudication of nuisance.[53] Where farm crossings

Mississippi.— Cage *v.* Trager, 60 Miss. 563.

Missouri.— Williams *v.* Monroe, 125 Mo. 574, 28 S. W. 853.

See 18 Cent. Dig. tit. "Eminent Domain," § 627.

Upon a collateral attack by a party to condemnation proceedings, in the absence of anything to the contrary, every reasonable presumption must be indulged in favor of the regularity and validity of the proceedings. Indiana Oolitic Limestone Co. *v.* Louisville, etc., R. Co., 107 Ind. 301, 7 N. E. 244. For collateral attack generally see *supra*, XI, N, 7.

Under Iowa Code (1873), § 1827, providing for the condemnation of lands for school purposes, if the proceeding in all respects conforms to the strict requirements of the statute, the judgment raises the presumption that no more land was taken than the statute permitted, that the owner withheld his conveyance thereof, that such taking was necessary, that the requisite tax was voted for its purchase, and all conditions precedent to the exercise of such power were performed. Oakland Independent School Dist. *v.* Hewitt, 105 Iowa 663, 75 N. W. 497. See also *supra*, note 5.

48. Alameda *v.* Cohen, 133 Cal. 5, 65 Pac. 127; Chicago, etc., R. Co. *v.* Chicago, 148 Ill. 479, 36 N. E. 72; Toledo *v.* Preston, 50 Ohio St. 361, 34 N. E. 353.

In Illinois where the statute provides that if the condemning party fails to pay the award and to take possession within the prescribed time the award shall cease to be binding, and the rights of the condemning party thereunder shall determine, the original proceedings and judgment cannot be interposed as a bar to subsequent proceedings commenced after the expiration of the prescribed time. Alabama Midland R. Co. *v.* Newton, 94 Ala. 443, 10 So. 89; Cincinnati Southern R. Co. *v.* Haas, 42 Ohio St. 239. See also Pearce *v.* Chicago, 169 Ill. 631, 48 N. E. 330.

A void judgment will not prevent the owner from subsequently having his damages assessed. McDowell *v.* Asheville, 112 N. C. 747, 17 S. E. 537. Plaintiff sued a sanitary district for damages to his crops from an overflow caused by the negligent construction of a channel diverting a river. In the condemnation proceedings for the channel, plaintiff had joined with other owners in a cross petition alleging that the tract constituted an entire dairy farm, for injury to which, and for loss of shipping facilities, damages were asked, but it did not appear that they were recovered. It did not appear but that, had the channel been constructed in accordance with the specifications, no overflow would have resulted, nor did it appear whether or not it was so built. It was held that the judgment in the condemnation proceedings would not bar plaintiff's recovery. Chicago Sanitary Dist. *v.* Ray, 199 Ill. 63, 64 N. E. 1048, 93 Am. St. Rep. 102.

49. Madera County *v.* Raymond Granite Co., 139 Cal. 128, 72 Pac. 915, 989.

50. Chicago, etc., R. Co. *v.* Snyder, 120 Iowa 532, 95 N. W. 183.

51. Alameda County *v.* Crocker, 125 Cal. 101, 57 Pac. 766.

52. *Louisiana.*— Boulat *v.* Municipality No. 1, 5 La. Ann. 363.

Maine.— Furbish *v.* Kennebec County, 93 Me. 117, 44 Atl. 364.

Massachusetts.— *In re* Sunderland Bridge Case, 122 Mass. 459.

Michigan.—Balch *v.* Detroit, 109 Mich. 253, 67 N. W. 122.

Pennsylvania.— *In re* Ziegler, 12 York Leg. Rec. 158.

See 18 Cent. Dig. tit. "Eminent Domain," § 630.

That judgment is not a personal one see *supra*, XI. N, 5.

That judgment may leave it optional with petitioner whether or not it will pay the award and take the land see *supra*, XI, N, 1.

The rule in Delaware, where a railroad company institutes the proceedings to determine the value of property on its right of way, is that the effect is merely to fix the value of the land, and that it does not vest any right or fix any liability on the company. Williams *v.* Odessa, etc., R. Co., 7 Del. Ch. 303, 44 Atl. 821. Consult also the title immediately preceding.

Priority of judgment.—A judgment against a railroad company for damages caused by the construction and operation of its road is entitled to priority of payment over mortgage bonds out of the fund produced by a sale of the road to foreclose the mortgage. Epling *v.* Dickson, 170 Ill. 329, 48 N. E. 1001 [*reversing* 61 Ill. App. 78].

53. Wisconsin Telephone Co. *v.* Krueger, 115 Wis. 150, 90 N. W. 458.

are a part of the plan of a railroad, and are shown on the map and profile, and are considered by the commissioners in making their award, the court or jury should on appeal assess the damages with reference to such plan, and the railroad company thereby becomes bound to construct the crossings.[54] The taking of possession by the company under the judgment will intercept the continuity of adverse possession.[55]

b. As to Right of Possession of Property — (i) *In General.* A judgment on the verdict fixes finally and conclusively the sum which must be regarded as just compensation for the property taken, so far as may be necessary to confer upon the condemning corporation the right to appropriate the property condemned[56] upon payment of such sum.[57] But a mere judgment in favor of the owner for the value of the land, unpaid and unsecured, is not compensation made, and will not warrant the dispossessing the owner of his property.[58] The right to possession accrues only upon proof that the compensation fixed by the judgment has been paid or secured or deposited in court.[59] If the owner continues

54. Kansas City, etc., R. Co. *v.* Kregelo, 32 Kan. 608, 5 Pac. 15; Jones *v.* Seligman, 81 N. Y. 190.

55. *Re* Greenough, 24 L. T. Rep. N. S. 347, 19 Wkly. Rep. 580. But see *Re* Evans, 42 L. J. Ch. 357.

56. *Indiana.*— Jeffries *v.* Maccown, 30 Ind. 226.

Iowa.— Gear *v.* Dubuque, etc., R. Co., 20 Iowa 523, 89 Am. Dec. 550.

Missouri.— Cory *v.* Chicago, etc., R. Co., 100 Mo. 282, 13 S. W. 346.

New Jersey.— Jersey City, etc., R. Co. *v.* Central R. Co., 48 N. J. Eq. 379, 22 Atl. 728.

New York.— *In re* Brooklyn, 5 Hun 175.

See 18 Cent. Dig. tit. "Eminent Domain," § 630.

A judgment in an action for trespass against a railway company for constructing its road over plaintiff's land without first condemning it confers upon the company no title to the land. Anderson, etc., R. Co. *v.* Kernodle, 54 Ind. 314.

An agreement between an owner and a railroad company pending an appeal from the assessment of damages, under which a judgment was entered for a specified amount with stay of execution for two years, does not amount to a sale of the right of way, nor confer authority on the company to enter into possession. Irish *v.* Burlington, etc., R. Co., 44 Iowa 380.

The title to land condemned for canal improvements does not vest in the state until the damages have been fixed. Ballou *v.* Ballou, 78 N. Y. 325.

Under the New York statute, providing that a municipality may take possession of lands condemned for public use at any time after confirmation of the commissioners' report, and that it may suspend the carrying of such public use into effect for a period not exceeding fifteen months, the owner is entitled to the possession until the time fixed by the municipality for carrying the improvement into effect. Hammersley *v.* New York, 67 Barb. 35.

57. *Colorado.*— Dolores No. 2 Land, etc., Co. *v.* Hartman, 17 Colo. 138, 29 Pac. 378.

Illinois.— Chicago, etc., R. Co. *v.* Chicago, 148 Ill. 141, 35 N. E. 881; Price *v.* Engelking, 58 Ill. App. 547.

Indiana.— Grant County *v.* Small, 61 Ind. 318.

Kentucky.— Carrico *v.* Colvin, 92 Ky. 342, 17 S. W. 854, 13 Ky. L. Rep. 603.

Missouri.— Shively *v.* Lankford, 174 Mo. 535, 74 S. W. 835.

New York.— Niagara Falls, etc., R. Co. *v.* Hotchkiss, 16 Barb. 270.

See 18 Cent. Dig. tit. "Eminent Domain," § 630 *et seq.*

58. Moody *v.* Jacksonville, etc., R. Co., 20 Fla. 597; Carrico *v.* Colvin, 92 Ky. 342, 17 S. W. 854, 13 Ky. L. Rep. 603; Pryzbylowicz *v.* Missouri River R. Co., 17 Fed. 492, 3 McCrary 586.

Such a judgment simply gives the right to take the property upon paying the value as fixed by the judgment, which right exists without any corresponding right on the part of the owner to compel the condemning party to take the property at the value fixed by the judgment. Price *v.* Engelking, 58 Ill. App. 547. But see *supra*, note 52.

An execution on a judgment against a private corporation, to be rendered at least "two terms of the district court" after the taking of the property, is of too uncertain efficacy as a means of procuring payment to amount to adequate compensation. Buffalo Bayou, etc., R. Co. *v.* Ferris, 26 Tex. 588.

In Ohio a city took possession of land for a street and caused the damages to be assessed, but failed to pay them within the period allowed by the statute. Afterward, and without further judicial proceedings, the city caused the street to be improved, intending to go on and complete the original proceedings. It was held that the owner had his election either to bring an action for the amount of the damages awarded, or to have the damages assessed as of the time when the street was finally opened. Toledo *v.* Groll, 2 Ohio Cir. Ct. 199, 1 Ohio Cir. Dec. 441 [*affirmed* in 23 Cinc. L. Bul. 220].

59. Harris *v.* Chicago, 162 Ill. 288, 44 N. E. 437; Niagara Falls, etc., R. Co. *v.* Hotchkiss, 16 Barb. (N. Y.) 270.

in possession he is a mere tenant by sufferance,[60] and may be removed from the premises when the petitioner complies with the requirements as to making compensation.[61]

(II) *Possession Pending Appeal.* The just compensation which the constitution requires to be made to the landowner before his land can be taken, injured, or destroyed, is the amount which is finally ascertained by a jury upon trial of the case on appeal;[62] and it follows that pending an appeal, the amount being not yet ascertained, possession cannot be taken.[63] But in most of the states,

In Illinois an award fixing the value of the real estate at a certain sum, and of the improvements at a certain other sum, and further finding that the owner will have sustained no damages by reason of the interruption of his business, if he shall retain the improvements for three months, but fixing the damages of interruption at a certain sum if he retains possession two months, and with an additional sum if he retains possession only one month, does not entitle the owner to surrender the possession at any time and claim the amount then fixed by the award, but leaves it optional with the corporation whether or not it shall take possession within three months and pay the damages fixed. Glennon *v.* Chicago, etc., R. Co., 79 Ill. 501.

Under the New York statute the fee of lands taken for streets by the city of New York did not pass to the corporation until accepted by some affirmative act. Strang *v.* New York Rubber Co., 1 Sweeny 78.

Under the statute relating to the laying out of Ocean avenue in Brooklyn, the title of the owner is not divested until the map is filed showing what land has been taken and appropriated by the park commissioners for that purpose. Rider *v.* Stryker, 2 Hun (N. Y.) 115, 4 Thomps. & C. (N. Y.) 399 [*affirmed* in 63 N. Y. 136].

60. Niagara Falls, etc., R. Co. *v.* Hotchkiss, 16 Barb. (N. Y.) 270; Philadelphia *v.* Miskey, 68 Pa. St. 49.

61. Chicago, etc., R. Co. *v.* Chicago, 148 Ill. 141, 35 N. E. 881, 887; People *v.* New York Cent., etc., R. Co., 2 Hun (N. Y.) 482, 5 Thomps. & C. (N. Y.) 84 [*affirmed* in 60 N. Y. 116]; Philadelphia *v.* Miskey, 68 Pa. St. 49.

A proceeding against a part of several tenants in common confers no right as against the other cotenants. State *v.* First Judicial Dist. Ct., 52 Minn. 283, 53 N. W. 1157.

The judgment does not affect the right of a lessee in possession if he is not made a party to the proceeding. Baltimore, etc., R. Co. *v.* Parrette, 55 Fed. 50.

Where a railroad company institutes proceedings to obtain possession of the land which it has condemned, it need not prove that the use of the land is necessary for its operations or that defendant's possession interferes with its use of the land. Pittsburgh, etc., R. Co. *v.* Peet, 152 Pa. St. 488, 25 Atl. 612, 19 L. R. A. 467.

Writ of assistance.— There are decisions in New York to the effect that the court in which the condemnation proceeding is pending may make all necessary orders and give proper directions to carry into effect the condemnation, and may issue an order in the nature of a writ of assistance to put the company in possession. People *v.* New York Cent., etc., R. Co., 2 Hun 482, 5 Thomps. & C. 84 [*affirmed* in 60 N. Y. 116]. But there is a contrary decision in the earlier case of Niagara Falls, etc., R. Co. *v.* Hotchkiss, 16 Barb. 270.

62. San Mateo County *v.* Coburn, 130 Cal. 631, 63 Pac. 78, 621; Redman *v.* Philadelphia, etc., R. Co., 33 N. J. Eq. 165; Harrisburg, etc., Turnpike Road Co. *v.* Harrisburg, etc., Electric R. Co., 177 Pa. St. 585, 35 Atl. 850, 34 L. R. A. 439.

63. *Georgia.*— Chambers *v.* Cincinnati, etc., R. Co., 69 Ga. 320.

Indiana.— Lake Erie, etc., R. Co. *v.* Kinsey, 87 Ind. 514.

Kansas.— Kansas City *v.* Kansas Pac. R. Co., 18 Kan. 331.

Maryland.— New Central Coal Co. *v.* George's Creek Coal, etc., Co., 37 Md. 537.

Michigan.— Detroit, etc., R. Co. *v.* Probate Judge, 63 Mich. 676, 30 N. W. 598.

New Jersey.— Jersey City, etc., R. Co. *v.* Central R. Co., 48 N. J. Eq. 379, 22 Atl. 728.

Ohio.— Matter of George, 5 Ohio Cir. Ct. 207.

Texas.— Travis County *v.* Trogdon, (Civ. App. 1895) 29 S. W. 46.

See 18 Cent. Dig. tit. "Eminent Domain," § 632.

Contra.— Tracy *v.* Elizabethtown, etc., R. Co., 80 Ky. 259; Manhattan R. Co. *v.* Stroub, 70 Hun (N. Y.) 363, 24 N. Y. Suppl. 68.

In Iowa occupancy by a railroad company pending an appeal does not violate the constitutional provision against taking the property without compensation first being made. Peterson *v.* Ferreby, 30 Iowa 327. Where the owners appeal to the district court from an allowance of no damages for the appropriation of their land for a street, they are entitled to an injunction restraining the opening of the street pending the appeal. Iowa College *v.* Davenport, 7 Iowa 213.

In Kansas, pending an appeal by an owner, he may if necessary maintain an injunction to protect his possession. Kansas City *v.* Kansas Pac. R. Co., 18 Kan. 331. But in a later case the same court holds that the owner cannot proceed with the action for damages and also have his action to perpetually enjoin the company from the exercise or enjoyment of such use. Reisner *v.* Strong, 24 Kan. 410.

In Missouri on appeal from an assessment of damages by a county court for opening a highway the court may either stay proceedings until the damages are finally paid or

in those whose constitutions require that the compensation shall first be paid, as well as in those whose constitutions do not contain that requirement, the legislature has provided that possession may be taken by the condemning party pending an appeal, either upon payment or tender of the damages assessed, and from which the appeal is taken,[64] or upon depositing that amount in court,[65] or upon giving bond to secure the damages which shall ultimately be awarded.[66] The

order the road opened. Forsyth *v.* Heege, 61 Mo. App. 277.

In New York each owner of improved or cultivated land through which the commissioners have laid out a highway, having a right to appeal to three judges of the common pleas, his rights cannot be affected by proceedings on the appeal of any other owner; and the commissioners cannot open the road until a decision upon his appeal. Clark *v.* Phelps, 4 Cow. 190.

In Tennessee, where the charter of a railroad company contained two contradictory provisions, one that the company appealing might proceed with the work upon giving the requisite bond, and the other prohibiting any injunction or supersedeas to stop the work, the latter, being a proviso, is controlling. White *v.* Nashville, etc., R. Co., 7 Heisk. 518.

64. *Georgia.*— Oliver *v.* Union Point, etc., R. Co., 83 Ga. 257, 9 S. E. 1086.

Indiana.— Wabash R. Co. *v.* Ft. Wayne, etc., Traction Co., 161 Ind. 295, 67 N. E. 674; Manufacturers' Natural Gas Co. *v.* Leslie, (Sup. 1898) 49 N. E. 946.

Iowa.— Peterson *v.* Ferreby, 30 Iowa 327.

Kentucky.— Asher *v.* Louisville, etc., R. Co., 87 Ky. 391, 8 S. W. 854, 10 Ky. L. Rep. 185.

New Hampshire.— Low *v.* Concord R. Co., 63 N. H. 557, 3 Atl. 739.

New Jersey.— National Docks, etc., Connecting R. Co. *v.* Pennsylvania R. Co., (Ch. 1895) 30 Atl. 1102; Pomona Branch R. Co. *v.* Camden, etc., R. Co., (Ch. 1890) 20 Atl. 350; Packard *v.* Bergen Neck R. Co., 48 N. J. Eq. 281, 22 Atl. 227; Johnson *v.* Baltimore, etc., R. Co., 45 N. J. Eq. 454, 17 Atl. 574.

Contra.— Faust *v.* Huntsville, 83 Ala. 279, 3 So. 771; Browning *v.* Camden, etc., R., etc., Co., 4 N. J. Eq. 47.

See 18 Cent. Dig. tit. "Eminent Domain," § 632.

The constitution of Georgia does not extend the constitutional right to trial by jury to condemnation proceedings, and therefore a statute authorizing the petitioner to prosecute the work pending an appeal, upon paying or tendering the amount of the award, is constitutional. Oliver *v.* Union Point, etc., R. Co., 83 Ga. 257, 9 S. E. 1086.

In New Jersey, where the verdict has been set aside, the company cannot on appeal take possession of the property. Pennsylvania R. Co. *v.* National Docks, etc., Connecting R. Co., 53 N. J. Eq. 178, 32 Atl. 220.

Where pending an appeal the damages are tendered to the owner and accepted by him, this will not preclude the corporation from having the damages reduced on the hearing of the appeal. Indianapolis, etc., R. Co. *v.* Brower, 12 Ind. 374. See also Doughty *v.* Somerville, etc., R. Co., 21 N. J. L. 442.

65. *Arizona.*— Fisher *v.* Yavapai County Dist. Ct., (1894) 36 Pac. 176.

Georgia.— Savannah, etc., R. Co. *v.* Postal Tel. Cable Co., 115 Ga. 554, 42 S. E. 1.

Indiana.—Consumers' Gas Trust Co. *v.* Harless, 131 Ind. 446, 29 N. E. 1062, 15 L. R. A. 505; Meyer *v.* State, 125 Ind. 335, 25 N. E. 351.

Missouri.— St. Louis, etc., R. Co. *v.* Evans, etc., Fire Brick Co., 85 Mo. 307; Ring *v.* Mississippi River Bridge Co., 57 Mo. 496.

Montana.— State *v.* McHatton, 15 Mont. 159, 38 Pac. 711.

New Jersey.— Mercer, etc., R. Co. *v.* Delaware, etc., R. Co., 26 N. J. Eq. 464.

Ohio.— Meily *v.* Zurmehly, 23 Ohio St. 627.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 632, 633.

A company which has been for several years in possession of land under a lease from a part of the owners, and has been operating a road on it, may appeal from the award without depositing the amount of it in court, or restoring possession of the land. Ashland Coal, etc., R. Co. *v.* Davidson, 20 S. W. 270, 14 Ky. L. Rep. 339.

Under the constitution of New Jersey a railroad company cannot by the mere payment of the award into court without a tender of it to the owner take possession of the land pending the appeal. Redman *v.* Philadelphia, etc., R. Co., 33 N. J. Eq. 165.

The Texas statute provides that the petitioner shall not take possession of the property until payment of the damages; and it is held that an appeal by the owner from the judgment, accompanied by a supersedeas bond, will prevent the petitioner from taking possession of the land, even though it deposits with the clerk of the court the amount of the award. Crary *v.* Port Arthur Channel, etc., Co., (Civ. App. 1898) 45 S. W. 842.

66. *California.*— Spring Valley Water Works *v.* Drinkhouse, 95 Cal. 220, 30 Pac. 218.

Illinois.— Johnson *v.* Metropolitan West Side El. R. Co., 160 Ill. 477, 45 N. E. 680; Atchison, etc., R. Co. *v.* Schneider, 127 Ill. 144, 20 N. E. 41, 2 L. R. A. 422; Chicago, etc., R. Co. *v.* Phelps, 125 Ill. 482, 17 N. E. 769; St. Louis, etc., R. Co. *v.* Karnes, 101 Ill. 402; Mitchell *v.* Illinois, etc., R., etc., Co., 68 Ill. 286; Centralia, etc., R. Co. *v.* Henry, 31 Ill. App. 456.

Kansas.— Central Branch Union Pac. R. Co. *v.* Atchison, etc., R. Co., 28 Kan. 453.

Minnesota.— State *v.* Hennepin County Dist. Ct., 35 Minn. 461, 29 N. W. 60; Weir *v.* St. Paul, etc., R. Co., 18 Minn. 155.

statute may properly provide that in a proceeding to appropriate land for a street or road an appeal shall not prevent the appropriation of the land for that purpose.[67] If the judgment of condemnation is reversed for inadequacy of compensation an order for possession must fall with the reversal.[68]

9. RIGHT TO COMPENSATION AWARDED. The statute may provide that the award shall be paid into court for the benefit of the owner;[69] but if there is no dispute as to the persons entitled to it, the court has no power independent of the statute to order the money to be deposited.[70] When deposited it belongs immediately to the owner,[71] and should be paid to him upon his application for an order to that effect.[72]

10. INTEREST — a. In General. Whether or not interest on the award should be allowed must necessarily depend not only upon statutory provisions[73] but also upon the attendant circumstances of each case.[74] Generally interest on the award should be allowed,[75] and in some instances included in the final order or judg-

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Lawrence, 10 Phila. 604.

Texas.— Texas, etc., R. Co. *v.* Orange, etc., R. Co., 29 Tex. Civ. App. 38, 68 S. W. 801.

United States.— Northern Pac. R. Co. *v.* St. Paul, etc., R. Co., 3 Fed. 702, 1 McCrary 302.

See 18 Cent. Dig. tit. "Eminent Domain," § 633.

Contra.— Asher *v.* Louisville, etc., R. Co., 87 Ky. 391, 8 S. W. 854, 10 Ky. L. Rep. 185; Covington Short Route Transfer Co. *v.* Piel, 87 Ky. 267, 8 S. W. 449, 10 Ky. L. Rep. 146.

The petitioner need not in addition to filing the bond deposit with the county treasurer the amount of the award before entering on the premises. Davis *v.* Northwestern El. R. Co., 170 Ill. 595, 48 N. E. 1058.

67. Terre Haute, etc., R. Co. *v.* Flora, 29 Ind. App. 442, 64 N. E. 648; Travis County *v.* Trogdon, (Tex. Civ. App. 1895) 29 S. W. 46 [*reversed* in 88 Tex. 302, 31 S. W. 358]; Terre Haute *v.* Farmers' L. & T. Co., 99 Fed. 838, 40 C. C. A. 117.

68. San Mateo County *v.* Coburn, 130 Cal. 631, 63 Pac. 78, 621.

Liability for damages.— Where a judgment awarding expropriation is reversed on appeal, and the proceedings are quashed, the petitioner, who has meantime taken possession of the land, is liable to the owner for actual damages, even though there has been no stay of the proceedings. Dussuau *v.* Municipality No. 1, 6 La. Ann. 575.

69. *Ex p.* Van Vorst, 2 N. J. Eq. 292; Chesapeake, etc., R. Co. *v.* Bradford, 6 W. Va. 220. See also *supra*, XI, N, 7, b, (II).

Effect of deposit on running of interest see *infra*, XI, N, 10, d. (II).

70. Saratoga, etc., R. Co. *v.* Schenectady Stove Co., 66 How. Pr. (N. Y.) 43.

71. State *v.* Lubke, 15 Mo. App. 152; Oregon, etc., R. Co. *v.* Barlow, 3 Oreg. 311.

The fact that the company has taken an appeal does not justify the clerk in refusing to pay the damages to the owner, nor does it prevent the owner from taking proceedings to recover the amount; and it is wholly immaterial that the company has notified the clerk not to pay over the money. Meyer *v.* State, 125 Ind. 335, 25 N. E. 351.

A condition, attached to a payment into court by the petitioner, that the money shall not be paid to the owner until the company's appeal is determined, is without force where the company enters upon the land. Consumers' Gas Trust Co. *v.* Harless, 131 Ind. 446, 29 N. E. 1062, 15 L. R. A. 505.

72. Meyer *v.* State, 125 Ind. 335, 25 N. E. 351; State *v.* Lubke, 15 Mo. App. 152. If the company has paid the amount into court, it cannot, on an order to show cause why the fund should not be paid to a certain person claiming to be the owner, contend that it was entitled to the land under its grant from the government of a right of way over public land. Northern Pac. R. Co. *v.* Jackman, 6 Dak. 236, 50 N. W. 123.

Money paid into court to enable the court to render a judgment in pursuance of the verdict should be paid to the owner, although the company has filed a paper stating that the money was paid under protest and without waiving a right to appeal. Oregon, etc., R. Co. *v.* Barlow, 3 Oreg. 311.

Where the money is paid into the court of chancery, under the statute, for the use of the owners, notice to the company of an application by the owners to have it paid over to them is not necessary. *Ex p.* Van Vorst, 2 N. J. Eq. 292.

73. San Francisco, etc., R. Co. *v.* Leviston, 134 Cal. 412, 66 Pac. 473, construing Cal. Civ. Code Proc. §§ 1251, 1253. In *In re* New York, etc., Bridge, 137 N. Y. 95, 98, 32 N. E. 1054, construing N. Y. Code Civ. Proc. § 3357 *et seq.*, it was said: "Before interest can be allowed in any case it must be by virtue of some contract express or implied, or by virtue of some statute, or on account of the default of the party liable to pay, and then it is allowed as damages for the default." In State *v.* Humes, 34 Wash. 347, 75 Pac. 348, it was held that a judgment in favor of landowners in condemnation proceedings for the value of the land taken is a judgment within Wash. Laws (1899), p. 129, § 6, providing that judgments shall draw interest from date at the rate of six per cent per annum.

74. See cases cited *infra*, note 75 *et seq.*

75. Lough *v.* Minneapolis, etc., R. Co., 116 Iowa 31, 89 N. W. 77; Concord R. Co. *v.* Greely, 23 N. H. 237; North Hudson R. Co. *v.* Booraem, 28 N. J. Eq. 593; Kluender *v.*

ment.[76] The interest should not be compounded.[77] The owner is not, however, entitled to interest on the damages assessed for injuries to land not taken,[78] unless the injury is wrongfully inflicted.[79]

b. Runs From When. Whether the interest is to be computed from the time of entry and possession,[80] from the date of the vesting of the title to the land appropriated,[81] from the date of the filing of the award,[82] from the date of the

Milwaukee, 57 Wis. 636, 15 N. W. 805. See also cases cited *infra*, note 76 *et seq.*

76. Hollingsworth *v.* Des Moines, etc., R. Co., 63 Iowa 443, 19 N. W. 325; Shattuck *v.* Wilton R. Co., 23 N. H. 269; Concord R. Co. *v.* Greely, 23 N. H. 237; *In re* East One Hundred and Seventy-Fifth St., 49 N. Y. App. Div. 114, 63 N. Y. Suppl. 468 [*modifying* 29 Misc. 487, 62 N. Y. Suppl. 45, and *affirmed* in 163 N. Y. 606, 57 N. E. 1117]; Millick *v.* Philadelphia, 11 Phila. (Pa.) 354.

If the award is made to unknown owners, such owners have the same right to interest as those who are known. Matter of New York, 35 N. Y. App. Div. 406, 54 N. Y. Suppl. 911. But *compare* Matter of New York, 91 N. Y. App. Div. 532, 86 N. Y. Suppl. 1035.

77. Millick *v.* Philadelphia, 11 Phila. (Pa.) 354.

78. People *v.* Coler, 168 N. Y. 644, 61 N. E. 1133 [*affirming* 60 N. Y. App. Div. 77, 69 N. Y. Suppl. 863].

79. Missouri, etc., R. Co. *v.* O'Connor, (Tex. Civ. App. 1899) 51 S. W. 511.

80. *Illinois.*—Phillips *v.* South Park Com'rs, 119 Ill. 626, 10 N. E. 230; Chicago *v.* Palmer, 93 Ill. 125; Illinois, etc., R. Co. *v.* McClintock, 68 Ill. 296.

Iowa.— Lough *v.* Minneapolis, etc., R. Co., 116 Iowa 31, 89 N. W. 77; Hollingsworth *v.* Des Moines, etc., R. Co., 63 Iowa 443, 19 N. W. 325.

Massachusetts.— Pegler *v.* Hyde Park, 176 Mass. 101, 57 N. E. 327.

Nebraska.— Atchison, etc., R. Co. *v.* Plant, 24 Nebr. 127, 38 N. W. 33.

Ohio.— Cincinnati *v.* Williams, 8 Ohio Dec. (Reprint) 718, 9 Cinc. L. Bul. 243.

Pennsylvania. — Pennsylvania R. Co. *v.* Cooper, 58 Pa. St. 408; Stewart *v.* County, 2 Pa. St. 340.

Washington.— Bellingham Bay, etc., R. Co., *v.* Strand, 14 Wash. 144, 44 Pac. 140, 46 Pac. 238.

United States.— See U. S. *v.* Engeman, 46 Fed. 898.

See 18 Cent. Dig. tit. "Eminent Domain," § 639.

In Arkansas, where a railroad company has been in the enjoyment of land, the award will bear interest from the filing of the petition for condemnation. Newgass *v.* St. Louis, etc., R. Co., 54 Ark. 140, 15 S. W. 188.

In Iowa, if the evidence as to the time when possession was taken is undisputed, the question of allowing interest is one for the court. Lough *v.* Minneapolis, etc., R. Co., 116 Iowa 31, 89 N. W. 77.

In Ohio, if a city appropriates property and omits to pay the assessed damages within the time prescribed, but afterward takes possession without further proceedings, if the owner elects to have the damages assessed him as of the time when the street was finally opened, he is entitled to interest only from that time. Toledo *v.* Groll, 2 Ohio Cir. Ct. 199, 1 Ohio Cir. Dec. 441.

In England while interest may be payable from the date of the verdict (*In re* Eccleshill Local Bd., 13 Ch. D. 365, 49 L. J. Ch. 214, 28 Wkly. Rep. 536), and the jury may award interest as part of the damages (Hilhouse *v.* Davis, 1 M. & S. 169), yet the court cannot add to the verdict interest accrued before the date on which the verdict was rendered. Caledonia R. Co. *v.* Carmichael, L. R. 2 H. L. Sc. 56. But *In re* Eccleshill Local Bd., *supra*, is disapproved in *In re* Pigott, 18 Ch. D. 146, 50 L. J. Ch. 679, 44 L. T. Rep. N. S. 792, 29 Wkly. Rep. 727, where it is held that interest should be payable not from the date of the award, but from the time when the company could safely take possession, that is, when a good title was shown. And to the same effect is Spencer-Bell *v.* London, etc., R. Co., 33 Wkly. Rep. 771.

81. Miller *v.* St. Louis, etc., R. Co., 162 Mo. 424, 63 S. W. 85; *In re* East One Hundred and Seventy-Fifth St., 49 N. Y. App. Div. 114, 63 N. Y. Suppl. 468 [*modifying* 29 Misc. 487, 62 N. Y. Suppl. 45, and *affirmed* in 163 N. Y. 606, 57 N. E. 1117]; Matter of New York, 35 N. Y. App. Div. 406, 54 N. Y. Suppl. 911; Matter of Bassford, 36 Misc. (N. Y.) 732, 74 N. Y. Suppl. 397.

82. *Minnesota.*— Minneapolis *v.* Wilkin, 30 Minn. 145, 15 N. W. 668.

New Hampshire.—Concord R. Co. *v.* Greely, 23 N. H. 237.

Pennsylvania.— Haley *v.* Philadelphia, 68 Pa. St. 45, 8 Am. Rep. 153; Pennsylvania R. Co. *v.* Cooper, 58 Pa. St. 408; Lemke's Case, 23 Pa. Co. Ct. 93; Hayes *v.* Baltimore, etc., R. Co., 29 Pittsb. Leg. J. 239.

West Virginia.— Chesapeake, etc., R. Co. *v.* Bradford, 6 W. Va. 220.

Wisconsin.— Seefeld *v.* Chicago, etc., R. Co., 67 Wis. 96, 29 N. W. 904.

United States.— See U. S. *v.* Engeman, 46 Fed. 898.

See 18 Cent. Dig. tit. "Eminent Domain," § 639.

Under the Pennsylvania act, providing that the councils of the city of Philadelphia may, when they shall deem the public exigency to demand it, by ordinance order any street laid out upon the public plans of the city to be opened, and that the owners may petition the court for viewers to assess the damages, upon which suit may be brought against the city if they are not paid in one year, the owner is entitled to interest on the award from the time when he is entitled to sue for it. Dyer *v.* Philadelphia, 4 Phila. 328.

confirmation of the award[83] or from a fixed time after its confirmation,[84] from the date of entering the final order,[85] from the time of demand,[86] or from some time different from all these[87] depends upon the provisions of the statute under which the condemnation proceedings are had.[88]

c. Waiver or Estoppel to Claim. The owner may by his acts waive his right to interest[89] or be estopped to claim it.[90] Where the owner accepts the sum

83. Harness *v.* Chesapeake, etc., Canal Co., 1 Md. Ch. 248; Weide *v.* St. Paul, 62 Minn. 67, 64 N. W. 65; Devlin *v.* New York, 131 N. Y. 123, 30 N. E. 45 [*distinguishing* Cutter *v.* New York, 92 N. Y. 166, and *reversing* 60 Hun 68, 14 N. Y. Suppl. 251]; Matter of New York, 21 N. Y. App. Div. 357, 47 N. Y. Suppl. 564; Eno *v.* Metropolitan El. R. Co., 56 N. Y. Super. Ct. 95, 1 N. Y. Suppl. 521; New York, etc., Bridge *v.* Brooklyn Third M. E. Church, 18 N. Y. Suppl. 257; Miskey *v.* Philadelphia, 68 Pa. St. 48; *In re* Pringle St., 7 Kulp 346; Davis *v.* North Pennsylvania R. Co., 2 Phila. (Pa.) 146; *In re* Ziegler, 12 York Leg. Rec. 158.

In Pennsylvania the award carries interest from the date of the decree confirming it, although the company, pending proceedings by certiorari, abstained from taking possession of the land as it had the right to do. Davis *v.* North Pennsylvania R. Co., 2 Phila. 146.

84. Phillips *v.* Pease, 39 Cal. 582; Erie County *v.* Buffalo, 63 Hun (N. Y.) 565, 18 N. Y. Suppl. 635 [*distinguishing* Donnelly *v.* Brooklyn, 121 N. Y. 9, 24 N. E. 17].

85. *Maryland.*— Norris *v.* Baltimore, 44 Md. 598.

Missouri.— Martin *v.* St. Louis, 139 Mo. 246, 41 S. W. 231.

New Jersey.— National Docks, etc., R. Co. *v.* Pennsylvania R. Co., 54 N. J. Eq. 142, 33 Atl. 860.

New York.— New York, etc., Bridge *v.* Brooklyn Third M. E. Church, 18 N. Y. Suppl. 257.

Pennsylvania.— Leiper *v.* Baltimore, etc., R. Co., 5 Pa. Co. Ct. 60; *In re* Still, 2 Chest. Co. Rep. 233.

See 18 Cent. Dig. tit. "Eminent Domain," § 639.

86. Beveridge *v.* West Chicago Park Com'rs, 100 Ill. 75; Clough *v.* Unity, 18 N. H. 75; Fredericks *v.* New York, 165 N. Y. 656, 59 N. E. 1122 [*affirming* 44 N. Y. App. Div. 274, 60 N. Y. Suppl. 724]; Donnelly *v.* Brooklyn, 121 N. Y. 9, 24 N. E. 17; Carpenter *v.* New York, 51 N. Y. App. Div. 584, 64 N. Y. Suppl. 839; Deering *v.* New York, 51 N. Y. App. Div. 402, 64 N. Y. Suppl. 606; Matter of New York, 35 N. Y. App. Div. 406, 54 N. Y. Suppl. 911; Irwin *v.* New York, 9 N. Y. Suppl. 264; Phillips *v.* Cudlipp, 50 How. Pr. (N. Y.) 363; People *v.* Canal Com'rs, 5 Den. (N. Y.) 401; Atty.-Gen. *v.* Turpin, 3 Hen. & M. (Va.) 548. See also Matter of New York, 91 N. Y. App. Div. 532, 86 N. Y. Suppl. 1035.

This rule applies to the state itself. People *v.* Canal Com'rs, 5 Den. (N. Y.) 401.

87. In proceedings by the city of Chicago, interest will be allowed after the expiration of a reasonable time. Chicago *v.* Wheeler, 25 Ill. 478, 79 Am. Dec. 342, holding two years to be a reasonable time. Where the evidence showed that possession was taken during a certain month, interest from the first day of the following month will be proper. Lough *v.* Minneapolis, etc., R. Co., 116 Iowa 31, 89 N. W. 77. Where the award is not payable until four months from the time appointed for beginning the improvement, the owner is entitled to interest only from that time. Hamersley *v.* New York, 56 N. Y. 533.

88. Necessity of demand.— In order to set interest running, the demand must be for the precise amount due. Deering *v.* New York, 51 N. Y. App. Div. 402, 64 N. Y. Suppl. 606; Carpenter *v.* New York, 44 N. Y. App. Div. 230, 60 N. Y. Suppl. 633.

Where a statute makes a demand a condition precedent to a proceeding to compel payment of the award, it does not necessarily make it a condition precedent to the recovery of interest. Matter of New York, 35 N. Y. App. Div. 406, 54 N. Y. Suppl. 911.

Under the New York statute relating to the acquiring of school sites in the city of New York, and providing that upon confirmation of the commissioners' report the city shall become seized in fee of the lands, and under section 4, which provides for payment with interest from the confirmation, and that, in default of payment within four calendar months after confirmation, suit may be brought for the same, with interest from and after demand thereof, interest is to be allowed from the date of confirmation until the expiration of the four months, and on the aggregate amount then due from the time of demand. Devlin *v.* New York, 131 N. Y. 123, 30 N. E. 45 [*distinguishing* Cutter *v.* New York, 92 N. Y. 166, and *reversing* 60 Hun 68, 14 N. Y. Suppl. 251].

89. Jamison *v.* Burlington, etc., R. Co., 87 Iowa 265, 54 N. W. 242; West *v.* Omaha, 48 Nebr. 456, 67 N. W. 439.

90. Woollacott *v.* Chicago, 187 Ill. 504, 58 N. E. 426; Gillespie *v.* New York, 3 Edw. (N. Y.) 512.

A mortgagee is not estopped to claim his interest in an award paid to the estate of the owner by any delay less than the statutory period. Lumbermen's Ins. Co. *v.* St. Paul, 82 Minn. 497, 85 N. W. 525.

An owner was awarded £80 as compensation, and afterward made a deed to the company for that consideration, no claim for interest being made. It was held that the making of the conveyance did not estop the owner from afterward claiming interest on the award from the date of its entry to the time of payment. *In re* Baltimore Extension R. Co., [1895] 1 Ir. R. 169.

awarded and gives a receipt acknowledging payment in full, he thereby waives his right to interest and cannot afterward maintain a suit to recover the same;[91] but it is otherwise where the amount is accepted under an agreement that such acceptance shall not prejudice his right to the interest which he claims, and which alone is in controversy.[92]

d. In Case of Appeal — (I) *In General.* The general rule seems to be that on an appeal from an award interest from the date of the original award should be added to the whole amount finally awarded.[93]

(II) *Effect of Deposit in Court* — (A) *On Recovery by Owner.* But it has been held in some cases that where the petitioner has deposited in court the amount of the award,[94] and especially where under such circumstances the landowner has withdrawn or has the right to withdraw such deposit,[95] that the landowner is not entitled to recover interest on the amount so deposited, although he may be entitled to all interest actually received by the clerk of the court on the money while in the clerk's possession.[96] On the other hand it has been held that

By remaining in possession the owner may estop himself. See Plum *v.* Kansas, 101 Mo. 525, 14 S. W. 657, 10 L. R. A. 371; Hilton *v.* St. Louis, 99 Mo. 199, 12 S. W. 657; Hamersley *v.* New York, 67 Barb. (N. Y.) 35; Matter of Riverside Park, 27 Misc. (N. Y.) 373, 58 N. Y. Suppl. 963; *In re* Second St., 66 Pa. St. 132. On the other hand, it has been held in Massachusetts that, if the owner refuses to yield possession after the judgment, so that the company is forced to file a bill in equity in order to obtain possession, the owner is notwithstanding entitled to interest from the date of the award. Imbescheid *v.* Old Colony R. Co., 171 Mass. 209, 50 N. E. 609.

If the owner makes no opposition to the condemnation of land, but relies on his right to have the damages paid within thirty days after the entry of judgment on the award, a failure on the part of the railroad company to take possession does not relieve it from the payment of interest. Davis *v.* North Pennsylvania R. Co., 2 Phila. (Pa.) 146.

Where taking possession of the property is delayed by appellate proceedings instituted by some of the owners, an owner not joining in such appeal will not lose his right to interest. Plum *v.* Kansas, 101 Mo. 525, 14 S. W. 657, 10 L. R. A. 371. But *compare* Hilton *v.* St. Louis, 99 Mo. 199, 12 S. W. 657.

91. Cutter *v.* New York, 92 N. Y. 166, holding further that in such case the owner's protest against the refusal to pay interest was of no importance.

92. Martin *v.* St. Louis, 139 Mo. 246, 41 S. W. 231.

93. Hartshorn *v.* Burlington, etc., R. Co., 52 Iowa 613, 3 N. W. 648; Whitacre *v.* St. Paul, etc., R. Co., 24 Minn. 311; Wilkin *v.* St. Paul, etc., R. Co., 22 Minn. 177; Knauft *v.* St. Paul, etc., R. Co., 22 Minn. 173; Warren *v.* First Div. St. Paul, etc., R. Co., 21 Minn. 424; Burlington, etc., R. Co. *v.* White, 28 Nebr. 166, 44 N. W. 95; Atchison, etc., R. Co. *v.* Plantt, 24 Nebr. 127, 38 N. W. 33; Shattuck *v.* Wilton R. Co., 23 N. H. 269.

Under the New Hampshire statute, if the owner takes an appeal from an award of damages for land taken for a highway, and the appeal is referred to a referee, the owner is entitled to interest only from the time of the referee's report, since his damages are undecided until such report is made. Wentworth *v.* Portsmouth, 68 N. H. 392, 44 Atl. 531.

94. Reisner *v.* Atchison Union Depot, etc., Co., 27 Kan. 382

Under the New York Consolidation Act, which provides for payment of street opening damages from a special fund, and provides further that if that fund becomes exhausted the controller shall issue bonds to raise the amount of the award, and that if the owners are unknown the court may direct the controller to retain the award made to such persons, or to pay it into court, this does not repeal the statutory provision that the city may pay the award into court and stop the running of interest. Matter of New York, 35 N. Y. App. Div. 406, 54 N. Y. Suppl. 911.

95. If the constitution or the statute provides that the petitioner may take possession upon paying the award into court, the owner is entitled to withdraw the money as soon as it is deposited, and is therefore not entitled to interest pending the determination of the petitioner's exceptions or appeal. Chicago, etc., R. Co. *v.* Eubanks, 130 Mo. 270, 32 S. W. 658; Snyder *v.* Cowan, 120 Mo. 389, 25 S. W. 382 [*affirming* 50 Mo. App. 430]; St. Louis, etc., R. Co. *v.* Fowler, 113 Mo. 458, 20 S. W. 1069.

The rule in Wisconsin is that, although the company has paid the money into court pending an appeal and has not taken possession, the award bears interest from the date of its filing, if the premises have been vacated by the tenant, and the owner has received no rent subsequent to the filing of the award. Uniacke *v.* Chicago, etc., R. Co., 67 Wis. 108, 29 N. W. 899. And it is further held in that state that the owner may refuse to accept the amount deposited till the amount to which he is entitled is deposited, and may then claim interest from the date of the award as first made. Stolze *v.* Milwaukee, etc., R. Co., 113 Wis. 44, 88 N. W. 919, 90 Am. St. Rep. 833.

96. St. Louis, etc., R. Co. *v.* Clark, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751;

while the landowner is not entitled to interest on the deposit if the verdict on appeal exceeds the original award interest should be given on the increased amount.[97]

(B) *On Recovery by Petitioner.* Where the award has been paid into court, and the amount finally awarded is less than that deposited, the petitioner is not entitled to interest on the balance.[98]

(III) *Effect of Withdrawal of Appeal.* If the petitioner withdraws its appeal, interest should be allowed on the award from the date of its filing;[99] but if the appeal by the owner is withdrawn he is not entitled to interest.[1]

e. Effect of Tender and Deposit. If the amount is tendered to the owner and he refuses to receive it, and it is then paid into court as provided by the statute, this stops the running of interest.[2]

f. Reduction of Rents and Profits. Where an owner recovers interest on an award of damages for land taken for public use he must account for rents and profits from the time of the taking.[3] And it has been held under some statutes that the owner is not entitled to interest on the award so long as he remains in possession and receives rents and profits from the land.[4]

11. Lien of Award or Judgment. The owner of the land which has been condemned, but which has not been paid for, has a lien for the amount of the

Snyder *v.* Cowan, 120 Mo. 389, 25 S. W. 382 [*affirming* 50 Mo. App. 430].

97. *Georgia.*— Selma, etc., R. Co. *v.* Gammage, 63 Ga. 604.

Kansas.— Wichita, etc., R. Co. *v.* Kuhn, 38 Kan. 104, 16 Pac. 75.

Nebraska.— Chicago, etc., R. Co. *v.* Buel, 56 Nebr. 205, 76 N. W. 571; Sioux City, etc., R. Co. *v.* Brown, 13 Nebr. 317, 14 N. W. 407.

New Hampshire.— Shattuck *v.* Wilton R. Co., 23 N. H. 269.

Wisconsin.— Neilson *v.* Chicago, etc., W. R. Co., 91 Wis. 557, 64 N. W. 849.

See 18 Cent. Dig. tit. "Eminent Domain," § 639.

If the award is paid into court, and an appeal is prosecuted by only one of the owners of the lands condemned, the fact that the amount of damages awarded him is decreased will not prevent him from recovering interest on the new amount from the date of the original award, if the damages allowed all the owners exceed the original award. Neilson *v.* Chicago, etc., R. Co., 91 Wis. 557, 64 N. W. 849.

Under the Iowa code which provides that if the damages are decreased on appeal such amount only shall be paid to the owners, the jury may award damages for the delay in making compensation, and it is immaterial that such damages are denominated interest. Noble *v.* Des Moines, etc., R. Co., 61 Iowa 637, 17 N. W. 26.

98. St. Louis, etc., R. Co. *v.* Knapp, 160 Mo. 396, 61 S. W. 300 [*distinguishing* St. Louis, etc., R. Co. *v.* Lewright, 113 Mo. 660, 21 S. W. 210]; *In re* New York El. R. Co., 44 Hun (N. Y.) 117.

Where money was turned over to owner.— In Missouri it has been held that the rule stated in the text is true notwithstanding the fact that the money deposited was turned over to the owner. St. Louis, etc., R. Co. *v.* Knapp, 160 Mo. 396, 61 S. W. 300 [*distinguishing* St. Louis, etc., R. Co. *v.* Lewright, 113 Mo. 660]. But in Wisconsin it has been held that if the money has been paid into court and has been withdrawn by the owner on giving bond, the condemning party is entitled to recover interest upon the amount by which the award is decreased, such interest to run from the date on which the owner withdrew the deposit. Watson *v.* Milwaukee, etc., R. Co., 57 Wis. 332, 15 N. W. 468.

99. Berggren *v.* Fremont, etc., R. Co., 23 Nebr. 620, 37 N. W. 470.

1. Donaldson *v.* Pennsylvania R. Co., 15 Wkly. Notes Cas. (Pa.) 312; Ross *v.* Pennsylvania R. Co., 14 Wkly. Notes Cas. (Pa.) 143.

2. National Docks, etc., Connecting R. Co. *v.* Pennsylvania R. Co., 54 N. J. Eq. 142, 33 Atl. 860. See also Matter of New York, etc., Bridge, 137 N. Y. 95, 34 N. E. 1054.

3. Plum *v.* Kansas City, 101 Mo. 525, 14 S. W. 557, 10 L. R. A. 371. If the land has been of actual value to the owner while in his possession and used by him between the time of filing the award and the assessment by the jury, the amount of such value should be ascertained by the jury, or court if the matter is tried without a jury, and deducted from the interest allowed. Warren *v.* First Div. St. Paul, etc., R. Co., 21 Minn. 424.

4. Hamersley *v.* New York, 67 Barb. (N. Y.) 35; *In re* Second St., 66 Pa. St. 132 [*distinguishing* Pennsylvania R. Co. *v.* Cooper, 58 Pa. St. 408]. In State *v.* Humes, 34 Wash. 347, 75 Pac. 348, it was held that where a judgment was rendered in favor of a landowner for property taken by a city for public use, the landowner was not entitled to interest on the judgment after its rendition while he remained in actual possession and had the rents and profits of the land, in the absence of a showing that such rents and profits were less than the interest.

award, after the condemning party has taken possession,[5] which is good against all persons occuping it as lessees, grantees, or otherwise;[6] and this lien is enforceable in equity,[7] like a vendor's lien.[8] In the case of a railroad this lien covers the entire road.[9] The lien does not accrue until the confirmation of the commissioners' report.[10] The lien has been held to be on the same footing as that of an ordinary judgment at law and expires in the same time.[11] The fact that the owner permits the condemning party to enter on the land and construct the improvement does not, so long as the right to the award is not released, amount to a waiver of the lien.[12]

12. ENFORCEMENT OF AWARD OR JUDGMENT. It is intended to notice here[13] only those means of enforcing the judgment which are of the same nature as those

5. *Illinois.*— Epling *v.* Dickson, 170 Ill. 329, 48 N. E. 1001.

Maine.— Pierce *v.* Knapp, 34 Me. 402; Knapp *v.* Clark, 30 Me. 244.

Missouri.— Provolt *v.* Chicago, etc., R. Co., 69 Mo. 633.

New Jersey.— Frelinghuysen *v.* Central R. Co., 28 N. J. Eq. 388.

New York.— Fisher *v.* New York, 67 N. Y. 73.

Ohio.— Fries *v.* Wheeling, etc., R. Co., 56 Ohio St. 135, 46 N. E. 516.

Pennsylvania.— Buffalo, etc., R. Co. *v.* Harvey, 107 Pa. St. 319.

Texas.— St. Louis, etc., R. Co. *v.* Henderson, 86 Tex. 307, 24 S. W. 381.

Vermont.—Bridgman *v.* St. Johnsbury, etc., R. Co., 58 Vt. 198, 2 Atl. 467; Adams *v.* St. Johnsbury R. Co., 57 Vt. 240; Kittell *v.* Missisquoi R. Co., 56 Vt. 96.

Virginia.— Southern R. Co. *v.* Gregg, 101 Va. 308, 43 S. E. 570.

See 18 Cent. Dig. tit. "Eminent Domain," § 644.

Neither the ownership nor the title is vested until payment, and a conveyance by one having the title, after a judgment is entered and before possession is taken or payment made, passes the property with all rights and burdens appurtenant thereto. Price *v.* Engelking, 58 Ill. App. 547.

Under Ohio Rev. St. § 6448, a judgment for the value of land appropriated by a railroad company in favor of an owner who has taken no proceedings to prevent the construction of the road over his land or to obtain compensation is not a lien on the land. Central Trust Co. *v.* Valley R. Co., 79 Fed. 195.

6. Price *v.* Engelking, 58 Ill. App. 547; Ball *v.* Maysville, etc., R. Co., 102 Ky. 486, 43 S. W. 731, 19 Ky. L. Rep. 1540, 80 Am. St. Rep. 362; Knapp *v.* Clark, 30 Me. 244; Provolt *v.* Chicago, etc., R. Co., 69 Mo. 633.

Claims against an insolvent railroad company for right of way taken by condemnation have priority over the necessary expenses of a receivership, operating expenses, etc., and even over receiver's certificates, although these latter are decreed to be a first lien on the road and equipment. Crosby *v.* Morristown, etc., R. Co., (Tenn. Ch. App. 1897) 42 S. W. 507.

Owners of land which has been formally appropriated by a railroad company have a lien for the value as found in the award, which is superior to that of any prior or subsequent mortgage given by the company. Coburn *v.* Sands, 150 Ind. 141, 48 N. E. 786; Easton's Appeal, 47 Pa. St. 255; Western Pennsylvania R. Co. *v.* Johnston, 59 Pa. St. 290.

7. *Illinois.*— Epling *v.* Dickson, 170 Ill. 329, 48 N. E. 1001.

New Jersey,— Frelinghuysen *v.* New Jersey Cent. R. Co., 28 N. J. Eq. 388.

Ohio.— Fries *v.* Wheeling, etc., R. Co., 56 Ohio St. 135, 46 N. E. 516.

Pennsylvania.— Buffalo, etc., R. Co. *v.* Harvey, 107 Pa. St. 319.

Vermont.—Bridgman *v.* St. Johnsbury, etc., R. Co., 58 Vt. 198, 2 Atl. 467; Adams *v.* St. Johnsbury, etc., R. Co., 57 Vt. 240; Kittell *v.* Missisquoi, etc., R. Co., 56 Vt. 96.

Virginia.— Southern R. Co. *v.* Gregg, 101 Va. 308, 43 S. E. 570.

See 18 Cent. Dig. tit. "Eminent Domain," § 644.

8. Ball *v.* Maysville, etc., R. Co., 102 Ky. 486, 43 S. W. 731, 19 Ky. L. Rep. 1540, 80 Am. St. Rep. 362; Coe *v.* New Jersey Midland R. Co., 31 N. J. Eq. 105; Bridgman *v.* St. Johnsbury, etc., R. Co., 58 Vt. 198, 2 Atl. 467; State *v.* Mills, 29 Wis. 322; St. Germans *v.* Crystal Palace R. Co., L. R. 11 Eq. 568, 24 L. T. Rep. N. S. 288, 19 Wkly. Rep. 584. See also Wing *v.* Tottenham, etc., R. Co., L. R. 3 Ch. 740, 37 L. J. Ch. 654, 16 Wkly. Rep. 1098; Walker *v.* Ware, etc., R. Co., L. R. 1 Eq. 195, 35 Beav. 52, 12 Jur. N. S. 18, 35 L. J. Ch. 94, 13 L. T. Rep. N. S. 517, 14 Wkly. Rep. 158; Sutton *v.* Hoylake R. Co., 20 L. T. Rep. N. S. 214; Heriot *v.* London, etc., R. Co., 16 L. T. Rep. N. S. 473.

9. Ball *v.* Maysville, etc., R. Co., 102 Ky. 486, 43 S. W. 731, 19 Ky. L. Rep. 1540, 80 Am. St. Rep. 362.

10. Fisher *v.* New York, 67 N. Y. 73.

11. Dickson *v.* Epling, 61 Ill. App. 78; Pierce *v.* Knapp, 34 Me. 402.

12. Kittell *v.* Missisquoi, etc., R. Co., 56 Vt. 96; Kendall *v.* Missisquoi, etc., R. Co., 55 Vt. 438; Southern R. Co. *v.* Gregg, 101 Va. 308, 43 S. E. 570.

13. **The remedies which are open to the owner for the recovery of the damages assessed, or by which he may compel the payment of the compensation for his land, are** hereinafter considered. See *infra,* XII, B, 2.

employed in enforcing ordinary civil judgments,[14] of which the first and most common is the levy of an execution,[15] the weight of authority being that, when the damages have been assessed, and the award has been confirmed by the court, this constitutes a judgment for the amount in favor of the owner which may be enforced by execution,[16] and the condemning party is not entitled to a stay.[17] The judgment cannot be enforced by a warrant of distress.[18]

O. Dismissal or Abandonment of Proceedings — 1. Right to Discontinue — a. In General. In the absence of any statutory provision showing a legislative intent to the contrary,[19] the condemning party may discontinue the condemnation proceedings at any time before the right of the property-owner to compensation or damages has become complete.[20] The proceedings may be dis-

14. See Monroe County *v.* State, 156 Ind. 550, 60 N. E. 344 (proceeding under the Indiana highway act of March 7, 1895); *In re* Rhinebeck, etc., R. Co., 67 N. Y. 242 [*affirming* 8 Hun 34] (proceedings under N. Y. Laws (1850), c. 140); State *v.* Humes, 34 Wash. 347, 75 Pac. 348.

Defenses in proceedings to enforce judgment.— In proceedings to enforce a judgment the condemning party will not be permitted to show that a part of the land embraced in the condemnation was public property, or that a part only of the land which it was proposed to condemn was actually proceeded against. South Chicago City R. Co. *v.* Chicago, 196 Ill. 490, 63 N. E. 1046.

Enforcement of judgment generally see Judgments.

15. North Branch Canal Co. *v.* Hireen, 44 Pa. St. 418; Bellingham Bay, etc., R. Co. *v.* Strand, 14 Wash. 144, 44 Pac. 140, 46 Pac. 238.

Execution generally see Executions.

Failure to give sufficient bond.— Where the judgment provides that, unless the condemning party elects in thirty days to build certain fences and cattle-guards, and gives bond in double the assessed value of the same with sureties, defendant may have execution, the execution will issue unless a sufficient bond is given. California Southern R. Co. *v.* Southern Pac. R. Co., 65 Cal. 293, 4 Pac. 12.

16. State *v.* Withrow, (Mo. 1891) 24 S. W. 638; Provolt *v.* Chicago, etc., R. Co., 69 Mo. 633; Drath *v.* Burlington, etc., R. Co., 15 Nebr. 367, 18 N. W. 717; Neal *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 19, 2 Grant (Pa.) 137; Davis *v.* North Pennsylvania R. Co., 2 Phila. (Pa.) 146; Laredo *v.* Benavides, (Tex. Civ. App. 1894) 25 S. W. 482. But *compare* State *v.* Fort, 180 Mo. 97, 79 S. W. 167, where the proceedings were on appeal to the supreme court at the instance of both parties, the circuit court having set aside the verdict as excessive.

An exception to this rule is furnished in Illinois, where it is held that in a proceeding to condemn a railroad right of way it is error to award execution against the company for the assessed damages (Springfield, etc., R. Co. *v.* Turner, 68 Ill. 187; St. Louis, etc., R. Co. *v.* Lux, 63 Ill. 523), although if the jury finds that the land has been taken by the company, and not merely that it is proposed to take it, it is proper to award execution on the judgment (Peoria, etc., R. Co. *v.* Mitchell, 74 Ill. 394).

In those jurisdictions in which it is held that the judgment in condemnation proceedings is a conditional one, so that the petitioner may pay the award and take the property, or may abandon the proceedings and incur no liability for the compensation fixed, a judgment for the award and costs is erroneous, if it provides for its enforcement by execution. Dolores No. 2 Land, etc., Co. *v.* Hartman, 17 Colo. 138, 29 Pac. 378; Evansville, etc., Straight Line R. Co. *v.* Fitzpatrick, 10 Ind. 120; Evansville, etc., Straight Line R. Co. *v.* Stringer, 10 Ind. 551.

17. Harrisburg, etc., R. Co. *v.* Peffer, 84 Pa. St. 295.

18. Russell Mills *v.* Plymouth County Com'rs, 16 Gray (Mass.) 347; Com. *v.* Blue-Hill Turnpike Corp., 5 Mass. 420. *Contra*, under the Maine statute, see Furbish *v.* Kennebec County Com'rs, 93 Me. 117, 44 Atl. 364.

19. Simpson *v.* Kansas City, 111 Mo. 237, 20 S. W. 38; O'Neill *v.* Hudson County, 41 N. J. L. 161; Mabon *v.* Halsted, 39 N. J. L. 640.

20. *California.*— Eureka, etc., R. Co. *v.* McGrath, 74 Cal. 49, 15 Pac. 360.

Illinois.— Hyde Park *v.* Dunham, 85 Ill. 569; Meeker *v.* Chicago, 96 Ill. App. 23.

Indiana.— Brokaw *v.* Terre Haute, 97 Ind. 451.

Iowa.— Hunting *v.* Curtis, 10 Iowa 152. See also State *v.* Keokuk, 9 Iowa 438.

Kansas.— St. Louis, etc., R. Co. *v.* Martin, 29 Kan. 750.

Kentucky.— Manion *v.* Louisville, etc., R. Co., 90 Ky. 491, 14 S. W. 532, 12 Ky. L. Rep. 445.

Louisiana.— Mallard *v.* Lafayette, 5 La. Ann. 112; *In re* New Orleans, 4 Rob. 357. See also *In re* New Orleans, 20 La. Ann. 497.

Minnesota.— Kremer *v.* Chicago, etc., R. Co., 51 Minn. 15, 52 N. W. 977, 38 Am. St. Rep. 468; Wilcox *v.* St. Paul, etc., R. Co., 35 Minn. 439, 29 N. W. 148; Witt *v.* St. Paul, etc., R. Co., 35 Minn. 404, 29 N. W. 161.

Missouri.— Simpson *v.* Kansas City, 111 Mo. 237, 20 S. W. 38; St. Louis *v.* Meintz, 107 Mo. 611, 18 S. W. 30; State *v.* Hug, 44 Mo. 116; St. Joseph *v.* Hamilton, 43 Mo. 282; North Missouri R. Co. *v.* Lackland, 25 Mo. 515.

New Hampshire.— Jones *v.* Whittemore, 70 N. H. 284, 47 Atl. 259.

continued as to one or more of several owners whose property it was proposed to condemn,[21] unless this is precluded by some statutory provision.[22] But the condemning party cannot, while persisting in the avowal of its purpose to condemn the land, withdraw from the inquisition and the judgment thereon because dissatisfied with the result, in order to seek by other methods to procure a smaller valuation of the desired property,[23] nor can a city abandon an improvement to the injury of a person who has appealed from an assessment, where it has paid

New Jersey.— O'Neill *v.* Hudson County, 41 N. J. L. 161; Mabon *v.* Halsted, 39 N. J. L. 640.

New York.— *In re* Military Parade Ground, 60 N. Y. 319; Hudson River R. Co. *v.* Outwater, 3 Sandf. 689; Onondaga County *v.* White, 38 Misc. 587, 77 N. Y. Suppl. 1074; Browning *v.* Collis, 21 Misc. 155, 47 N. Y. Suppl. 76; New York, etc., R. Co. *v.* Thorne, 1 How. Pr. N. S. 190; People *v.* Brooklyn, 1 Wend. 318, 19 Am. Dec. 502. See also Matter of Munson, 9 N. Y. St. 126.

Ohio.— Dayton, etc., R. Co. *v.* Marshall, 11 Ohio St. 497.

Pennsylvania.— Moravian Seminary *v.* Bethlehem Borough, 153 Pa. St. 583, 26 Atl. 237; *In re* Penn Alley, 1 Pa. Dist. 141; Marshall *v.* Grove, 10 Pa. Co. Ct. 532.

West Virginia.— Barbour County Ct. *v.* Hall, 51 W. Va. 269, 41 S. E. 119.

Wisconsin.— Van Valkenburgh *v.* Milwaukee, 43 Wis. 574.

United States.— U. S. *v.* Oregon R., etc., Co., 16 Fed. 524, 9 Sawy. 61.

See 18 Cent. Dig. tit. "Eminent Domain," § 648.

The courts will not coerce a corporation to adopt the condemnation of property for public use, even at the instance of the owners. State *v.* Graves, 19 Md. 351, 81 Am. Dec. 639. See also *In re* New Orleans, 20 La. Ann. 497.

Abandonment of condemnation proceedings is not analogous to a nonsuit in an ordinary civil action. Denver, etc., R. Co. *v.* Lamborn, 8 Colo. 380, 8 Pac. 582.

Election final.— An election either to pursue or to abandon the condemnation after the price has been fixed is final, and no right of reconsideration remains. Mabon *v.* Halsted, 39 N. J. L. 640. But *compare* Cornwall *v.* Louisville, etc., R. Co., 104 Ky. 29, 46 S. W. 685, 20 Ky. L. Rep. 373.

Quashing proceedings where no title acquired.— Where after proceedings have been taken to condemn land for the use of the state, the damages have been assessed, and a decree of condemnation entered, it appears that the state has acquired no title by the decree, the court should, on motion of the attorney-general, quash all the proceedings, and order the money to be refunded to the state. Stanford *v.* Worn, 27 Cal. 171.

Error in refusing to permit a dismissal is not waived by filing cross petitions for the assessment of damages, or a failure to file a motion for a new trial or in arrest of judgment, before the judgment assessing the damages is entered. Harvey *v.* Aurora, etc., R. Co., 174 Ill. 295, 51 N. E. 163.

Motion addressed to discretion of court.— Where, in an action for the recovery of land unlawfully occupied by a railway company, the latter in its answer asks for an assessment of the damages for the appropriation thereof, under the statute, it is entitled to abandon or dismiss such application at any time before the final submission of the case. But where it fails to assert such right, and asks to amend its answer, or for leave to dismiss or abandon such application for an assessment of damages, and the motion is treated and disposed of as one addressed to the discretion of the court, it will be so treated in the supreme court, and the decision of the trial court will not be interfered with, except in case of abuse of discretion. Kremer *v.* Chicago, etc., R. Co., 51 Minn. 15, 52 N. W. 977, 38 Am. St. Rep. 468.

Where the owner institutes proceedings for the assessment of damages, and the trial has begun, he cannot discontinue. Worcester *v.* Lakeside Mfg. Co., 174 Mass. 299, 54 N. E. 833.

Withdrawal of plea for condemnation in proceedings by owner.— Where a company, in accordance with statutory authorization, has sought to condemn lands in proceedings by the owner to recover the land or its value, it cannot withdraw its plea for condemnation in so far as it affects plaintiff's right to recover under the admission of title, but full effect should be given to the abandonment of the plea in so far as the condemnation of the property is concerned. Texas, etc., R. Co. *v.* Ford, 9 Tex. Civ. App. 557, 30 S. W. 372. And see Gulf Coast, etc., R. Co. *v.* Poindexter, 70 Tex. 98, 7 S. W. 316.

21. Long *v.* Louisville, 98 Ky. 67, 32 S. W. 271, 17 Ky. L. Rep. 642; Myers *v.* South Bethlehem, 149 Pa. St. 85, 24 Atl. 280.

22. Wheeler *v.* Fitchburg, 150 Mass. 350, 23 N. E. 207, holding that under the Massachusetts statute which declares that, where a way is laid out over the lands of several persons, an entry for the purpose of constructing any part of the way is to be deemed a taking possession of all the lands, the discontinuance of a portion of the way after the entry on any portion does not cut off the owner's right to damages for the taking of land in the portion so discontinued, although the entry itself was not on his land.

23. District of Columbia *v.* Prospect Hill Cemetery, 5 App. Cas. (D. C.) 497.

The abandonment must be in good faith, and must be a complete surrender of the project so far as the land involved is concerned. Robertson *v.* Hartenbower, (Iowa 1903) 94 N. W. 857. A municipality cannot,

damages, collected benefits, and made the improvement wholly or in part.[24] And where an abandonment of the proceedings would violate a contract made with the owner it will not be allowed.[25]

b. Stage of Proceedings at Which Right May Be Exercised. The condemnation proceedings may be dismissed or abandoned at any time prior to final judgment,[26] or final confirmation of the report of the commissioners or appraisers appointed to assess damages or compensation,[27] or before the compensation has been paid or deposited in the manner provided by law,[28] or the right of the property-owner to compensation has otherwise become vested.[29] The proceeding may be abandoned even after the damages are assessed,[30] and a reasonable opportunity should be given, after the price of the land is fixed, for the petitioner to reject the award and abandon the proceeding.[31] The right to abandon is not lost by the taking of an appeal by either the condemning party or the owner.[32] But after a

under the pretense of abandonment, repeal the ordinance ordering an improvement, and then take possession of the premises condemned, and use them for the purpose contemplated by the repealed ordinance and the condemnation proceedings, thus defeating the right of the property-owner as adjudicated in the condemnation proceedings. Evanston *v.* Clark, 77 Ill. App. 234.

24. Shannahan *v.* Waterbury, 63 Conn. 420, 28 Atl. 611.

25. Bardstown, etc., Turnpike Co. *v.* Nelson County, 109 Ky. 800, 60 S. W. 862, 22 Ky. L. Rep. 1457.

26. North Missouri R. Co. *v.* Lackland, 25 Mo. 515; *In re* Waynesboro School Dist., 1 Pa. Co. Ct. 422.

27. *In re* Jersey City Water Com'rs, 31 N. J. L. 72, 86 Am. Dec. 199; *In re* Military Parade Ground, 60 N. Y. 319 [*affirming* 2 Hun 374, 4 Thomps. & C. 671, 48 How. Pr. 285]; *In re* Syracuse, etc., R. Co., 4 Hun (N. Y.) 311; *In re* Wall St., 17 Barb. (N. Y.) 617; New York, etc., R. Co. *v.* Thorne, 1 How. Pr. N. S. (N. Y.) 190; *In re* Anthony St., 20 Wend. (N. Y.) 618, 32 Am. Dec. 608; New York *v.* Mapes, 6 Johns. Ch. (N. Y.) 46; *In re* Penn Alley, 1 Pa. Dist. 141.

Filing plat.— Since no title is acquired to land sought to be condemned for a parade ground in New York city by simply making and filing the map and survey required by statute, the department of public parks may discontinue such proceedings at any time before the confirmation of the assessment, notwithstanding the filing of a plat. *In re* Military Parade Ground, 60 N. Y. 319 [*affirming* 2 Hun 374, 4 Thomps. & C. 671, 48 How. Pr. 285].

28. Denver, etc., R. Co. *v.* Lamborn, 8 Colo. 380, 8 Pac. 582; Kadish *v.* Chicago, (Ill. 1886) 6 N. E. 467; Chicago *v.* Barbian, 80 Ill. 482; Peoria, etc., R. Co. *v.* Rice, 75 Ill. 329; Norris *v.* Baltimore, 44 Md. 598; Merrick *v.* Baltimore, 43 Md. 219; State *v.* Graves, 19 Md. 351, 81 Am. Dec. 639; Graff *v.* Baltimore, 10 Md. 544; Stacey *v.* Vermont Cent. R. Co., 27 Vt. 39.

29. *In re* Washington Park, 56 N. Y. 144, 2 Thomps. & C. 637 [*reversing* 15 Abb. Pr. N. S. 148]; Hudson River R. Co. *v.* Outwater, 3 Sandf. (N. Y.) 689; Matter of Yonkers, 12 N. Y. St. 567; People *v.* Brooklyn, 1 Wend. (N. Y.) 318, 19 Am. Dec. 502.

30. *Colorado.*— Denver, etc., R. Co. *v.* Lamborn, 8 Colo. 380, 8 Pac. 582.

Illinois.— Kadish *v.* Chicago, (1886) 6 N. E. 467; People *v.* Highway Com'rs, 88 Ill. 141; Chicago *v.* Barbian, 80 Ill. 482; Sangamon County *v.* Brown, 13 Ill. 207.

Iowa.— Gear *v.* Dubuque, etc., R. Co., 20 Iowa 523, 89 Am. Dec. 550; Burlington, etc., R. Co. *v.* Sater, 1 Iowa 421.

Kentucky.— Manion *v.* Louisville, etc., R. Co., 90 Ky. 491, 14 S. W. 532, 12 Ky. L. Rep. 445.

New York.— New York, etc., R. Co. *v.* Thorne, 1 How. Pr. N. S. 190.

Pennsylvania.— Funk *v.* Waynesboro School Dist., (1886) 10 Atl. 427; *In re* Waynesboro School Dist., 1 Pa. Co. Ct. 422; Roberts *v.* Germantown R. Co., 11 Pittsb. Leg. J. 276.

West Virginia.— Barbour County Ct. *v.* Hall, 51 W. Va. 269, 41 S. E. 119.

See 18 Cent. Dig. tit. "Eminent Domain," § 649.

31. *Illinois.*— People *v.* Highway Com'rs, 88 Ill. 141; Sangamon County *v.* Brown, 13 Ill. 207.

Iowa.— State *v.* Keokuk, 9 Iowa 438.

Louisiana.— *In re* New Orleans, 20 La. Ann. 497.

Maryland.— State *v.* Graves, 19 Md. 351, 81 Am. Dec. 639.

Minnesota.— State Park Com'rs *v.* Henry, 38 Minn. 266, 36 N. W. 874.

New Jersey.— O'Neill *v.* Hudson County, 41 N. J. L. 161; Mabon *v.* Halsted, 39 N. J. L. 640.

New York.— Hudson River R. Co. *v.* Outwater, 3 Sandf. 689.

United States.— U. S. *v.* Oregon R., etc., Co., 16 Fed. 524, 9 Sawy. 61.

If the court increases the award, the company should have a reasonable time after the order is made to decide whether or not it will abandon the proceedings. Duluth *v.* Lindberg, 70 Minn. 132, 72 N. W. 967.

32. *California.*— South California Mountain Water Co. *v.* Cameron, 141 Cal. 283, 74 Pac. 838; Pool *v.* Butler, 141 Cal. 46, 74 Pac. 444.

Colorado.— Denver, etc., R. Co. *v.* Lamborn, 8 Colo. 380, 8 Pac. 582.

final judgment of condemnation has been entered,[33] or the amount of compensation has been finally fixed[34] and judgment therefor rendered,[35] or in any other way the landowner has acquired a vested right to compensation,[36] as where the same

Indiana.— Brokaw *v.* Terre Haute, 97 Ind. 451.

Iowa.— Burlington, etc., R. Co. *v.* Sater, 1 Iowa 421.

New Hampshire.—Clarke *v.* Manchester, 56 N. H. 502.

Wisconsin.— Wright *v.* Wisconsin Cent. R. Co., 29 Wis. 341.

See 18 Cent. Dig. tit. "Eminent Domain," § 649.

Proceedings may be dismissed after verdict on appeal. Brokaw *v.* Terre Haute, 97 Ind. 451. But see Drath *v.* Burlington, etc., R. Co., 15 Nebr. 367, 18 N. W. 717.

Although the damages have been agreed upon between the owner and the condemning party, on appeal the proceedings may be discontinued. People *v.* Highway Com'rs, 88 Ill. 141.

Partial abandonment.— A city may, after an appeal from an award of damages for taking a street, discontinue a portion of the street, or the proceedings may be further prosecuted for the purpose of having the damages assessed for so much of the street as was not discontinued. Curtis *v.* Portland, 60 Me. 55.

33. Chicago, etc., R. Co. *v.* Chicago, 148 Ill. 179, 36 N. E. 72; Duncan *v.* Louisville, 8 Bush (Ky.) 98; Matter of Washington Park, 15 Abb. Pr. N. S. (N. Y.) 148. In the case last cited it was held that an adjudication of the necessity or propriety of taking the land determines the rights of the respective parties, subject to the further proceedings to fix the compensation, and that after such adjudication the applicant cannot discontinue without the consent of the landowners.

Where the condemning party acquires no right to enter until the damages are actually paid or tendered, it has been held that the right of the owner to the compensation does not attach until the entry of the corporation on the condemned land, and hence the corporation may abandon the proceedings even after the judgment if it has not taken possession of the premises. Manion *v.* Louisville, etc., R. Co., 90 Ky. 491, 14 S. W. 532, 12 Ky. L. Rep. 445. See also Evanston *v.* O'Leary, 70 Ill. App. 124.

34. People *v.* Syracuse, 78 N. Y. 56, where the award became final through an omission to appeal within the time allowed. See also Myers *v.* South Bethlehem, 149 Pa. St. 85, 24 Atl. 280 [*distinguishing* State *v.* Graves, 19 Md. 351, 81 Am. Dec. 639].

After confirmation of the commissioner's report in proceedings, under the general railroad act, to condemn lands for railroad purposes, the rights of the parties become vested, and the corporation cannot escape payment of the award by abandonment of the proceedings. *In re* Rhinebeck, etc., R. Co., 67 N. Y. 242 [*affirming* 8 Hun 34]; Lent *v.* New York, etc., R. Co., 55 Hun (N. Y.) 180, 7 N. Y. Suppl. 729.

35. *Illinois.*— Chicago, etc., R. Co. *v.* Chicago, 148 Ill. 479, 36 N. E. 72.

Iowa.— Burlington, etc., R. Co. *v.* Sater, 1 Iowa 421. But *compare* Gear *v.* Dubuque, etc., R. Co., 20 Iowa 523, 89 Am. Dec. 550.

Kentucky.— Duncan *v.* Louisville, 8 Bush 98.

Louisiana.— *In re* New Orleans, 20 La. Ann. 394; *In re* New Orleans, 4 Rob. 357.

Missouri.— North Missouri R. Co. *v.* Lackland, 25 Mo. 515.

Nebraska.— Drath *v.* Burlington, etc., R. Co., 15 Nebr. 367, 18 N. W. 717.

New Jersey.— *In re* Jersey City Water Com'rs, 31 N. J. L. 72, 86 Am. Dec. 199.

New York.— People *v.* Syracuse, 78 N. Y. 56; *In re* Rhinebeck, etc., R. Co., 67 N. Y. 242 [*affirming* 8 Hun 34]; *In re* Syracuse, etc., R. Co., 4 Hun 311; *In re* Wall St., 17 Barb. 617; Hudson River R. Co. *v.* Outwater, 3 Sandf. 689; *In re* Anthony St., 20 Wend. 618, 32 Am. Dec. 608; New York *v.* Mapes, 6 Johns. Ch. 46.

Pennsylvania.— Wood *v.* State Insane Hospital, 164 Pa. St. 159, 30 Atl. 237.

Wisconsin.— Milwaukee, etc., R. Co. *v.* Stolze, 101 Wis. 91, 76 N. W. 1113.

Election to procure confirmation.— If a railroad company elects, after the report of the commissioners is filed, to proceed and procure the confirmation of the report, the relation of vendor and vendee is established, and the company is bound to pay the award. Lent *v.* New York, etc., R. Co., 55 Hun (N. Y.) 180, 7 N. Y. Suppl. 729.

A judgment irregularly entered on the day when the verdict was rendered, being a nullity, cannot stand in the way of a motion for a discontinuance of the proceedings. Moravian Seminary *v.* Bethlehem, 153 Pa. St. 583, 26 Atl. 237.

36. *Colorado.*— Denver, etc., R. Co. *v.* Lamborn, 8 Colo. 380, 8 Pac. 582.

Connecticut.— Shannahan *v.* Waterbury, 63 Conn. 420, 28 Atl. 611.

Indiana.— Lafayette *v.* Shultz, 44 Ind. 97.

Kentucky.— See Manion *v.* Louisville, etc., R. Co., 90 Ky. 491, 14 S. W. 532, 12 Ky. L. Rep. 445.

Maine.— Furbish *v.* Kennebec County, 93 Me. 117, 44 Atl. 364.

New York.— Buell *v.* Lockport, 11 Barb. 602; Hawkins *v.* Rochester, 1 Wend. 53, 19 Am. Dec. 462.

Pennsylvania.— Wood *v.* State Insane Hospital, 164 Pa. St. 159, 30 Atl. 237 (holding that this rule applies not only to railroad corporations, but also to municipal and quasi-municipal corporations); Moravian Seminary *v.* Bethlehem, 153 Pa. St. 583, 26 Atl. 237.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 649, 655.

has been paid or deposited according to law for his benefit,[37] the condemning party cannot abandon the proceedings so as to deprive the owner of his right to the compensation awarded,[38] especially where the damages are limited to those actually sustained.[39] The right to abandon or dismiss a proceeding is not lost by taking possession of the property under statutory authority pending the proceedings,[40] or by a mere entry to lay out the improvement,[41] or a mere wrongful or unlawful taking of possession;[42] but it has been held that if by the owner's express or implied consent the property is taken or damaged before compensation is made, the owner has a vested right in the compensation,[43] and where the statutes of the state are such that the taking of possession of the land gives the owner a vested right to compensation therefor (as distinguished from damages for the temporary disseizin), the taking of possession does deprive the condemning party of any right to subsequently escape payment of the compensation by abandoning or dismissing the proceedings.[44] Where the statute fixes a period within which the petitioner must discontinue or lose his right to do so, it may abandon at any time prior to the expiration of such period.[45]

When rights fixed.— In proceedings to acquire lands for public use under a statute allowing this to be done *in invitum* on making compensation, an adjudication of the necessity or propriety of taking certain lands determines the right of the respective parties subject to the further proceedings to fix the compensation, and after such adjudication the applicants cannot discontinue, nor should the court permit them to discontinue without the consent of the landowner. *In re* Washington Park, 15 Abb. Pr. N. S. (N. Y.) 148. Where an injunction obtained by an abutting owner to restrain the construction of a railroad was vacated on the condition that defendant should stipulate to prosecute the work vigorously to completion and give an undertaking to indemnify plaintiff against damages, defendant could not thereafter discontinue condemnation proceedings commenced against plaintiff, whether or not plaintiff might reinstate the injunction. *In re* Southern Boulevard R. Co., 17 N. Y. Suppl. 828. In Missouri the owner of land on which a state road is located acquires a vested right to the amount of the award as soon as the report of the commissioners is filed or the verdict of a jury found, and he is entitled to a warrant therefor, whether the road is actually opened or not. Wilkerson *v.* Buchanan County, 12 Mo. 328.

Even though title has not vested in the condemning party, if the owner's right to the amount awarded as compensation has vested, the proceedings cannot be discontinued. People *v.* Syracuse, 78 N. Y. 56.

Discontinuance of location by joint board of county commissioners.— Where a highway has been duly located by the joint adjudication and action of the county commissioners of several counties, their subsequent action under the original petition declaring a portion of such location discontinued because the damages awarded to the landowners by a jury or committee were excessive, is unauthorized and void. Jones *v.* Oxford County, 45 Me. 419.

37. *Colorado.*— Denver, etc., R. Co. *v.* Lamborn, 8 Colo. 380, 8 Pac. 582.

Illinois.— Kadish *v.* Chicago, (1886) 6 N. E. 467; Chicago *v.* Barbian, 80 Ill. 482.

Indiana.— Lafayette *v.* Shultz, 44 Ind. 97.

Missouri.— Gray *v.* St. Louis, etc., R. Co., 81 Mo. 126.

New York.— Crowner *v.* Watertown, etc., R. Co., 9 How. Pr. 457.

Pennsylvania.— Fischer *v.* Catawissa R. Co., 175 Pa. St. 554, 34 Atl. 860; *In re* Weatherly Water Co., 7 Pa. Dist. 561, 21 Pa. Co. Ct. 330.

See 18 Cent. Dig. tit. "Eminent Domain," § 649.

38. **Effect of order of dismissal.**— An order of dismissal can dispose only of what was then before the court and had not been finally adjudicated, and an improvident order of dismissal will not divest rights which have become vested under the proceedings and the subject-matter of which has passed out of the jurisdiction of the court. Kennet, etc., R. Co. *v.* Senter, 83 Mo. App. 181.

39. Smart *v.* Portsmouth, etc., R. Co., 20 N. H. 233; Clough *v.* Unity, 18 N. H. 75.

40. Denver, etc., R. Co. *v.* Lamborn, 8 Colo. 380, 8 Pac. 582; Brokaw *v.* Terre Haute, 97 Ind. 451.

41. Funk *v.* Waynesboro School Dist., (Pa. 1886) 10 Atl. 427; Roberts *v.* Germantown R. Co., 11 Pittsb. Leg. J. (Pa.) 278.

42. Chicago, etc., R. Co. *v.* Gates, 120 Ill. 86, 11 N. E. 527.

43. Chicago *v.* Barbian, 80 Ill. 482 [*followed* in Kadish *v.* Chicago, (Ill. 1886) 6 N. E. 467].

44. See Beale *v.* Pennsylvania R. Co., 86 Pa. St. 509.

Circumstances not constituting a taking.— The fact that people living in the neighborhood of premises which are sought to be condemned and others having occasion to pass that way have been accustomed to drive or walk over the premises whenever it was desirable to do so does not constitute a taking of possession by the municipality so as to prevent it from abandoning the proceedings. Rice *v.* Chicago, 57 Ill. App. 558.

45. Cincinnati Southern R. Co. *v.* Haas, 9 Ohio Dec. (Reprint) 33, 10 Cinc. L. Bul. 97

e. Imposition of Conditions. Where the condemning party seeks to discontinue the proceedings the court may impose such terms as under the circumstances justice and fairness to the parties require.[46] The payment of costs by the condemning party which discontinues the proceedings is very commonly required.[47] In a number of cases the owner has been allowed his expenses necessarily incurred in the matter,[48] including fees necessarily paid to counsel;[49] but the more general rule is that such disbursements are not allowable unless authorized by statute.[50]

2. What Amounts to Abandonment. A delay in prosecuting the condemnation proceedings may amount to an abandonment;[51] but where the owner appeals from the award it is incumbent upon him to prosecute his appeal, and his delay cannot be urged as tending to show an abandonment by the petitioner.[52] Under the statutes of some states a failure of the condemning party to pay the amount of the award within a fixed time after the confirmation of the award or the entry of final judgment in the condemnation proceedings amounts to an abandonment of the proceedings.[53] A resolution of a city council pursuant to charter, to abandon proceedings for laying out a street, in which damages have been awarded, is

[*affirming* 8 Ohio Dec. (Reprint) 642, 9 Cinc. L. Bul. 97]; Andrews *v.* Hyde Park, 20 Ohio Cir Ct. 278, 10 Ohio Cir. Dec. 781.

46. Hudson River R. Co. *v.* Outwater, 3 Sandf. (N. Y.) 689; Onondaga County *v.* White, 38 Misc. (N. Y.) 587, 77 N. Y. Suppl. 1074; New York, etc., R. Co. *v.* Thorne, 1 How. Pr. N. S. (N. Y.) 190; Milwaukee, etc., R. Co. *v.* Stolze, 101 Wis. 91, 76 N. W. 1113.

A repeal of the ordinance authorizing the proceeding or of so much as relates to the property in regard to which the discontinuance is allowed should be required as a condition precedent to a discontinuance of the condemnation proceedings by a municipal corporation. Moravian Seminary *v.* Bethlehem Borough, 153 Pa. St. 583, 26 Atl. 237.

47. *Indiana.*— Brokaw *v.* Terre Haute, 97 Ind. 451.

Kentucky.— Manion *v.* Louisville, etc., R. Co., 90 Ky. 491, 14 S. W. 532, 12 Ky. L. Rep. 445.

Missouri.— State *v.* Hug, 44 Mo. 116; North Missouri R. Co. *v.* Reynal, 25 Mo. 534.

New York.— *In re* Waverly Waterworks Co., 85 N. Y. 478 [*reversing* 16 Hun 57]; Hudson River R. Co. *v.* Outwater, 3 Sandf. 689.

Pennsylvania.— Moravian Seminary *v.* Bethlehem Borough, 153 Pa. St. 583, 26 Atl. 237; *In re* Penn Alley, 1 Pa. Dist. 141.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 649, 650; and Costs, 11 Cyc. 66; Dismissal and Nonsuit, 14 Cyc. 418.

48. *Missouri.*— Owen *v.* Springfield, 83 Mo. App. 557.

New York.— *In re* Waverly Waterworks Co., 85 N. Y. 478 [*reversing* 16 Hun 57]; *In re* Le Roy, 35 N. Y. App. Div. 177, 55 N. Y. Suppl. 149 [*affirming* 23 Misc. 53, 50 N. Y. Suppl. 611].

Ohio.— Cincinnati *v.* Thrall, 9 Ohio S. & C. Pl. Dec. 251, 6 Ohio N. P. 158.

Pennsylvania.— Moravian Seminary *v.* Bethlehem Borough, 153 Pa. St. 583, 26 Atl. 237; *In re* Franklin St., 14 Pa. Super. Ct. 403.

England.— Reg. *v.* Lancashire Justices, 4 Wkly. Rep. 643.

See 18 Cent. Dig. tit. "Eminent Domain," § 650.

49. St. Louis R. Co. *v.* Southern R. Co., 138 Mo. 591, 39 S. W. 471; *In re* Waverly Waterworks Co., 85 N. Y. 478 [*reversing* 16 Hun 57]; Cincinnati *v.* Thrall, 9 Ohio S. & C. Pl. Dec. 251, 6 Ohio N. P. 158; Marshall *v.* Grove, 10 Pa. Co. Ct. 532.

50. *California.*— Coburn *v.* Townsend, 103 Cal. 233, 37 Pac. 202; San Jose, etc., R. Co. *v.* Mayne, 83 Cal. 566, 23 Pac. 522.

Illinois.— Chicago Sanitary Dist. *v.* Bernstein, 175 Ill. 215, 51 N. E. 720.

Kentucky.— Owensboro, etc., R. Co. *v.* Gray, 14 Ky. L. Rep. 79.

Minnesota.— Minneapolis, etc., R. Co. *v.* Woodworth, 32 Minn. 452, 21 N. W. 476; Bergman *v.* St. Paul, etc., R. Co., 21 Minn. 533.

Missouri.— St. Louis *v.* Meintz, 107 Mo. 611, 18 S. W. 30.

New York.— *In re* New York, 34 N. Y. App. Div. 468, 54 N. Y. Suppl. 295.

Ohio.— Andrews *v.* Hyde Park, 20 Ohio Cir. Ct. 278, 10 Ohio Cir. Dec. 781; Hyde Park *v.* Grant, 9 Ohio S. & C. Pl. Dec. 723, 6 Ohio N. P. 471.

See 18 Cent. Dig. tit. "Eminent Domain," § 650.

51. Macon *v.* Owen, 3 Ala. 116 (holding that where a writ of ad quod damnum is sued out in September, returnable at the next term of the orphans' court (sitting monthly), and no proceedings are had thereon until the next February, it is to be considered as abandoned); People *v.* Lewis, 26 How. Pr. (N. Y.) 378.

Court may dismiss proceeding for want of prosecution. Colorado Eastern R. Co. *v.* Union Pac. R. Co., 94 Fed. 312, 36 C. C. A. 263.

52. Bradley *v.* Northern Pac. R. Co., 38 Minn. 234, 36 N. W. 345.

53. Alabama Midland R. Co. *v.* Newton, 94 Ala. 443, 10 So. 89; Bartleson *v.* Minneapolis, 33 Minn. 468, 23 N. W. 839; Minneapolis, etc., R. Co. *v.* Woodworth, 32 Minn.

an effectual abandonment, and is not qualified by a subsequent resolution adopted at the same meeting instituting proceedings for laying the same street over the same lands.[54] Where the condemning party deposits the condemnation money in accordance with law and takes possession of the land, a subsequent withdrawal of the deposit, for the reason that the proceedings were illegal, is an abandonment of all right to claim possession of the property under such proceedings.[55] An agreement submitting to arbitrators the matters involved in the condemnation proceedings is in effect a discontinuance of the condemnation.[56] A dismissal as to one of several joint owners amounts to a dismissal as to all of them.[57]

8. EFFECT OF DISMISSAL OR ABANDONMENT — a. Title of Owner. Where the proceedings are abandoned the title remains in the owner as if no proceedings had been had.[58]

b. Rights of Owner — (1) *RECOVERY OF COMPENSATION.* Where the condemnation proceedings are abandoned, the owner of the property cannot recover the compensation awarded,[59] especially if the condemning party has not taken possession of the land.[60]

452, 21 N. W. 476; Cincinnati Southern R. Co. *v.* Haas, 9 Ohio Dec. (Reprint) 33, 10 Cinc. L. Bul. 97 [*affirming* 8 Ohio Dec. (Reprint) 642, 9 Cinc. L. Bul. 97].

What is a final judgment.—A judgment dismissing an appeal of the condemning party from the award is a final judgment within the meaning of the Minnesota statute providing that "if such award, when no appeal is taken, is not paid within sixty days after the filing of said award, or, in case an appeal is taken, within sixty days after the entry of final judgment, the proceedings shall be deemed to be abandoned by the party instituting the same, and the person in whose favor the award was made may have judgment entered against the corporation instituting the proceeding, for damages, to be computed on the award at the rate of ten per cent, from the date of the filing the award to the date of entering judgment." Minneapolis, etc., R. Co. *v.* Woodworth, 32 Minn. 452, 453, 21 N. W. 476.

Failure to pay within the time limited is regarded as final on the question of the necessity of taking, in the absence of a showing that the failure was by mistake or unintentional. Cincinnati Southern R. Co. *v.* Haas, 9 Ohio Dec. (Reprint) 33, 10 Cinc. L. Bul. 97 [*affirming* 8 Ohio Dec. (Reprint) 642, 9 Cinc. L. Bul. 97].

Where possession taken.— If a city, after the award is made, takes possession of the land and constructs a viaduct over railroad tracks, it does not abandon the proceeding by failing to prepay the award. Woolard *v.* Nashville. 108 Tenn. 353, 67 S. W. 801.

54. State *v.* Minneapolis, 40 Minn. 483, 42 N. W. 355.

55. Hull *v.* Chicago, etc., R. Co., 21 Nebr. 371, 32 N. W. 162.

56. Niagara Falls, etc., R. Co. *v.* Brundage, 7 N. Y. App. Div. 445, 39 N. Y. Suppl. 1048.

57. Grand Rapids, etc., R. Co. *v.* Alley, 34 Mich. 16.

58. *Indiana.*— Keicher *v.* Killbuck Turnpike Co.. 33 Ind. 333, the opinion of the court being by Gregory, J.

Missouri.— St. Joseph *v.* Hamilton, 43 Mo. 282.

New York.— Matter of Munson, 9 N. Y. St. 126.

Pennsylvania.— *In re* Franklin St., 14 Pa. Super. Ct. 403.

Wisconsin.— Van Valkenburgh *v.* Milwaukee, 43 Wis. 574.

United States.— Bauman *v.* Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. ed. 270.

See 18 Cent. Dig. tit. "Eminent Domain," § 655.

59. *Connecticut.*— Carson City *v.* Hartford, 48 Conn. 68.

Illinois.— Ligare *v.* Chicago, etc., R. Co., 160 Ill. 530, 43 N. E. 734 [*affirming* 50 Ill. App. 84].

Iowa.— Hastings *v.* Burlington, etc., R. Co., 38 Iowa 316.

Kentucky.— Manion *v.* Louisville, etc., R. Co., 90 Ky. 491, 14 S. W. 532, 12 Ky. L. Rep. 445.

Minnesota.— Daley *v.* St. Paul, 7 Minn. 390.

Vermont.— Stacey *v.* Vermont Cent. R. Co., 27 Vt. 39.

Wisconsin.— Feiten *v.* Milwaukee, 47 Wis. 494, 2 N. W. 1148; Van Valkenburgh *v.* Milwaukee, 43 Wis. 574.

See 18 Cent. Dig. tit. "Eminent Domain," § 655.

Abandonment is a matter of defense to be set up in the answer. Daley *v.* St. Paul, 7 Minn. 390.

Collection of judgment for compensation may be enjoined. Van Valkenburgh *v.* Milwaukee, 43 Wis. 574.

Where the proceedings are dismissed at the instance of the owner for a failure on the part of the condemning party to comply with some statutory provision, this amounts to an abandonment, and the owner cannot recover the damages. Pearce *v.* Chicago, 176 Ill. 152, 52 N. E. 27 [*affirming* 67 Ill. App. 671].

60. *California.*—Lamb *v.* Schottler, 54 Cal. 319.

Connecticut.—Stevens *v.* Danbury, 53 Conn. 9, 22 Atl. 1071.

(II) *RECOVERY OF DAMAGES.* Where the proceedings are abandoned the petitioner is liable for all damages which the owner has suffered by reason of anything done in connection with the proposed condemnation.[61] But only the actual losses inflicted on the owner by the institution and maintenance of the proceedings are recoverable,[62] and it has been held that to warrant a recovery the acts causing the loss must have been both wrongful and injurious.[63] While the

Illinois.— Chicago *v.* Hayward, 176 Ill. 130, 52 N. E. 26 [*reversing* 60 Ill. App. 582].
Indiana.— Decker *v.* Washburn, 8 Ind. App. 673, 35 N. E. 1111.
Maryland.—Black *v.* Baltimore, 50 Md. 235, 33 Am. Rep. 320.
Massachusetts.—Drury *v.* Boston, 101 Mass. 439.
Missouri.— St. Joseph *v.* Hamilton, 43 Mo. 282.
Ohio.— Hayes *v.* Cincinnati, etc., R. Co., 17 Ohio St. 110; State *v.* Cincinnati, etc., R. Co., 17 Ohio St. 103.
See 18 Cent. Dig. tit. "Eminent Domain," § 655.

If possession has been actually taken and retained, the owner is entitled to recover compensation for the appropriation. Montreal *v.* Hogan, 8 Quebec Q. B. 534.

61. *Illinois.*— Centralia, etc., R. Co. *v.* Henry, 31 Ill. App. 456.
Louisiana.— Dussuau *v.* Municipality No. 1, 6 La. Ann. 575.
Missouri.— Simpson *v.* Kansas City, 111 Mo. 237, 20 S. W. 38; Leisse *v.* St. Louis, etc., R. Co., 72 Mo. 561 [*affirming* 2 Mo. App. 105, 5 Mo. App. 585].
New Hampshire.— Clarke *v.* Manchester, 56 N. H. 502.
Wisconsin.— Feiten *v.* Milwaukee, 47 Wis. 494, 2 N. W. 1148; Van Valkenburgh *v.* Milwaukee, 43 Wis. 574.
See 18 Cent. Dig. tit. "Eminent Domain," § 654.

The owner may recover for the interruption to his business caused by the proceedings and the resulting loss (Lohse *v.* Missouri Pac. R. Co., 44 Mo. App. 645) and for the loss of rents (McLaughlin *v.* Municipality No. 2, 5 La. Ann. 504; Leisse *v.* St. Louis, etc., R. Co., 2 Mo. App. 105 [*affirmed* in 72 Mo. 561]. See also Simpson *v.* Kansas City, 111 Mo. 237, 20 S. W. 38. *Contra*, where loss not due to wrongful act of condemning party. Feiten *v.* Milwaukee, 47 Wis. 494, 2 N. W. 1148).

The owner may sue for trespass and is not restricted to the statutory remedy by writ of ad quod damnum. Pittsburgh, etc., R. Co. *v.* Swinney, 97 Ind. 586, where the court said that the cases of Indiana Cent. R. Co. *v.* Oakes, 20 Ind. 9; McCormack *v.* Terre Haute, etc., R. Co., 9 Ind. 283; Victory *v.* Fitzpatrick, 8 Ind. 281, have been either expressly or impliedly overruled.

Proceeding to obtain indemnity for trouble and expense.— Where an order of a city to take land for a street becomes void, under the statute, by reason of a lapse of two years without possession having been taken or damages awarded, the owner, seeking to recover for trouble and expense occasioned by the proceeding, must begin *de novo*, and cannot recover under a petition for a jury to assess actual damages for the taking of the land. Drury *v.* Boston, 101 Mass. 439.

Attorneys' fees.— Minn. Gen. St. (1878), c. 34, § 29, as amended by Laws (1881), c. 57, authorizes the entry of a judgment summarily and upon motion, upon condemnation proceedings being abandoned, for damages to the owner at the rate of ten per cent on the award from the date of the filing the award to the date of entry of judgment, but it does not authorize judgment to be thus entered for counsel fees incurred by the landowner in the progress of the condemnation proceedings, whether or not, notwithstanding the act of 1881, the landowner may recover for such counsel fees by action by virtue of Minn. Gen. St. (1878), c. 34, § 31. Minneapolis, etc., R. Co. *v.* Woodworth, 32 Minn. 452, 21 N. W. 476.

Delay.— Where, in the case of the condemnation of land by a city for a contemplated public improvement, the notice to M that his land would be condemned was given seven months before the condemnation and the fixing of the value of his property, and M acquiesced in the assessment, but other parties appealed, and all of these appeals had not been finally disposed of before the ordinance was repealed, there was no such unauthorized delay on the part of the city in abandoning the work as would give M a cause of action on that ground. Baltimore *v.* Musgrave, 48 Md. 272, 30 Am. Rep. 458.

Reinstitution of proceedings.— Notwithstanding the reinstitution of proceedings for the condemnation of the same property, the condemning party is liable to an action for damages occasioned by the first proceedings unless such damages were adjudicated in the second, and whether they were so adjudicated is a question which may be tried by submitting it to the jury upon the evidence. Gibbons *v.* Missouri Pac. R. Co., 40 Mo. App. 146. See also Cincinnati, etc., R. Co. *v.* Blank, 5 Ohio S. & C. Pl. Dec. 569, 7 Ohio N. P. 605.

62. Leisse *v.* St. Louis, etc., R. Co., 2 Mo. App. 105 [*affirmed* in 72 Mo. 561]; Thurston *v.* Alstead, 26 N. H. 259; Clark *v.* Hampstead, 19 N. H. 365. As to the right to recover expenses, including counsel fees, see XI, Q.

63. Feiten *v.* Milwaukee, 47 Wis. 494, 2 N. W. 1148 [*distinguishing* Van Valkenburgh *v.* Milwaukee, 43 Wis. 574]. See also Bergman *v.* St. Paul, etc., R. Co., 21 Minn. 533, 534, where proceedings for the condemnation of land having been dismissed, it was held that the owner could not maintain an action to recover for his labor, loss of time, and expenses in conducting and attending to the

final discontinuance of the proceedings is not alone *prima facie* evidence that they were unnecessary in the beginning and that consequently the whole proceeding was wrongful,[64] a *prima facie* case is made where there was a long, unexplained, and wrongful delay in the proceedings, and they were finally dismissed;[65] and a voluntary dismissal of the proceedings for the assessment of damages by the condemning party after it has entered under a statutory license to enter and continue in possession while proceedings are pending, and has greatly damaged the property by carrying away sand and gravel, is such an abuse of the statutory license as to constitute the condemning party a trespasser *ab initio*.[66]

4. SURRENDER OR RECOVERY OF POSSESSION. Where the condemning party has entered into possession of the land pending proceedings to condemn, it must surrender and abandon the possession in order to render a discontinuance effectual,[67] and the owner is entitled to recover possession.[68]

5. WITHDRAWAL OF DEPOSIT. Where the mere making of a deposit in court does not have the effect of giving the property-owner a vested right to compensation, the condemning party may, upon the proceedings being abandoned or dismissed, withdraw or reclaim the deposit if it has not entered upon, taken possession of, or injured the land;[69] but it is otherwise where the condemning party has taken possession or the owner has otherwise acquired a vested right in the deposit.[70]

6. REINSTATEMENT OF PROCEEDINGS. Abandoned proceedings cannot be restored or reinstated as against third persons whose rights have intervened.[71]

7. SUBSEQUENT PROCEEDING TO APPROPRIATE SAME PROPERTY. A condemning party which abandons the proceedings does not thereby lose the right to institute new proceedings for the condemnation of the same property, if it acts in good faith;[72] but it is otherwise where the abandonment of the first proceedings was in

proceedings on his part, the court saying: "If the plaintiff is entitled to recover, it must be by virtue of some contract, express or implied, or of some positive rule of law conferring upon him a right of action, or upon the ground that defendant has been guilty of a tort. . . . Neither is there anything in the complaint tending to show any tortious or malicious conduct on the part of defendant."

64. Simpson *v.* Kansas City, 111 Mo. 237, 20 S. W. 38 [*disapproving* Rogers *v.* St. Charles, 3 Mo. App. 41; Leisse *v.* St. Louis, etc., R. Co., 2 Mo. App. 105 (*affirmed* in 72 Mo. 561)].

65. Simpson *v.* Kansas City, 111 Mo. 237, 20 S. W. 38.

66. Pittsburgh, etc., R. Co. *v.* Swinney, 97 Ind. 586.

67. Wilcox *v.* St. Paul, etc., R. Co., 35 Minn. 439, 29 N. W. 148; Witt *v.* St. Paul, etc., R. Co., 35 Minn. 404, 29 N. W. 161; Bellingham Bay, etc., R. Co. *v.* Strand, 14 Wash. 144, 44 Pac. 140, 46 Pac. 238, holding that where plaintiff in condemnation proceedings maintained possession of the land by virtue of the proceedings, and did not offer to surrender it, it was properly denied the right to abandon the proceedings after verdict assessing defendant's damages.

68. Keicher *v.* Killbuck Turnpike Co., 33 Ind. 333.

Where the condemning party was in possession when the proceedings were begun under a grant from a town and not by virtue of any process of the court, the owner is not entitled to a writ of restitution. Durham, etc., R. Co. *v.* North Carolina R. Co., 108 N. C. 304, 12 S. E. 983.

69. Reynolds *v.* Louisiana, etc., R. Co., 59 Ark. 171, 26 S. W. 1039; Atchison, etc., R. Co. *v.* Wilson, 66 Kan. 233, 69 Pac. 342.

Where condemnation proceedings void.— Where, after a railroad company had commenced work upon, and proceedings to condemn land, it had been enjoined from adopting the route proposed, since which it had wholly abandoned the work on the land in question, and had no intention of resuming, the proceedings for condemnation were void, and the deposit continued the property of the company. Brattleboro First Nat. Bank *v.* West River R. Co., 49 Vt. 167.

Construction of sewer.— A city had condemned certain land for a street, and constructed a sewer through it, and had deposited in court a part of the amount awarded. Subsequently the proceedings were dismissed on the owner's petition, on account of the nonpayment of the balance of the compensation, and the street was not opened. Both parties having petitioned for the money deposited in court, it was held that the construction of the sewer gave the owner no claim on the money, and that it should be paid back to the city. Pearce *v.* Chicago, 67 Ill. App. 671.

70. Kennet, etc., R. Co. *v.* Senter, 83 Mo. App. 181.

71. Matter of Folts St., 29 N. Y. App. Div. 69, 51 N. Y. Suppl. 390. See also State *v.* Minneapolis, 40 Minn. 483, 42 N. W. 355.

72. *Alabama.*— Alabama Midland R. Co. *v.* Newton, 94 Ala. 443, 10 So. 89.

bad faith or simply for the purpose of depriving the owners of the damages awarded therein.[73] A former judgment of condemnation which remains in full force, but unsatisfied, is a bar to a new proceeding to condemn the same land.[74]

8. CONDEMNATION OF OTHER LANDS FOR SAME PURPOSE. A county court does not, by dismissing proceedings to condemn a particular piece of land for a road, even under a contract with the owner, lose the right to establish the road on another location, through the land of the same owner.[75]

P. Appeal and Certiorari — 1. APPEAL[76] — a. Right of Review — (1) *IN GENERAL.* The right to bring up for review, either by appeal or writ of error, questions arising in condemnation proceedings, is usually a statutory right,[77] the decisions being, however, somewhat conflicting as to whether the right must be

Illinois.— Pearce *v.* Chicago, 169 Ill. 631, 48 N. E. 330.

Iowa.— Corbin *v.* Cedar Rapids, etc., R. Co., 66 Iowa 73, 23 N. W. 270. See also Robertson *v.* Hartenbower, 120 Iowa 410, 94 N. W. 857.

Massachusetts.— Worcester *v.* Lakeside Mfg. Co., 174 Mass. 299, 54 N. E. 833.

Minnesota.— State *v.* Minneapolis, 40 Minn. 483, 42 N. W. 355.

Missouri.— See Gibbons *v.* Missouri Pac. R. Co., 40 Mo. App. 146.

New York.— Hudson River R. Co. *v.* Outwater, 3 Sandf. 689.

Ohio.— Cincinnati Southern R. Co. *v.* Haas, 42 Ohio St. 239; Cincinnati, etc., R. Co. *v.* Blank, 5 Ohio S. & C. Pl. Dec. 569, 7 Ohio N. P. 605.

73. Chicago, etc., R. Co. *v.* Chicago, 148 Ill. 479, 36 N. E. 72; Cincinnati *v.* Hott, 8 Ohio S. & C. Pl. Dec. 643, 5 Ohio N. P. 418.

The remedy is by a motion to dismiss the second proceeding and not by a bill in chancery for an injunction. Chicago, etc., R. Co. *v.* Chicago, 148 Ill. 479, 36 N. E. 72; Chicago, etc., R. Co. *v.* Chicago, 143 Ill. 641, 32 N. E. 178.

74. Pearce *v.* Chicago, 169 Ill. 631, 48 N. E. 330.

75. Barbour County Ct. *v.* Hall, 51 W. Va. 269, 41 S. E. 119.

76. Appeal and error generally see APPEAL AND ERROR.

77. *Alabama.*— Memphis, etc., R. Co. *v.* Birmingham, etc., R. Co., 96 Ala. 571, 11 So. 642, 18 L. R. A. 166.

Connecticut.— Cockcroft's Appeal, 60 Conn. 161, 22 Atl. 482; Kirtland *v.* Meriden, 39 Conn. 107.

Illinois.— Brown *v.* Robertson, 123 Ill. 631, 15 N. E. 30; Austin *v.* Belleville, etc., R. Co., 19 Ill. 310.

Indiana.— Wabash, etc., Canal *v.* Johnson, 2 Ind. 219.

Iowa.— Sigafoos *v.* Talbot, 25 Iowa 214; Umbarger *v.* Bean, 15 Iowa 256; Deaton *v.* Polk County, 9 Iowa 594.

Kentucky.— Tracy *v.* Elizabethtown, etc., R. Co., 78 Ky. 309.

Maine.— Knight *v.* Aroostook River R. Co., 67 Me. 291; Cowell *v.* Great Falls Mfg. Co., 6 Me. 282.

Maryland.— Moores *v.* Bel-Air Water, etc., Co., 79 Md. 391, 29 Atl. 1033; Page *v.* Baltimore, 34 Md. 558; Wilmington, etc., R. Co. *v.* Condon, 8 Gill & J. 443.

Massachusetts.—*In re* Northampton Bridge, 116 Mass. 442; Morey *v.* Whittenton Mills, 8 Cush. 374.

Michigan.—Kundinger *v.* Saginaw, 59 Mich. 355, 26 N. W. 634.

Minnesota.— Paddock *v.* St. Croix Boom Corp., 8 Minn. 277.

Mississippi.— New Orleans, etc., R. Co. *v.* Hemphill, 35 Miss. 17.

Missouri.— St. Charles *v.* Rogers, 49 Mo. 530; North Missouri R. Co. *v.* Lackland, 25 Mo. 515.

New Jersey.— Paterson, etc., Traction Co. *v.* De Gray, (Sup. 1903) 56 Atl. 250.

New York.— *In re* Board of St. Opening, 111 N. Y. 581, 19 N. E. 283; Troy, etc., R. Co. *v.* Northern Turnpike Co., 16 Barb. 100; Rochester, etc., R. Co. *v.* Beckwith, 10 How. Pr. 168.

North Carolina.— Cape Fear, etc., R. Co. *v.* Stewart, 132 N. C. 248, 43 S. E. 638; Raleigh, etc., R. Co. *v.* Jones, 23 N. C. 24.

Oregon.— Hammer *v.* Polk County, 15 Oreg. 578, 16 Pac. 420.

Pennsylvania.— *In re* Vernon Park, 163 Pa. St. 70, 29 Atl. 972; Pennsylvania R. Co. *v.* Gorsuch, 84 Pa. St. 411; Church *v.* Northern Cent. R. Co., 45 Pa. St. 339; Ligat *v.* Com., 19 Pa. St. 456; Turner's Appeal, 2 Walk. 229; Miller *v.* Southwest Pennsylvania Pipe Lines, 2 Pa. Dist. 602.

South Carolina.—Atlantic Coast Line R. Co. *v.* South Bound R. Co., 57 S. C. 317, 35 S. E. 553.

Virginia.— Chesapeake, etc., Canal Co. *v.* Hoye, 2 Gratt. 511.

See 18 Cent. Dig. tit. "Eminent Domain," § 660.

A writ of error and not appeal is the proper mode of review under some statutes.

Florida.— Florida Cent., etc., R. Co. *v.* Bear, 43 Fla. 319, 31 So. 287.

Indiana.— Lawrenceburgh, etc., R. Co. *v.* Smith, 3 Ind. 253, from an award of damages.

Maryland.— Moores *v.* Bel-Air Water, etc., Co., 79 Md. 391, 29 Atl. 1033.

Mississippi.— New Orleans, etc., R. Co. *v.* Hemphill, 35 Miss. 17.

Nebraska.— Nebraska L. & T. Co. *v.* Lincoln, etc., R. Co., 53 Nebr. 246, 73 N. W. 546, from judgment of district court.

Ohio.— Toledo, etc., R. Co. *v.* Toledo, etc., R. Co., 9 Ohio Cir. Dec. 244.

expressly conferred,[78] or whether the general statute governing civil proceedings is applicable.[79] But where no legal objection exists to the proceeding for taking the land, the remedy for an interference otherwise with the rights of the owner is not by an appeal from the order of condemnation, but by an action at law.[80]

(II) *PERSONS ENTITLED* — (A) *In General.* Either the condemning party or the landowner has the right of appeal,[81] and although in some jurisdictions it is held that the person appealing must have been brought into the proceeding as a party thereto,[82] the rule in other jurisdictions is that any one who is directly affected by the result of the proceeding may appeal.[83] The owner may appeal

United States.— Baltimore, etc., R. Co. *v.* Sixth Presb. Church, 19 Wall. 62, 22 L. ed. 97.

78. Hutchins *v.* De Witt County Com'rs, 6 Ill. 345; Chappell *v.* Edmondson Ave., etc., Electric R. Co., 83 Md. 512, 35 Atl. 19; Moores *v.* Bel-Air Water, etc., Co., 79 Md. 391, 29 Atl. 1033; Conter *v.* St. Paul, etc., R. Co., 24 Minn. 313; McNamara *v.* Minnesota Cent. R. Co., 12 Minn. 388; *In re* Board of St. Opening, 111 N. Y. 581, 19 N. E. 283.

That the right must be expressly conferred see Hutchins *v.* De Witt County Com'rs, 6 Ill. 345; Chappell *v.* Edmondson Ave., etc., R. Co., 83 Md. 512, 35 Atl. 19; Moores *v.* Bel-Air Water, etc., Co., 79 Md. 391, 29 Atl. 1033. But see Pemigewasset Bridge *v.* New Hampton, 47 N. H. 151, holding that an appeal would lie from an award of damages notwithstanding there was no special provision by the statute for the right of appeal.

79. Bowersox *v.* Seneca County Com'rs, 20 Ohio St. 496 (holding the general statute not applicable); Atlantic Coast Line R. Co. *v.* South Bound R. Co., 57 S. C. 317, 35 S. E. 553; Parks *v.* Dallas Terminal R., etc., Co., (Tex. Civ. App. 1904) 78 S. W. 533.

In Missouri it is said that "a right of appeal exists under the general law, whether given or not by the special act or charter under which the proceeding is had, whenever a burden is imposed upon the property of a citizen." King's Lake Drainage, etc., Dist. *v.* Jamison, 176 Mo. 557, 564, 75 S. W. 679.

In New York it is held that proceedings in eminent domain form an independent and complete system, especially created by the legislature, and not connected with or controlled by the provisions of the code applicable to appeals to the court of appeals. *In re* Board of St. Opening, 111 N. Y. 581, 19 N. E. 283; *In re* Delaware, etc., Canal Co., 69 N. Y. 209; Erie R. Co. *v.* Steward, 59 N. Y. App. Div. 187, 69 N. Y. Suppl. 57.

In Vermont it was formerly held that the statute permitting all questions of law decided on the trial of a case in the county court to be carried up to the supreme court on exceptions did not apply to questions arising in proceedings for appraising the damages in laying out a highway (Adams *v.* Newfane, 8 Vt. 271); but under Acts (1896), No. 265, the general provisions are held to be applicable (Littleton Bridge Co. *v.* Pike, 72 Vt. 7, 47 Atl. 108).

In Washington, where provision is made for a review on appeal only as to the amount of damages, the general statute relating to appeal does not apply. Western American Co. *v.* St. Ann Co., 22 Wash. 158, 60 Pac. 158.

80. *In re* New York, etc., R. Co., 101 N. Y. 685, 5 N. E. 769.

81. *Illinois.*— Hartman *v.* Belleville, etc., R. Co., 64 Ill. 24.

Kentucky.— Wright *v.* Baker, 94 Ky. 343, 22 S. W. 335, 15 Ky. L. Rep. 109.

Massachusetts.— Marshall Fishing Co. *v.* Hadley Falls Co., 5 Cush. 602.

New Hampshire.— Page *v.* Keene, 49 N. H. 535.

Pennsylvania.— *In re* Towanda Bridge Co., 91 Pa. St. 216; *In re* South Lebanon Tp. School Dist., 22 Pa. Super. Ct. 330; Bechtel *v.* Bechtelsville Borough, 3 Pa. Dist. 713; Lodge *v.* Frankford, etc., R. Co., 9 Phila. 543.

South Carolina.— Chesterfield, etc., R. Co. *v.* Johnson, 58 S. C. 560, 36 S. E. 919.

Washington.— Western American Co. *v.* St. Ann Co., 22 Wash. 158, 60 Pac. 158.

Wisconsin.— Lee *v.* Northwestern Union R. Co., 33 Wis. 222.

See 18 Cent. Dig. tit. "Eminent Domain," § 665.

The real owner may appeal, although the commissioners in their report named the wrong person as the probable owner of the land. Chicago, etc., R. Co. *v.* Grovier, 41 Kan. 685, 21 Pac. 779.

But the condemning company cannot appeal from an award distributing the compensation to the several owners as it is not a party to, nor interested in, such distribution. Chicago, etc., R. Co. *v.* Baker, 102 Mo. 553, 15 S. W. 64; Haswell *v.* Vermont Cent. R. Co., 23 Vt. 228; Spaulding *v.* Milwaukee, etc., R. Co., 57 Wis. 304, 14 N. W. 368, 15 N. W. 482.

A railroad company cannot, by a single appeal, in which it makes the county commissioners the adverse party, transfer the entire proceeding into the court to which the appeal lies, so as to affect the landowners. Missouri Pac. R. Co. *v.* Gruendel, 3 Kan. App. 53, 44 Pac. 439.

82. Cedar Rapids, etc., Land, etc., Co. *v.* Chicago, etc., R. Co., 60 Iowa 35, 14 N. W. 76; Connable *v.* Chicago, etc., R. Co., 60 Iowa 27, 14 N. W. 75; *In re* Oneida St., 22 Misc. (N. Y.) 235, 49 N. Y. Suppl. 828; Wingfield *v.* Crenshaw, 3 Hen. & M. (Va.) 245.

A party permitted to intervene on an ex parte order, but afterward dismissed from the suit on the setting aside of the order, is not such a party to the action as to be entitled to appeal. People *v.* Pfeiffer, 59 Cal. 89.

83. Chicago, etc., R. Co. *v.* Grovier, 41 Kan. 685, 21 Pac. 779; Wilson *v.* Cowley

even though the damages are assessed in his favor, since the effect of the condemnation is to appropriate his property.[84] As a general rule the owner to whom the appeal is allowed is the one who is the owner at the time of the taking[85] and not a subsequent grantee or purchaser,[86] unless he becomes such pending the proceedings.[87] Where the owner dies pending the proceedings, the right of appeal passes to the heirs or devisees, and not to the personal representatives.[88]

(B) *Owners of Separate Interests.* Each owner of a separate interest or tract has the right of appeal with reference to such interest,[89] and an appeal by one owner cannot affect the rights of others who are joined with him in the original proceeding.[90] Thus if a mortgagee is a party to the proceedings he has a right of appeal independently of the owner of the fee;[91] and if the award is made to the owner and the mortgagee jointly the owner may appeal without joining the mortgagee.[92] But one landowner cannot complain on appeal of irregularities which affect another landowner only.[93]

(III) *Waiver or Bar of Right.* The party complaining may waive or defeat his right of appeal by any act inconsistent therewith,[94] as where the condemning party takes possession of the premises and pays the amount of the

County Com'rs, 18 Kan. 575; Michigan Air Line R. Co. *v.* Barnes, 40 Mich. 383; McCay *v.* Baltimore, etc., R. Co., 2 Chest. Co. Rep. (Pa.) 558; Robinson *v.* South Chester, 3 Del. Co. (Pa.) 176.

84. Pearson *v.* Island County, 3 Wash. 497, 28 Pac. 1108.

85. Rines *v.* Portland, 93 Me. 227, 44 Atl. 925.

A mortgagee is such an owner as has a right to prosecute an appeal from the freeholders' award, and upon such an appeal the petitioner in a condemnation proceeding may bring in the landowner in order that it may be fully protected. Omaha Bridge, etc., Co. *v.* Reed, 3 Nebr. (Unoff.) 793, 92 N. W. 1021, 96 N. W. 276.

86. Cedar Rapids, etc., Land, etc., Co. *v.* Chicago, etc., R. Co., 60 Iowa 35, 14 N. W. 76; Connable *v.* Chicago, etc., R. Co., 60 Iowa 27, 14 N. W. 75; Rines *v.* Portland, 93 Me. 227, 44 Atl. 925.

Where the vendor is in equity a trustee for the vendee, the latter may appeal in the name of the vendor and equity will protect his rights as against the vendor. McIntyre *v.* Easton, etc., R. Co., 26 N. J. Eq. 425.

87. Trogden *v.* Winona, etc., R. Co., 22 Minn. 198; Carli *v.* Stillwater, etc., R. Co., 16 Minn. 260; Central Land Co. *v.* Providence, 15 R. I. 246, 2 Atl. 553.

88. Bower *v.* Grayville, etc., R. Co., 92 Ill. 223; Satterfield *v.* Crow, 8 B. Mon. (Ky.) 553; McCay *v.* Baltimore, etc., R. Co., 2 Chest. Co. Rep. (Pa.) 558; Ross *v.* North Providence, 10 R. I. 461.

89. *Illinois.*—Gage *v.* Chicago, 141 Ill. 642, 31 N. E. 163.

New Hampshire.— Page *v.* Keene, 49 N. H. 535.

New Jersey.— Rimback *v.* Essex County Park Commission, 62 N. J. L. 494, 41 Atl. 699.

Pennsylvania.— Robinson *v.* South Chester, 3 Del. Co. Rep. 176.

Wisconsin.— Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 379, 18 N. W. 431.

The owner of several parcels for which damages have been separately awarded may take a single appeal from the whole award. Larson *v.* Superior Short Line R. Co., 64 Wis. 59, 24 N. W. 487.

A life-tenant may appeal from an award to him as owner without joining the owner of the reversion. Chicago, etc., R. Co. *v.* Ellis, 52 Kan. 41, 33 Pac. 478, 52 Kan. 48, 34 Pac. 352.

Husband and wife.— Where the premises are a part of a homestead occupied by the husband and wife, the title being in the wife, both may join in the appeal. Chicago, etc., R. Co. *v.* Anderson, 42 Kan. 297, 21 Pac. 1059.

90. Roper *v.* New Britain, 70 Conn. 459, 39 Atl. 850; Clark *v.* Phelps, 4 Cow. (N. Y.) 190.

91. Michigan Air Line R. Co. *v.* Barnes, 40 Mich. 383; Omaha Bridge, etc., Co. *v.* Reed, 3 Nebr. (Unoff.) 793, 92 N. W. 1021, 96 N. W. 276.

92. Dixon *v.* Rockwell, etc., R. Co., 75 Iowa 367, 29 N. W. 646; Lance *v.* Chicago, etc., R. Co., 57 Iowa 636, 11 N. W. 612.

93. Paterson, etc., Turnpike Co. *v.* Van Orden, 3 N. J. L. 534. One of several different owners of property held in severalty has no right to complain of an order granting a new trial as to the property of another owner. Gage *v.* Chicago, 141 Ill. 642, 31 N. E. 163.

94. *In re* New York Cent., etc., R. Co., 60 N. Y. 112; Rodgers *v.* Freemansburg, 2 Pa. Co. Ct. 523.

Where a petitioner fails to make payment of the compensation as required by statute, a writ of error thereafter sued out by him will be dismissed. Florida Cent., etc., R. Co. *v.* Bear, 43 Fla. 319, 31 So. 287.

A mortgagee's right of appeal is not lost or suspended by his filing a claim for the payment of the mortgage against the estate of the mortgagor. Omaha Bridge, etc., R. Co. *v.* Reed, 3 Nebr. (Unoff.) 793, 92 N. W. 1021, 96 N. W. 276.

Filing exceptions to the report of viewers does not operate as a waiver of the right of

award,[95] unless such payment is made only conditionally,[96] or under an order of the court,[97] or where the landowner accepts payment of the whole or a portion of the amount awarded.[98] This right may also be barred by statute,[99] unless there is a constitutional provision prohibiting the legislature from barring such right.[1]

b. Appellate Jurisdiction. Questions as to which an appeal will lie from condemnation proceedings are regulated wholly by constitutional or statutory provisions.[2] Under some of the provisions of some constitutions and some

appeal to the common pleas and trial by jury. Rodgers *v.* Freemansburg, 2 Pa. Co. Ct. 523.

An appellant's appearance in opposition to the confirmation of a commissioner's report is not a waiver of his right to appeal from the order appointing the commissioners, where no sufficient order limiting the time to appeal from such order was served, and where before the appeal was taken the commissioners made their report. *In re* New York Cent., etc., R. Co., 60 N. Y. 112.

An error in granting a new trial as to the party objecting thereto is cured by the subsequent election of such party to proceed in the second trial. Gage *v.* Chicago, 141 Ill. 642, 31 N. E. 163.

95. Missouri Pac. R. Co. *v.* Gruendel, 3 Kan. App. 53, 44 Pac. 439; Jersey City *v.* Hamilton, (N. J. Sup. 1904) 56 Atl. 670.

96. Chicago, etc., R. Co. *v.* Phelps, 125 Ill. 482, 17 N. E. 769.

97. Fort St. Union Depot Co. *v.* Backus, 92 Mich. 33, 52 N. W. 790.

98. Baltimore, etc., R. Co. *v.* Johnson, 84 Ind. 420; Mississippi, etc., R. Co. *v.* Byington, 14 Iowa 572; Steuart *v.* Baltimore, 7 Md. 500; Parks *v.* Dallas Terminal, R., etc., Co., (Tex. Civ. App. 1904) 78 S. W. 533. But see Low *v.* Concord R. Co., 63 N. H. 557, 3 Atl. 739, holding that a receipt of the amount assessed is a payment *pro tanto* only and does not constitute a waiver of the landowner's right of appeal.

An owner's withdrawal of the amount deposited by the condemning company on giving the requisite bond is without prejudice to an appeal from the award. Weyer *v.* Milwaukee, etc., R. Co., 57 Wis. 329, 15 N. W. 481.

99. Burns *v.* Chicago, etc., R. Co., 102 Iowa 7, 70 N. W. 728; Carpenter *v.* Cincinnati, etc., Canal Co., 35 Ohio St. 307.

The right to except to the judgment, either final or interlocutory, rendered on the coming in of the report of commissioners assessing the damages for land taken for railroad purposes is barred in Vermont. Goodsell *v.* Rutland-Canadian R. Co., 74 Vt. 206, 52 Atl. 437.

In Minnesota it is held that a special act denying the right of appeal in condemnation proceedings for a park does not contravene a constitutional provision that the supreme court shall have appellate jurisdiction in all cases both in law and equity, since there is a right of review in such cases by certiorari. Minneapolis *v.* Wilkin, 30 Minn. 140, 14 N. W. 581.

Estoppel.—A corporation organized under a charter containing a clause prohibiting an appeal from an award is estopped from denying its validity. Darge *v.* Horicon Iron Mfg. Co., 22 Wis. 417.

1. Memphis, etc., R. Co. *v.* Birmingham, etc., R. Co., 96 Ala. 571, 11 So. 642, 18 L. R. A. 166; *In re* Vernon Park, 163 Pa. St. 70, 29 Atl. 972; *In re* Towanda Bridge Co., 91 Pa. St. 216. See Ky. Const. (1891) § 242; S. D. Const. (1889) art. 17, § 18.

2. *Illinois.*— Mills *v.* Parlin, 106 Ill. 60 [*affirming* 11 Ill. App. 396]; Springfield, etc., R. Co. *v.* Peters, 8 Ill. App. 300, appellate court, where the proceedings do not involve the right, title, or validity of a franchise.

Iowa.— Ottumwa *v.* Derks, 32 Iowa 506; Grinnell *v.* Mississippi, etc., R. Co., 18 Iowa 570; Runner *v.* Keokuk, 11 Iowa 543; Ball *v.* Humphrey, 4 Greene 204, district court concurrent with circuit court.

Maine.— Bangor *v.* Penobscot County Com'rs, 30 Me. 270, holding that a statute giving in the case of a particular city an appeal to the common pleas in proceedings for the location of streets and ways takes away the appeal given by the general law to the county commissioners.

Missouri.— King's Lake Drainage, etc., Dist. *v.* Jamison, 176 Mo. 557, 75 S. W. 679, county court to the circuit court, and not directly from the county court to the supreme court.

Montana.— Allport *v.* Helena, etc., R. Co., 12 Mont. 279, 29 Pac. 966, holding that under Comp. St. § 685, and Rev. St. § 307, an appeal from the district court of one county to that of another, without first obtaining a change of venue, gives the court no jurisdiction.

New York.— *In re* Delaware, etc., Canal Co., 69 N. Y. 209; *In re* Canal St., 12 N. Y. 406; New York Cent. R. Co. *v.* Marvin, 11 N. Y. 276, supreme court.

Ohio.— Little Miami R. Co. *v.* Perrin, 16 Ohio 479, common pleas.

Oregon.— Portland *v.* Gaston, 38 Oreg. 533, 63 Pac. 1051, circuit court whose decision is final and conclusive.

South Carolina.— Chesterfield, etc., R. Co. *v.* Johnson, 58 S. C. 560, 36 S. E. 919; Atlantic Coast Line R. Co. *v.* South Bound R. Co., 57 S. C. 317, 35 S. E. 553, circuit court.

See 18 Cent. Dig. tit. "Eminent Domain," § 659; and, generally, COURTS.

An appeal from a justice of the peace, in Illinois and Indiana, lies to the circuit court. Coffman *v.* Highway Com'rs, 85 Ill. App. 90; Parker *v.* Henderson, Smith (Ind.) 28; White Water Valley Canal Co. *v.* Henderson, 8 Blackf. (Ind.) 528.

An appeal from commissioners, under the statutes in the various jurisdictions, lies to the district court (Warren *v.* First Div. St. Paul, etc., R. Co., 18 Minn. 384; Paddock *v.*

statutes an appeal lies to the court of last resort,[3] although under others it has been held to be otherwise.[4]

c. Orders and Judgments Reviewable — (1) *In General.* In the absence of a statute providing otherwise an appeal or writ of error will lie only from a final judgment or order in condemnation proceedings;[5] and usually may be taken only

St. Croix Boom Corp., 8 Minn. 277, if the order appointing the commissioners was made by the judge of the supreme court. *Contra*, Monongahela Nav. Co. *v.* Blair, 20 Pa. St. 71), to the county court (Taylor *v.* Travis County, 77 Tex. 333, 14 S. W. 137; Huggins *v.* Hurt, 23 Tex. Civ. App. 404, 56 S. W. 944; Bell *v.* Palo Pinto County, (Tex. Civ. App. 1895) 29 S. W. 929; Miller *v.* Wilbarger County, (Tex. Civ. App. 1894) 26 S. W. 245), to the circuit court (Hamilton *v.* Ft. Wayne, 73 Ind. 1; Richardson *v.* Mississippi Levee Com'rs, 77 Miss. 518, 26 So. 963), to the general term of the supreme court (Matter of Metropolitan El. R. Co., 57 Hun (N. Y.) 130, 11 N. Y. Suppl. 191), to the common pleas (Lamoreux *v.* Luzerne County, 116 Pa. St. 195, 9 Atl. 274; *In re* Springdale Tp., 91 Pa. St. 260; Pinneo *v.* Lackawanna, etc., R. Co., 43 Pa. St. 361; Rodgers *v.* Freemansburg, 2 Pa. Co. Ct. 523), but not to quarter sessions (*In re* Springdale Tp., *supra*), nor to the supreme court (Rodgers *v.* Freemansburg, *supra*). And see Weir *v.* St. Paul, etc., R. Co., 18 Minn. 155, holding that a statute (Gen. St. (1866) c. 34) is not unconstitutional because it does not provide that such an appeal may be taken to any court save that in which the petition was first filed.

Under Ohio Rev. St. §§ 6414–6453 the decision of the probate court in favor of the right of condemnation by a private corporation is final, and error does not lie to such decision from the common pleas. Ohio Postal Tel. Co. *v.* Cleveland, etc., R. Co., 11 Ohio S. & C. Pl. Dec. 52, 8 Ohio N. P. 121.

3. New Orleans *v.* Contonio, 111 La. 545, 35 So. 740.

In Illinois under the Eminent Domain Act, § 12, an appeal lies directly from the trial court to the supreme court (Metropolitan West Side El. R. Co. *v.* Siegel, 161 Ill. 638, 44 N. E. 276; Kankakee, etc., R. Co. *v.* Straut, 101 Ill. 653), even though there is no question of freehold or franchise involved, and the proceedings only involve an easement (Peoria, etc., Union R. Co. *v.* Peoria, etc., R. Co., 105 Ill. 110); although it has been held that unless the case involved a franchise (Chicago, etc., R. Co. *v.* Dunbar, 95 Ill. 571), the appeal should be to the appellate court in the first instance (Mills *v.* Parlin, 106 Ill. 60 [*affirming* 11 Ill. App. 396]; Chicago, etc., R. Co. *v.* Dunbar, 95 Ill. 571; Springfield, etc., R. Co. *v.* Peters, 8 Ill. App. 300). And see Fitzpatrick *v.* Joliet, 87 Ill. 58 (holding that where there is no statute authorizing an appeal from the county court to the circuit court, a writ of error lies from the supreme court to the county court); St. Louis, etc., R. Co. *v.* Lux, 63 Ill. 523 (holding that the supreme court has jurisdiction of an appeal from a judgment, under the act of 1852, although such act makes a judgment of the circuit court final and conclusive).

In Missouri proceedings to condemn a right of way for a railroad involve title to real estate, within the provisions of the constitution (art. 6, § 6), giving the supreme court exclusive appellate jurisdiction in such cases. Joplin, etc., R. Co. *v.* McGregor, 53 Mo. App. 366; St. Louis, etc., R. Co. *v.* Lewright, 44 Mo. App. 212, 113 Mo. 660, 21 S. W. 210.

In the District of Columbia a writ of error lies from the United States supreme court to the supreme court of the District of Columbia on a judgment confirming an assessment of damages to private property for a street. Baltimore, etc., R. Co. *v.* Sixth Presb. Church, 19 Wall. (U. S.) 62, 22 L. ed. 97.

4. Memphis, etc., R. Co. *v.* Hopkins, 108 Ala. 159, 18 So. 845; Louisville, etc., R. Co. *v.* Peoples St. R., etc., Co., 101 Ala. 331, 13 So. 308; Portland *v.* Gaston, 38 Oreg. 533, 63 Pac. 1051; Rodgers *v.* Freemansburg, 2 Pa. Co. Ct. 523. But see Georgia Cent. R. Co. *v.* Alabama, etc., R. Co., 130 Ala. 559, 30 So. 566, holding that under Code, § 1717, an appeal will lie direct to the supreme court from an order of the probate court granting an application for a right to condemn a right of way across the tracks and right of way of another company.

In New York the decision of the general term of the supreme court is final and conclusive and no appeal will lie therefrom to the court of appeals. *In re* New York, etc., R. Co., 98 N. Y. 12; *In re* New York, etc., R. Co., 94 N. Y. 287; *In re* Delaware, etc., Canal Co., 69 N. Y. 209; *In re* Canal St., 12 N. Y. 406; New York Cent. R. Co. *v.* Marvin, 11 N. Y. 276.

5. *Illinois.*— Hyde Park *v.* Dunham, 85 Ill. 569.

Iowa.— Vancleave *v.* Clark, 37 Iowa 184.

Missouri.— State *v.* Engelmann, 106 Mo. 628, 17 S. W. 759.

New York.— Matter of New York, etc., R. Co., 40 How. Pr. 335.

North Carolina.— Holly Shelter R. Co. *v.* Newton, 133 N. C. 132, 45 S. E. 549, 98 Am. St. Rep. 701 (holding that the fact that a plea in bar is filed in proceedings to condemn a railroad right of way does not justify an appeal from an order directing the clerk to proceed to hear such proceedings and appoint commissioners); Norfolk, etc., R. Co. *v.* Warren, 92 N. C. 620.

Ohio.— Steubenville, etc., R. Co. *v.* Patrick, 7 Ohio St. 170; Toledo, etc., R. Co. *v.* Toledo, etc., Belt R. Co., 9 Ohio Cir. Dec. 244.

Pennsylvania.— Lake Erie Limestone Co.'s Petition, 188 Pa. St. 509, 41 Atl. 648; Penn-

from the whole judgment or award,[6] although it embraces several interests.[7] As to what is a final judgment or order in these special proceedings in many cases depends upon the statutory provisions of the respective states,[8] but it may be said in general that any judgment or order of the court which determines the merits of the case is a final judgment from which an appeal may be taken.[9]

(II) *ORDERS AS TO RIGHT TO TAKE OR APPOINTING COMMISSIONERS.* A judgment or order in favor of the right to condemn, and appointing commissioners, by the weight of authority, is not appealable,[10] until after ascertainment

sylvania Steel Co.'s Appeal, 161 Pa. St. 571, 29 Atl. 294.

United States.— Judson *v.* Gage, 98 Fed. 540, 39 C. C. A. 156.

See 18 Cent. Dig. tit. "Eminent Domain," § 660 *et seq.*

An interlocutory order is not a subject of appeal (Cape Fear, etc., R. Co. *v.* King, 125 N. C. 454, 34 S. E. 541; Norfolk, etc., R. Co. *v.* Warren, 92 N. C. 620; Twelfth-St. Market Co. *v.* Philadelphia, etc., R. Co., 142 Pa. St. 580, 21 Atl. 902, 989; Slocum's Appeal, 12 Wkly. Notes Cas. (Pa.) 84), unless made so by statute (Tennessee Coal, etc., Co. *v.* Birmingham Southern R. Co., 128 Ala. 526, 29 So. 455).

An affirmative finding that the use is a public one is not a final determination of the proceeding but only an incident thereto. State *v.* Engelmann, 106 Mo. 628, 17 S. W. 759.

An order of the superior court remanding the proceedings to the clerk that he may hear the same is interlocutory and no appeal lies therefrom, although a plea in bar was filed by defendant. Holly Shelter R. Co. *v.* Newton, 133 N. C. 132, 45 S. E. 549, 98 Am. St. Rep. 701.

Under a Missouri special act a writ of error does not lie from the decision of the judge or clerk to whom viewers appointed under such act made report of their assessment of damages. Hannibal, etc., R. Co. *v.* Morton, 20 Mo. 70.

6. Cedar Rapids, etc., R. Co. *v.* Chicago, etc., R. Co., 60 Iowa 35, 14 N. W. 76; Portland *v.* Kamm, 5 Oreg. 362. *Compare* St. Joseph *v.* Hamilton, 43 Mo. 282.

7. Larson *v.* Superior Short Line R. Co., 64 Wis. 59, 24 N. W. 487; Weyer *v.* Milwaukee, etc., R. Co., 57 Wis. 329, 15 N. W. 481.

A joint order or assessment to different owners must be appealed from jointly. Chicago, etc., R. Co. *v.* Hurst, 30 Iowa 73.

Separate orders entered as to different owners but in one proceeding may all be reviewed upon one appeal. *In re* Prospect Park, etc., R. Co., 67 N. Y. 371.

8. Tennessee Coal, etc., Co. *v.* Birmingham Southern R. Co., 128 Ala. 526, 29 So. 455; Los Angeles *v.* Pomeroy, 132 Cal. 340, 64 Pac. 477; St. Johnsville *v.* Smith, 61 N. Y. App. Div. 380, 70 N. Y. Suppl. 880.

An assessment by appraisers is appealable under Ind. Rev. St. (1838) c. 343, § 17. Wabash, etc., Canal *v.* Johnson, 2 Ind. 219.

9. People *v.* Pfeiffer, 59 Cal. 89; Phillips *v.* Pease, 39 Cal. 582; Sacramento, etc., R. Co. *v.* Harlan, 24 Cal. 334; Denver, etc., R. Co. *v.* Jackson, 6 Colo. 340; Erie R. Co. *v.* Steward, 59 N. Y. App. Div. 187, 69 N. Y. Suppl. 57; Cincinnati, etc., R. Co. *v.* Barcalow, 4 Ohio Cir. Ct. 49, 2 Ohio Cir. Dec. 413.

Instances of final judgments or orders are: An order of an intermediate court dismissing the case on appeal from the commissioners (Warren *v.* First Div. St. Paul, etc., R. Co., 18 Minn. 384), unless the judgment dismisses the proceedings without prejudice to the petitioner's right to begin other proceedings (Canandaigua *v.* Benedict, 13 N. Y. App. Div. 600, 43 N. Y. Suppl. 630); an order dissolving an injunction which had been issued to restrain a municipality from appropriating land for a street (Iowa College *v.* Davenport, 7 Iowa 213); a final order of condemnation, made after an alleged payment of damages (Los Angeles *v.* Pomeroy, 132 Cal. 340, 64 Pac. 477); an order of the probate court determining who was entitled to the fund deposited (Defoe *v.* Bay Cir. Judge, 116 Mich. 567, 74 N. W. 733); or an order of reversal by the general term of the supreme court, leaving the owner without any award whatever (Clark *v.* Amsterdam Water Com'rs, 148 N. Y. 1, 42 N. E. 414).

Under the Connecticut statute, where the return of the appraisers to the court sets out a protest against the assessment, a decision on the burden of proof and rulings on the evidence, the judgment of the court accepting the report, is one from which an appeal lies. New Milford Water Co. *v.* Watson, 75 Conn. 237, 52 Atl. 947, 53 Atl. 57.

A judgment sustaining a demurrer to an answer, which leaves the appointment of the commissioners and the assessment of the damages still to be made, is not a final judgment (Southern R. Co. *v.* Postal Tel. Cable Co., 179 U. S. 641, 21 S. Ct. 249, 45 L. ed. 355; Postal Tel. Cable Co. *v.* Southern R. Co., 90 Fed. 211 [*affirmed* in 93 Fed. 393, 35 C. C. A. 366]); nor is an order overruling the demurrer to a petition (Parker *v.* Snohomish County Super. Ct., 25 Wash. 544, 66 Pac. 154).

An order refusing to vacate a previous order directing a jury to be impaneled to ascertain the compensation to be paid by a railroad company is not appealable as it does not affect the merits of the case. Aull *v.* Columbia, etc., R. Co., 42 S. C. 431, 20 S. E. 302.

10. *Indiana.*— Freshour *v.* Logansport, etc., Turnpike Co., 104 Ind. 463, 4 N. E. 157.

Missouri.— St. Joseph Terminal R. Co. *v.* Hannibal, etc., R. Co., 94 Mo. 535, 6 S. W.

of the compensation and payment thereof,[11] although in some jurisdictions it is held otherwise on the ground that such order or judgment determines finally that the lands proposed to be taken are necessary for the intended improvement, and that the petitioner has the right to maintain the proceedings.[12] But an order refusing to appoint commissioners is a final order and hence appealable.[13]

(III) *Orders Confirming Report or Award.* The general rule is that an appeal will lie from an order confirming the report or award of the commissioners or jury,[14] although it has been held otherwise.[15]

(IV) *Orders on Motions to Set Aside Award or For New Trial.* An appeal will lie from an order setting aside the report of the commissioners,[16] and

691. *Compare* Lee *v.* Tebo, etc., R. Co., 53 Mo. 178.

New York.— St. Johnsville *v.* Smith, 61 N. Y. App. Div. 380, 70 N. Y. Suppl. 880; Erie R. Co. *v.* Steward, 59 N. Y. App. Div. 187, 69 N. Y. Suppl. 57.

North Carolina.— Holly Shelter R. Co. *v.* Newton, 133 N. C. 132, 45 S. E. 549; Davie County *v.* Cook, 86 N. C. 18. *Compare* Minor *v.* Harris, 61 N. C. 322.

Pennsylvania.—Com. *v.* Stephens, 9 Pa. Super. Ct. 218; *In re* Johnstown, etc., Turnpike Co., 5 Pa. Super. Ct. 65, 40 Wkly. Notes Cas. 483.

Virginia.— Richmond, etc., R. Co. *v.* Johnson, 99 Va. 282, 38 S. E. 195.

West Virginia.— Wheeling Bridge, etc., R. Co. *v.* Wheeling Steel, etc., Co., 41 W. Va. 747, 24 S. E. 651.

See 18 Cent. Dig. tit. "Eminent Domain," § 661.

11. St. Johnsville *v.* Smith, 61 N. Y. App. Div. 380, 70 N. Y. Suppl. 880.

12. New Milford Water Co. *v.* Watson, 75 Conn. 237, 52 Atl. 947, 53 Atl. 57; *In re* St. Paul, etc., R. Co., 34 Minn. 227, 25 N. W. 345; State *v.* Oshkosh, etc., R. Co., 100 Wis. 538, 77 N. W. 193. *Compare* Forest Cemetery Assoc. *v.* Constans, 70 Minn. 436, 73 N. W. 153. But see Williams *v.* Hartford, etc., R. Co., 13 Conn. 110, holding that the appointment of freeholders to assess damages is not the subject of revision by writ of error.

13. Denver Power, etc., Co. *v.* Denver, etc., R. Co., 30 Colo. 204, 69 Pac. 568.

14. *California.*— Phillips *v.* Pease, 39 Cal. 582.

Minnesota.— Fletcher *v.* Chicago, etc., R. Co., 67 Minn. 339, 69 N. W. 1085.

Missouri.— St. Louis, etc., R. Co. *v.* Evans, etc., Fire Brick Co., 85 Mo. 307.

New York.— King *v.* New York, 36 N. Y. 182; *In re* Riverside Park, 42 N. Y. App. Div. 198, 58 N. Y. Suppl. 1029; *In re* Central Park, 4 Lans. 467, 61 Barb. 40; Rochester, etc., R. Co. *v.* Beckwith, 10 How. Pr. 168.

Ohio.— State *v.* Waite, 25 Ohio Cir. Ct. 216.

Pennsylvania.— Levering *v.* Philadelphia, etc., R. Co., 8 Watts & S. 459.

United States.— Baltimore, etc., R. Co. *v.* Sixth Presb. Church, 19 Wall. 62, 22 L. ed. 97.

See 18 Cent. Dig. tit. "Eminent Domain," § 660 *et seq.*

In New York while an order of the general term confirming the commissioners' report or award cannot be reviewed on appeal to the appellate court (*In re* New York, etc., Bridge, 137 N. Y. 95, 32 N. E. 1054; *In re* Metropolitan El. R. Co., 22 N. Y. Suppl. 298), or affirming an order of a special term confirming the report of the commissioners, when there is presented only an error of law or fact and no question as to the jurisdiction of the commissioners is raised (Brooklyn El. R. Co. *v.* Flynn, 147 N. Y. 344, 41 N. E. 704), the action of the general term modifying an award by increasing or diminishing it is reviewable (*In re* New York, etc., Bridge, 137 N. Y. 95, 32 N. E. 1054).

Second report.— Under the New York statute the court of appeals will not review the action of the general term in refusing to set aside a second report of commissioners, all the formalities of law having been complied with, and there being no allegation of fraud or mistake, since the general railroad act provides that a second report shall be final and conclusive. *In re* Southern Boulevard R. Co., 143 N. Y. 253, 38 N. E. 276; *In re* State Reservation Com'rs, 37 Hun 537. See also *In re* Southern Boulevard R. Co., 141 N. Y. 532, 36 N. E. 600; *In re* Prospect Park, etc., R. Co., 20 Hun 184.

15. Wilmington, etc., R. Co. *v.* Condon, 8 Gill & J. (Md.) 443; Raleigh, etc., R. Co. *v.* Jones, 23 N. C. 24; Hill *v.* Salem, etc., Turnpike Co., 1 Rob. (Va.) 263, all holding that an appeal will not lie from an award of the county court confirming the report of the commissioners.

In Maryland, where a circuit court has confirmed the inquisition in railroad proceedings, the action is conclusive and final, and neither appeal nor error lies to the supreme court if the company had any right at all to make the condemnation. Hopkins *v.* Philadelphia, etc., R. Co., 94 Md. 257, 51 Atl. 404.

16. Matter of Guilford, 85 N. Y. App. Div. 207, 83 N. Y. Suppl. 312; Manhattan R. Co. *v.* O'Sullivan, 6 N. Y. App. Div. 571, 40 N. Y. Suppl. 326 [*affirmed* in 150 N. Y. 569, 44 N. E. 1125]; *In re* New York, etc., R. Co., 33 Hun (N. Y.) 231. But see Wilmington, etc., R. Co. *v.* Condon, 8 Gill & J. (Md.) 443 (holding that no appeal lies from the decision of the county court setting aside an inquisition); Lee *v.* Tebo, etc., R. Co., 53 Mo. 178 (holding that the propriety of instructions or declarations of law asked on a motion to set aside the commissioners' report cannot be examined nor reviewed on appeal to the circuit court).

from an order denying a motion for a new trial,[17] but not from one granting a new trial.[18]

d. Taking and Perfecting Appeal — (I) *In General.* The manner of taking and perfecting an appeal is generally governed by statute.[19] But the party appealing need not in his petition state the grounds of his appeal, unless the statute so provides.[20] And although the appeal is irregularly taken, a voluntary appearance and filing of pleadings by the adverse party cures the defects;[21] unless it is a special appearance only, as for the purpose of moving to dismiss the appeal for want of proper service.[22] It is also usually required that there shall be an affidavit that the appeal is not for purposes of delay.[23]

(II) *Time of Taking Appeal.* The time for taking an appeal from the award of the commissioners, or from other final orders or judgments, is in most of the states fixed by statute,[24] the usual time being thirty days after the filing of

In West Virginia an appeal cannot properly be taken from an order overruling a motion to set aside the commissioners' report, where the court has not acted upon the report. Pack *v.* Chesapeake, etc., R. Co., 5 W. Va. 118.

17. Minnesota Valley R. Co. *v.* Doran, 15 Minn. 230.

The refusal of the trial court to grant a motion for a new trial not filed within the time prescribed was not error, and the appeal will be treated as if no such motion had been filed. Kansas City *v.* Mastin, 169 Mo. 80, 68 S. W. 1037.

18. District of Columbia *v.* Prospect Hill Cemetery, 5 App. Cas. (D. C.) 497; McNamara *v.* Minnesota Cent. R. Co., 12 Minn. 388; *In re* New York, etc., R. Co., 98 N. Y. 12; *In re* New York, etc., R. Co., 94 N. Y. 287.

19. Chase *v.* Sullivan R. Co., 20 N. H. 195; Bell *v.* Palo Pinto County, (Tex. Civ. App. 1895) 29 S. W. 929; and cases cited *infra*, this and following notes.

An appeal is not vitiated by reason of its containing a protest of the petitioner against the whole proceedings as illegal and void. Chase *v.* Sullivan R. Co., 20 N. H. 195.

Under the Illinois act of 1853 an appeal may be taken in the manner prescribed for appealing from a justice, or it may be done by filing certified copies of the proceedings of the commissioners. Peoria County *v.* Harvey, 18 Ill. 364.

A petition reciting that "petitioner, therefore, appeals from the award of said viewers and asks that he be awarded a trial by jury according to the course of the common law" **is sufficient.** Mansfield Borough's Appeal, 158 Pa. St. 314, 315, 27 Atl. 959.

While a bill in equity enjoining a railroad company from locating and maintaining its railroad cannot be united in a United States court with a legal cause of action to recover compensation for the lands taken, yet under 23 U. S. St. at L. 73, granting a right of way to the Southern Kansas railroad through the Indian Territory, the bill may be considered as a petition for an appeal. Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 10 S. Ct. 965, 34 L. ed. 295 [*reversing* 33 Fed. 900].

20. Bushwick Highways Com'rs *v.* Meserole, 10 Wend. (N. Y.) 122; Mauldin *v.* Greenville, 64 S. C. 444, 42 S. E. 202.

21. *Indiana.*— Beynon *v.* Brandywine, etc., Turnpike Co., 39 Ind. 129.

Iowa.— Robertson *v.* Eldora R., etc., Co., 27 Iowa 245.

Kansas.— St. Louis, etc., R. Co. *v.* Quinn, 24 Kan. 370.

New York.— Matter of Schreiber, 3 Abb. N. Cas. 68.

Pennsylvania.— Perry *v.* Pennsylvania Schuylkill Valley R. Co., 3 Pa. Co. Ct. 59.

22. Spurrier *v.* Wirtner, 48 Iowa 486.

The mere filing of a præcipe for subpœnas is not such a voluntary appearance as to waive defects in taking the appeal. Beckwith *v.* Kansas City, etc., Co., 28 Kan. 484.

23. Matter of Schreiber, 3 Abb. N. Cas. (N. Y.) 68; *In re* Hanover Borough Alley, 4 Pa. Dist. 160.

24. *Alabama.*— Georgia Cent. R. Co. *v.* Alabama, etc., R. Co., 130 Ala. 559, 30 So. 566; State *v.* Williams, 125 Ala. 115, 28 So. 401; Hendricks *v.* Johnson, 6 Port. 472.

Iowa.— Jamison *v.* Burlington, etc., R. Co., 69 Iowa 670, 29 N. W. 774.

Kentucky.— Kimble *v.* Leischer, 81 Ky. 384; Henderson, etc., R. Co. *v.* Dickerson, 16 B. Mon. 297.

Louisiana.— *In re* New Orleans, 10 La. Ann. 311.

Maine.— Clark *v.* Maine Shore-Line R. Co., 81 Me. 477, 17 Atl. 497.

New Hampshire.— Dow *v.* Atkinson, 59 N. H. 38; Dodge *v.* Acworth, 32 N. H. 474.

New York.— People *v.* Mott, 5 Thomps. & C. 207.

North Carolina.— Norfolk Southern R. Co. *v.* Ely, 95 N. C. 77.

Ohio.— Buckingham *v.* Steubenville, etc., R. Co., 10 Ohio St. 25.

United States.— Clinton *v.* Missouri Pac. R. Co., 122 U. S. 469, 7 S. Ct. 1268, 30 L. ed. 1214.

See 18 Cent. Dig. tit. "Eminent Domain," § 669.

An appeal not sued out until after the report of the commissioners and an order of condemnation is entered will be dismissed on motion. Georgia Cent. R. Co. *v.* Alabama, etc., R. Co., 130 Ala. 559, 30 So. 566.

The two months within which application for a writ of error must be made in Mary-

the award or after its confirmation, as the case may be.[25] If no time is fixed by the statute the appeal must be taken in a reasonable time.[26] But in the absence of statute providing otherwise, an appeal cannot be taken before a final disposition of the case in the lower court.[27]

(III) *Citation or Notice.* As a general rule notice of an appeal must be served on the opposite party or parties[28] or his or their agent[29] or upon some

land run from the date of the order confirming the award, and not of the order overruling objections to it. Moores *v.* Bel-Air Water, etc., Co., 79 Md. 391, 29 Atl. 1033.

Leave to file a petition in error, under Ohio Rev. St. § 2259, may be granted within six months from the rendition of the judgment complained of. Norwood *v.* Wooley, 9 Ohio Cir. Ct. 195, 4 Ohio Cir. Dec. 274.

The affidavit of a juror is admissible to prove the date on which the award was actually made, when the object is to show that an appeal was taken in time. Jamison *v.* Burlington, etc., R. Co., 69 Iowa 670, 29 N. W. 774.

25. *Alabama.*— Birmingham R., etc., Co. *v.* Birmingham Traction Co., 128 Ala. 110, 29 So. 187; State *v.* Williams, 125 Ala. 115, 28 So. 401.

Indiana.— Butler *v.* Parker, 9 Ind. 534; Pruitt *v.* Shelbyville, etc., R. Co., 2 Ind. 530.

Kansas.— Rennick *v.* Lyon County, 45 Kan. 442, 25 Pac. 856.

Maine.— Clark *v.* Maine Shore-Line R. Co., 81 Me. 477, 17 Atl. 497.

Ohio.— Cleveland, etc., R. Co. *v.* Wick, 35 Ohio St. 247.

Pennsylvania.— *In re* William St., 191 Pa. St. 472, 43 Atl. 326; Geissinger *v.* Hellertown Borough, 133 Pa. St. 522, 19 Atl. 412; Perry's Appeal, (1888) 13 Atl. 66; Gettysburg Memorial Assoc. *v.* Sherfy, 117 Pa. St. 256, 10 Atl. 758; Gwinner *v.* Lehigh, etc., R. Co., 55 Pa. St. 126; *In re* Helme, 7 Kulp 93; Spear *v.* Montgomery County, 24 Pa. Co. Ct. 177, 16 Montg. Co. Rep. 157; *In re* Cheltenham Tp. Road, 11 Pa. Co. Ct. 671; Rodgers *v.* Freemansburg, 2 Pa. Co. Ct. 523.

Washington.— Seattle, etc., R. Co. *v.* O'Meara, 4 Wash. 17, 29 Pac. 835.

Wisconsin.— Neff *v.* Chicago, etc., R. Co., 14 Wis. 370.

See 18 Cent. Dig. tit. "Eminent Domain," § 669.

The time of taking an appeal will be reckoned from the filing of the report or from the time it is in some legitimate manner brought to the notice of the parties interested (Jamison *v.* Burlington, etc., R. Co., 69 Iowa 670, 29 N. W. 774; Kansas City, etc., R. Co. *v.* Hurst, 42 Kan. 462, 22 Pac. 618); and not necessarily from the time when it is reduced to writing and signed by the commissioners (Kansas City, etc., R. Co. *v.* Hurst, *supra*).

26. Jones *v.* Wills Valley R. Co., 30 Ga. 43; State *v.* Dean, 9 Ga. 405.

27. State *v.* Engelmann, 106 Mo. 628, 17 S. W. 759; Steubenville, etc., R. Co. *v.* Patrick, 7 Ohio St. 170. And see *supra*, XI, P, 1.

28. *California.*— U. S. *v.* Crooks, 116 Cal. 43, 47 Pac. 870; Butte County *v.* Boydstun, 68 Cal. 189, 8 Pac. 835.

Illinois.— Hartman *v.* Belleville, etc., R. Co., 64 Ill. 24.

Iowa.— Haggard *v.* Algona Independent School Dist., 113 Iowa 486, 85 N. W. 777; Waltmeyer *v.* Wisconsin, etc., R. Co., 64 Iowa 688, 21 N. W. 139; Spurrier *v.* Wirtner, 48 Iowa 486; Hahn *v.* Chicago, etc., R. Co., 43 Iowa 333; Robertson *v.* Eldora R., etc., Co., 27 Iowa 245; Burlington, etc., R. Co. *v.* Sinnamon, 9 Iowa 293.

New Jersey.— Jones *v.* Morristown Aqueduct Co., 37 N. J. L. 556 [*affirming* 36 N. J. L. 206].

New York.— *In re* Grade Crossing Com'rs, 68 N. Y. App. Div. 560, 74 N. Y. Suppl. 205.

South Carolina.— Atlantic Coast Line R. Co. *v.* South Bound R. Co., 57 S. C. 317, 35 S. E. 553.

Tennessee.— Woolard *v.* Nashville, 108 Tenn. 353, 67 S. W. 801.

Texas.— Karnes County *v.* Ray, (Civ. App. 1900) 57 S. W. 76.

Wisconsin.— Neff *v.* Chicago, etc., R. Co., 14 Wis. 370.

See 18 Cent. Dig. tit. "Eminent Domain," § 670.

If one of several owners appeals, the other owners are adverse parties on whom notice must be served. U. S. *v.* Crooks, 116 Cal. 43, 47 Pac. 870; Butte County *v.* Boydstun, 68 Cal. 189, 8 Pac. 835.

In Wisconsin, however, it has been held that notice of an appeal from the award of commissioners need not be served upon the opposite party where the statute does not so require. Weyer *v.* Milwaukee, etc., R. Co., 57 Wis. 329, 15 N. W. 481.

A New Jersey statute requiring a written notice to be served on the adverse party within ten days after filing the petition for appeal is held not to be jurisdictional, and under exceptional circumstances the court may legally proceed to try an appeal, although such notice was not given within the time stated. Nicoll *v.* New York, etc., Tel. Co., 62 N. J. L. 733, 42 Atl. 583, 72 Am. St. Rep. 666 [*affirming* 62 N. J. L. 156, 40 Atl. 627].

Under the Iowa code, which provides that if the petitioners for the establishment of a highway are required to pay the damages notice of an appeal from an award must be served on the persons first named in the petition, it is not necessary to serve them if it is sought only to charge the county with the damages. Raymond *v.* Clay County, 68 Iowa 130, 26 N. W. 34.

29. Hahn *v.* Chicago, etc., R. Co., 43 Iowa 333.

official,[30] or the statute may provide that the notice shall be filed with the clerk of the court to which the appeal is taken.[31] But where the appeal is by several owners several distinct notices are not required, one notice, stating generally that an appeal has been taken, being sufficient.[32] Under some statutes the notice may be signed by the attorney of the party appealing,[33] and may be served by the sheriff who has conducted the proceedings,[34] in which case the return of the sheriff is sufficient proof of service,[35] and must specify the objections.[36] But in the absence of any special statutory regulation, any act of the party appealing which is usually required in cases of appeal from one tribunal to another, and which clearly indicates an intention to appeal, is sufficient.[37]

(IV) *Payment of Fees or Costs, Bonds, Etc.* It may also be required as a condition to a review in the appellate court that the appealing party pay all the costs accruing up to the time of the appeal,[38] and that he give a proper and sufficient security in the shape of a bond or undertaking[39] except where the state is a

A civil engineer of a railroad company may be a proper agent upon whom to serve notice, where he has transacted business connected with procuring the right of way, has charge of the service and location, and has an office in the county. Jamison *v.* Burlington, etc., R. Co., 69 Iowa 670, 29 N. W. 774.

An attorney for the railroad company is not such an agent, in Illinois under Laws (1852), p. 146 (Hartman *v.* Belleville, etc., R. Co., 64 Ill. 24); although in Iowa notice of an appeal from an award of damages by the sheriff's jury served on the attorney of the opposite party is sufficient (Hahn *v.* Chicago, etc., R. Co., 43 Iowa 333).

30. Haggard *v.* Algona Independent School Dist., 113 Iowa 436, 85 N. W. 777 (county school superintendent); Raymond *v.* Clay County, 68 Iowa 130, 26 N. W. 34; Waltmeyer *v.* Wisconsin, etc., R. Co., 64 Iowa 688, 21 N. W. 139 (deputy sheriff).

Where the appeal is from an award of damages for land taken for a highway, such award having been made by the board of supervisors, the notice must be served on the owner of the land as well as on the county auditor. Spurrier *v.* Wirtner, 48 Iowa 486.

Where there are several commissioners of highways in a town, notice must be served on all of them, and service on one is not sufficient. People *v.* Lawrence, 54 Barb. (N. Y.) 589.

In Missouri, where property is taken by a city, and the statute requires notice to be given to the board of aldermen, it is not necessary that the notice should be served when the board is in session; it is sufficient if it is served upon the presiding officer, the clerk, and the members of the board. Edina *v.* Shoot, 129 Mo. 354, 31 S. W. 767.

31. Klein *v.* St. Paul, etc., R. Co., 30 Minn. 451, 16 N. W. 265, holding that a notice served upon the agent of the petitioning railway company, and not filed with the clerk of the district court, is not sufficient.

32. Larson *v.* Superior Short-Line R. Co., 64 Wis. 59, 24 N. W. 487; Weyer *v.* Milwaukee, etc., R. Co., 57 Wis. 329, 15 N. W. 481; Neff *v.* Chicago, etc., R. Co., 14 Wis. 370.

33. Weyer *v.* Milwaukee, etc., R. Co., 57 Wis. 329, 15 N. W. 481.

34. Cedar Rapids, etc., Land, etc., Co. *v.* Chicago, etc., R. Co., 60 Iowa 35, 14 N. W. 76.

35. Edina *v.* Shoot, 129 Mo. 354, 31 S. W. 767.

36. Flint, etc., R. Co. *v.* Detroit, etc., R. Co., 64 Mich. 350, 31 N. W. 281; Michigan Air-Line R. Co. *v.* Barnes, 44 Mich. 222, 6 N. W. 651.

37. Robertson *v.* Eldora, etc., Coal Co., 27 Iowa 245.

38. Perry *v.* Pennsylvania Schuylkill Valley R. Co., 3 Pa. Co. Ct. 59; Sherfy *v.* Gettysburg Battlefield Memorial Assoc., 3 Pa. Co. Ct. 58; Deisher *v.* Reading, etc., R. Co., 2 Pa. Co. Ct. 606.

Municipal corporations are not within this rule, since they sue and are sued in a representative capacity. Gamble *v.* Lebanon City, 3 Pa. Co. Ct. 594.

The rule does not apply to an appeal under the act of April 9, 1856, supplementary to the railroad law of 1849, which provides that either party may appeal from the report of the viewers within thirty days after the report is filed. Perry's Appeal, (Pa. 1888) 13 Atl. 66; Gettysburg Battlefield Memorial Assoc. *v.* Sherfy, 117 Pa. St. 256, 10 Atl. 758.

Payment into court pending appeal.— A railroad company which has been in possession of land for several years under a lease from a part of the owners, and has been operating a road thereon, may appeal on the issue of the amount of damages adjudged against it in condemnation proceedings, without depositing the amount of the judgment in court or restoring possession of the land. Ashland Coal, etc., R. Co. *v.* Davidson, 20 S. W. 270, 14 Ky. L. Rep. 339. And see State *v.* Waite, 25 Ohio Cir. Ct. 216.

39. *California.*— Los Angeles *v.* Pomeroy, 132 Cal. 340, 64 Pac. 477.

Georgia.— Selma, etc., R. Co. *v.* Gammage, 63 Ga. 604.

Indiana.— Butler *v.* Parker, 9 Ind. 534; Parker *v.* Henderson, 1 Ind. 62.

Iowa.— Grinnell *v.* Mississippi, etc., R. Co., 18 Iowa 570.

Kansas.— St. Louis, etc., R. Co. *v.* Morse, 50 Kan. 99, 31 Pac. 676; Kansas City, etc., R. Co. *v.* Hurst, 42 Kan. 462, 22 Pac. 618; Beckwith *v.* Kansas City, etc., R. Co., 28

party appellant.[40] This bond operates as a supersedeas;[41] and if defective, in some jurisdictions renders the appeal void,[42] unless no possible harm can result from the defect,[43] although the more general practice is to allow the bond to be amended[44] or to allow a new bond to be filed.[45]

(v) *PARTIES.* Every person whose rights and liabilities may in any way be affected by the final decree should be made a party to the appeal.[46] If the landowner dies pending an appeal in proceedings which affect the fee of the land his heirs at law should be made parties.[47]

e. The Record. Except where the trial on appeal in condemnation proceed-

Kan. 484; Missouri River, etc., R. Co. *v.* Owen, 8 Kan. 409.

Kentucky.— Henderson, etc., R. Co. *v.* Dickerson, 16 B. Mon. 297.

Ohio.— State *v.* Waite, 25 Ohio Cir. Ct. 216.

Pennsylvania.— Easton's Appeal, 47 Pa. St. 255; Perry *v.* Pennsylvania Schuylkill Valley R. Co., 3 Pa. Co. Ct. 49; Sherfy *v.* Gettysburg Battlefield Memorial Assoc., 3 Pa. Co. Ct. 58; Deisher *v.* Reading, etc., R. Co., 2 Pa. Co. Ct. 606.

Texas.— Karnes County *v.* Ray, (Civ. App. 1900) 57 S. W. 76; Bexar County *v.* Terrell, (Civ. App. 1890) 14 S. W. 62.

See 18 Cent. Dig. tit. "Eminent Domain," § 671.

The undertaking on appeal from a judgment against an elevated railroad company for past and fee damages should provide for the payment of the fee damages, as well as the past damages and the costs. Eno *v.* New York El. R. Co., 15 N. Y. App. Div. 336, 44 N. Y. Suppl. 61; State *v.* Waite, 25 Ohio Cir. Ct. 216.

Under a Texas statute which provides that the bond shall be in double the amount of the judgment and costs, a supersedeas bond for double the amount of probable costs as fixed by the clerk of the county court is sufficient, and it need not be for double the value of the right of way, a condemnation proceeding not being a suit for the recovery of land. Crary *v.* Port Arthur Channel, etc., Co., (Tex. Civ. App. 1898) 45 S. W. 842.

In Pennsylvania it is held that in fixing the amount of security to be given by the company on appeal, the amount awarded by the viewers cannot be considered, but the court must inform itself by testimony as to the value of the land. Slingluff *v.* Wissahickon Turnpike Co., 1 Phila. 879.

But unless expressly required by the statute, it seems that a bond is not necessary. Perry's Appeal, (Pa. 1888) 13 Atl. 66; Gettysburg Battlefield Memorial Assoc. *v.* Sherfy, 117 Pa. St. 256, 10 Atl. 758; Nebraska R. Co. *v.* Van Dusen, 6 Nebr. 160.

40. Pruitt *v.* Shelbyville Lateral Branch R. Co., 2 Ind. 530.

41. Los Angeles *v.* Pomeroy, 132 Cal. 340, 64 Pac. 477; Eno *v.* New York El. R. Co., 15 N. Y. App. Div. 336, 44 N. Y. Suppl. 61; Crary *v.* Port Arthur Channel, etc., Co., (Tex. Civ. App. 1898) 45 S. W. 842. And see State *v.* Waite, 25 Ohio Cir. Ct. 216.

In New York a judgment directing payment of the award will not be stayed, pending an appeal, on the ground that the award was excessive; but a bond may be taken from the owners conditioned to make restitution in case the award should be reduced. Manhattan R. Co. *v.* O'Sullivan, 8 N. Y. App. Div. 320, 40 N. Y. Suppl. 937.

42. Parker *v.* Henderson, 1 Ind. 62.

A void appeal-bond cannot constitute or effect an appeal from an award of condemnation commissioners of the district court. St. Louis, etc., R. Co. *v.* Morse, 50 Kan. 99, 31 Pac. 676.

43. Chicago, etc., R. Co. *v.* Abilene Town-Site Co., 42 Kan. 97, 21 Pac. 1112, holding that where the appeal-bond is in a sum about one third the amount awarded, the appeal itself is not to be treated as utterly void for the mere reason that the bond is not in double the amount of the award, but it may be treated as sufficiently valid to authorize a trial on the merits if no possible harm can result to the owner by reason of the penalty being too small.

44. Selma, etc., R. Co. *v.* Gammage, 63 Ga. 604.

45. Rippe *v.* Chicago, etc., R. Co., 22 Minn. 44.

If the bond given by the owner is made payable to a third person, not a party to the proceeding, and no special equities are shown, the court may refuse to allow the appeal to be perfected by giving a new bond payable to the proper party. Lovitt *v.* Wellington, etc., R. Co., 26 Kan. 297.

46. Hibberd's Appeal, 2 Pa. Dist. 28.

Persons entitled to appeal see *supra,* XI, P, 1, a, (II).

Where the viewers report that no damages would be sustained by any of the owners, an appeal may be taken by one of the owners without making the other owners parties to it. Robinson *v.* South Chester, 3 Del. Co. (Pa.) 176.

The railroad company is a proper party defendant to an appeal from the decision of the railroad commissioners by one whose land has been taken for the use of the railroad. Chase *v.* Sullivan R. Co., 20 N. H. 195.

A party to whom the land was conveyed after the taking cannot as an intervener be made a party to an appeal. Cedar Rapids, etc., Land, etc., Co. *v.* Chicago, etc., R. Co., 60 Iowa 35, 14 N. W. 76; Connable *v.* Chicago, etc., R. Co., 60 Iowa 27, 14 N. W. 75.

47. Peoria, etc., R. Co. *v.* Rice, 75 Ill. 329. And see *supra,* XI, M, 1, a, (II).

ings is *de novo*,[48] the court can consider only matters contained in the record.[49] The record must show affirmatively everything essential to jurisdiction and regularity,[50] as that a final order was made on the merits, and that the appellant claimed his appeal and filed his bond within the statutory period,[51] and must be filed in the court within the time fixed by statute.[52] It also includes all proceedings or facts which the law or practice of the court requires to be enrolled,[53] but not what it is not necessary to enroll, unless otherwise made a part of the record.[54] If the

48. See *infra*, XI, M, 1, i.

49. *Indiana.*— Evansville, etc., Straight Line R. Co. *v.* Cochran, 10 Ind. 560.

Kansas.— St. Louis, etc., R. Co. *v.* Martin, 29 Kan. 750.

Massachusetts.— Walker *v.* Boston, etc., R. Co., 3 Cush. 1.

Missouri.— Hannibal, etc., R. Co. *v.* Morton, 27 Mo. 317.

New York.— New York, etc., R. Co. *v.* Corey, 5 How. Pr. 177.

In proceedings to extend a street, where the record contains no testimony or anything in the place of testimony, but only the verdict and exceptions thereto, the order confirming the award will be affirmed. Macfarland *v.* Byrnes, 19 App. Cas. (D. C.) 531.

Objections to the admission of certain deeds in evidence, although excepted to, cannot be considered on appeal if no copies of the deeds are furnished in the papers submitted to the appellate court. Cowdrey *v.* Woburn, 136 Mass. 409.

An order overruling certain objections and requests of the landowners is not reviewable, where such order does not appear in the record. *In re* Street Opening, 111 N. Y. 581, 19 N. E. 283.

In a proceeding under the Missouri statute to assess the damages sustained by plaintiff from changing the grade of a street, where it is conceded by the city that the sum adjudged is not excessive, the failure of the record to show proper notice will not work a reversal. Imler *v.* Springfield, 30 Mo. App. 669.

On an appeal from a motion to confirm the report of commissioners, the court must act solely upon the report, and affidavits cannot be read. Metropolitan West Side El. R. Co. *v.* Siegel, 161 Ill. 638. 44 N. E. 276; Rondout, etc., R. Co. *v.* Field, 38 How. Pr. (N. Y.) 187; New York, etc., R. Co. *v.* Coburn, 6 How. Pr. (N. Y.) 223. *Compare* Minneapolis *v.* Wilkin, 30 Minn. 140, 14 N. W. 581.

Evidence given before the viewers will not be noticed by the supreme court, as it constitutes no part of the record. Ohio, etc., R. Co. *v.* Bradford, 19 Pa. St. 363.

Ordinarily the only portions of the record which can be resorted to in determining what were the issues passed upon by a jury are the written pleadings or issues settled; but upon an appeal in proceedings to condemn land for railroad purposes, where the statute prescribes no other written pleading than the petition for the appointment of commissioners, and no issues are formally settled, but those submitted are the ones raised by the proofs on the trial, the settled case made, which forms part of the judgment-roll, and on which a motion to vacate the verdict is based, may be resorted to for the purpose of determining the issues and supporting the verdict. St. Paul, etc., R. Co. *v.* Matthews, 16 Minn. 341.

50. *In re* Cooper, 93 N. Y. 507; Matter of New York, 89 N. Y. App. Div. 490, 85 N. Y. Suppl. 858; Matter of Fourth Ave., 11 Abb. Pr. (N. Y.) 189; Karnes County *v.* Ray, (Tex. Civ. App. 1900) 57 S. W. 76. See, generally, APPEAL AND ERROR, 2 Cyc. 1025.

Amendment.— Where the transcript is imperfect, but it can be amended by a writ of certiorari, the appeal will be held valid. Clinton *v.* Missouri Pac. R. Co., 122 U. S. 469, 7 S. Ct. 1268, 30 L. ed. 1214. And see *In re* New York, etc., R. Co., 33 Hun (N. Y.) 293, holding that where it is claimed that the minutes of testimony annexed to the commissioners' report are defective, but no fraud is charged, the commissioners should be given an opportunity to correct the minutes.

51. Myers *v.* Old Mission, etc., Road, 7 Iowa 315.

52. White Water Valley Canal Co. *v.* Henderson, 8 Blackf. (Ind.) 528; Nebraska, etc., R. Co. *v.* Storer, 22 Nebr. 90, 34 N. W. 69; Gifford *v.* Republican Valley, etc., R. Co., 20 Nebr. 538, 31 N. W. 11; *In re* Mansfield Borough, 158 Pa. St. 314, 27 Atl. 959; Karnes County *v.* Ray, (Tex. Civ. App. 1900) 57 S. W. 76.

53. Ruston *v.* Grimwood, 30 Ind. 364 (holding that the petition, remonstrance, report of the viewers, and the final order are parts of the record); Bell *v.* Pavey, 7 Ind. App. 19, 33 N. E. 1011. See, generally, APPEAL AND ERROR, 2 Cyc. 1053.

54. Madera County *v.* Raymond Granite Co., 139 Cal. 128, 72 Pac. 915. 989 (holding that a certificate signed by the trial judge but bearing date subsequent to the notice of appeal is not a part of the judgment-roll); Manhattan R. Co. *v.* Taber, 7 Misc. (N. Y.) 347, 27 N. Y. Suppl. 860 (holding that on appeal from an order denying costs, the minutes of the proceedings before the commissioners, which were not considered by the court below on the question of costs, cannot be considered by the general term on appeal); *In re* Upper Dublin Tp. Road, 94 Pa. St. 126 (holding that a statement of facts which the parties agreed should be considered as if established by deposition forms no part of the record). And see, generally, APPEAL AND ERROR, 2 Cyc. 1053.

statute makes no provision for bills of exceptions, such a bill does not form a part of the record even if taken;[55] but where the statute does provide for them they are essential.[56]

f. Review — (1) *In General.* An appeal to an appellate court in condemnation proceedings is to be treated as an appeal in a civil action commenced in a *nisi prius* court;[57] and as a general rule an appeal in condemnation proceedings brings the whole case before the appellate court;[58] but the review will proceed only on grounds considered in the lower court,[59] and only such questions will be considered as were properly raised and preserved by appellant below,[60] as have not

55. Hannibal, etc., R. Co. *v.* Morton, 27 Mo. 317.

56. Clapp *v.* McFarland, 20 App. Cas. (D. C.) 224; Suver *v.* Chicago, etc., R. Co., 123 Ill. 293, 14 N. E. 12; Ottumwa *v.* Derks, 32 Iowa 506; St. Louis *v.* Boyce, 130 Mo. 572, 31 S. W. 594. But see Harvey *v.* Aurora, etc., R. Co., 174 Ill. 295, 51 N. E. 163, holding that where the appeal is from an order denying a motion to dismiss the proceedings, it is unnecessary to take a bill of exception on the final judgment awarding damages.

57. Witt *v.* St. Paul, etc., R. Co., 35 Minn. 404, 29 N. W. 161 [*overruling* Conter *v.* St. Paul, etc., R. Co., 24 Minn. 313].

58. *Indiana.*— Keicher *v.* Killbuck Turnpike Co., 33 Ind. 333.

Iowa.— Deaton *v.* Polk County, 9 Iowa 594.

Minnesota.— Lumbermen's Ins. Co. *v.* St. Paul, 85 Minn. 234, 88 N. W. 749; Curtis *v.* St. Paul, etc., R. Co., 20 Minn. 28; Lehmicke *v.* St. Paul, etc., R. Co., 19 Minn. 464.

Missouri.— King's Lake Drainage, etc., Dist. *v.* Jamison, 176 Mo. 557, 75 S. W. 679. *Compare* St. Joseph *v.* Hamilton, 43 Mo. 282.

North Carolina.— Phifer *v.* Carolina Cent. R. Co., 72 N. C. 433.

See 18 Cent. Dig. tit. "Eminent Domain," § 681.

In New York, on appeal to the county judges from an order locating a road, the judges review the entire proceedings, and may inquire into the question of damages (Brunswick Highway Com'rs *v.* Meserole, 10 Wend. 122); but the court of appeals will not review a decision of the commissioners as to what was included in the description of the land (*In re* Southern Boulevard R. Co., 143 N. Y. 253, 38 N. E. 276).

In Indiana, where the proceedings are by a town to appropriate land for a street, the trial on appeal is not *de novo*, and no questions can be determined except those of the regularity of the proceedings and the amount of damages. Terre Haute, etc., R. Co. *v.* Flora, 29 Ind. App. 442, 64 N. E. 648.

Taxation of costs.— Statements of witnesses will not be examined on appeal to determine whether more than three witnesses testified to the same fact, to decide as to the taxation of costs. Louisville, etc., Air Line R. Co. *v.* Dryden, 39 Ind. 393.

59. Eno *v.* Manhattan R. Co., 21 N. Y. App. Div. 548, 48 N. Y. Suppl. 516; Postal Tel. Cable Co. *v.* Texas, etc., R. Co., (Tex. Civ. App. 1898) 46 S. W. 912.

60. *Colorado.*— Colorado Fuel, etc., Co. *v.* Four Mile R. Co., 29 Colo. 90, 66 Pac. 902; Colorado Midland R. Co. *v.* Brown, 15 Colo. 193, 25 Pac. 87.

Illinois.— Burke *v.* Chicago Sanitary Dist., 152 Ill. 125, 38 N. E. 670; Peoria, etc., R. Co. *v.* Laurie, 63 Ill. 264; Kankakee, etc., R. Co. *v.* Chester, 62 Ill. 235.

Indiana.— Lake Erie, etc., R. Co. *v.* Kokomo, 130 Ind. 224, 29 N. E. 780; Beynon *v.* Brandywine, etc., Turnpike Co., 39 Ind. 129.

Iowa.— Ball *v.* Humphrey, 4 Greene 204.

Massachusetts.— Fitchburg R. Co. *v.* Boston, etc., R. Co., 3 Cush. 58; Walker *v.* Boston, etc., R. Co., 3 Cush. 1.

Michigan.— Benton Harbor Terminal R. Co. *v.* King, 131 Mich. 377, 91 N. W. 641; Shroeder *v.* Detroit, etc., R. Co., 44 Mich. 387, 6 N. W. 872; Michigan Air-Line R. Co. *v.* Barnes, 44 Mich. 222, 6 N. W. 651; Bissell *v.* Collins, 28 Mich. 277, 15 Am. Rep. 217.

Minnesota.— Wilkin *v.* St. Paul, etc., R. Co., 22 Minn. 177; Knauft *v.* St. Paul, etc., R. Co., 22 Minn. 173; Lake Superior, etc., R. Co. *v.* Greve, 17 Minn. 322.

Missouri.— Shively *v.* Lankford, 174 Mo. 535, 74 S. W. 835.

Nebraska.— Hastings, etc., R. Co. *v.* Ingalls, 15 Nebr. 123, 16 N. W. 762.

Nevada.— Virginia, etc., R. Co. *v.* Elliott, 5 Nev. 358.

New Jersey.— Leeds *v.* Camden, etc., R. Co., 53 N. J. L. 229, 233, 23 Atl. 168, 169.

New York.— Mitchell *v.* Metropolitan El. R. Co., 132 N. Y. 552, 30 N. E. 385 [*affirming* 9 N. Y. Suppl. 130]; Buffalo, etc., R. Co. *v.* Brainard, 9 N. Y. 100; Matter of Ludlow St., 47 N. Y. App. Div. 317, 62 N. Y. Suppl. 42.

Pennsylvania.— Ohio, etc., R. Co. *v.* Vicary, 1 Am. L. Reg. 121.

Virginia.— Muire *v.* Falconer, 10 Gratt. 12.

West Virginia.— Steenrod *v.* Wheeling, etc., R. Co., 27 W. Va. 1; Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812.

United States.— Shepherd *v.* Baltimore, etc., R. Co., 130 U. S. 426, 9 S. Ct. 598, 32 L. ed. 970.

See 18 Cent. Dig. tit. "Eminent Domain," § 666.

Objections cannot be raised for the first time on appeal to discrimination by the jury in their verdict between the actual and the exemplary damages (Texas, etc., R. Co. *v.* Casey, 52 Tex. 112); nor to the right to

been waived,[61] and as were included in the record,[62] unless the objection goes to the jurisdiction,[63] or is one which it is not the appellant's duty to have corrected in the lower court.[64] As a general rule only matters of law apparent on the face of the record can be considered on appeal,[65] and not questions or findings of

enter a preliminary decree determining the title of defendant to the property sought to be taken (Chicago, etc., R. Co. *v.* Ward, 128 Ill. 349, 18 N. E. 828, 21 N. E. 562; Drucker *v.* Manhattan R. Co., 106 N. Y. 157, 12 N. E. 568, 60 Am. Rep. 437); nor to the mode of verifying the petition (*In re* Boston Hoosac Tunnel R. Co., 79 N. Y. 64); nor to the sufficiency of an ordinance, providing for the improvement (Chicago, etc., R. Co. *v.* Pontiac, 169 Ill. 155, 48 N. E. 485); nor to matters arising subsequent to the judgment (Hubbard *v.* Hartford, 74 Conn. 452, 51 Atl. 133).

An objection that the award is against the law and the evidence is insufficient to raise any question on appeal. Michigan Air-Line R. Co. *v.* Barnes, 44 Mich. 222, 6 N. W. 651.

On an appeal from the commissioners' award the appellate court must confine itself to the questions properly before the commissioners. Leeds *v.* Camden, etc., R. Co., 53 N. J. L. 229, 233, 23 Atl. 168, 169.

Where no appeal is taken from an order appointing the appraisers within the time limited by statute, questions as to alleged errors in the appointment and in the order itself cannot be considered on an appeal from a judgment accepting the report. New Milford Water Co. *v.* Watson, 75 Conn. 237, 52 Atl. 947, 53 Atl. 57.

Motion for a new trial.— It is not necessary, in order to secure a review of rulings on evidence, that a motion for a new trial should be made. Loloff *v.* Sterling, 31 Colo. 102, 71 Pac. 1113; Sultan Water, etc., Co. *v.* Weyerhauser Timber Co., 31 Wash. 558, 72 Pac. 114. *Compare* St. Louis *v.* Boyce, 130 Mo. 572, 31 S. W. 594, which holds that the filing of a bill of exceptions does not preserve exceptions to the commissioners' report in condemnation proceedings, unless a motion for a new trial is filed within four days after the rendition of final judgment.

61. Ann Arbor R. Co. *v.* Beach, 110 Mich. 209, 68 N. W. 124.

62. See *supra*, XI, P, 1, e.

Although the constitution requires that on appeal all questions arising on the record shall be disposed of, yet if the judgment is reversed because of a failure in the petition to set out jurisdictional facts, it is not necessary that the court should decide whether the statute gave to plaintiff railway company the power to condemn a portion of the right of way of defendant company. Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578, 19 N. E. 440.

63. *In re* Boston Hoosac Tunnel, etc., R. Co., 79 N. Y. 64.

Jurisdiction of the court need not be determined upon an appeal from a judgment confirming the report of the appraisers where no error appeared in the court's action. New Milford Water Co. *v.* Watson, 75 Conn. 237, 52 Atl. 947, 53 Atl. 57.

64. Ligare *v.* Chicago, 157 Ill. 637, 41 N. E. 1021, holding that the entry of judgment for a less compensation than the sum awarded by the verdict of the jury may be assigned as error by the owner, since it was not his duty to move in the trial court to have the error corrected.

65. *Indiana.*— Wabash R. Co. *v.* Cincinnati, etc., R. Co., 29 Ind. App. 546, 63 N. E. 325.

Kentucky.— Robb *v.* Maysville, etc., Turnpike Road Co., 3 Metc. 117.

Massachusetts.— Fay *v.* Upton, 153 Mass. 6, 26 N. E. 997; Fowle *v.* Arlington, 122 Mass. 585 note; Dwight Printing Co. *v.* Boston, 122 Mass. 583; Tucker *v.* Massachusetts Cent. R. Co., 116 Mass. 124; Com. *v.* Boston, etc., R. Co., 3 Cush. 25.

Minnesota.— Ramsey County *v.* Stees, 27 Minn. 14, 6 N. W. 401.

Missouri.— Shively *v.* Lankford, 174 Mo. 535, 74 S. W. 835.

New York.— *In re* Union El. R. Co., 113 N. Y. 275, 21 N. E. 81; Gilbert El. R. Co. *v.* Kobbe, 70 N. Y. 361; *In re* Prospect Park, etc., R. Co., 20 Hun 184.

Pennsylvania.— Delaware Div. Canal Co. *v.* McKeen, 52 Pa. St. 117; Rodgers *v.* Freemansburg, 2 Pa. Co. Ct. 523. And see Mifflin *v.* Pennsylvania R. Co., 2 Leg. Gaz. 222.

South Carolina.— Chesterfield, etc., R. Co. *v.* Johnson, 58 S. C. 560, 36 S. E. 919.

Tennessee.— Evans *v.* Shields, 3 Head 70.

Vermont.— Littleton Bridge Co. *v.* Pike, 72 Vt. 7, 47 Atl. 108.

See 18 Cent. Dig. tit. "Eminent Domain," § 685.

In Alabama, appeals in ad quod damnum proceedings, being regulated by the code, which permits an appeal to the circuit court from any assessment of damages before a probate judge, questions of law arising from defects in the proceedings before a probate judge cannot be considered on the appeal. McCulley *v.* Cunningham, 96 Ala. 583, 11 So. 694.

Under Vt. Acts (1882), No. 90, exceptions to a judgment of the county court rendered upon the commissioners' report will be determined as though based upon a petition for certiorari, and only questions affecting the essential rights of the parties will be considered. Hooker *v.* Montpelier, etc., R. Co., 62 Vt. 47, 19 Atl. 775.

The question whether the use is a public one or not, being a judicial question, is subject to review by the appellate court. Pittsburg, etc., R. Co. *v.* Benwood Iron Works, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680.

Under the Massachusetts statute for determining the amount of damages for making free the Northampton bridge, the award

fact;[66] although in some instances an appeal has been held to bring before the appellate court the whole case, both as to the law and the facts.[67] The question of title may in a proper case be raised in the appellate court.[68]

(II) *Presumptions.* The presumptions which are usually indulged by appellate courts in support of the action of the trial court obtain in proceedings for the condemnation of private property.[69] Thus it is a general rule, where the evidence is not preserved in the record, that every presumption will be indulged in favor of the judgment on questions of fact,[70] as that the jury decided correctly on plaintiff's title.[71] In the absence of any circumstances which would indicate a failure to comply with the law, it will be presumed that the requirements of the statute, both those prior to the appeal and those at the time of taking it, were followed,[72] and that the appeal was properly taken;[73] that not only were the proceedings had in the county in which the land was located,[74] but that the taking of the land was authorized by law and was for the purpose of a public use,[75] and was necessary for the purpose.[76] It will also be presumed that the proceedings were regular,[77] and that the petition correctly described the land.[78] So in the absence of any contrary showing in the record, it will be presumed that the commissioners and jurors possessed the necessary qualifications,[79] that they were duly sworn,[80] that correct rules as to the damages were applied.[81] So too in the absence of such

of the commissioners is, in the absence of an appeal to a jury, final, and questions of law cannot be reserved for the supreme court. *In re* Northampton Bridge, 116 Mass. 442.

66. St. Joseph *v.* Crowther, 142 Mo. 155, 43 S. W. 786; Lee *v.* Tebo, etc., R. Co., 53 Mo. 178; Bischoff *v.* New York El. R. Co., 61 N. Y. Super. Ct. 211, 18 N. Y. Suppl. 865.

67. Texas, etc., R. Co. *v.* Southern Development Co., 52 La. Ann. 535, 27 So. 101.

68. Brisbine *v.* St. Paul, etc., R. Co., 23 Minn. 114; Diedrich *v.* Northwestern Union R. Co., 42 Wis. 248, 24 Am. Rep. 399; Giordano *v.* Manhattan R. Co., 9 N. Y. Suppl. 258. See also Appeal and Error, 2 Cyc. 586 note 77.

69. See, generally, Appeal and Error, 3 Cyc. 266 *et seq.*

70. Clapp *v.* Macfarland, 20 App. Cas. (D. C.) 224; Fisher *v.* Chicago, etc., R. Co., 104 Ill. 323.

71. York County *v.* Wrightsville, etc., R. Co., 7 Watts & S. (Pa.) 236.

72. Siman *v.* Rhoades, 24 Minn. 25; Shively *v.* Lankford, 174 Mo. 535, 74 S. W. 835; St. Louis Terminal R. Co. *v.* St. Louis, etc., R. Co., 100 Mo. 419, 13 S. W. 710; Karnes County *v.* Ray, (Tex. Civ. App. 1900) 57 S. W. 76; San Antonio *v.* Sullivan, 23 Tex. Civ. App. 658, 57 S. W. 45.

73. Rippe *v.* Chicago, etc., R. Co., 23 Minn. 18; Matter of Forsyth Boulevard, 127 Mo. 417, 30 S. W. 188; Karnes County *v.* Ray, (Tex. Civ. App. 1900) 57 S. W. 76.

Notice of an appeal from an award of damages constitutes presumptive evidence that an award has been made. Hahn *v.* Chicago, etc., R. Co., 43 Iowa 333.

74. *In re* Chad's Ford Turnpike Road, 5 Binn. (Pa.) 481.

75. Curtis *v.* St. Paul, etc., R. Co., 20 Minn. 28.

76. Bosworth *v.* Providence, 17 R. I. 58, 20 Atl. 97.

77. Neal *v.* Cogar, 1 A. K. Marsh. (Ky.) 589; Matter of Forsyth Boulevard, 127 Mo. 417, 30 S. W. 188; Coster *v.* New Jersey R., etc., Co., 23 N. J. L. 227; Mississippi R. Co. *v.* McDonald, 12 Heisk. (Tenn.) 54.

Under an Oregon statute it is held that this rule applies only after jurisdiction is acquired, and that the existence of jurisdictional facts must nevertheless be shown. Northern Pac. Terminal Co. *v.* Portland, 14 Oreg. 24, 13 Pac. 705.

On appeal from the quashing of an inquisition, it will be presumed, unless the contrary is made to appear, that there were irregularities justifying the quashing, although they are not apparent on the record. Noel *v.* Sale, 1 Call (Va.) 495.

When a notice of filing the petition is not given, and the record shows that the owner appeared and objected to the regularity of the proceedings, but without stating the ground, it will be presumed that he objected to the want of sufficient notice, and his appearance for this purpose will not render the proceedings valid. Cruger *v.* Hudson River R. Co., 12 N. Y. 190.

Although the petition did not allege any attempt to agree as to the point and manner of crossing the defendant railroad by the petitioner's road, it will not be presumed on appeal that there has been a waiver of the effort to agree, if objections were seasonably and appropriately made. Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578, 19 N. E. 440.

78. Ackerman *v.* Huff, 71 Tex. 317, 9 S. W. 236.

79. Ohio River R. Co. *v.* Blake, 38 W. Va. 718, 18 S. E. 957; Chesapeake, etc., R. Co. *v.* Patton, 9 W. Va. 648.

80. Lyon *v.* Green Bay, etc., R. Co., 42 Wis. 538.

81. *District of Columbia.*— Metropolitan R. Co. *v.* Macfarland, 20 App. Cas. 421.

Illinois.— Mitchell *v.* Illinois, etc., R., etc., Co., 85 Ill. 566.

a contrary showing it will be presumed that interest was properly allowed,[82] and that the award was adequate.[83]

(III) *Questions as to Value and Damages.* The questions of value[84] and of damages[85] are brought before the court on appeal from the award, although in most cases the findings on these questions will not be reviewed,[86] unless there has

Iowa.— Mississippi, etc., R. Co. *v.* Byington, 14 Iowa 572.

Minnesota.— Whitacre *v.* St. Paul, etc., R. Co., 24 Minn. 311; Siman *v.* Rhoades, 24 Minn. 25.

New Jersey.— Ellsworth *v.* New Jersey Cent. R. Co., 34 N. J. L. 93.

New York.— *In re* New York, etc., R. Co., 29 Hun 1, holding that the presumption in favor of the correctness of the commissioners' report cannot be affected by a certificate of one of the commissioners, signed by him subsequently, in which he states what rule is adopted in estimating the damages.

Pennsylvania.— Pennsylvania Schuylkill Valley R. Co. *v.* Ziemer, 124 Pa. St. 560, 17 Atl. 187.

South Dakota.— Chicago, etc., R. Co. *v.* Brink, (1903) 94 N. W. 422.

Vermont.— Baxter *v.* Rutland, 67 Vt. 607, 32 Atl. 488.

See 18 Cent. Dig. tit. "Eminent Domain," § 683.

82. Matter of Campbell, 1 N. Y. St. 768; Bridgeman *v.* Hardwick, 67 Vt. 653, 32 Atl. 502.

83. Peoria, etc., R. Co. *v.* Barnum, 107 Ill. 160; Tench *v.* Abshire, 90 Va. 768, 19 S. E. 779.

84. Morgan's Louisiana, etc., R., etc., Co. *v.* Barton, 51 La. Ann. 1338, 26 So. 271 (holding that plaintiff in expropriation may appeal on the issue of value when he claims the value is excessive); Matter of Ludlow St., 47 N. Y. App. Div. 317, 62 N. Y. Suppl. 42; Ohio Postal Tel. Co. *v.* Cleveland, etc., R. Co., 11 Ohio S. & C. Pl. Dec. 52, 8 Ohio N. P. 121 (holding that the common pleas can review only assessment of compensation and damages).

Where an appeal is taken from an order of the special term of the supreme court, affirming the commissioners' report assessing damages and benefits on land affected by the condemnation, and there is no appeal from the order appointing the commissioners, such appeal brings up only the question as to whether the commissioners have correctly exercised their functions in imposing assessments and making awards. Matter of Ludlow St., 47 N. Y. App. Div. 317, 62 N. Y. Suppl. 42.

85. Matter of Ludlow St., 47 N. Y. App. Div. 317, 62 N. Y. Suppl. 42; Ohio Postal Tel. Co. *v.* Cleveland, etc., R. Co., 11 Ohio S. & C. Pl. Dec. 52, 8 Ohio N. P. 121; Leader *v.* Multnomah County, 23 Oreg. 213, 31 Pac. 481; Western American Co. *v.* St. Ann Co., 22 Wash. 158, 60 Pac. 158.

An appeal from the award by the landowner, if the proceedings are otherwise regular, brings up for review only the amount of damages awarded (Sangamon County *v.* Brown, 13 Ill. 207; Briggs *v.* Labette County, 39 Kan. 90, 17 Pac. 331; Wabaunsee County *v.* Bisby, 37 Kan. 253, 15 Pac. 241; Trogden *v.* Winona, etc., R. Co., 22 Minn. 198; Rippe *v.* Chicago, etc., R. Co., 20 Minn. 187, 23 Minn. 18; St. Paul, etc., R. Co. *v.* Murphy, 19 Minn. 500), although in Iowa it is held to bring up also the question whether any damages are recoverable (Spray *v.* Thompson, 9 Iowa 40).

An appeal from an assessment of commissioners for damages brings the case before the district court on its merits. Runner *v.* Keokuk, 11 Iowa 543.

The ruling in Michigan and the recent ruling in Louisiana are that the jury's estimate is not conclusive, but may be reviewed on appeal. Texas, etc., R. Co. *v.* Southern Development Co., 52 La. Ann. 535, 27 So. 101; Grand Rapids, etc., R. Co. *v.* Weiden, 70 Mich. 390, 38 N. W. 294. *Compare* New Orleans, etc., R. Co. *v.* Rabasse, 44 La. Ann. 178, 10 So. 708.

86. *District of Columbia.*— District of Columbia *v.* Prospect Hill Cemetery, 5 App. Cas. 497.

Massachusetts.— First Baptist Soc. *v.* Fall River, 119 Mass. 95.

Missouri.— Kansas City *v.* Bacon, 147 Mo. 259, 48 S. W. 860; Lee *v.* Tebo, etc., R. Co., 53 Mo. 178.

Nebraska.— Northeastern Nebraska R. Co. *v.* Frazier, 25 Nebr. 42, 40 N. W. 604.

Nevada.— Virginia, etc., R. Co. *v.* Elliott, 5 Nev. 358.

New York.— *In re* Boston Road, 27 Hun 409; Matter of Buffalo, Sheld. 423; *In re* New York El. R. Co., 12 N. Y. Suppl. 858.

Pennsylvania.— Ohio, etc., R. Co. *v.* Vicary, 1 Am. L. Reg. 121.

Rhode Island.— Central Land Co. *v.* Providence, 15 R. I. 246, 2 Atl. 553.

Wisconsin.— Darge *v.* Horicon Iron Mfg. Co., 22 Wis. 417.

See 18 Cent. Dig. tit. "Eminent Domain," § 685.

Setting aside a verdict or a report of commissioners for the reason that the damages are inadequate or excessive see *supra*, XI, M, 11, b, (II).

A separate review on the question of damages for the location of a road cannot be had unless the county has a special law on the subject. Huntingdon County *v.* Kauffman, 126 Pa. St. 305, 17 Atl. 595; *In re* Hopewell Tp. Road, 12 Pa. Co. Ct. 517.

The supreme court on appeal cannot examine the merits of an award or appraisement, but any error apparent on the record may be corrected; and its power in such respect is not limited to the absence of a right of appeal. Delaware Div. Canal Co. *v.* McKeen, 52 Pa. St. 117.

been some error of law or of the principle upon which compensation and damages have been assessed,[87] especially if the evidence was conflicting,[88] or unless allowed by special statutes.[89] Where the question of damages alone is brought up on appeal, matters preliminary to the assessment will not be considered,[90] such as the right to appropriate the land,[91] the necessity for taking the land,[92] the question as to the use being a public one,[93] or a failure to agree as to the price, although there is some conflict of opinion on this latter point.[94]

(IV) *Matters Within Discretion of Lower Court.* Matters which are within the discretion of the court below will not ordinarily be reviewed on appeal.[95]

The amount of damages as fixed by the jury cannot be passed upon in the circuit court on an appeal from the county court upon an application to open a new public road. Rawlings *v.* Biggs, 85 Ky. 251, 3 S. W. 147, 8 Ky. L. Rep. 919.

87. Kansas City *v.* Bacon, 147 Mo. 259, 48 S. W. 860; Matter of Buffalo, Sheld. (N. Y.) 423; *In re* Rochester, 20 N. Y. Suppl. 506; *In re* Buffalo, etc., R. Co., 14 N. Y. Suppl. 1; Rondout, etc., R. Co. *v.* Field, 38 How. Pr. (N. Y.) 187; *In re* Byberry, 6 Phila. (Pa.) 384.

Setting aside an award for excess or inadequacy in amount see *supra*, XI, M, 11, b, (II).

88. Schuster *v.* Chicago Sanitary Dist., 177 Ill. 626, 52 N. E. 855; Virginia, etc., R. Co. *v.* Elliott, 5 Nev. 358; *In re* Thompson, 127 N. Y. 463, 28 N. E. 389, 14 L. R. A. 52; *In re* Thompson, 121 N. Y. 277, 24 N. E. 472 [*affirming* 45 Hun 261]; *In re* Bushwick Ave., 48 Barb. (N. Y.) 9; Byrnes *v.* Douglass, 83 Fed. 45, 27 C. C. A. 399.

That objections to the amount of the award will not be considered where the evidence is conflicting and there is no showing of passion or prejudice see *supra*, XI, M, 11, b, (II).

89. Matter of Hand St., 52 Hun (N. Y.) 206, 5 N. Y. Suppl. 158, holding that under a special act in New York upon an appeal from an order of a special term to the general term of the supreme court, the latter may examine all questions of law or of fact that may be involved therein, including the question of damages.

90. Lindsay Irr. Co. *v.* Mehrtens, 97 Cal. 676, 32 Pac. 802; Warren *v.* First Div. St. Paul, etc., R. Co., 18 Minn. 384; Turner *v.* Holleran, 11 Minn. 253; Gilbert El. R. Co. *v.* Kobbe, 70 N. Y. 361; Leader *v.* Multnomah County, 23 Oreg. 213, 31 Pac. 481.

In Kansas, where the board of county commissioners goes to trial upon an appeal from an award of damages made by themselves for opening a road, they cannot be held to say that they have established no road, and that therefore no damages should be awarded. Lyon County *v.* Kiser, 26 Kan. 279.

91. Western American Co. *v.* St. Ann Co., 22 Wash. 158, 60 Pac. 158.

But the question of the right of railroad commissioners, under the New Hampshire statute, to take certain property at all, may be raised by an appeal from their award. Northern R. Co. *v.* Concord, etc., R. Co., 27 N. H. 183.

The validity of a patent issued to a railroad company and the fact that it is lawfully organized with power to procure the condemnation of land for its roadway can only be questioned on the application for the appointment of commissioners or on certiorari thereon or other direct proceedings authorized by law therefor, and not on an appeal from an award of damages. Miller *v.* Prairie du Chien, etc., R. Co., 34 Wis. 533.

92. *Kansas.*—Jockheck *v.* Shawnee County, 53 Kan. 780, 37 Pac. 621.

Michigan.— Detroit, etc., R. Co. *v.* Hall, (1903) 94 N. W. 1066.

New York.— *In re* Union El. R. Co., 113 N. Y. 275, 21 N. E. 81.

Ohio.— Little Miami R. Co. *v.* Perrin, 16 Ohio 479.

Vermont.— Stearns *v.* Barre, 73 Vt. 281, 50 Atl. 1086, 87 Am. St. Rep. 721, 58 L. R. A. 240.

West Virginia.— Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812.

Whether the public interests demand the road, and whether the fiscal condition of the county will justify the payment of the damages awarded, is for the county and not the appellate court to decide. Sangamon County *v.* Brown, 13 Ill. 207.

93. Lindsay Irr. Co. *v.* Mehrtens, 97 Cal. 676, 32 Pac. 802; Denny *v.* Bush, 95 Ind. 315.

94. New York, etc., R. Co. *v.* Wheeler, 72 Conn. 481, 45 Atl. 14; Schuster *v.* Chicago Sanitary Dist., 177 Ill. 626, 52 N. E. 855. *Contra,* Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578, 19 N. E. 440; Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 6 Ohio Cir. Ct. 362, 3 Ohio Cir. Dec. 493.

95. *Connecticut.*— Wilcox *v.* Meriden, 57 Conn. 120, 17 Atl. 366.

Georgia.— Georgia Southern, etc., R. Co. *v.* Jones, 90 Ga. 292, 15 S. E. 824.

Kansas.— Kansas City, etc., R. Co. *v.* Kennedy, 49 Kan. 19, 30 Pac. 126.

Maine.— Burr *v.* Bucksport, etc., R. Co., 64 Me. 131.

Massachusetts.— Teele *v.* Boston, 165 Mass. 88, 42 N. E. 506; Wamesit Power Co. *v.* Lowell, etc., R. Co., 130 Mass. 455; Richardson *v.* Curtis, 2 Gray 497.

Michigan.— Detroit, etc., R. Co. *v.* Hall, (1903) 94 N. W. 1066.

New York.— Chaphe *v.* State, 117 N. Y. 511, 23 N. E. 185; Manhattan R. Co. *v.* O'Sullivan, 6 N. Y. App. Div. 571, 40 N. Y. Suppl. 326; Matter of Union El. R. Co., 55 Hun 163, 7 N. Y. Suppl. 853.

Pennsylvania.— *In re* Towanda Bridge Co., 91 Pa. St. 216.

g. Effect of Appeal. An appeal, while pending, precludes the owner from resorting to any other remedy, inconsistent therewith,[96] and although it is improvidently granted it is nevertheless valid until properly vacated, and cannot be disregarded in a collateral proceeding.[97] By appealing the owner waives all questions as to the regularity of the proceedings,[98] such as want of notice,[99] the fact that the oath was not administered to the commissioners,[1] or irregularities in the selection of a jury;[2] but he does not waive objections going to the jurisdiction,[3] or to the legality of the condemnation.[4] A final judgment which provides for the payment of the ascertained compensation to the owner, and adjudges title and ownership to be in the public, is a judgment *in rem*, and is not affected by an appeal or writ of error,[5] although the assessment of damages may be stayed pending an appeal from the judgment.[6]

h. Determination and Disposition of the Cause — (i) *In General.* On appeal in condemnation proceedings the appellate court has authority to make such order and take such further proceedings as it shall see fit;[7] but it cannot, on

Wisconsin.—Allen *v.* Milwaukee, 72 Wis. 182, 39 N. W. 347; Pick *v.* Rubicon Hydraulic Co., 27 Wis. 433.

See 18 Cent. Dig. tit. "Eminent Domain," § 684.

Where a motion is made at special term of the New York supreme court to set aside an award as excessive, such court is not the original tribunal whose discretionary action will not be disturbed, and the appellate court will confirm the award if it was right, and will affirm the order setting it aside if it was wrong. Manhattan R. Co. *v.* O'Sullivan, 6 N. Y. App. Div. 571, 40 N. Y. Suppl. 326 [*affirmed* in 150 N. Y. 569, 44 N. E. 1125].

96. Ney *v.* Swinney, 36 Ind. 454.

An appeal from the award which brings in question only the sufficiency of the damages is not, however, inconsistent with a proceeding to vacate the appointment of the commissioners, and to oppose the condemnation proceedings. *In re* Minneapolis R. Terminal Co., 38 Minn. 157, 36 N. W. 105.

97. State *v.* Lubke, 15 Mo. App. 152.

98. *Iowa.*— Runner *v.* Keokuk, 11 Iowa 543; Mississippi, etc., R. Co. *v.* Rosseau, 8 Iowa 373.

New Jersey.— Lehigh Valley R. Co. *v.* Dover, etc., R. Co., 43 N. J. L. 528.

New York.— *In re* New York, etc., R. Co., 89 N. Y. 453.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Lawrence, 10 Phila. 604.

Wisconsin.— State *v.* Harland, 74 Wis. 11, 41 N. W. 1060.

Where an appeal is taken from the award of commissioners on the matter of damages, it would seem to be a waiver of all irregularities in the previous proceedings. If it is desired to take advantage of such irregularities the record must be brought up by certiorari. Fitchburg R. Co. *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 58; Delaware, etc., R. Co. *v.* Burson, 61 Pa. St. 369; Lehigh Valley R. Co. *v.* Dover, etc., R. Co., 43 N. J. L. 528.

99. Ellsworth *v.* Chicago, etc., R. Co., 91 Iowa 386, 59 N. W. 78; Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110.

1. Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110.

2. Williamson *v.* Cass County, 84 Ill. 361; Mississippi, etc., R. Co. *v.* Rosseau, 8 Iowa 373.

3. Slough *v.* Chicago, etc., R. Co., 71 Iowa 641, 33 N. W. 149.

4. *In re* Minneapolis R. Terminal Co., 38 Minn. 157, 36 N. W. 105; Warren *v.* First Div. St. Paul, etc., R. Co., 18 Minn. 384; French *v.* East Orange, 49 N. J. L. 401, 8 Atl. 107; *In re* Niagara Falls, etc., R. Co., 121 N. Y. 319, 24 N. E. 452.

5. St. Louis, etc., R. Co. *v.* Clark, 119 Mo. 357, 24 S. W. 157; Kohl *v.* Hannaford, 5 Ohio Dec. (Reprint) 306, 4 Am. L. Rec. 372.

As to running of interest pending an appeal see *infra*, XI, N, 10, d.

A proceeding to reverse a judgment has no effect on the status of the property; until the judgment is reversed such status is precisely that which the judgment declares it to be. Kohl *v.* Hannaford, 5 Ohio Dec. (Reprint) 306, 4 Am. L. Rec. 372.

In Indiana it has been held in proceedings by a natural gas company to condemn land for the purpose of conducting gas, that on an appeal by the company the appeal has the effect of annulling the appraisement. Consumers' Gas Trust Co. *v.* Huntsinger, 12 Ind. App. 285, 40 N. E. 34.

If there is no dispute as to the persons who are entitled to receive the compensation, and there is no disability of those persons to receive it, the court has no power to order a deposit of the sum awarded or any part of it during an appeal by the petitioner (Saratoga, etc., R. Co. *v.* Schenectady Stove Co., 66 How. Pr. (N. Y.) 43), or if already deposited it has no power to order payment to defendants pending the appeal upon other grounds than the insufficiency of the damages awarded (Pool *v.* Butler, 141 Cal. 46, 74 Pac. 444).

6. Harlem River, etc., R. Co. *v.* Arnow, 16 N. Y. App. Div. 380, 45 N. Y. Suppl. 6. But see Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 96 Ill. 125.

7. Louisiana Western R. Co. *v.* Crossman, 111 La. 611, 35 So. 784, Breaux, J., delivering the opinion of the court.

affirming the judgment or award appealed from, render a personal judgment against the appealing party for the amount of the award.[8]

(II) *Correcting, Modifying, or Setting Aside.* The court on appeal may correct the judgment so as to make it conform to what the parties were entitled to as the result of the trial;[9] it may modify the judgment so as to make it conform to the findings of fact and the conclusions of law,[10] or it may set aside the award where the commissioners have exceeded their authority.[11] But as a rule it should not disturb the order, verdict, or award unless palpably contrary to the evidence,[12] or there has been a clear disregard of legal principles,[13] or unless it appears that the verdict was influenced by passion or prejudice.[14] The right of the petitioner

Where a highway is discontinued pending an appeal as to land damages, there is no legal objection to an assessment upon the same appeal for such damages as may have been caused to the landowner by the laying out. Clarke *v.* Manchester, 56 N. H. 502.

8. Cleveland, etc., Valley R. Co. *v.* Wick, 35 Ohio St. 247.

9. Siman *v.* Rhoades, 24 Minn. 25.

A reduction of the damages cannot be made if they have been paid to the landowner or deposited with the treasurer. Low *v.* Concord R. Co., 63 N. H. 557, 3 Atl. 739.

10. Livingston *v.* Manhattan R. Co., 4 N. Y. App. Div. 165, 38 N. Y. Suppl. 751; Adams *v.* Manhattan R. Co., 15 Misc. (N. Y.) 17, 36 N. Y. Suppl. 426. But in an earlier New York case it is held that the court has power only to confirm or set aside the award, or to correct irregularities, and has no power to change the amount. Rochester Waterworks Co. *v.* Wood, 60 Barb. (N. Y.) 137, 41 How. Pr. (N. Y.) 53.

Compelling the owner to remit and return all excessive damages see *supra*, XI, M, 11, d.

11. Smith *v.* Trenton Delaware Falls Co., 17 N. J. L. 5.

12. *Arkansas.*— Fayetteville, etc., R. Co. *v.* Combs, 51 Ark. 324, 11 S. W. 418; Springfield, etc., R. Co. *v.* Rhea, 44 Ark. 268.

California.— San Jose *v.* Reed, 65 Cal. 241, 3 Pac. 806.

District of Columbia.— District of Columbia *v.* Prospect Hill Cemetery, 5 App. Cas. 497.

Illinois.— Illinois, etc., R. Co. *v.* Humiston, 208 Ill. 100, 69 N. E. 880; Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515; Metropolitan West Side R. Co. *v.* Siegel, 161 Ill. 638, 44 N. E. 276; Pittsburg, etc., R. Co. *v.* Lyons, 159 Ill. 576, 43 N. E. 377; McReynolds *v.* Burlington, etc., R. Co., 106 Ill. 152; Tonica, etc., R. Co. *v.* Roberts, 22 Ill. 224; Tonica, etc., R. Co. *v.* Unsicker, 22 Ill. 221; Illinois, etc., R. Co. *v.* Van Horn, 18 Ill. 257.

Indiana.— Forsyth *v.* Wilcox, 143 Ind. 144, 41 N. E. 371.

Kentucky.— Ohio Valley R., etc., Co. *v.* Thomas, 5 S. W. 470, 9 Ky. L. Rep. 508.

Louisiana.— New Orleans *v.* Morgan, 111 La. 851, 35 So. 951 (because it may appear to be possibly over liberal); New Orleans *v.* Schroeder, 111 La. 653, 35 So. 800 (holding that where no other issue than that of value is presented the verdict will not be disturbed); New Orleans, etc., R. Co. *v.* McNeeley, 47 La. Ann. 1298, 17 So. 798; New Orleans, etc., R. Co. *v.* Rabasse, 44 La. Ann. 178, 10 So. 708; New Orleans, etc., R. Co. *v.* Frank, 39 La. Ann. 707, 2 So. 310.

Michigan.— Flint, etc., R. Co. *v.* Detroit, etc., R. Co., 64 Mich. 350, 31 N. W. 281.

Mississippi.— New Orleans, etc., R. Co. *v.* McBride, 38 Miss. 32.

Nebraska.— Fink *v.* Republican Valley R. Co., 27 Nebr. 660, 43 N. W. 418.

New York.— Long Island R. Co. *v.* Reilly, 89 N. Y. App. Div. 166, 85 N. Y. Suppl. 875; *In re* Gilroy, 78 Hun 260, 28 N. Y. Suppl. 910; *In re* Newton, 19 N. Y. Suppl. 573; Matter of Rogers Ave., 22 N. Y. Suppl. 27, 29 Abb. N. Cas. 361; *In re* New York, etc., R. Co., 4 N. Y. Suppl. 88; Pryor's Appeal, 5 Abb. Pr. 272.

Pennsylvania.— Winebiddle *v.* Pennsylvania R. Co., 2 Grant 32.

Virginia.— Muire *v.* Falconer, 10 Gratt. 12.

West Virginia.— Doddridge County Sup'rs *v.* Stout, 9 W. Va. 703.

Wisconsin.— Allen *v.* Milwaukee, 72 Wis. 182, 39 N. W. 347; Wisconsin Cent. R. Co. *v.* Cornell University, 49 Wis. 162, 5 N. W. 331.

See 18 Cent. Dig. tit. "Eminent Domain," § 685. See also Appeal and Error, 3 Cyc. 381 note 79.

A judgment in favor of a railroad company, which was rendered on appeal from a judgment dismissing the company's petition, will not be set aside in the supreme court on the ground that the petition was amended in the court below so as to include more land than the original petition included. Newton *v.* Alabama Midland R. Co., 99 Ala. 468, 13 So. 259.

The commissioners' report will not be set aside on appeal because it fails to recite that the commissioners went upon the premises and viewed the same, in the absence of evidence to the contrary (St. Louis, etc., R. Co. *v.* St. Louis, etc., R. Co., 100 Mo. 419, 13 S. W. 710), nor because it does not award damages to defendant corporation, when no evidence on that point is preserved in the record (St. Louis, etc., R. Co. *v.* St. Louis, etc., R. Co., *supra*).

13. Long Island R. Co. *v.* Reilly, 89 N. Y. App. Div. 166, 85 N. Y. Suppl. 875; *In re* New York, etc., R. Co., 37 Hun (N. Y.) 317.

14. Texas, etc., R. Co. *v.* Eddy, 42 Ark. 527; Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515; Louisville, etc., R. Co. *v.* Ingram, 14

to enter on the land on payment of the award is not stayed nor lost by the subsequent setting aside of the verdict for errors occurring at the trial.[15]

(III) *REVERSAL.* An order, judgment, or award may be reversed on appeal for material errors in the lower court, resulting in substantial injustice to the appellant;[16] but no such reversal may be had on appeal for harmless errors in giving or refusing instructions,[17] in admitting or excluding evidence,[18] in

S. W. 534, 12 Ky. L. Rep. 456; Long Island R. Co. *v.* Reilly, 89 N. Y. App. Div. 166, 85 N. Y. Suppl. 875.

15. National Docks, etc., R. Co. *v.* Pennsylvania R. Co., (N. J. Ch. 1895) 30 Atl. 1102.

The provision of the California code that when a judgment is reversed the appellate court may order complete restitution of all property and rights lost by the judgment, so far as such restitution is consistent, confers upon the court a discretionary power; and where after an appeal by the owner the court allows the petitioner to take possession of the land and occupy it pending the litigation, upon its paying into court a sum in addition to the judgment, the supreme court will not, on reversing and remanding the cause as to the amount of damages only, put the owner back into possession unless the circumstances render it just and necessary. Spring Valley Water Works *v.* Drinkhouse, 95 Cal. 220, 30 Pac. 218.

16. Brunswick, etc., R. Co. *v.* McLaren, 47 Ga. 546; Port Huron, etc., R. Co. *v.* Voorheis, 50 Mich. 506, 15 N. W. 882; Detroit, etc., R. Co. *v.* Crane, 50 Mich. 182, 15 N. W. 73; Lehigh Valley R. Co. *v.* Dover, etc., R. Co., 43 N. J. L. 528; Matter of Rochester, etc., R. Co., 50 Hun (N. Y.) 29, 2 N. Y. Suppl. 457; *In re* New York, etc., R. Co., 37 Hun (N. Y.) 317; Troy, etc., R. Co. *v.* Northern Turnpike Co., 16 Barb. (N. Y.) 100; Troy, etc., R. Co. *v.* Lee, 13 Barb. (N. Y.) 169.

Where the property injured consisted of two lots, one of which was undoubtedly injured to some extent but the other suffering only nominal damages, if the damages are awarded in a lump sum, and the decision of the trial judge does not show how much he assessed as to each lot, the entire judgment must be reversed. Peak *v.* Kings County Electric R. Co., 83 N. Y. App. Div. 631, 81 N. Y. Suppl. 926.

Where there is evidence that the land had advanced in value between the entry and the filing of the petition, error in assessing the damages as of an earlier date is prejudicial to the landowner. Newgass *v.* St. Louis, etc., R. Co., 54 Ark. 140, 15 S. W. 88, Hemingway, J., delivering opinion of the court.

Although the order of the trial court requires the petitioner to pay the award within a fixed time, the judgment may nevertheless be reversed, although that time has elapsed. Leavenworth, etc., R. Co. *v.* Herley, 45 Kan. 535, 26 Pac. 23.

An order of condemnation may be reversed as to one of the parties and affirmed as to the others. Bigelow *v.* Draper, 6 N. D. 152, 69 N. W. 570.

An order granting a landowner damages in proceedings for the establishment of a public road is still adverse to him in the sense that it establishes the road over his land, and an objection that the order is in his favor cannot be urged against an appeal taken by him. Pearson *v.* Island County, 3 Wash. 497, 28 Pac. 1108.

17. Instances of harmless error in giving or refusing instructions see the following cases:

California.— Arcata, etc., R. Co. *v.* Murphy, 71 Cal. 122, 11 Pac. 881, holding that an instruction fixing the day following the filing of the complaint as the date for fixing the value is not prejudicial to the owner if there is no evidence of an increase in value between the time of commencing the action and the time of trial.

District of Columbia.— District of Columbia *v.* Prospect Hill Cemetery, 5 App. Cas. 497.

Illinois.— Groves, etc., R. Co. *v.* Herman, 206 Ill. 34, 69 N. E. 36; Chicago, etc., R. Co. *v.* Blume, 137 Ill. 448, 27 N. E. 601; Chicago, etc., R. Co. *v.* Ward, 128 Ill. 349, 21 N. E. 562; Centralia, etc., R. Co. *v.* Brake, 125 Ill. 393, 17 N. E. 820; Chicago, etc., R. Co. *v.* Dooling, 95 Ill. 202; McAuley *v.* Columbus, etc., R. Co., 83 Ill. 348.

Iowa.— Hoyt *v.* Chicago, etc., R. Co., 117 Iowa 296, 90 N. W. 724; Pingery *v.* Cherokee, etc., R. Co., 78 Iowa 438, 43 N. W. 285; Bell *v.* Chicago, etc., R. Co., 74 Iowa 343, 37 N. W. 768.

Massachusetts.— Warren *v.* Spencer Water Co., 143 Mass. 155, 9 N. E. 527.

Nebraska.— Burlington, etc., R. Co. *v.* White, 28 Nebr. 166, 44 N. W. 95.

Pennsylvania.— Miller *v.* Windsor Water Co., 148 Pa. St. 429, 23 Atl. 1132.

Tennessee.— Smith *v.* East End St. R. Co., 87 Tenn. 626, 11 S. W. 709.

Virginia.— Eppes *v.* Callè, 1 Munf. 258.

Wisconsin.— Weyer *v.* Chicago, etc., R. Co., 68 Wis. 180, 31 N. W. 710.

United States.— Sharp *v.* U. S., 191 U. S. 341, 24 S. Ct. 114, 48 L. ed. 211 [*affirming* 112 Fed. 893, 50 C. C. A. 597, 57 L. R. A. 932].

See 18 Cent. Dig. tit. "Eminent Domain," § 686.

A statement of the charge, in an action for damages for the condemnation by a city of a strip of land for a street, that the land is taken absolutely from plaintiff, and the title is taken from him and vested in the city for all time, cannot be said to be harmless error. Larkin *v.* Scranton City, 162 Pa. St. 289, 29 Atl. 910.

18. Instances of harmless error in admitting or excluding evidence see the following cases:

making the award,[19] or in rulings or findings otherwise.[20] Nor can the appellate court appoint new commissioners upon reversal.[21]

(IV) *Remanding.* Where there is some error in the proceedings or the evi-

California.— Los Angeles, etc., R. Co. *v.* Rumpp, 104 Cal. 20, 37 Pac. 859; San Jose, etc., R. Co. *v.* Mayne, 83 Cal. 566, 23 Pac. 522.

Idaho.— Spokane, etc., R. Co. *v.* Lieuallen, 2 Ida 1101, 29 Pac. 854, Huston, J., delivering the opinion of the court.

Illinois.— Pittsburg, etc., R. Co. *v.* Lyons, 159 Ill. 576, 43 N. E. 377; Chicago, etc., R. Co. *v.* Greiney, 137 Ill. 628, 25 N. E. 798; Culbertson, etc., Packing, etc., Co. *v.* Chicago, 111 Ill. 651.

Iowa.— Burns *v.* Chicago, etc., R. Co., 102 Iowa 7, 70 N. W. 728; Pingery *v.* Cherokee, etc., R. Co., 78 Iowa 438, 43 N. W. 285; Ball *v.* Keokuk, etc., R. Co., 74 Iowa 132, 37 N. W. 110.

Kansas.— Chicago, etc., R. Co. *v.* Woodward, 47 Kan. 191, 27 Pac. 836; Chicago, etc., R. Co. *v.* Brunson, 43 Kan. 371, 23 Pac. 495; Chicago, etc., R. Co. *v.* Dill, 41 Kan. 736, 21 Pac. 778; Chicago, etc., R. Co. *v.* Grovier, 41 Kan. 685, 21 Pac. 779; Le Roy, etc., R. Co. *v.* Hollis, 39 Kan. 646, 18 Pac. 947.

Massachusetts.— Cowdrey *v.* Woburn, 136 Mass. 409.

Michigan.— Fort-St. Union Depot Co. *v.* Jones, 83 Mich. 415, 47 N. W. 349.

Missouri.— Doyle *v.* Kansas City, etc., R. Co., 113 Mo. 280, 20 S. W. 970.

Nebraska.— Smith *v.* Crete, etc., R. Co., 29 Nebr. 142, 45 N. W. 287.

New York.— Eno *v.* Manhattan R. Co., 21 N. Y. App. Div. 548, 48 N. Y. Suppl. 516; *In re* New York, etc., R. Co., 37 Hun 317; Troy, etc., R. Co. *v.* Northern Turnpike, 16 Barb. 300; Troy, etc., R. Co. *v.* Lee, 13 Barb. 169.

Oregon.— Portland *v.* King, (1891) 26 Pac. 376.

Pennsylvania.— Reinhold *v.* Ephrata, 171 Pa. St. 425, 33 Atl. 362; Dorlan *v.* East Brandywine, etc., R. Co., 46 Pa. St. 520.

Texas.— Dallas, etc., R. Co. *v.* Chenault, (App. 1890) 16 S. W. 173.

Washington.— Seattle, etc., R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738.

See 18 Cent. Dig. tit. "Eminent Domain," § 686.

19. Galena, etc., R. Co. *v.* Birkbeck, 70 Ill. 208; Duluth, etc., R. Co. *v.* West, 51 Minn. 103, 53 N. W. 197.

20. Burden *v.* Stein, 25 Ala. 455; Onset St. R. Co. *v.* Plymouth County, 154 Mass. 395, 28 N. E. 286; Paterson, etc., Turnpike Co. *v.* Van Orden, 3 N. J. L. 534; Roberts *v.* New York El. R. Co., 155 N. Y. 31, 49 N. E. 262; Cook *v.* New York El. R. Co., 144 N. Y. 115, 39 N. E. 2; Sixth Ave. R. Co. *v.* Metropolitan El. R. Co., 138 N. Y. 548, 34 N. E. 400; Messenger *v.* Manhattan R. Co., 129 N. Y. 502, 29 N. E. 955 [*affirming* 59 N. Y. Super. Ct. 576, 13 N. Y. Suppl. 958]; People *v.* Greenburgh, 57 N. Y. 549. And see Consolidated St. R. Co. *v.* Toledo Electric St. R. Co., 8 Ohio S. & C. Pl. Dec. 268; 6 Ohio N. P. 537.

It is harmless error to refuse permission to open and close the proceedings unless it is evident from the record that injustice has resulted therefrom (Warner *v.* Gunnison, 2 Colo. App. 430, 31 Pac. 238; Houston, etc., R. Co. *v.* Postal Tel. Cable Co., 18 Tex. Civ. App. 502, 45 S. W. 179; McDonald *v.* Texas, etc., R. Co., 1 Tex. Unrep. Cas. 191); to refuse to allow a city to discontinue condemnation proceedings where by ordinance it can discontinue such proceedings at any time after the assessment of damages (Hyde Park *v.* Dunham, 85 Ill. 569); to submit evidence to the jury which is sufficient to satisfy the court of the corporate existence of the condemning corporation (Henry *v.* Centralia, etc., R. Co., 121 Ill. 264, 12 N. E. 744); to fail to submit to a jury where no different result may be anticipated had a jury acted (Haggard *v.* Algona Independent School Dist., 113 Iowa 486, 85 N. W. 777); to refuse an order of entry on filing the proper bond on appeal, where the company pays the judgment and thereupon obtains an order of entry (Atchison, etc., R. Co. *v.* Schneider, 127 Ill. 144, 20 N. E. 41, 2 L. R. A. 422); to refuse certain findings as to the value of easements taken where the record shows that the true rule of damages was adopted (Sixth Ave. R. Co. *v.* Metropolitan El. R. Co., 138 N. Y. 548, 34 N. E. 400); or to refuse to allow plaintiff to amend its articles of appropriation (Chicago, etc., R. Co. *v.* Hunter, 128 Ind. 213, 27 N. E. 477).

The failure of the record to show that proper notice is given of the condemnation proceedings will not work a reversal of the award of damages where it is conceded by the condemning corporation that the sum adjudged is not excessive. Imler *v.* Springfield, 30 Mo. App. 669.

Failure to find as to the benefit which would accrue to the portions of land not taken is not a prejudicial error. Tehama County *v.* Bryan, 68 Cal. 57, 8 Pac. 673.

Separate owners.— A failure to obtain jurisdiction of certain defendants whose lands or interests are distinct from those of the defendant who appeals is not ground for a reversal (St. Louis *v.* Lanigan, 97 Mo. 175, 10 S. W. 475); but if a part of the owners appeal, a reversal of the judgment as to them is a reversal as to all, although there were separate awards (Kansas City *v.* Mulkey, 176 Mo. 229, 75 S. W. 973).

21. *In re* New York, etc., R. Co., 98 N. Y. 447 [*affirming* 33 Hun 639], Earl, J., delivering the opinion of the court.

In New Jersey, when a case is appealed, and there is a trial and judgment, which judgment is reversed on error and the case remitted, it is lawful for the justice holding the circuit to strike a jury and set the case down for trial. Pennsylvania R. Co. *v.*

dence is so conflicting that the appellate court is unable to do justice between the parties, it may remand the case with instructions for further proceedings,[22] as that new commissioners be appointed,[23] or a new trial may be awarded.[24] Upon remanding the case there should be a new trial *de novo*.[25]

(v) *Dismissal, Withdrawal, or Abandonment.* An appeal will be dismissed if it was not taken within the prescribed time,[26] if the notice required by statute has not been given,[27] or if the amount in controversy is not sufficient to give the appellate court jurisdiction;[28] but it will not be dismissed on account of any irregularities which occurred prior to the appeal,[29] or because the petitioner is in default,[30] or where the only question before the court on appeal is the amount of the award, the court cannot dismiss the petition and subsequent proceedings.[31] Where the owner has appealed from the award, he may dismiss his appeal and withdraw his exceptions to the award, without losing his right to resort to an action to recover his damages; since a withdrawal of the exceptions without accepting the award is not a ratification of the award.[32] But after issue has been joined on the appeal and a trial had on the merits, the appellant cannot, without the consent of the other party, withdraw the appeal and stand on the viewers' award.[33] If the petitioner appeals, and afterward becomes satisfied that the award is correct, and therefore does not desire to further prosecute the appeal, the proper course is to affirm the award;[34] and a motion to dismiss should not be sustained in such a case without requiring the petitioner to pay interest on the award.[35]

(vi) *Recovering Payments Made.* Where the petitioner makes a deposit

National Docks Co., 58 N. J. L. 425, 34 Atl. 753.

22. Bailey *v.* New Orleans, 19 La. Ann. 271.

A case may be remanded for further hearing where it appears that the commissioners have refused to hear the parties or to take their evidence or that the report is such as to show fraud or irregularity; but not for an erroneous ruling by the commissioners in excluding testimony or in admitting immaterial or even incompetent or hearsay evidence. *In re* Nassau Cable Co., 36 Hun (N. Y.) 272.

23. New Orleans, etc., R. Co. *v.* Zeringue, 23 La. Ann. 521; *In re* Nassau Cable Co., 36 Hun (N. Y.) 272.

24. Morin *v.* St. Paul, etc., R. Co., 30 Minn. 100, 14 N. W. 460.

A new trial may be ordered by the appellate court for an error in the assessment of damages. Morin *v.* St. Paul, etc., R. Co., 30 Minn. 100, 14 N. W. 460; Peak *v.* Kings County Electric R. Co., 83 N. Y. App. Div. 631, 81 N. Y. Suppl. 926; Bigelow *v.* Draper, 6 N. D. 152, 69 N. W. 570.

25. State *v.* Gill, 84 Mo. 248; Cincinnati Southern R. Co. *v.* Banning, Ohio Prob. 114; Thetford *v.* Kilburn, 36 Vt. 179; Hunter *v.* Matthews, 12 Leigh (Va.) 228.

In Missouri if a new trial is awarded, there must be another trial *de novo* as to all the owners, and not merely as to those who appealed. State *v.* Gill, 84 Mo. 248.

26. Peters *v.* Hastings, etc., R. Co., 19 Minn. 260.

27. Selma, etc., R. Co. *v.* Gammage, 63 Ga. 604; Dubuque, etc., R. Co. *v.* Shinn, 5 Iowa 516; Dubuque, etc., R. Co. *v.* Crittenden, 5 Iowa 514; Grand Rapids *v.* Chicago, etc., R. Co., 95 Mich. 473, 55 N. W. 359.

28. New Orleans *v.* Contonio, 111 La. 545, 35 So. 740.

29. Wilkin *v.* St. Paul, etc., R. Co., 22 Minn. 177; Knauft *v.* St. Paul, etc., R. Co., 22 Minn. 173; Harper *v.* Miller, 26 N. C. 34.

When a railroad company appeals from an award of viewers, and more than two years elapse before the owner moves to strike off the appeal, during which time he amended the record and repeatedly marked the case for trial, the motion to strike off will be refused, although the appeal was defective in form. Perry *v.* Pennsylvania Schuylkill Valley R. Co., 3 Montg. Co. Rep. (Pa.) 43.

30. Omaha, etc., R. Co. *v.* Umstead, 17 Nebr. 459, 23 N. W. 350.

31. Rippe *v.* Chicago, etc., R. Co., 20 Minn. 187.

32. Chicago, etc., R. Co. *v.* Patterson, 26 Ind. App. 295, 59 N. E. 688.

Where a city abandons a portion of the land taken for a street, after an appeal by the owner, the latter may abandon his appeal, with costs, or he may pursue it and have the damages assessed for so much of the land as is still covered by the street. Curtis *v.* Portland, 60 Me. 55.

33. Schuylkill River East Side R. Co. *v.* Harris, 124 Pa. St. 215, 16 Atl. 838; Schuylkill River East Side R. Co.'s Appeal, (Pa. 1889) 16 Atl. 840. See also Brown *v.* Corey, 43 Pa. St. 495.

34. Robbins *v.* Omaha, etc., R. Co., 27 Nebr. 73, 42 N. W. 905; Berggren *v.* Fremont, etc., R. Co., 23 Nebr. 620, 37 N. W. 470; Donaldson *v.* Pennsylvania R. Co., 5 Pa. Co. Ct. 62 note.

35. Berggren *v.* Fremont, etc., R. Co., 23 Nebr. 620, 37 N. W. 470.

of the award and goes into possession, it is entitled, if the judgment of condemnation is reversed, to have the sum repaid to it,[36] and if the deposit is withdrawn by the owner he may be compelled to refund the amount to the petitioner,[37] or if the amount is diminished on appeal the petitioner is entitled to recover the amount of the diminution.[38] The same rule applies where the award has been paid to the owner.[39]

1. **Trial De Novo** — (I) *In General.* Under statutes giving the right of appeal in condemnation proceedings, there can be a trial *de novo* in the appellate court only when authorized by the statute or constitution.[40]

(II) *Scope of Inquiry.* A trial *de novo* in the appellate court opens the whole case for trial upon its merits,[41] and not on the exceptions filed[42] and all

36. Ligare *v.* Chicago, etc., R. Co., 50 Ill. App. 84.

37. Watson *v.* Milwaukee, etc., R. Co., 57 Wis. 332, 15 N. W. 468.

38. Cincinnati Southern R. Co. *v.* Banning, 10 Ohio Dec. (Reprint) 385, 21 Cinc. L. Bul. 9.

Under N. H. Gen. Laws, c. 160, § 22, if a railroad company has taken the land and paid the assessed damages to the owner or to the state treasurer and entered upon the land, it cannot recover back any part of the sum, although the verdict of the jury is for a less sum than the award appealed from. Ranlet *v.* Concord R. Corp., 62 N. H. 561.

39. Missouri Pac. R. Co. *v.* Gruendel, 3 Kan. App. 53, 44 Pac. 439; Cincinnati Southern R. Co. *v.* Banning, 10 Ohio Dec. (Reprint) 385, 21 Cinc. L. Bul. 9.

40. *Alabama.*— Montgomery Southern R. Co. *v.* Sayre, 72 Ala. 443.

Indiana.— Evansville, etc., R. Co. *v.* Terre Haute, 161 Ind. 26, 67 N. E. 686; Reynolds *v.* Shults, 106 Ind. 291, 6 N. E. 619; Hays *v.* Parrish, 52 Ind. 132; Heady *v.* Vevay, etc., Turnpike Co., 52 Ind. 117; Kemp *v.* Smith, 7 Ind. 471.

Iowa.— Prosser *v.* Wapello County, 18 Iowa 327; Runner *v.* Keokuk, 11 Iowa 543.

Kentucky.— Winchester, etc., Turnpike-Road Co. *v.* Evans, 110 Ky. 463, 61 S. W. 1008, 22 Ky. L. Rep. 1883; Elizabethtown, etc., R. Co. *v.* Catlettsburg Water Co., 110 Ky. 175, 61 S. W. 47, 22 Ky. L. Rep. 1632.

Missouri.— *In re* Gardner, 41 Mo. App. 589.

New Jersey.— Miller *v.* Newark, 35 N. J. L. 460.

Ohio.— State *v.* Hamilton County, 69 Ohio St. 372, 69 N. E. 659.

Oregon.— Portland *v.* Kamm, 5 Oreg. 362.

Pennsylvania.— Michael *v.* Crescent Pipe Line Co., 159 Pa. St. 99, 28 Atl. 204; Schuylkill River East Side R. Co. *v.* Harris, 124 Pa. St. 215, 16 Atl. 838; Hibberd's Appeal, 2 Pa. Dist. 28.

Tennessee.—Alloway *v.* Nashville, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123.

Texas.— Southern Cotton Press, etc., Co. *v.* Galveston Wharf Co., 3 Tex. App. Civ. Cas. § 256.

Wisconsin.— Watson *v.* Milwaukee, etc., R. Co., 57 Wis. 332, 15 N. W. 468.

United States.— Sharpe *v.* U. S., 112 Fed. 893, 50 C. C. A. 597, 57 L. R. A. 932.

See 18 Cent. Dig. tit. "Eminent Domain," § 675 *et seq.*

A trial de novo may be had of an appeal from the county court to the circuit court in special proceedings to condemn land for railroads or turnpikes (Chattaroi R. Co. *v.* Biggs, 7 Ky. L. Rep. 515), or from a judgment condemning a mill site (Towson *v.* Debow, 5 Sneed (Tenn.) 193. But see Kearns *v.* Thomas, 37 Wis. 118, holding that under Wis. Const. art. 7, § 63, causes arising under the mill-dam act and brought up on appeal are to be determined on exceptions).

Where after an assessment of damages the company paid to the sheriff the amount awarded, and both parties appealed, and without the knowledge of the company the owner subsequently accepted the money from the sheriff, although the owner's appeal is defeated thereby, yet the court still has jurisdiction on the company's appeal, and the owner has the right to contest the amount of recovery. Burns *v.* Chicago, etc., R. Co., 102 Iowa 7, 70 N. W. 728.

41. Peed *v.* Brenneman, 72 Ind. 288; Mississippi, etc., R. Co. *v.* Rosseau, 8 Iowa 373; Chicago, etc., R. Co. *v.* Baker, 102 Mo. 553, 15 S. W. 64; Gulf, etc., R. Co. *v.* Kerfoot, 85 Tex. 267, 20 S. W. 58.

Estoppel.—Accepting under an agreed order the amount of the award and executing a bond for its return, so far as it might be in excess of the sum adjudged on appeal, does not estop defendant from claiming in the circuit court more than such amount, since the statute requires a case to be tried anew in the circuit court. Elizabethtown, etc., R. Co. *v.* Catlettsburg Water Co., 110 Ky. 175, 61 S. W. 47, 22 Ky. L. Rep. 1632. But where county commissioners go to trial upon an appeal from an award for land damages made by themselves for opening a road they cannot be heard to say that they have established no road and that therefore no damages could be awarded. Lyon County *v.* Kiser, 26 Kan. 279.

Where a verdict is so defective that a judgment cannot be rendered thereon against the remonstrant, he is entitled to a new trial of the whole case, including the question of public utility, not only as to him, but as to all the remonstrants. Peed *v.* Brenneman, 72 Ind. 288.

42. Chicago, etc., R. Co. *v.* Baker, 102 Mo. 553, 15 S. W. 64; Chester Rolling Mills *v.* Grannan, 1 Del. Co. (Pa.) 379; Southern Cotton Press, etc., Co. *v.* Galveston Wharf Co., 3 Tex. App. Civ. Cas. § 256; Wooster *v.*

questions in reference to the condemnation which appear on the record may be considered,[43] although it has been held that on appeal from the commissioners' award the retrial can be only of matters submitted to the commissioners.[44] The usual presumptions will be indulged in favor of the action of the trial court.[45]

(III) *Mode and Conduct of Trial* — (A) *In General.* The proceedings in a trial *de novo* are in general conformity with those of ordinary *nisi prius* trials,[46] either by a jury,[47] or by the court without a jury,[48] the owner being considered

Sugar River Valley R. Co., 57 Wis. 311, 15 N. W. 401.

43. Cook *v.* Boone Suburban Electric R. Co., 122 Iowa 437, 98 N. W. 293; Dudley *v.* Minnesota, etc., R. Co., 77 Iowa 408, 42 N. W. 359.

If an owner remonstrates against the establishment of a highway, both upon the ground that it is not of public utility, and on account of the damages, two issues are presented which must be tried *de novo* on appeal to the circuit court. Reynolds *v.* Shults, 106 Ind. 291, 6 N. E. 619; Schmied *v.* Keeney, 72 Ind. 309.

Under Mo. Laws (1887), p. 246, giving a right of appeal from a judgment of the county court in the case of opening, changing, or vacating a road to the circuit court to be tried anew, the circuit court may on appeal determine as to the necessity of the road. *In re* Gardner, 41 Mo. App. 589.

The question of whether or not a railroad company can lawfully construct its road according to a proposed plan cannot be considered on the trial of an appeal, nor should it be submitted to the jury to say what plans ought to be adopted. Packard *v.* Bergen Neck R. Co., 54 N. J. L. 553, 25 Atl. 506. But see St. Louis, etc., R. Co. *v.* Clark, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751, holding that, although the appropriation of lands is complete when the railroad company pays the award into court and takes possession, it may, on a subsequent trial before the jury, announce lands on which the road will be constructed, with a view to obtaining a reduction of damages.

In fixing compensation on a trial de novo the quality of the estate of one alleged to be an owner must be considered. Miller *v.* Newark, 35 N. J. L. 460.

44. Peoria, etc., R. Co. *v.* Laurie, 63 Ill. 264.

The scope of an appeal from the commissioners' award is to secure a retrial of the same matter submitted to the commissioners (Whitacre *v.* St. Paul, etc., R. Co., 24 Minn. 311; Trogden *v.* Winona, etc., R. Co., 22 Minn. 198; Warren *v.* First Div. St. Paul, etc., R. Co., 21 Minn. 424; Sherwood *v.* St. Paul, etc., R. Co., 21 Minn. 122; Rippe *v.* Chicago, etc., R. Co., 20 Minn. 187; Curtis *v.* St. Paul, etc., R. Co., 20 Minn. 28; St. Paul, etc., R. Co. *v.* Murphy, 19 Minn. 500); therefore any property not included in the award will not be affected by the appeal, and damages to such property are not a proper subject of inquiry (Chicago, etc., R. Co. *v.* Grovier, 41 Kan. 685, 21 Pac. 779).

45. Graf *v.* St. Louis, 8 Mo. App. 562.

On appeal from a decree dismissing a bill to restrain highway commissioners from opening a highway across the complainant's land, the supreme court cannot in the absence of any showing of the fact presume that the commissioners failed to report to the town auditors their award or that no provision was made for its payment. Todemier *v.* Aspinwall, 43 Ill. 401.

46. Miller *v.* Newark, 35 N. J. L. 460; Hibberd's Appeal, 2 Pa. Dist. 28, holding that on appeal from an award of viewers of a public road, in Pennsylvania, the proceedings should as nearly as possible conform to the practice and pleadings in chancery.

47. *Alabama.*— Montgomery Southern R. Co. *v.* Sayre, 72 Ala. 443.

District of Columbia.— Macfarland *v.* Byrnes, 19 App. Cas. 531.

Indiana.— Hays *v.* Parrish, 52 Ind. 132.

Kentucky.— Walton *v.* Norman, 42 S. W. 1146, 19 Ky. L. Rep. 1079.

New Jersey.— Budd *v.* New Jersey R., etc., Co., 14 N. J. L. 467.

Ohio.— Covington, etc., Bridge Co. *v.* Magruder, 63 Ohio St. 455, 59 N. E. 216.

Pennsylvania.— Michael *v.* Crescent Pipe Line Co., 159 Pa. St. 99, 28 Atl. 204; Traut *v.* New York, etc., R. Co., (1888) 15 Atl. 678 (holding the court may direct the jury to view the premises on appeal from a reviewer's decision); Bechtel *v.* Bechtelsville Borough, 3 Pa. Dist. 713.

See 18 Cent. Dig. tit. "Eminent Domain," § 675 *et seq.*

In fixing compensation the jury in the appellate court may compare the market value of the whole tract at the date of the commissioner's award with its market value at the time when it is taken and the improvement constructed thereon, and may award the difference, provided that any increase of value resulting to the land in common with other lands is excluded from their consideration, or it appears clearly that there has been no such increase; and in the latter case it is not erroneous to give such instructions without qualifying them by a direction to exclude their consideration in such increase of value. Packard *v.* Bergen Neck R. Co., 54 N. J. L. 553, 25 Atl. 506. And see Chicago, etc., R. Co. *v.* Broquet, 47 Kan. 571, 28 Pac. 717.

The verdict of the jury in such a trial may blend the value of the land taken and the damages in one aggregate sum. Packard *v.* Bergen Neck R. Co., 54 N. J. L. 553, 25 Atl. 506.

48. Evansville, etc., R. Co. *v.* Miller, 30 Ind. 209; Budd *v.* New Jersey R., etc., Co., 14 N. J. L. 467.

plaintiff[49] and in some jurisdictions entitled to the right to open and close,[50] although in other jurisdictions this right is held to be in the petitioner since he has the burden of proof.[51] Every person whose rights or liabilities may in any way be affected by the final judgment should be made a party,[52] but where several tracts belonging to different owners are embraced in the same proceeding, each owner is not entitled to a separate trial,[53] and if separate appeals are taken, they should be consolidated for the purpose of trial.[54]

(B) *Pleadings.* The form of the issues is of little consequence,[55] if the statement or pleading when filed is of such character as to clearly show the questions arising, and to give both parties an opportunity to obtain their full rights.[56] In some jurisdictions it is unnecessary to file any pleadings in the trial court,[57] although in the discretion of the court they may be required to do so,[58] or to file a bill of exceptions.[59] But where pleadings have been filed they may be amended and additional pleadings may be filed.[60]

Under the Pennsylvania lateral railroad act, the determination of the necessity of the proposed road on appeal from the viewers' report is exclusively for the court, and should not be submitted to the jury in the appellate court. Boyd *v.* Negley, 40 Pa. St. 377; Brown *v.* Peterson, 40 Pa. St. 373.

49. Sangamon County *v.* Brown, 13 Ill. 207; Chicago, etc., R. Co. *v.* Butts, 55 Kan. 660, 41 Pac. 948; Omaha, etc., R. Co. *v.* Umstead, 17 Nebr. 459, 23 N. W. 350; Morris, etc., R. Co. *v.* Bonnell, 34 N. J. L. 474; Watson *v.* Milwaukee, etc., R. Co., 57 Wis. 332, 15 N. W. 468.

50. Indiana, etc., R. Co. *v.* Cook, 102 Ind. 133, 26 N. E. 203; Peed *v.* Brenneman, 89 Ind. 252; Consumers' Gas Trust Co. *v.* Huntsinger, 12 Ind. App. 285, 40 N. E. 34; Minnesota Valley R. Co. *v.* Doran, 17 Minn. 188; Omaha, etc., R. Co. *v.* Walker, 17 Nebr. 432, 23 N. W. 348; Morris, etc., R. Co. *v.* Bonnell, 34 N. J. L. 474.

51. Montgomery Southern R. Co. *v.* Sayre, 72 Ala. 443; Harrison *v.* Young, 9 Ga. 359; Barrall *v.* Quick, 111 Ky. 22, 63 S. W. 33, 23 Ky. L. Rep. 421; Shelbyville, etc., Turnpike Co. *v.* Louisville, etc., R. Co., 51 S. W. 805, 21 Ky. L. Rep. 548; Alloway *v.* Nashville, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123.

52. Hibberd's Appeal, 2 Pa. Dist. 28.

53. Gulf, etc., R. Co. *v.* Kerfoot, 85 Tex. 267, 20 S. W. 59; Watson *v.* Milwaukee, etc., R. Co., 57 Wis. 332, 15 N. W. 468.

A joint owner may show the damage for the entire tract, although the other owner refuses to join in the appeal. Hanrahan *v.* Fox, 47 Iowa 102.

If the land is owned by husband and wife, they cannot unite with a claim for damages to their joint land a demand for damages for other land owned by the husband alone. Leavenworth, etc., R. Co. *v.* Wilkins, 45 Kan. 674, 26 Pac. 16.

54. Jamieson *v.* Cass County, 56 Ind. 466; Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364, 18 N. W. 328.

Where the owner appeals from the award, and another person, who claims to be a lessee and to own the improvements, subsequently appeals, the first appeal should not be continued in order to try the two together, if the appellant in the first appeal is ready for trial, and no valid ground for a continuance is presented by defendant. Douglass *v.* Sargent, 32 Kan. 413, 4 Pac. 861.

55. Cresson, etc., Short-Route R. Co. *v.* Aunsman, (Pa. 1887) 11 Atl. 561.

56. *California.*— Los Angeles, etc., R. Co. *v.* Rumpp, 104 Cal. 20, 37 Pac. 859.

Indiana.— Decatur *v.* Grand Rapids, etc., R. Co., 146 Ind. 577, 45 N. E. 793.

Kansas.— Kansas City, etc., R. Co. *v.* Kennedy, 49 Kan. 19, 30 Pac. 126; Chicago, etc., R. Co. *v.* Wilkinson, 42 Kan. 337, 22 Pac. 412; Burlington, etc., R. Co. *v.* Billings, 38 Kan. 243, 16 Pac. 473; Missouri River, etc., R. Co. *v.* Owen, 8 Kan. 409.

Nebraska.— Nebraska R. Co. *v.* Van Dusen, 6 Nebr. 160.

New Jersey.— National Docks, etc., Connecting R. Co. *v.* Pennsylvania R. Co., 57 N. J. L. 637, 32 Atl. 274.

Pennsylvania.— Cresson, etc., Short Route R. Co. *v.* Aunsman, (1887) 11 Atl. 561.

See 18 Cent. Dig. tit. "Eminent Domain," § 675 *et seq.*

57. Lake Erie, etc., R. Co. *v.* Heath, 9 Ind. 558; Chicago, etc., R. Co. *v.* Wilkinson, 42 Kan. 337, 22 Pac. 412; Ellsworth, etc., R. Co. *v.* Maxwell, 39 Kan. 651, 18 Pac. 819; St. Joseph, etc., R. Co. *v.* Orr, 8 Kan. 419; Fremont, etc., R. Co. *v.* Meeker, 28 Nebr. 94, 44 N. W. 79; Nebraska R. Co. *v.* Van Dusen, 6 Nebr. 160.

Under the Newark city charter the issue on which the trial shall be had will be framed under the directions of the court, in the language of the charter, without answer being filed and notwithstanding one if filed. Miller *v.* Newark, 35 N. J. L. 460.

But where the one appealing has not filed his claim for damages either before the commissioners or in the circuit court, he is not entitled to an award. Hays *v.* Parrish, 52 Ind. 132.

58. Chicago, etc., R. Co. *v.* Wilkinson, 42 Kan. 337, 22 Pac. 412.

59. Winchester, etc., Turnpike Road Co. *v.* Evans, 110 Ky. 463, 61 S. W. 1008, 22 Ky. L. Rep. 1883.

60. Swinney *v.* Ft. Wayne, etc., R. Co., 59 Ind. 205; Pittsburgh, etc., R. Co. *v.* Swinney,

(c) *Evidence.* Either party may introduce in such trial competent evidence tending to establish his position,[61] as to show title or ownership[62] or to show what land was condemned,[63] or on the question of damages.[64]

2. CERTIORARI[65]— a. In General. A writ of certiorari will lie for the purpose of reviewing condemnation proceedings where the lower court or the commissioners have exceeded their jurisdiction,[66] where no appeal or writ of error is allowed,[67] or these remedies have been lost without fault or negligence of the

59 Ind. 100; Siman *v.* Rhoades, 24 Minn. 25; Gulf, etc., R. Co. *v.* Kerfoot, 85 Tex. 267, 20 S. W. 59.

61. Frosard *v.* St. Landry Police Jury, 3 La. Ann. 560.

One of the view jury is competent to give evidence upon the trial upon an appeal from an assessment of damages. Philadelphia, etc., R. Co. *v.* Rogers, 2 Walk. (Pa.) 275.

Testimony as to the condition of the land at the time of the trial instead of the filing of the report is improper. Conter *v.* St. Paul, etc., R. Co., 22 Minn. 342.

A petition of citizens for the construction of a railroad is not evidence upon a trial upon an appeal from the report of viewers as against an owner who did not release his damages. Philadelphia, etc., R. Co. *v.* Patterson, 3 Walk. (Pa.) 143.

Failure to file a petition on appeal from an assessment of damages is no ground for an objection to the introduction of evidence. Ellsworth, etc., R. Co. *v.* Maxwell, 39 Kan. 651, 18 Pac. 819.

62. Missouri River, etc., R. Co. *v.* Owen, 8 Kan. 409.

Burden of proof.— Where one not named in the condemnation award or proceedings appeals from the assessment and files a petition on appeal, claiming that he is the owner of the land appropriated, which claim is denied, the burden is on him to prove title or exclusive possession for the period covered by the statute of limitations. Chicago, etc., R. Co. *v.* Cook, 43 Kan. 83, 22 Pac. 988.

63. St. Joseph, etc., R. Co. *v.* Orr, 8 Kan. 419; Missouri River, etc., R. Co. *v.* Owen, 8 Kan. 409.

Evidence tending to show that the condemning company occupied more land than described in the draft is admissible upon a trial of an appeal from a report of viewers. Pennsylvania, etc., Canal, etc., Co. *v.* Roberts, 2 Walk. (Pa.) 482.

The record of the proceedings before the commissioners may be used and referred to to explain the location of the improvement and of the land taken. Sherman *v.* St. Paul, etc., R. Co., 30 Minn. 227, 15 N. W. 239.

64. Sharp *v.* U. S., 191 U. S. 341, 24 S. Ct. 114, 48 L. ed. 211 [*affirming* 112 Fed. 893, 50 C. C. A. 597, 57 L. R. A. 932], holding that the jury on a trial *de novo*, upon an appeal from an award of commissioners, must be satisfied as to the value and damages by the testimony produced before them, without reference to any testimony produced before the commissioners, and they must not be influenced by the commissioners' report.

An award of damages to a mortgagee is competent evidence on a trial on appeal to show the amount of damages sustained by the owner, but is not conclusive on that question, although it is conclusive as to the mortgagee who had not appealed. Trogden *v.* Winona, etc., R. Co., 22 Minn. 198.

It is inadmissible in such trial on the question of damages to introduce as evidence the fact that a petitioner to condemn land for a railroad already has the right of way sought by another route (Boyd *v.* Negley, 40 Pa. St. 377), or testimony of the amount awarded (Chicago, etc., R. Co. *v.* Broquet, 47 Kan. 571, 28 Pac. 717), or the award of damages (Southern Cotton Press, etc., Co. *v.* Galveston Wharf Co., 3 Tex. App. Civ. Cas. § 256), or the record of proceedings before the commissioners (Sherman *v.* St. Paul, etc., R. Co., 30 Minn. 227, 15 N. W. 239), or to ask the commissioners whether their assessment correctly expressed their judgment (Winklemans *v.* Des Moines Northwestern R. Co., 62 Iowa 11, 17 N. W. 82); nor should witnesses be permitted to testify as to damages to crops not on the right of way by driving teams hitched to plows and scrapers through them, which were matters which the commissioners could not properly consider in making their award (Burlington, etc., R. Co. *v.* Schluntz, 14 Nebr. 421, 16 N. W. 439).

Under the practice in New Jersey on a trial *de novo* in the circuit court after a trial in the district court, the only testimony to be considered is that received on the second trial supplemented by a personal view of the premises by a jury. Sharp *v.* U. S., 191 U. S. 341, 24 S. Ct. 114, 48 L. ed. 211 [*affirming* 112 Fed. 893, 50 C. C. A. 597, 57 L. R. A. 932].

65. Certiorari generally see CERTIORARI.

66. Oran *v.* Hoblit, 19 Ill. App. 259; Bixby *v.* Goss, 54 Mich. 551, 20 N. W. 581; Dunlap *v.* Toledo, etc., R. Co., 46 Mich. 190, 9 N. W. 249; People *v.* Hildreth, 126 N. Y. 360, 27 N. E. 558; Tennessee Cent. R. Co. *v.* Campbell, 109 Tenn. 640, 75 S. W. 1012.

67. *Massachusetts.*— *In re* Endicott, 24 Pick. 339; Palmer Co. *v.* Ferrill, 17 Pick. 58.

Minnesota.— Minneapolis *v.* Wilkin, 30 Minn. 140, 14 N. W. 581.

Montana.— State *v.* Fifth Judicial Dist. Ct., 29 Mont. 153, 74 Pac. 200.

New Jersey.— Vanwickle *v.* Camden, etc., Transp. Co., 14 N. J. L. 162.

North Carolina.— Brooks *v.* Morgan, 27 N. C. 481.

Tennessee.— Tennessee Cent. R. Co. *v.* Campbell, 109 Tenn. 640, 75 S. W. 1012.

Vermont.— Lyman *v.* Burlington, 22 Vt. 131; Adams *v.* Newfane, 8 Vt. 271.

Washington.— State *v.* King County Super. Ct., 30 Wash. 219, 232, 70 Pac. 484.

applicant,[68] and in all cases where errors in the adjudications of the lower courts or commissioners are sought to be corrected and there is no other plain, speedy, and adequate remedy.[69] In the absence of statute providing otherwise, however, the issuance of the writ is within the discretion of the superior court[70] and should not be granted where there is another adequate remedy,[71] where the statutes have furnished a different and exclusive remedy,[72] or where the appellant has been guilty of laches, or is estopped[73] unless the proceedings were wholly unauthorized.[74] The writ will be quashed where it has been issued improvidently.[75] Where merits are shown a supersedeas will issue to prevent the petitioner from entering upon the premises until the case is decided upon review.[76]

b. Determination Reviewable. The general rule is that the exercise of any function which is judicial in its nature may be reviewed by writ of certiorari,[77]

Wisconsin.—State *v.* Oshkosh, 84 Wis. 548, 54 N. W. 1095.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 688, 689.

In Pennsylvania, if there are no irregularities in the proceedings of the viewers or errors in the record, the owner may file exceptions, and if dissatisfied he still has his remedy by certiorari, and may at the same time retain full title to the land. Philadelphia, etc., R. Co. *v.* Lawrence, 10 Phila. 604.

68. Joliet, etc., R. Co. *v.* Barrows, 24 Ill. 562 (holding that where a party had no notice of the assessment until after the time limited for appeal had expired he may have the decision reviewed by certiorari); Tennessee Cent. R. Co. *v.* Campbell, 109 Tenn. 640, 75 S. W. 1012.

69. Tennessee Cent. R. Co. *v.* Campbell, 109 Tenn. 640, 75 S. W. 1012.

70. *In re* Waterville, 31 Me. 506; Brown *v.* Essex County, 12 Metc. (Mass.) 208; Barnard *v.* Fitch, 7 Metc. (Mass.) 605; Matter of Eightieth St., 17 Abb. Pr. (N. Y.) 324; West River Bridge Co. *v.* Dix, 16 Vt. 446.

71. Baltimore, etc., R. Co. *v.* Northern Cent. R. Co., 15 Md. 193; Dunlap *v.* Toledo, etc., R. Co., 46 Mich. 190, 9 N. W. 249.

The rule in Minnesota is that where a judgment defective in form is entered on the verdict, the error should be corrected by application to the court below for a correction of the record, or a vacation of the erroneous verdict, and not by certiorari. St. Paul, etc., R. Co. *v.* Murphy, 19 Minn. 500.

In Washington a decision adjudging the proposed appropriation to be for a public use may be reviewed on appeal, and therefore certiorari will not lie. Seattle, etc., R. Co. *v.* State, 5 Wash. 807, 32 Pac. 744.

72. State *v.* Fifth Judicial Dist. Ct., 29 Mont. 153, 74 Pac. 200; *In re* Tucker, 27 N. H. 405; State *v.* Miller, 23 N. J. L. 383; Tennessee Cent. R. Co. *v.* Campbell, 109 Tenn. 640, 75 S. W. 1012.

73. Slocum *v.* Neptune Tp., 68 N. J. L. 595, 53 Atl. 301.

Where the proceedings of the commissioners are void, the fact that the owner, treating them as void, brings trespass, does not preclude a review by certiorari. Names *v.* Olive Tp., etc., Highway Com'rs, 30 Mich. 490.

74. Barnard *v.* Fitch, 7 Metc. (Mass.) 605, holding that where proceedings on a complaint for flowing land are not authorized by Mass. Rev. St. c. 116, and judgment for damages is recovered, a writ of certiorari will be granted to remove those proceedings or for the purpose of quashing them, although such judgment might have been prevented by a proper defense to the complaint.

75. Com. *v.* Hall, 8 Pick. (Mass.) 440, holding that the payment, pending a petition for the writ, of damages assessed by the jury, in order that the condemning company may enter upon the land and make its improvement within the period allowed by its charter, is not such payment as to make the issuance of the writ improvident.

76. Tennessee Cent. R. Co. *v.* Campbell, 109 Tenn. 640, 75 S. W. 1012.

77. Brickell *v.* San Francisco, (Cal. 1894) 35 Pac. 357; Wulzen *v.* San Francisco, 101 Cal. 15, 35 Pac. 353, 40 Am. St. Rep. 17; Lamb *v.* Schottler, 54 Cal. 319.

A writ of certiorari will lie to amend the verdict of a jury summoned to assess the damages sustained by the taking of land to construct a levee (Allen *v.* Board of Levee Com'rs, 57 Miss. 163); to review the proceedings of the court of common pleas on a complaint for flowing land by a mill-dam (Com. *v.* Ellis, 11 Mass. 462); or to review the decisions of the court of common pleas relating to the assessment of damages for laying out a highway (*In re* Endicott, 24 Pick. (Mass.) 239).

An order appointing commissioners will be set aside on certiorari where the petitioner had not made a *bona fide* effort to purchase the land as required by N. J. Rev. St. p. 928, § 12. Chambers *v.* Carteret, etc., R. Co., 54 N. J. L. 85, 22 Atl. 995.

Proceedings for the opening or altering of streets in a city have been held not to be reviewable upon certiorari (*In re* Mt. Morris Square, 2 Hill (N. Y.) 14; Dixon *v.* Cincinnati, 14 Ohio 240), although in other cases the contrary view is held (St. Charles *v.* Rogers, 49 Mo. 530; Townsend *v.* Jersey City, 26 N. J. L. 444, where the damages assessed by surveyors are clearly illegal and unauthorized; Brooklyn *v.* Patchen, 8 Wend. (N. Y.) 47; Stafford *v.* Albany, 7 Johns. (N. Y.) 541). And see *In re* Carlton St., 20 Wend. (N. Y.) 685, holding that it is a mat-

where the proceedings have been fully tried and ended,[78] as an adjudication of the right to condemn[79] or an award of excessive damages.[80]

c. Grounds For Writ. The writ will issue where there are irregularities in the proceedings whereby the rights of a party are prejudiced,[81] or where prejudicial error has intervened,[82] or there is an abuse of power;[83] but it will not lie merely because of non-payment of the damages,[84] nor because great public inconvenience might result from interference with the proceedings, where there is another adequate remedy.[85]

d. Time For Instituting. Application for the writ must be made within the time prescribed by statute,[86] and if an unreasonable delay is made in applying therefor it should not be sued out unless the delay is satisfactorily explained.[87] After the final determination by the court it is too late to bring up by certiorari irregularities in the proceedings before the commissioners.[88]

ter of course for the supreme court in considering cases to grant a certiorari after confirmation of the commissioners' report where the object is to remove the proceedings into that court for the correction of errors.

78. *Colorado.*— Sievers *v.* Garfield County Ct., 11 Colo. App. 147, 52 Pac. 634.

Maryland.— Baltimore, etc., Turnpike Co. *v.* Northern Cent. R. Co., 15 Md. 193.

Massachusetts.— Barnard *v.* Fitch, 7 Metc. 605.

New York.— People *v.* Hildreth, 126 N. Y. 360, 27 N. E. 558. But where the statute makes a second report of commissioners final, such report cannot be reviewed on certiorari. People *v.* Betts, 55 N. Y. 600.

Ohio.— Central Ohio R. Co. *v.* Holler, 7 Ohio St. 220.

Tennessee.— Tennessee Cent. R. Co. *v.* Campbell, 109 Tenn. 640, 75 S. W. 1012.

Vermont.—Rand *v.* Townshend, 26 Vt. 670.

See 18 Cent. Dig. tit. "Eminent Domain," § 688.

Where the report of viewers was set aside by the court below, the order was not such a final one as would be set aside on certiorari, since the party is entitled to an alias view on motion. Covert *v.* Hulick, 33 N. J. L. 307; *In re* Kiskiminitas Tp. Road, 32 Pa. St. 9.

79. People *v.* Brighton, 20 Mich. 57; Slocum *v.* Neptune Tp., 68 N. J. L. 595, 53 Atl. 301; Seattle, etc., R. Co. *v.* Bellingham Bay, etc., R. Co., 29 Wash. 491, 69 Pac. 1107, 91 Am. St. Rep. 907.

Until judgment is rendered for the recovery of the land by plaintiff and a determination by the trial court that plaintiff had the right to have the land condemned, there is not a final and reviewable judgment. Tennessee Cent. R. Co. *v.* Campbell, 109 Tenn. 640, 75 S. W. 1012.

80. *Ex p.* New Jersey R. Co., 16 N. J. L. 393; Pennsylvania R. Co. *v.* Heister, 8 Pa. St. 445. *Compare* Reitenbaugh *v.* Chester Valley R. Co., 21 Pa. St. 100.

81. *Iowa.*— Runner *v.* Keokuk, 11 Iowa 543.

Maine.— Minot *v.* Cumberland County Com'rs, 28 Me. 121; Cushing *v.* Gay, 23 Me. 9.

Massachusetts.— Cambridge *v.* Middlesex County Com'rs, 117 Mass. 79; Haverhill Bridge *v.* Essex County Com'rs, 103 Mass. 120, 4 Am. Rep. 518; Charles River Branch R. Co. *v.* Norfolk County, 7 Gray 389.

Mississippi.—Cage *v.* Trager, 60 Miss. 563; Board of Levee Com'rs *v.* Allen, 60 Miss. 93.

New Jersey.— Glazier *v.* New Jersey, etc., R. Co., 60 N. J. L. 353, 37 Atl. 614.

New York.— Betts *v.* Williamsburg, 15 Barb. 255; Patchin *v.* Brooklyn, 2 Wend. 377.

See 18 Cent. Dig. tit. "Eminent Domain," § 688.

The fact that the appraisers adjourned two days because all were not present is not an irregularity which can be corrected on certiorari, if the report was filed in due time, unless it is shown to have resulted in prejudice to the rights of a party. Johnson *v.* Clayton County, 61 Iowa 89, 15 N. W. 856.

82. *Massachusetts.*— Barnard *v.* Fitch, 7 Metc. 605.

New Jersey.— Scattergood *v.* Lord, 26 N. J. L. 140.

New York.— *In re* Carlton St., 20 Wend. 685; Brooklyn *v.* Patchen, 8 Wend. 47.

Pennsylvania.— Reitenbaugh *v.* Chester Valley R. Co., 21 Pa. St. 100.

Vermont.— Prince *v.* Braintree, 64 Vt. 540, 26 Atl. 1095.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 688, 689.

83. People *v.* Adam, 74 N. Y. App. Div. 604, 77 N. Y. Suppl. 754; Fonda *v.* Canal Appraisers, 1 Wend. (N. Y.) 288; Western Union R. Co. *v.* Dickson, 30 Wis. 389.

84. *In re* Tucker, 27 N. H. 405.

85. Detroit Western Transit, etc., R. Co. *v.* Backus, 48 Mich. 582, 12 N. W. 861; Matter of Eightieth St., 17 Abb. Pr. (N. Y.) 324.

86. Dunlap *v.* Toledo, etc., R. Co., 46 Mich. 190, 9 N. W. 249; Simmons *v.* Passaic, 38 N. J. L. 60; People *v.* Hildreth, 126 N. Y. 360, 27 N. E. 558.

87. Dunlap *v.* Toledo, etc., R. Co., 46 Mich. 190, 9 N. W. 249.

88. *In re* Wells County Road, 7 Ohio St. 16.

Certiorari removing the proceedings to the supreme court will not be retained, where the questions raised are such as could have been raised by certiorari or appeal after the inquest of damages, and the retention of the writ is likely to do injury by delaying the proceedings. Detroit Western Transit, etc., R. Co. *v.* Backus, 48 Mich. 582, 12 N. W. 861. And see Baltimore, etc., R. Co. *v.* Northern Cent. R. Co., 15 Md. 193.

e. Parties Entitled to the Writ. The writ may be sued out by the owner,[89] unless estopped[90] or by any person named in the petition as a claimant of some interest in the land.[91] It may also in some instances be sued out by any one who is injured by the proceedings,[92] unless the injury to such owner differs in degree only and not in kind from that to the public generally.[93] But this writ cannot be sued out by a party for errors in which he is not interested.[94]

f. Hearing. The writ brings up nothing but the record,[95] and the authority of the court is limited to an examination of the regularity of the proceeding, it not having power to review the case upon the merits,[96] nor to receive evidence.[97] Thus errors in the proceedings of the commissioners are properly reviewable by certiorari,[98] since an appeal waives all errors and irregularities in the initial pro-

89. State *v.* Goldstucker, 40 Wis. 124.

If a railroad company has named as owner a person known by it not to have any interest in the land, both the person so named and the real owner may by certiorari review the order appointing the commissioners. Chambers *v.* Carteret, etc., R. Co., 54 N. J. L. 85, 22 Atl. 995.

Where a reassessment of damages in a highway proceeding is brought up by certiorari, the writ is properly indorsed in the name of the township as plaintiff and not the state. Readington Tp. *v.* Dilley, 24 N. J. L. 209.

90. Brown *v.* Essex County Com'rs, 12 Metc. (Mass.) 208, holding that where a town way is laid out over land which A has conveyed to B, but the deed to which has not been recorded, and B does not make known to the commissioners his title and his claim for damages, although an opportunity is afforded him to do so, a writ of certiorari will not be issued on the petition of B for the purpose of quashing the commissioners' proceedings.

91. New Jersey Cent. R. Co. *v.* Hudson Terminal R. Co., 46 N. J. L. 289.

92. Betts *v.* Williamsburg, 15 Barb. (N. Y.) 255.

One whose land has been dedicated for a street cannot bring certiorari to review the proceedings wherein damages have been denied him for taking the land for a highway. Cahill *v.* Cranford Tp., 36 N. J. L. 404.

93. Hammond *v.* Worcester County, 154 Mass. 509, 28 N. E. 902; Davis *v.* Hampshire County, 153 Mass. 218, 26 N. E. 848, 11 L. R. A. 750.

94. *In re* Kensington, etc., Turnpike Co., 97 Pa. St. 260 [*reversing* 12 Phila. 611], holding that a city cannot by certiorari object to the legality of the confirmation of appraisers' award upon a remittitur filed by a turnpike company whose road the city was seeking to acquire by the proceedings, since the city had no concern in that question.

95. Ann Arbor R. Co. *v.* Beach, 110 Mich. 209, 68 N. W. 124; Leyba *v.* Armijo, (N. M. 1902) 68 Pac. 939; *In re* Kensington, etc., Turnpike Co., 97 Pa. St. 260.

Whether or not a county court has jurisdiction to entertain proceedings for the purpose of enlarging an irrigation ditch will, when raised by certiorari before final judgment, be determined by the petition filed in the county court. Sievers *v.* Garfield County Ct., 11 Colo. App. 147, 52 Pac. 634.

Where on certiorari to review proceedings by a city for taking land for a road, the record shows that the court, after the lapse of the term, reopened its judgment and awarded a writ of restitution for the amount paid, and it is claimed that such action was prompted by fraud, the supreme court will not confirm the condemnation proceedings unless the record discloses that the court acted on fraudulent grounds. *In re* Kensington, etc., Turnpike Co., 97 Pa. St. 260 [*reversing* 12 Phila. 611].

The court will not consider errors or irregularities dependent upon facts which are not set up in the petition. Everett *v.* Cedar Rapids, etc., R. Co., 28 Iowa 417.

96. McCulley *v.* Cunningham, 96 Ala. 583, 11 So. 694; New Jersey R., etc., Co. *v.* Suydam, 17 N. J. L. 25; People *v.* Hildreth, 126 N. Y. 360, 27 N. E. 558 (holding that the court may inquire as to the jurisdiction of the commissioner, whether he pursued the mode required by law, and whether any legal rules were violated as to the prejudice of the relator; and it may examine the facts so far as to ascertain whether the determination was supported by the evidence or was against the preponderating weight of evidence); People *v.* Canal Bd., 7 Lans. (N. Y.) 220; *In re* Kensington, etc., Turnpike Co., 97 Pa. St. 260 [*reversing* 12 Phila. 611]; *In re* Spring Garden St., 4 Rawle (Pa.) 192; *In re* Herrick, etc., Tps., 16 Pa. Super. Ct. 579; Palethorp *v.* Philadelphia, etc., R. Co., 2 Walk. (Pa.) 487. And see Cahill *v.* Cranford Tp., 36 N. J. L. 404.

In Vermont, in proceedings to ascertain the damages occasioned by the taking of land for railroad purposes, the supreme court on exceptions taken under Acts (1882), No. 90, will only consider questions affecting the essential rights of the parties as upon a petition for certiorari. Hooker *v.* Montpelier, etc., R. Co., 62 Vt. 47, 19 Atl. 775.

97. State *v.* Miller, 23 N. J. L. 383; *In re* Kensington, etc., Turnpike Co., 97 Pa. St. 260 [*reversing* 12 Phila. 611]; Allison *v.* Delaware, etc., Canal Co., 5 Whart. (Pa.) 482.

The supreme court will not on certiorari hear evidence, and decide whether the award is too great or too small, where neither corruption, bias, nor interest is imputed or proved. State *v.* Miller, 23 N. J. L. 383.

98. *Alabama.*— McCulley *v.* Cunningham, 96 Ala. 583, 11 So. 694.

ceedings.[99] A writ of certiorari bringing up the appointment of commissioners has merely the effect of a writ of error,[1] and the questions to be considered are as to the propriety of establishing the improvement and the regularity of the proceedings in the lower county court.[2] But the question of the impartiality of the viewers will not be considered.[3]

g. Determination. Where the proceedings are reviewed by certiorari, they must be affirmed or reversed as an entirety.[4] If the judgment is reversed, the mandate is a sufficient authority for the court from which the proceedings were removed to vacate an order of confirmation.[5]

Q. Costs, Fees, and Expenses[6] — **1. In the Absence of Express Statute.** It is well settled that condemnation proceedings are not within the statutory provisions relating to costs in civil actions.[7] It is therefore held in accordance with the general rule that costs can be imposed and recovered only in cases where there is a statutory authority therefor,[8] that no costs can be awarded in the absence of some special statutory provision relating to this class of proceedings;[9] and that if given

Iowa.—Abney *v.* Clark, 87 Iowa 727, 55 N. W. 6; Runner *v.* Keokuk, 11 Iowa 543; Connolly *v.* Griswold, 7 Iowa 416; McCrory *v.* Griswold, 7 Iowa 248.

Massachusetts.— Fitchburg R. Co. *v.* Boston, etc., R. Co., 3 Cush. 58.

Michigan.— Weber *v.* Ryers, 82 Mich. 177, 179, 46 N. W. 233, 234.

Pennsylvania.— Delaware, etc., R. Co. *v.* Burson, 61 Pa. St. 369.

Wisconsin.— Miller *v.* Prairie du Chien, etc., R. Co., 34 Wis. 533.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 688, 689.

The office of certiorari to review the determination of commissioners is to decide questions of law. People *v.* Hildreth, 126 N. Y. 360, 27 N. E. 558.

On a petition to the county court to lay out a highway, questions as to the necessity of the road and as to the assessment of damages cannot be revised by the supreme court on certiorari (West River Bridge Co. *v.* Dix, 16 Vt. 446); and if the county commissioners refuse to grant a petition to lay out a private road, on the ground that the law authorizing it is unconstitutional, certiorari will not lie to review the proceedings (Steele *v.* Madison County, 83 Ala. 304, 3 So. 761).

The determination of the county commissioners as to the sufficiency of the excuse offered for a delay in prosecuting the review cannot be revised by the supreme court on certiorari. Portland, etc., R. Co. *v.* Cumberland County Com'rs, 64 Me. 505, Virgin, J., delivering the opinion of the court.

99. Fitchburg R. Co. *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 58; Delaware, etc., R. Co. *v.* Burson, 61 Pa. St. 369; Hall's Appeal, 56 Pa. St. 238.

Mistake, irregularity, or even fraud in the proceedings previous to the appointment of the commissioners, or in their appointment, can be taken advantage of only by certiorari; such matters do not constitute grounds for setting aside the award. Bennet *v.* Camden, etc., Transp. Co., 14 N. J. L. 145.

1. Columbia Delaware Bridge Co. *v.* Geisse, 35 N. J. L. 558.

2. Connolly *v.* Griswold, 7 Iowa 416; McCrory *v.* Griswold, 7 Iowa 248; Wood *v.* Quincy, 11 Cush. (Mass.) 487; Getz *v.* Philadelphia, etc., R. Co., 1 Walk. (Pa.) 427.

The legality of the plan for crossing may be reviewed by the supreme court on certiorari. National Docks, etc., R. Co. *v.* State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. Rep. 421.

The reassessment of damages in the laying out of a highway may be brought up on certiorari by itself, without also bringing up the proceedings as to the laying out. Readington Tp. *v.* Dilley, 24 N. J. L. 209.

3. *In re* Chartiers Tp., 34 Pa. St. 413.

4. Names *v.* Olive Tp., etc., Highway Com'rs, 30 Mich. 490; Durant *v.* Jersey City, 25 N. J. L. 309; Church *v.* Northern Cent. R. Co., 45 Pa. St. 339.

Where the proceedings are reversed, the commissioners have no authority to make a new assessment, since the judgment is a reversal not only of their proceedings, but also of their appointment, the order appointing them having been part of the record before the court. People *v.* Brooklyn, 49 Barb. (N. Y.) 136.

If, under the general railroad act of New York, a company presents a petition to condemn more land than it is authorized to condemn, and avers its inability to agree with the owner for the purchase of the whole, the proceedings will be set aside *in toto.* New Jersey Cent. R. Co. *v.* Hudson Terminal R. Co., 46 N. J. L. 289.

5. Central Ohio R. Co. *v.* Holler, 7 Ohio St. 220.

6. **Costs in proceedings instituted by the landowner** see *infra,* XII, S.

7. Dickinson *v.* Amherst Water Co., 139 Mass. 210, 29 N. E. 657; Gifford *v.* Dartmouth, 129 Mass. 135; Williams *v.* Taunton, 126 Mass. 287; Hampshire, etc., Canal Co. *v.* Ashley, 15 Pick. (Mass.) 496; Com. *v.* Carpenter, 3 Mass. 268; Wisconsin Cent. R. Co. *v.* Kneale, 79 Wis. 89, 48 N. W. 248; Cornish *v.* Milwaukee, etc., R. Co., 60 Wis. 476, 19 N. W. 443.

8. See Costs, 11 Cyc. 24.

9. *Massachusetts.*— Gifford *v.* Dartmouth, 129 Mass. 135; Hampshire, etc., Canal Co. *v.* Ashley, 15 Pick. 496; Com. *v.* Carpenter, 3 Mass. 268.

by the statute the allowance of them in any case will depend upon the terms of the enactment.[10] There are cases, however, which, while conceding that the statutes as to costs in civil actions do not apply,[11] hold that the constitutional provisions that the owner must receive an adequate compensation for the property taken require that that class of expenses usually taxed as costs should be included as an element of the owner's damages.[12]

2. UNDER STATUTORY PROVISIONS. The question of costs in condemnation proceedings is usually regulated by statute; in some cases by the statutes relating to condemnation proceedings in general,[13] or such proceedings in particular classes of cases,[14] and in others by the charter of the condemning company or corporation;[15] and in cases not otherwise provided for the code provisions as to costs in special proceedings have been held to apply.[16] If the proceeding is under a special stat-

New Jersey.— Metler *v.* Easton, etc., R. Co., 37 N. J. L. 222.

New York.— *In re* Brooklyn, 148 N. Y. 107, 42 N. Y. Suppl. 413 [*affirming* 88 Hun 176, 34 N. Y. Suppl. 991 (*reversing* 32 N. Y. Suppl. 182, 24 N. Y. Civ. Proc. 117)].

Pennsylvania.— Herbein *v.* Philadelphia, etc., R. Co., 9 Watts 272; *In re* Moyer St., 6 Phila. 81.

South Carolina.— Greenville, etc., R. Co. *v.* Partlow, 6 Rich. 286.

Wisconsin.— Wisconsin Cent. R. Co. *v.* Kneale, 79 Wis. 89, 48 N. W. 248.

See 18 Cent. Dig. tit. "Eminent Domain," § 690.

10. Hester *v.* Detroit Park, etc., Com'rs, 84 Mich. 450, 47 N. W. 1097; St. Louis *v.* Meintz, 107 Mo. 611, 18 S. W. 30; Metler *v.* Easton, etc., R. Co., 37 N. J. L. 222.

11. Dolores No. 2 Land, etc., Co. *v.* Hartman, 17 Colo. 138, 29 Pac. 378.

12. Dolores No. 2 Land, etc., Co. *v.* Hartman, 17 Colo. 138, 29 Pac. 378; Rieker *v.* Danville, 204 Ill. 191, 68 N. E. 403; Epling *v.* Dickson, 170 Ill. 329, 48 N. E. 1001 [*reversing* 61 Ill. App. 78]; U. S. *v.* Dumplin Island, 1 Barb. (N. Y.) 24; Stolze *v.* Milwaukee, etc., R. Co., 113 Wis. 44, 88 N. W. 919, 90 Am. St. Rep. 833. See also San Francisco *v.* Collins, 98 Cal. 259, 33 Pac. 56.

To compel the landowners to pay any part of the expenses incurred by the condemning party for the purpose of ascertaining the compensation would conflict with the constitutional right of the landowners to just compensation. *In re* New York, etc., R. Co., 94 N. Y. 287.

A statute would be unconstitutional which required the landowner to pay the costs of the condemnation proceedings. Southwestern Land Co. *v.* Hickory Jackson Ditch Co., 18 Colo. 489, 33 Pac. 275.

Execution does not issue for such costs which stand on the same footing as the other damages awarded. Chicago, etc., R. Co. *v.* Bull, 20 Ill. 218.

13. *California.*— Alameda *v.* Cohen, 133 Cal. 5, 65 Pac. 127; San Francisco *v.* Collins, 98 Cal. 259, 33 Pac. 56.

Illinois.— Chicago, etc., R. Co. *v.* Guthrie, 192 Ill. 579, 61 N. E. 658.

Iowa.— Frankel *v.* Chicago, etc., R. Co., 70 Iowa 424, 30 N. W. 679; Noble *v.* Des Moines, etc., R. Co., 61 Iowa 637, 17 N. W. 26.

New York.— *In re* Brooklyn Union El. R. Co., 176 N. Y. 213, 68 N. E. 249 [*reversing* 82 N. Y. App. Div. 567, 81 N. Y. Suppl. 527]; Syracuse *v.* Benedict, 86 Hun 343, 33 N. Y. Suppl. 944; Dansville, etc., R. Co. *v.* Hammond, 77 Hun 39, 28 N. Y. Suppl. 454; Matter of Lake Shore, etc., R. Co., 65 Hun 538, 20 N. Y. Suppl. 573.

Washington.— Owsley *v.* Oregon R., etc., Co., 1 Wash. 491, 20 Pac. 782.

See 18 Cent. Dig. tit. "Eminent Domain," § 690.

14. Dickinson *v.* Amherst Water Co., 139 Mass. 210, 29 N. E. 657; New Haven, etc., Co. *v.* Northampton, 102 Mass. 116; *In re* Syracuse, etc., R. Co., 4 Hun (N. Y.) 311; *In re* Egypt St., 11 Montg. Co. Rep. (Pa.) 94.

15. *Georgia.*— Leak *v.* Selma, etc., R. Co., 47 Ga. 345.

Minnesota.— State *v.* Hennepin County Dist. Ct., 87 Minn. 268, 91 N. W. 1111.

Missouri.— St. Louis *v.* Meintz, 107 Mo. 611, 18 S. W. 30.

New Jersey.— Metler *v.* Easton, etc., R. Co., 37 N. J. L. 222.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Johnson, 2 Whart. 275; Leiper *v.* Baltimore, etc., R. Co., 5 Pa. Co. Ct. 60, 3 Del. Co. 373.

See 18 Cent. Dig. tit. "Eminent Domain," § 690.

16. *In re* Brooklyn, 148 N. Y. 107, 42 N. E. 413 [*affirming* 88 Hun 176, 34 N. Y. Suppl. 991 (*reversing* 32 N. Y. Suppl. 182, 24 N. Y. Civ. Proc. 117)]; Rensselaer, etc., R. Co. *v.* Davis, 55 N. Y. 145; Bley *v.* Hamburg, 84 N. Y. App. Div. 23, 82 N. Y. Suppl. 35; *In re* New York, etc., R. Co., 26 Hun (N. Y.) 592, 63 How. Pr. (N. Y.) 123; *In re* Syracuse, etc., R. Co., 4 Hun (N. Y.) 311.

In Wisconsin it is held that although condemnation proceedings are classed as "special proceedings" no costs can be awarded under the statutes relating to such proceedings, since the statute provides for costs only when such proceedings are auxiliary to, or in some way connected with, an action at law or in equity. Wisconsin Cent. R. Co. *v.* Kneale, 79 Wis. 89, 48 N. W. 248.

ute which provides a system of procedure for the proceedings under it, the provisions of the general condemnation statutes as to costs do not apply.[17] In proceedings instituted by the United States the question of costs is governed by the statutes relating to condemnation proceedings of the state where the property is situated.[18]

3. Effect of Offer to Purchase or Tender of Damages. In some of the states the condemning party before instituting proceedings may make an offer to purchase or a tender of damages, and if this is refused the question of costs will depend upon whether the amount subsequently allowed is greater or less than the amount tendered.[19]

4. On Appeal, New Trial, or Reassessment by Jury. In the case of an appeal from the assessment and trial in court, the statutes under which the appeals are taken provide in some cases that the award of costs shall be made according to whether the original assessment is increased or reduced,[20] in others that the allow-

17. Rieker *v.* Danville, 204 Ill. 191, 68 N. E. 403; Hester *v.* Detroit Park, etc., Com'rs, 84 Mich. 450, 47 N. W. 1097; Matter of Buffalo Grade Crossing Com'rs, 20 N. Y. App. Div. 271, 46 N. Y. Suppl. 1070 [*affirming* 19 Misc. 230, 43 N. Y. Suppl. 1073].

18. U. S. *v.* Engeman, 46 Fed. 898.

19. **Under the general condemnation law in New York** if the condemning party, prior to instituting the proceedings, makes an offer to purchase the property, which is not accepted, and the compensation subsequently awarded does not exceed the amount of the offer with interest, no costs shall be allowed to either party (Matter of Lake Shore, etc., R. Co., 65 Hun 538, 20 N. Y. Suppl. 573); but if no offer is made or the compensation awarded exceeds the amount of the offer with interest, defendant shall recover the costs of the proceeding (*In re* Brooklyn Union El. R. Co., 176 N. Y. 213, 68 N. E. 249 [*reversing* 82 N. Y. App. Div. 567, 81 N. Y. Suppl. 527]; Syracuse *v.* Stacey, 45 N. Y. App. Div. 260, 60 N. Y. Suppl. 1106; Manhattan R. Co. *v.* Taber, 78 Hun 434, 29 N. Y. Suppl. 220; St. Lawrence, etc., R. Co. *v.* De Camp, 23 N. Y. Suppl. 544); and in such cases the court may grant an additional allowance not exceeding five per cent of the amount awarded (Matter of Lake Shore, etc., R. Co., 65 Hun 538, 20 N. Y. Suppl. 573).

If the owner is under legal disability to convey, an offer to purchase would be useless, and the condemning party is not liable for costs for failing to make such offer. Manhattan R. Co. *v.* McKee, 1 N. Y. App. Div. 488, 37 N. Y. Suppl. 269.

Under the Oregon statute if the condemning party tenders an amount equal to or larger than that subsequently assessed by the jury he shall recover costs, but the statute does not apply where the tender is not made until after the proceeding is commenced. Oregon Cent. R. Co. *v.* Wait, 3 Oreg. 428.

Under the Pennsylvania statute if the owner does not recover more than the amount tendered he cannot recover the costs of the proceedings. Winebiddle *v.* Pennsylvania R. Co., 2 Grant 32.

20. *Georgia.*— Leak *v.* Selma, etc., R. Co., 47 Ga. 345.

Illinois.— Sangamon County *v.* Brown, 13 Ill. 207.

Iowa.— Heath *v.* Mason City, etc., R. Co., (1903) 94 N. W. 467; Noble *v.* Des Moines, etc., R. Co., 61 Iowa 637, 17 N. W. 26.

Minnesota.— Sherwood *v.* St. Paul, etc., R. Co., 21 Minn. 122.

New Hampshire.— Ranlet *v.* Concord R. Corp., 62 N. H. 561.

New Jersey.— Metler *v.* Easton, etc., R. Co., 37 N. J. L. 222.

New York.— Cary *v.* Marston, 56 Barb. 27.

Pennsylvania.— Schuylkill Nav. Co. *v.* Kittera, 2 Rawle 438.

See 18 Cent. Dig. tit. "Eminent Domain," § 693.

Under the Nebraska statute as amended in 1883, if the condemning party appeals and fails to reduce the amount of the award such appellant shall be liable for all costs occasioned by the appeal (Atchison, etc., R. Co. *v.* Plant, 24 Nebr. 127, 38 N. W. 33); and if the award is reduced neither party shall be liable for all of the costs of the appeal; and ordinarily in such cases the costs should be apportioned between the parties (Burlington, etc., R. Co. *v.* Spere, 24 Nebr. 125, 38 N. W. 35).

Where there is an appeal from the assessment as to several tracts of land and the award as to some is increased and as to others decreased, the costs should not be apportioned but should be governed according to whether the gross amount is greater or less than under the original assessment. Sherwood *v.* St. Paul, etc., R. Co., 21 Minn. 122.

A statute requiring the condemning party to pay the costs of the assessment and appeal, where the amount is not reduced, does not necessitate that the landowner should pay all of the costs in case of a reduction, but in such case the court is at liberty to make a proper distribution of the costs under the general rules of law. Jones *v.* Mahaska County Coal Co., 47 Iowa 35.

Where the case is remanded for a new trial the Michigan statute provides that if the amount of damages is reduced the condemning party is entitled to recover the costs of

ance shall be in the discretion of the court,[21] and in others that it shall be governed by the provisions as to costs in appeals from judgments of a justice.[22] In the absence of express provision as to costs it has been held that where an appeal is taken the proceeding then becomes a civil action and that the cost should be taxed accordingly;[23] and apparently in accordance with this view it is held in a number of cases, without reference to any statutory provision, that the costs should be awarded to the prevailing party.[24] If the appealing party voluntarily dismisses his appeal he must pay the costs.[25] If a railroad company appeals from the award and sells its road while the appeal is pending, the purchasing company is liable for the costs of the appeal, in case of a decision in favor of the landowner.[26] If, on an appeal by the landowner from the award of damages, the condemning company files a disclaimer of all interest in the property, it is in effect a dismissal of the entire proceeding, and the company must pay the costs.[27] Those statutes which allow a party dissatisfied with the award of the commissioners to have a jury appointed to make a reassessment usually provide for an award of costs according to whether the second assessment is larger or smaller than the first,[28] but in the absence of express provision no costs can be awarded to either party.[29]

the second trial. Fort St. Union Depot Co. *v.* Backus, 103 Mich. 556, 61 N. W. 787.

21. State *v.* Hennepin County Dist. Ct., 87 Minn. 268, 91 N. W. 1111; Chicago, etc., R. Co. *v.* Elliott, 117 Mo. 549, 24 S. W. 53.

22. Indiana Cent. R. Co. *v.* Atkinson, 6 Ind. 149; Centreville, etc., Turnpike Co. *v.* Jarrett, 4 Ind. 213.

23. Senaker *v.* Sullivan County, 4 Sneed (Tenn.) 116; Taylor *v.* Chicago, etc., R. Co., 83 Wis. 645, 53 N. W. 855. See also Vice *v.* Eden, 113 Ky. 255, 68 S. W. 125, 24 Ky. L. Rep. 132; Goodwin *v.* Boston, etc., R. Co., 63 Me. 363; Carolina Cent. R. Co. *v.* Phillips, 78 N. C. 49.

Where an application in proceedings to erect a mill-dam is contested, the proceedings assume the form and character of a suit *inter partes* as well as *in rem*, and if the contestant is unsuccessful he is properly taxed with the cost of the contest. Folmar *v.* Folmar, 71 Ala. 136.

24. Barrall *v.* Quick, 74 S. W. 214, 24 Ky. L. Rep. 2393; Gray *v.* Lowell, etc., R. Co., 4 Cush. (Mass.) 609; Com. *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 25; Bennage *v.* Union County, 22 Pa. Co. Ct. 342.

If on appeal the landowner prevails upon the principal points in dispute he should be allowed the costs of the appeal, although some small items which had been taxed by the superior court in his costs are disallowed. New Haven, etc., Co. *v.* Northampton, 102 Mass. 116.

If the claims of neither party are fully sustained on the appeal the costs of the appeal should be apportioned. Noble *v.* Des Moines, etc., R. Co., 61 Iowa 637, 17 N. W. 26.

If both parties appeal and each is sustained in part neither party should recover the costs of the appeal. Childs *v.* New Haven, etc., Co., 135 Mass. 570.

Where the landowner appeals only on the question of the public utility of a proposed road, the fact that the width of the road as previously established is reduced does not entitle him to recover the costs of the appeal. Mathews *v.* Droud, 114 Ind. 268, 16 N. E. 599.

Where appeals from several orders in condemnation proceedings are heard together, costs are allowed for one case only, although separate orders of affirmance are entered. *In re* Prospect Park, etc., R. Co., 67 N. Y. 371.

On an appeal from an order disallowing a motion for costs, if the order is affirmed the costs of the appeal are to be taxed against the appellant. Williams *v.* Taunton, 126 Mass. 287.

Where only one of several petitioners appeals from a judgment finding against the public utility of a proposed highway, and the former judgment is sustained, the petitioner who appealed is *prima facie* liable for all of the costs. Reader *v.* Smith, 88 Ind. 440.

Where the owners are copartners and own the property as such, and the issues are decided in favor of the condemning party, separate bills of cost should not be taxed against each owner. Syracuse *v.* Benedict, 86 Hun (N. Y.) 343, 33 N. Y. Suppl. 944.

25. Mississippi Cent. R. Co. *v.* Beatty, 35 Miss. 668.

26. Frankel *v.* Chicago, etc., R. Co., 70 Iowa 424, 30 N. W. 679.

27. St. Louis, etc., R. Co. *v.* Martin, 29 Kan. 750.

28. Hamlin *v.* New Bedford, 143 Mass. 192, 11 N. E. 115; Dickinson *v.* Amherst Water Co., 139 Mass. 210, 29 N. E. 657; Kidder *v.* Oxford, 116 Mass. 165; Harvard Branch R. Corp. *v.* Rand, 8 Cush. (Mass.) 218; Gray *v.* Lowell, etc., R. Co., 4 Cush. (Mass.) 609; Com. *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 25.

Under the Massachusetts railroad act which provides that the "prevailing party" shall recover costs, it is held that the landowner should recover costs if the jury find in his favor for any amount, although they assess the damages at a less amount than that found by the commissioners. New Haven, etc., Co. *v.* Northampton, 102 Mass. 116.

29. Gifford *v.* Dartmouth, 129 Mass. 135; Hampshire, etc., Canal Co. *v.* Ashley, 15 Pick. (Mass.) 496; Com. *v.* Carpenter, 3 Mass. 268.

5. By Whom Taxed. In Massachusetts the costs arising upon the application for a jury are taxed by the court to which the verdict is returned, but the costs upon the original application before the commissioners are taxed by the commissioners themselves.[30] Where the statute provides that the costs shall be assessed by the court they cannot be included by the jury in their estimate of damages.[31]

6. Amount, Rate, and Items Allowable. Since all costs and fees are recovered and taxed only under and by virtue of statute, they can be allowed only for such items and in such amounts as the statute authorizes.[32] Attorneys' fees cannot be allowed as costs in the absence of an express provision to that effect.[33] The same rule applies to fees for expert witnesses,[34] and neither can be allowed under a statute providing generally for an allowance of the costs of the proceeding.[35] Under some of the statutes attorneys' fees are expressly authorized,[36] but in such cases the allowance will be confined to cases coming strictly within the provisions of the act.[37] Officers' and witnesses' fees and fees of the commissioners or jurors, while in some cases expressly provided for,[38] may properly be taxed under statutes which provide generally for an allowance of the costs of the proceeding.[39]

30. New Haven, etc., Co. *v.* Northampton, 102 Mass. 116.

31. Hirst *v.* Delaware, etc., Canal Co., 2 Miles (Pa.) 444.

32. Conway *v.* McGregor, etc., R. Co., 43 Iowa 32; Hester *v.* Detroit Parks, etc., Com'rs, 84 Mich. 450, 47 N. W. 1097; St. Louis *v.* Meintz, 107 Mo. 611, 18 S. W. 30.

Where a notice of appeal is served by a person other than an officer whose fees are allowed by statute to be taxed as costs, no allowance for such service can be made. Conway *v.* McGregor, etc., R. Co., 43 Iowa 32.

If the commissioners appoint a clerk without any authority for such action, the value of his services cannot be included as part of the cost in the proceeding. New York *v.* Downs, 77 N. Y. App. Div. 351, 78 N. Y. Suppl. 1024.

33. *California.*— Coburn *v.* Townsend, 103 Cal. 233, 37 Pac. 202; San Jose, etc., R. Co. *v.* Mayne, 83 Cal. 566, 23 Pac. 522.

Illinois.— Rieker *v.* Danville, 204 Ill. 191, 68 N. E. 403.

Massachusetts.— Jones *v.* Carter, 8 Allen 431; Marshall Fishing Co. *v.* Hadley Falls Co., 5 Cush. 602.

Michigan.— Hester *v.* Detroit Park, etc., Com'rs, 84 Mich. 450, 47 N. W. 1097.

Missouri.— St. Louis *v.* Meintz, 107 Mo. 611, 18 S. W. 30.

New Hampshire.— Boston, etc., R. Co. *v.* Wentworth, 20 N. H. 406.

North Carolina.— North Carolina R. Co. *v.* Goodwin, 110 N. C. 175, 14 S. E. 687.

Pennsylvania.— *In re* Moyer St., 6 Phila. 81.

See 18 Cent. Dig. tit. "Eminent Domain," § 692.

Where the proceeding is under a special act providing a procedure of its own, a provision of a general eminent domain act allowing attorneys' fees is not applicable. Rieker *v.* Danville, 204 Ill. 191, 68 N. E. 403.

Where the condemning party dismisses the proceeding it has been held in Missouri that attorney's fees should be allowed as a part of the owner's costs under charters providing that in cases of dismissal the costs should be taxed by the court "as may be deemed just" (St. Louis R. Co. *v.* Southern R. Co., 138 Mo. 591, 39 S. W. 471), or "according to equity" (North Missouri R. Co. *v.* Lackland, 25 Mo. 515); and a similar allowance has been made where the condemning party, having an absolute right to dismiss, needlessly, wrongfully, and vexatiously continued the proceeding against the protest of the landowner (Simpson *v.* Kansas City, 111 Mo. 237, 20 S. W. 38); but the allowance will not be made on this account where such a state of facts is not expressly alleged and proved (Lester Real Estate Co. *v.* St. Louis, 170 Mo. 31, 70 S. W. 151; St. Louis Brewing Assoc. *v.* St. Louis, 168 Mo. 37, 67 S. W. 563).

34. St. Louis *v.* Meintz, 107 Mo. 611, 18 S. W. 30; *In re* Grade Crossing Com'rs, 19 Misc. (N. Y.) 230, 43 N. Y. Suppl. 1073.

35. St. Louis *v.* Meintz, 107 Mo. 611, 18 S. W. 30.

36. Chicago, etc., R. Co. *v.* Guthrie, 192 Ill. 579, 61 N. E. 658; Chicago Sanitary Dist. *v.* Bernstein, 175 Ill. 215, 51 N. E. 720; Mellichar *v.* Iowa City, 116 Iowa 390, 90 N. W. 86; *In re* Daly, 91 Hun (N. Y.) 641, 37 N. Y. Suppl. 128.

A statute providing that the judge may allow a reasonable attorney's fee is not mandatory, but merely makes such allowance a matter of discretion. Dorland *v.* Judge Grand Rapid Super. Ct., 78 Mich. 182, 44 N. W. 52.

A fee for preparing an answer may be included where attorney's fees are authorized by statute, although the filing of a written answer is not required by statute. Mellichar *v.* Iowa City, 116 Iowa 390, 90 N. W. 86.

37. Wormely *v.* Mason City, etc., R. Co., 120 Iowa 684, 95 N. W. 203; Hyde Park *v.* Grant, 9 Ohio S. & C. Pl. Dec. 723, 6 Ohio N. P. 471.

38. See Hester *v.* Detroit Park, etc., Com'rs, 84 Mich. 450, 47 N. W. 1097; Dorland *v.* Judge Grand Rapids Super. Ct., 78 Mich. 182, 44 N. W. 52.

39. St. Louis *v.* Meintz, 107 Mo. 611, 18 S. W. 30; Pennsylvania R. Co. *v.* Keiffer, 22

The proceeding before the commissioners for the assessment of damages is not a trial and no trial fee is allowable.[40] In New York where the costs are taxed under the statute relating to special proceedings they are at the same rates as allowed for similar services in an action brought in the same court.[41] The extra allowance provided for by the New York statute applies only where the proceeding is under the general condemnation law,[42] and the amount of such allowance, within the limit prescribed by the statute, must be decided by the court according to what is a fair indemnity to the successful party under the circumstances of the particular case.[43]

R. Possession Pending Proceedings.[44] The almost universal rule is that a condemning party cannot take possession of the land which it is sought to condemn while the proceedings are pending, unless it has secured the payment of the compensation to be fixed.[45] In some instances, however, a statutory power is conferred upon the court in cases where such security is given to permit the condemning party to take possession pending the proceedings,[46] or, if already in possession, to retain the possession;[47] but in such case it rests in the discretion of the

Pa. St. 356; Leiper *v.* Baltimore, etc., R. Co., 3 Del. Co. (Pa.) 373, 5 Pa. Co. Ct. 60.

Where the statute allows "legal costs" this means such costs as are usually recovered in civil actions, and includes the travel and attendance of witnesses and the fees of the officer summoning them in addition to the costs incurred for the sheriff and jurors. Childs *v.* New Haven, etc., Co., 135 Mass. 570.

In all cases where witnesses can be legally called and examined a general provision for costs will include the fees of such witnesses and of the officers summoning them. Pennsylvania R. Co. *v.* Keiffer, 22 Pa. St. 356.

On an assessment by jury the sheriffs' and jurors' fees may be taxed as costs. New Haven, etc., Co. *v.* Northampton, 102 Mass. 116.

If the proceeding is under a special act which provides expressly what fees shall be taxed, witness' fees cannot be allowed unless authorized by the act. Hester *v.* Detroit Park, etc., Com'rs, 84 Mich. 450, 47 N. W. 1097.

The court has power to limit the number of witnesses which may be produced to prove a single point and thus prevent abuse, and the fees of all witnesses whose attendance is procured in good faith should be allowed. See Dorland *v.* Judge Grand Rapids Super. Ct., 78 Mich. 182, 44 N. W. 52.

40. St. Johnsville *v.* Cronk, 55 N. Y. App. Div. 633, 67 N. Y. Suppl. 419; Johnstown *v.* Frederick, 35 N. Y. App. Div. 44, 54 N. Y. Suppl. 412; Manhattan R. Co. *v.* Kent, 80 Hun (N. Y.) 559, 30 N. Y. Suppl. 959 [*affirmed* in 145 N. Y. 595, 40 N. E. 164]; Matter of Lake Shore, etc., R. Co., 65 Hun (N. Y.) 538, 20 N. Y. Suppl. 573; Matter of New York, etc., R. Co., 26 Hun (N. Y.) 592, 63 How. Pr. (N. Y.) 123.

A term fee cannot be allowed for the hearing before the commissioners. New Haven, etc., Co. *v.* Northampton, 102 Mass. 116.

41. *In re* Jerome Ave., 78 N. Y. App. Div. 631, 79 N. Y. Suppl. 662; *In re* New York, etc., R. Co., 26 Hun (N. Y.) 592, 63 How. Pr. (N. Y.) 123.

42. *In re* Brooklyn, 148 N. Y. 107, 42 N. Y. Suppl. 413 [*affirming* 88 Hun 176, 34 N. Y. Suppl. 991 (*reversing* 32 N. Y. Suppl. 182, 24 N. Y. Civ. Proc. 117)]; Matter of Grade Crossing Com'rs, 20 N. Y. App. Div. 271, 46 N. Y. Suppl. 1070 [*affirming* 19 Misc. 230, 43 N. Y. Suppl. 1073].

43. St. Lawrence, etc., R. Co. *v.* De Camp, 23 N. Y. Suppl. 544.

44. **Effect of judgment on right of possession pending appeal** see *supra*, XI, N, 8, b, (II).

45. See *supra*, X, F.

46. Templeton *v.* Twelfth Judicial Dist. Ct., 47 Cal. 70; People *v.* Pitkin County Dist. Ct., 11 Colo. 147, 17 Pac. 298; Byrnes *v.* Douglass, 23 Nev. 83, 42 Pac. 798.

A statute is not unconstitutional which provides that the court may authorize a railroad or canal company to take possession, or if in possession, to continue in possession of the premises during the pendency of condemnation proceedings, upon giving such security as the court may direct. State *v.* Baker, 20 Fla. 616; Matter of St. Lawrence, etc., R. Co., 66 Hun (N. Y.) 306, 21 N. Y. Suppl. 131.

The general railroad laws of Michigan, which allow possession to be taken while the proceedings are pending, do not apply in case of a crossing of one railroad over another, as section 30 of the general laws gives a state board the power to determine as to the manner of making such a crossing. Detroit, etc., R. Co. *v.* Livingston County Probate Judge, 63 Mich. 676, 30 N. W. 598.

The mere fact that it is contemplated to condemn certain land for a public use, or that the land is necessary for such use, gives no right of entry prior to the condemnation. Peterson *v.* Bean, 22 Utah 43, 61 Pac. 213.

The order cannot be made except upon full notice to the owner of the land and an adequate hearing. Detroit, etc., R. Co. *v.* Livingston County Probate Judge, 63 Mich. 676, 30 N. W. 598.

47. State *v.* Baker, 20 Fla. 616; Manhattan R. Co. *v.* Taber, 78 Hun (N. Y.) 434, 29 N. Y. Suppl. 220.

A judge in chambers, under the California code, has no power to make the order au-

court whether such an order shall be made,[48] or whether it shall subsequently be revoked.[49] A railroad company may also be authorized by its charter to take a temporary possession pending the proceeding.[50] A railroad company taking possession of land is not liable to the owner for mesne profits pending the final result of the proceedings, if the damages awarded have been paid, and there is no proof of abandonment or misuser by the company.[51]

XII. REMEDIES OF OWNER OF PROPERTY.

A. Statutory Remedies — 1. In General. Where the party seeking to appropriate the land fails to take the necessary statutory steps for the assessment of compensation and damages to the owner, the statutes usually contain provisions under which the owner may move for such assesssment or compel a condemnation of the land.[52] In such proceedings plaintiff is not entitled to recover for the use

thorizing the condemning company to remain in possession pending the proceedings. Loomis *v.* Andrews, 49 Cal. 239.

Where the possession of the condemning party was acquired by a trespass, by force, or by fraud, known by the party to have been such and without color of authority, he is not "in possession of the property sought to be condemned" within the true meaning of the statute providing that the court may authorize him to remain in possession pending the condemnation proceedings. *In re* St. Lawrence, etc., R. Co., 133 N. Y. 270, 31 N. E. 218; Canandaigua *v.* Benedict, 8 N. Y. App. Div. 475, 40 N. Y. Suppl. 707.

48. People *v.* Pitkin County Dist. Ct., 11 Colo. 147, 17 Pac. 298.

49. Templeton *v.* Twelfth Judicial Dist. Ct., 47 Cal. 70; People *v.* Pitkin County Dist. Ct., 11 Colo. 147, 17 Pac. 298.

Where possession has been taken pending the proceedings without an order authorizing it, the possession may be restored on motion to the court in which the proceedings are pending. *In re* Bryan, 65 Cal. 375, 4 Pac. 304.

50. Hall *v.* Pickering, 40 Me. 548, holding also that an omission by the company to call on the county commissioners to assess the compensation does not work a forfeiture of such right.

51. Ross *v.* Pennsylvania R. Co., 17 Phila. (Pa.) 339.

52. *District of Columbia.*— Dixon *v.* Baltimore, etc., R. Co., 1 Mackey 78.

Georgia.— Smith *v.* Floyd County, 85 Ga. 420, 11 S. E. 850.

Illinois.— Smith *v.* Chicago, etc., R. Co., 67 Ill. 191.

Indiana.— Indianapolis, etc., R. Co. *v.* Belt R. Co., 110 Ind. 5, 10 N. E. 923; Terre Haute, etc., R. Co. *v.* Scott, 74 Ind. 29.

Iowa.— Renwick *v.* Davenport, etc., R. Co., 49 Iowa 664.

Kansas.— St. Louis, etc., R. Co. *v.* Yount, 67 Kan. 396, 73 Pac. 63; Central Branch Union Pac. R. Co. *v.* Andrews, 26 Kan. 702.

Massachusetts.— Ahearn *v.* Middlesex County, 182 Mass. 518, 65 N. E. 905; Wood *v.* Westborough, 140 Mass. 403, 5 N. E. 613; Crompton Carpet Co. *v.* Worcester, 123 Mass. 498; Parker *v.* Boston, etc., R. Co., 3 Cush. 107, 50 Am. Dec. 709.

Minnesota.— Harrington *v.* St. Paul, etc., R. Co., 17 Minn. 215.

New York.— Matter of Hodge, 28 Misc. 104, 59 N. Y. Suppl. 775.

North Carolina.— Phillips *v.* Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868; Waddy *v.* Johnson, 27 N. C. 333.

Ohio.— Lawrence R. Co. *v.* O'Harra, 48 Ohio St. 343, 28 N. E. 175; Lawrence R. Co. *v.* Williams, 35 Ohio St. 168; Raymond *v.* Toledo, etc., R. Co., 16 Ohio Cir. Ct. 639, 9 Ohio Cir. Dec. 5; Matter of George, 5 Ohio Cir. Ct. 207, 3 Ohio Cir. Dec. 104; Hatry *v.* Painesville, etc., R. Co., 1 Ohio Cir. Ct. 426, 1 Ohio Cir. Dec. 238; Cincinnati *v.* Kemper, 7 Ohio Dec. (Reprint) 245, 2 Cinc. L. Bul. 5; Rapp *v.* Ohio Southern R. Co., 5 Ohio S. & C. Pl. Dec. 453, 5 Ohio N. P. 497. See also Atlantic, etc., R. Co. *v.* Robbins, 35 Ohio St. 531.

Pennsylvania.— McClinton *v.* Pittsburg, etc., R. Co., 66 Pa. St. 404; Lafean *v.* York County, 20 Pa. Super. Ct. 573.

South Carolina.— Cureton *v.* South Bound R. Co., 59 S. C. 371, 37 S. E. 914.

Tennessee.— Frater *v.* Hamilton County, 90 Tenn. 661, 19 S. W. 233.

Virginia.— Nash *v.* Upper Appomattox Co., 5 Gratt. 332.

Wisconsin.— Lenz *v.* Chicago, etc., R. Co., 111 Wis. 198, 86 N. W. 607; Stewart *v.* Milwaukee Electric R., etc., Co., 110 Wis. 540, 86 N. W. 163; Charnley *v.* Shawano Water Power, etc., Co., 109 Wis. 563, 85 N. W. 507, 53 L. R. A. 895. See also Sinnott *v.* Chicago, etc., R. Co., 81 Wis. 95, 50 N. W. 1097.

United States.— Grafton *v.* Baltimore, etc., R. Co., 21 Fed. 309.

See 18 Cent. Dig. tit. "Eminent Domain," § 458.

It is not necessary to the validity of a statute authorizing proceedings by railroad companies that it should give the landowner the right to institute the proceedings in case the company should fail to do so. State *v.* Baker, 20 Fla. 616.

The statutory remedy for enforcing the award is not barred or suspended by a provision in the charter of a railroad company re-

and occupation of the premises, but has an independent cause of action therefor.[53] Under some statutes the owner, to whom the compensation awarded has not been paid, must enforce the award by supplementary proceedings in the condemnation suit.[54]

2. CONSTITUTIONALITY OF STATUTES. It is competent for the legislature to prescribe the several steps to be pursued in the assertion of the right to compensation for land appropriated for public use, but the prescribed procedure must not destroy or substantially impair the right itself,[55] and as no person has a vested right to any particular remedy, the remedies are subject to modification or amendment by the legislature, provided there is no interference with the company's franchise or a property-owner's rights.[56] But where lands have been taken or injured without authority, the owner has a right to maintain his action and to have a trial by jury, and cannot constitutionally be required by retroactive legislation to submit his cause of action to a tribunal not proceeding according to the course of the common law.[57] The constitutional right of the legislature to require the owner to institute proceedings for the ascertainment of damages has been both asserted[58] and denied.[59]

3. EXCLUSIVENESS OF REMEDY — a. In General. Where a statutory remedy is given to the owner of the property, such statutory remedy is usually held to be exclusive, and to supersede the common-law remedies afforded the owner,[60]

quiring it, when requested by the owner of land condemned for its use, to give security for the payment of such damages as may be finally awarded before entering on the land. Fisher *v.* Warwick R. Co., 12 R. I. 287.

Where property not taken.— Under the Illinois Eminent Domain Act a landowner, where no portion of his land is actually taken or sought to be condemned for public use, is not entitled to have proceedings instituted to ascertain what damages his property may sustain in consequence of the construction and operation of a railway upon contiguous or adjacent lands in which he has no interest. Peoria, etc., R. Co. *v.* Schertz, 84 Ill. 135; Stetson *v.* Chicago, etc., R. Co., 75 Ill. 74.

Right to retake property.— It has been held in California that if private property be taken by a municipal corporation for public use, without compensation or provision therefor, the owner may retake the property. Colton *v.* Rossi, 9 Cal. 595.

Mandamus to compel appointment of commissioners.— Where the county judge refuses to appoint commissioners, as provided by statute, to award damages for the taking of land by a railroad company upon a proper application by the owner of the land, the proper remedy is probably by mandamus. Western Union R. Co. *v.* Dickson, 30 Wis. 389.

Under the Pennsylvania act of April 22, 1856, authorizing the burgesses and town council to petition the court to assess damages for the opening of streets, a petition by the abutters could not be entertained. Lucas *v.* Washington Borough, 2 Pa. Co. Ct. 630.

53. Leber *v.* Minneapolis, etc., R. Co., 29 Minn. 256, 13 N. W. 31.

54. South Chicago City R. Co. *v.* Chicago, 196 Ill. 490, 63 N. E. 1046; State *v.* Withrow, (Mo. Sup. 1891) 24 S. W. 638; Kent *v.* Wallingford, 42 Vt. 651; Doe *v.* Leeds, etc., R. Co., 16 Q. B. 796, 15 Jur. 946, 20 L. J. Q. B. 486, 71 E. C. L. 796.

55. Potter *v.* Ames, 43 Cal. 75; Denver Circle R. Co. *v.* Nestor, 10 Colo. 403, 15 Pac. 714; Nichols *v.* Bridgeport, 23 Conn. 189, 60 Am. Dec. 636. See also Steele *v.* Western Inland Lock Nav., 2 Johns. (N. Y.) 283.

56. Spaulding *v.* Arlington, 126 Mass. 492; Crompton Carpet Co. *v.* Worcester, 123 Mass. 498; Long's Appeal, 87 Pa. St. 114.

57. *In re* Townsend, 39 N. Y. 171.

58. Cage *v.* Trager, 60 Miss. 563.

59. Cox *v.* Louisville, etc., R. Co., 48 Ind. 178.

60. *Alabama.*— Dyer *v.* Tuskaloosa Bridge Co., 2 Port. 296, 27 Am. Dec. 655.

Arkansas.— Johnson *v.* St. Louis, etc., R. Co., 32 Ark. 758; Cairo, etc., R. Co. *v.* Turner, 31 Ark. 494, 25 Am. Rep. 564.

Indiana.— Ft. Wayne *v.* Hamilton, 132 Ind. 487, 32 N. E. 324, 32 Am. St. Rep. 263; Indiana Cent. R. Co. *v.* Oakes, 20 Ind. 9; Leviston *v.* Junction R. Co., 7 Ind. 597; Lafayette, etc., R. Co. *v.* Smith, 6 Ind. 249; Null *v.* White Water Valley Canal Co., 4 Ind. 431; Conwell *v.* Hagerstown Canal Co., 2 Ind. 588; Kimble *v.* White Water Valley Canal Co., 1 Ind. 285.

Iowa.— Dunlap *v.* Pulley, 28 Iowa 469.

Maine.— Hamor *v.* Bar Harbor Water Co., 78 Me. 127, 3 Atl. 40; Davis *v.* Russell, 47 Me. 443; Gowen *v.* Penobscot R. Co., 44 Me. 140; Eastman *v.* Stowe, 37 Me. 86; Mason *v.* Kennebec, etc., R. Co., 31 Me. 215.

Massachusetts.—Brickett *v.* Haverhill Aqueduct Co., 142 Mass. 394, 8 N. E. 119; Hull *v.* Westfield, 133 Mass. 433; Hazen *v.* Essex Co., 12 Cush. 475; Tower *v.* Boston, 10 Cush. 235; Parker *v.* Boston, etc., R. Co., 3 Cush. 107, 50 Am. Dec. 709; Sudbury Meadows *v.* Middlesex Canal, 23 Pick. 36; Stevens *v.* Middlesex Canal, 12 Mass. 466; Stowell *v.* Flagg, 11 Mass. 364.

Mississippi.— Brown *v.* Beatty, 34 Miss. 227, 69 Am. Dec. 389.

Missouri.— Markowitz *v.* Kansas City, 125

particularly where condemnation proceedings are pending;[61] but there are many cases asserting that where there is nothing in the statute to indicate an intention on the part of the legislature that the remedy provided should be exclusive it is

Mo. 485, 28 S. W. 642, 46 Am. St. Rep. 498; Gray *v.* St. Louis, etc., R. Co., 81 Mo. 126; Leary *v.* Hannibal, etc., R. Co., 38 Mo. 485; Baker *v.* Hannibal, etc., R. Co., 36 Mo. 543.

Nebraska.—Fremont, etc., R. Co. *v.* Mattheis, 35 Nebr. 48, 52 N. W. 698; Republican Valley R. Co. *v.* Fink, 18 Nebr. 82, 24 N. W. 439.

New Hampshire.— Henniker *v.* Contoocook Valley R. Co., 29 N. H. 146; Woods *v.* Nashua Mfg. Co., 4 N. H. 527; Lebanon *v.* Olcott, 1 N. H. 339.

New Jersey.— Lehigh Valley R. Co. *v.* McFarlan, 43 N. J. L. 605.

New York.— Calking *v.* Baldwin, 4 Wend. 667, 21 Am. Dec. 168.

North Carolina.— Dargan *v.* Carolina Cent. R. Co., 131 N. C. 623, 42 S. E. 979; Jones *v.* Franklin County, 130 N. C. 451, 42 S. E. 144; Allen *v.* Wilmington, etc., R. Co., 102 N. C. 381, 9 S. E. 4; Carolina Cent. R. Co. *v.* McCaskill, 94 N. C. 746; Holloway *v.* University R. Co., 85 N. C. 452; McIntire *v.* Western North Carolina R. Co., 67 N. C. 278; Mumford *v.* Terry, 4 N. C. 308. *Compare* White *v.* Northwestern North Carolina R. Co., 113 N. C. 610, 18 S. E. 330, 37 Am. St. Rep. 639, 22 L. R. A. 627.

Ohio.— Little Miami R. Co. *v.* Whitacre, 8 Ohio St. 590; Ernst *v.* Kunkle, 5 Ohio St. 523.

Oregon.— Cherry *v.* Lane County, 25 Oreg. 487, 36 Pac. 531.

Pennsylvania.— Phillips *v.* St. Clair Incline Plane Co., 153 Pa. St. 230, 25 Atl. 735; White *v.* McKeesport, 101 Pa. St. 394; Fehr *v.* Schuylkill Nav. Co., 69 Pa. St. 161; Koch *v.* Williamsport Water Co., 65 Pa. St. 288; Philadelphia, etc., R. Co. *v.* Williams, 54 Pa. St. 103; McKinney *v.* Monongahela Nav. Co., 14 Pa. St. 65, 53 Am. Dec. 517; Knorr *v.* Germantown R. Co., 5 Whart. 256; Seal *v.* Northern Cent. R. Co., 1 Pearson 108; Crossley *v.* Titusville, 32 Leg. Int. 30.

Rhode Island.— Smith *v.* Tripp, 14 R. I. 112.

South Carolina.— Glover *v.* Remley, 62 S. C. 52, 39 S. E. 780; Sams *v.* Port Royal, etc., R. Co., 15 S. C. 484; Fuller *v.* Edings, 11 Rich. 239.

Tennessee.— Tennessee, etc., R. Co. *v.* Adams, 3 Head 596; Colcough *v.* Nashville, etc., R. Co., 2 Head 171; Mitchell *v.* Franklin, etc., Turnpike Co., 3 Humphr. 456.

Wisconsin.— Milwaukee, etc., R. Co. *v.* Strange, 63 Wis. 178, 23 N. W. 432; Hanlin *v.* Chicago, etc., R. Co., 61 Wis. 515, 21 N. W. 623; Buchner *v.* Chicago, etc., R. Co., 60 Wis. 264, 19 N. W. 56; Smith *v.* Gould, 59 Wis. 631, 18 N. W. 457; Ford *v.* Chicago, etc., R. Co., 14 Wis. 609, 80 Am. Dec. 791; Pettibone *v.* La Crosse, etc., R. Co., 14 Wis. 443.

United States.— Reed *v.* Chicago, etc., R. Co., 25 Fed. 886.

See 18 Cent. Dig. tit. "Eminent Domain," § 718 *et seq.*

Remedy by appeal.— Under the Texas statute, giving the owner through whose premises a public road has been ordered a right of appeal from the assessment of damages by the commissioners' court, as in cases of appeal from the judgment of a justice, the remedy of an owner who is dissatisfied with the award by the commissioners' court is by appeal to the county court, and not by an original suit in the district court to enjoin the opening of the road, or for damages in case the injunction be refused. Huggins *v.* Hurt, 23 Tex. Civ. App. 404, 56 S. W. 944. And it is held in North Carolina, under a similar statute, that an owner who has not appealed cannot maintain an action for the value of the land. Lamb *v.* Elizabeth City, 132 N. C. 194, 43 S. E. 628, 131 N. C. 241, 42 S. E. 603.

Where a change in the grade of a street results in injuries which are the unavoidable consequence of the change, the remedy of the owner is not by an action of trespass, but by proceedings before viewers. Cooper *v.* Scranton City, 21 Pa. Super. Ct. 17; Curran *v.* East Pittsburg Borough, 20 Pa. Super. Ct. 590.

The owner's protest against the condemnation and refusal to accept the compensation awarded does not give him a right of action at law for the injuries sustained (Hueston *v.* Eaton, etc., R. Co., 4 Ohio St. 685), unless such right is expressly granted him by statute (Grigsby *v.* Burtnett, 31 Cal. 406).

When statute not applicable.— S. C. Gen. St. §§ 1550–1552, with reference to "an assessment of compensation" do not provide for a trial of the right to compensation, but refer only to the amount; and hence where the right to compensation is denied, a separate action may be maintained to restrain the landowner from proceeding under said sections. Georgia, etc., R. Co. *v.* Ridlehuber, 38 S. C. 308, 17 S. E. 24.

Action at law may be maintained for wrongful entry before condemnation. Republican Valley R. Co. *v.* Fink, 18 Nebr. 82, 24 N. W. 439.

61. Ft. Wayne *v.* Hamilton, 132 Ind. 487, 32 N. E. 324, 32 Am. St. Rep. 263; Rehman *v.* New Albany, etc., R. Co., 8 Ind. App. 200, 35 N. E. 292.

Pendency of appeal.— Where an appeal by a railroad company is pending, a separate action by the owner of the property, involving only such rights as can be adjudged and determined in the appeal, will be dismissed with costs (Phifer *v.* Carolina Cent. R. Co., 72 N. C. 433), but an owner may dismiss his own appeal and then bring his action (Chicago, etc., R. Co. *v.* Patterson, 26 Ind. App. 295, 59 N. E. 688).

Where the proceeding to condemn is of no effect until concluded, actions may be maintained for injuries pending the proceedings. Rumsey *v.* New York, etc., R. Co., 63 Hun (N. Y.) 200, 17 N. Y. Suppl. 672.

cumulative merely,[62] and it has been held that where the municipality taking the land alone had power to move in the matter, the owner may, if the municipality fails to move within a reasonable time, resort to his action.[63] If the owner is not bound to proceed under the statute for the assessment of damages, but may maintain an independent action for the injuries sustained, his acquiescence in the proceedings is not a waiver of his right to maintain an action for the wrongful appropriation of his land.[64]

b. Necessity For Compliance With Statute. Even where a specific remedy is provided by general statute or the charter of the condemning party, it is necessary in order to remit the landowner to such remedy and exclude his remedy at common law, that the condemning party should have proceeded under the statute or charter in taking the property and have substantially complied with its requirements;[65] and where condemnation proceedings are not perfected, neither party can

62. *Georgia.*— Doe *v.* Georgia R., etc., Co., 1 Ga. 524.

Illinois.— Smith *v.* Chicago, etc., R. Co., 67 Ill. 191.

Indiana.— Strickler *v.* Midland R. Co., 125 Ind. 412, 25 N. E. 455; McCormack *v.* Terre Haute, etc., R. Co., 9 Ind. 283; Chicago, etc., R. Co. *v.* Patterson, 26 Ind. App. 295, 59 N. E. 688; Pittsburgh, etc., R. Co. *v.* Harper, 11 Ind. App. 481, 37 N. E. 41.

Kansas.—Atchison, etc., R. Co. *v.* Weaver, 10 Kan. 344.

Maine.— Lee *v.* Pembroke Iron Co., 57 Me. 481, 2 Am. Rep. 59; Calais *v.* Dyer, 7 Me. 155; Fryeburg Canal *v.* Frye, 5 Me. 38.

Massachusetts.— Cogswell *v.* Essex Mill Corp., 6 Pick. 94.

Minnesota.— Harrington *v.* St. Paul, etc., R. Co., 17 Minn. 215.

Missouri.— See Hickman *v.* Kansas City, 120 Mo. 110, 25 S. W. 225, 41 Am. St. Rep. 684, 23 L. R. A. 658.

New Hampshire.—Ash *v.* Cummings, 50 N. H. 591.

New York.— Selden *v.* Delaware, etc., Canal Co., 24 Barb. 362.

North Carolina.— White *v.* Northwestern North Carolina R. Co., 113 N. C. 610, 18 S. E. 330, 37 Am. St. Rep. 639, 22 L. R. A. 827; Bridgers *v.* Dill, 97 N. C. 222, 1 S. E. 767.

Ohio.— Fries *v.* Wheeling, etc., R. Co., 56 Ohio St. 135, 36 N. E. 516; Atlantic, etc., R. Co. *v.* Robbins, 35 Ohio St. 531; Badgely *v.* Hamilton County, 1 Disn. 316, 12 Ohio Dec. (Reprint) 644; Raymond *v.* Toledo, etc., R. Co., 16 Ohio Cir. Ct. 639, 9 Ohio Cir. Dec. 5; Hathaway *v.* Springfield, etc., R. Co., 2 Ohio Dec. (Reprint) 349, 2 West. L. Month. 481.

Pennsylvania.— Woodward *v.* Webb, 65 Pa. St. 254; Schuylkill Nav. Co. *v.* McDonough, 33 Pa. St. 73.

Tennessee.— Parker *v.* East Tennessee, etc., R. Co., 13 Lea 669.

Wisconsin.— Younkin *v.* Milwaukee, Light, etc., Co., 112 Wis. 15, 87 N. W. 861.

See 18 Cent. Dig. tit. "Eminent Domain," § 718.

Option under statute.— Statutes sometimes give the landowner the option of proceeding by petition for the assessment of damages or by an ordinary action to recover damages. See Duck River Valley Narrow Gauge R. Co. *v.* Cochrane, 3 Lea (Tenn.) 478.

Election.— Where the remedies are cumulative the pursuit of one is a waiver of the other. Pinkham *v.* Chelmsford, 109 Mass. 225.

63. Corwith *v.* Hyde Park, 14 Ill. App. 635.

64. Chicago, etc., R. Co. *v.* Pattison, 26 Ind. App. 295, 59 N. E. 688.

65. *Connecticut.*— Healey *v.* New Haven, 49 Conn. 394.

Indiana.— Terre Haute, etc., R. Co. *v.* McKinley, 33 Ind. 274.

Iowa.— Mulholland *v.* Des Moines, etc., R. Co., 60 Iowa 740, 13 N. W. 726; Daniels *v.* Chicago, etc., R. Co., 35 Iowa 129, 14 Am. Rep. 490; Hunting *v.* Curtis, 10 Iowa 152.

Kansas.— Atchison, etc., R. Co. *v.* Weaver, 10 Kan. 344; Kansas Pac. R. Co. *v.* Streeter, 8 Kan. 133.

Maine.— Hamor *v.* Bar Harbor Water Co., 78 Me. 127, 3 Atl. 40.

Massachusetts.— Brickett *v.* Haverhill Aqueduct, 142 Mass. 394, 8 N. E. 119.

Ohio.— Cincinnati *v.* Coombs, 16 Ohio 181; Hathaway *v.* Springfield, etc., R. Co., 2 Ohio Dec. (Reprint) 349, 2 West. L. Month. 481. See also Harrison *v.* Sabina, 1 Ohio Cir. Ct. 49, 1 Ohio Cir. Dec. 30.

Pennsylvania.—McClinton *v.* Pittsburg, etc., R. Co., 66 Pa. St. 404; Brown *v.* Powell, 25 Pa. St. 229; Zanziger *v.* Wayne Electric Light Co., 6 Pa. Dist. 577.

South Carolina.— Glover *v.* Remley, 62 S. C. 52, 39 S. E. 780, sustaining an action against a railroad company for taking land, where the right to compensation was disputed and the owner had neither consented to nor permitted its entry on the land.

Texas.— International, etc., R. Co. *v.* Benitos, 59 Tex. 326.

Washington.—Downs *v.* Seattle, etc., R. Co., 5 Wash. 778, 32 Pac. 745, 33 Pac. 973.

Wisconsin.— Gilman *v.* Sheboygan, etc., R. Co., 40 Wis. 653; Sherman *v.* Milwaukee, etc., R. Co., 40 Wis. 645.

The taking must be evidenced by some writing sufficiently describing the property in order to remit the owner to his statutory remedy. Hamor *v.* Bar Harbor Water Co., 78 Me. 127, 3 Atl. 40.

Proceedings presumed to be regular.— Galena, etc., R. Co. *v.* Pound, 22 Ill. 399.

Defects may be cured by amendment. Dun-

claim any rights under them.[66] If the proceedings are so defective as to be void, they will furnish no defense to an action by the owner, either in trespass or ejectment,[67] for in such case the land was in a legal sense not taken;[68] but mere irregularities will not necessarily defeat the condemnation so as to give to the owner a right of action either in ejectment or trespass.[69]

B. Common Law and Equitable Remedies — 1. When Available. Where the legislature has not provided any specific method for ascertaining the compensation and for its recovery, the owner is left to his remedy at common law, and may resort to action which will afford relief,[70] and it has also been asserted that if the condemning party does not in all things conform to the judgment rendered in the condemnation proceedings, the owner is entitled to his common-

lap *v.* Toledo, etc., R. Co., 50 Mich. 470, 15 N. W. 555.

Defects may be waived by owner. *Colorado.*— Allen *v.* Colorado Cent. R. Co., 22 Colo. 238, 43 Pac. 1015.

Kentucky.— Conner *v.* Clark, 15 Ky. L. Rep. 126.

Massachusetts.— Abbott *v.* New York, etc., R. Co., 145 Mass. 450, 15 N. E. 91.

Minnesota.— Kanne *v.* Minneapolis, etc., R. Co., 33 Minn. 419, 23 N. W. 854.

Missouri.— Dietrich *v.* Murdock, 42 Mo. 279.

Waiver of damages.— Battles *v.* Braintree, 14 Vt. 348.

66. *Connecticut.*— Nichols *v.* Bridgeport, 23 Conn. 189, 60 Am. Dec. 636.

Louisiana.— Hullin *v.* New Orleans Municipality No. 2, 11 Rob. 97, 43 Am. Dec. 202.

Minnesota.— Teick *v.* Carver County, 11 Minn. 292.

Missouri.— Silvester *v.* St. Louis, 164 Mo. 601, 65 S. W. 278.

New Jersey.— Scudder *v.* Trenton Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756.

Wisconsin.— Koller *v.* La Crosse, 106 Wis. 369, 82 N. W. 34.

67. *Connecticut.*— Williams *v.* Hartford, etc., R. Co., 13 Conn. 397.

Illinois.— Peoria, etc., R. Co. *v.* Warner, 61 Ill. 52.

Kentucky.— Newport, etc., Bridge Co. *v.* Gill, 57 S. W. 229, 22 Ky. L. Rep. 325.

Michigan.— Dunlap *v.* Toledo, etc., R. Co., 50 Mich. 470, 15 N. W. 555; Names *v.* Oliver Tp., etc., Highway Com'rs, 30 Mich. 490.

Mississippi.— Illinois Cent. R. Co. *v.* Hoskins, (1902) 32 So. 150.

Nebraska.— Hull *v.* Chicago, etc., R. Co., 21 Nebr. 371, 32 N. W. 162.

Vermont.— Kidder *v.* Jennison, 21 Vt. 108.

Ejectment see *infra*, XII, B, 2, e.

Trespass see *infra*, XII, B, 2, i.

The condemning party may remove structures which it has erected on the land. Illinois Cent. R. Co. *v.* Hoskins, 80 Miss. 730, 32 So. 150, 92 Am. St. Rep. 612; Dietrich *v.* Murdock, 42 Mo. 279.

68. Nichols *v.* Bridgeport, 23 Conn. 189, 60 Am. Dec. 636.

69. *Maine.*— Hussey *v.* Bryant, 95 Me. 49, 49 Atl. 56.

Massachusetts.— Reed *v.* Acton, 117 Mass. 384; Pinkham *v.* Chelmsford, 109 Mass. 225.

New Hampshire.— Clement *v.* Burns, 43 N. H. 609.

New York.— Cahill *v.* Palmer, 17 Abb. Pr. 196.

North Carolina.—Jones *v.* Franklin County, 130 N. C. 451, 42 S. E. 144.

Ohio.— Ward *v.* Marietta, etc., Turnpike, etc., Co., 6 Ohio St. 15.

Pennsylvania.— McGregor *v.* Equitable Gas Co., 139 Pa. St. 230, 21 Atl. 13.

Vermont.— Butman *v.* Vermont Cent. R. Co., 27 Vt. 500.

Compare Rusch *v.* Milwaukee, etc., R. Co., 54 Wis. 136, 11 N. W. 253.

Election of remedies.— Where the proceedings are merely insufficient, the owner may waive the defects and obtain just compensation for his land, or he may take advantage of the irregularities, regard the land as still his property, and maintain trespass for any injury to his possession; but he cannot do both, and must elect which method he will pursue. Hussey *v.* Bryant, 95 Me. 49, 49 Atl. 56.

Proceeding against one only of two tenants in common.— Where the land belonged to two tenants in common, but by mistake proceedings by a town were had against only one, if the town took possession supposing it had full title, it is not liable to an action of trespass. Stevens *v.* Battell, 49 Conn. 156.

70. *Arkansas.*—Bentonville R. Co. *v.* Baker, 45 Ark. 252.

California.— San Diego Land, etc., Co. *v.* Neale, 78 Cal. 80, 20 Pac. 380; Johnson *v.* Alameda County, 14 Cal. 106.

Illinois.— Russell *v.* Chicago, etc., R. Co., 98 Ill. App. 347.

Iowa.— Mulholland *v.* Des Moines, etc., R. Co., 60 Iowa 740, 13 N. W. 726; Hunting *v.* Curtis, 10 Iowa 152.

Kansas.— Wichita, etc., R. Co. *v.* Fechheimer, 36 Kan. 45, 12 Pac. 302; Kansas Pac. R. Co. *v.* Streeter, 8 Kan. 133.

Michigan.— Grand Rapids, etc., R. Co. *v.* Heisel, 47 Mich. 393, 11 N. W. 212.

Minnesota.— See Harrington *v.* St. Paul, etc., R. Co., 17 Minn. 215.

Missouri.— Hickman *v.* Kansas City, 120 Mo. 110, 25 S. W. 225, 41 Am. St. Rep. 684, 23 L. R. A. 658.

Nebraska.— Crawford Co. *v.* Hathaway, (1903) 93 N. W. 781, 60 L. R. A. 889.

Ohio.— Jackson County *v.* McGhee, 20 Ohio Cir. Ct. 201, 11 Ohio Cir. Dec. 106.

Texas.— Boyer *v.* St. Louis, etc., R. Co., (Sup. 1903) 76 S. W. 441 [*reversing* (Civ. App. 1903) 72 S. W. 1038]; International,

law remedies.[71] There may also be circumstances under which the owner may have relief in equity.[72]

2. PARTICULAR REMEDIES CONSIDERED — a. Action For Compensation Awarded — (I) *IN GENERAL.* When the compensation awarded is not paid the general rule is that the owner may recover it by an action at law,[73] especially where the statute

etc., R. Co. *v.* Benitos, 59 Tex. 326; Missouri, etc., R. Co. *v.* Hopson, 15 Tex. Civ. App. 126, 39 S. W. 384.

Virginia.— Virginia, etc., R. Co. *v.* Campbell, 22 Gratt. 437; Atty.-Gen. *v.* Turpin, 3 Hen. & M. 548.

Wisconsin.— Lenz *v.* Chicago, etc., R. Co., 111 Wis. 198, 86 N. W. 607.

United States.— Lehigh Valley Coal Co. *v.* Chicago, 26 Fed. 415; Hollingsworth *v.* Tensas Parish, 17 Fed. 109, 4 Woods 280; Blanchard *v.* Kansas City, 16 Fed. 444, 5 McCrary 217.

See 18 Cent. Dig. tit. "Eminent Domain," § 458.

71. Hendricks *v.* Johnson, 6 Port. (Ala.) 472; Cullen *v.* New York, etc., R. Co., 66 Conn. 211, 33 Atl. 910; Erie County *v.* Buffalo, 63 Hun (N. Y.) 565, 18 N. Y. Suppl. 635; Walker *v.* Mad River, etc., R. Co., 8 Ohio 38.

72. Western R. Co. *v.* Alabama Grand Trunk R. Co., 96 Ala. 272, 11 So. 483, 17 L. R. A. 474; Gardner *v.* Jersey City, 32 N. J. Eq. 586; Hathaway *v.* Springfield, etc., R. Co., 2 Ohio Dec. (Reprint) 349, 2 West. L. Month. 481. And see *infra*, XII, B, 2, f *et seq.*

Where a city wrongfully enters on a private way, and erects structures on it to fit it for public use, thereby partially destroying the owner's means of access to his adjoining property, and a portion of the cost is assessed on such property, the owner may maintain a suit in equity to set aside such assessments and compel the restoration of his private way to its former condition, and for damages. Culver *v.* Yonkers, 80 N. Y. App. Div. 309, 80 N. Y. Suppl. 1034.

An owner may bring a suit in the nature of a bill of peace to protect his water-rights and determine and define conflicting rights to or claims upon the waters of the same stream. Crawford County *v.* Hathaway, (Nebr. 1903) 93 N. W. 781, 60 L. R. A. 889.

Effect of bill in equity.— It would seem that the owner, by filing a bill in equity, waives the constitutional right to condemnation proceedings and to a jury trial. Dieckmann *v.* New York, 34 Misc. (N. Y.) 684, 70 N. Y. Suppl. 1021 [*affirmed* in 75 N. Y. App. Div. 252, 78 N. Y. Suppl. 56]; Hathaway *v.* Springfield, etc., R. Co., 2 Ohio Dec. (Reprint) 349, 2 West. L. Month. 481.

A landowner who disputes the right of a petitioner for a lateral railroad to locate the railroad through his property may maintain a bill in equity to determine such right, notwithstanding statutory proceedings for the condemnation of property for the railroad are pending in another court in the same county. Youghiogheny River Coal Co. *v.* Robertson, 12 Pa. Co. Ct. 1.

The ascertainment of damages is a matter of purely legal cognizance, entirely foreign to the functions of a court of equity. Buchner *v.* Chicago, etc., R. Co., 56 Wis. 403, 14 N. W. 273.

73. *Arkansas.*— Auditor *v.* Crise, 20 Ark. 540.

District of Columbia.— Cahill *v.* District of Columbia, 3 MacArthur 419.

Indiana.— Chicago, etc., R. Co. *v.* Jones, 103 Ind. 386, 6 N. E. 8; Lane *v.* Miller, 22 Ind. 104; Chicago, etc., R. Co. *v.* Pattison, 26 Ind. App. 295, 59 N. E. 688; Clear Creek Tp. *v.* Rittger, 12 Ind. App. 355, 39 N. E. 1052.

Iowa.— Dimmick *v.* Council Bluffs, etc., R. Co., 58 Iowa 637, 12 N. W. 710; Hibbs *v.* Chicago, etc., R. Co., 39 Iowa 340.

Kansas.— Cohen *v.* St. Louis, etc., R. Co., 34 Kan. 158, 8 Pac. 138, 55 Am. Rep. 242.

Louisiana.— New Orleans, etc., R. Co. *v.* New Orleans Levee Dist., 48 La. Ann. 1098, 20 So. 678.

Maine.— Kimball *v.* Rockland, 71 Me. 137.

Maryland.— Pennsylvania R. Co. *v.* Reichert, 58 Md. 261.

Massachusetts.— Fuller *v.* French, 10 Metc. 359.

Nebraska.— Brown *v.* Chicago, etc., R. Co., 60 Nebr. 62, 89 N. W. 405; Ray *v.* Atchison, etc., R. Co., 4 Nebr. 439; Omaha, etc., R. Co. *v.* Menk, 4 Nebr. 21.

New Hampshire.— Sparhawk *v.* Walpole, 20 N. H. 317; Clough *v.* Unity, 18 N. H. 75.

New York.— Sage *v.* Brooklyn, 89 N. Y. 189; Fisher *v.* New York, 67 N. Y. 73; Ganson *v.* Buffalo, 1 Abb. Dec. 230, 1 Keyes 454; Eno *v.* Metropolitan El. R. Co., 56 N. Y. Super. Ct. 95, 1 N. Y. Suppl. 521; *In re* Bogert, 1 Wend. 41.

Ohio.— Toledo *v.* Groll, 2 Ohio Cir. Ct. 199, 1 Ohio Cir. Dec. 441 [*affirming* 23 Cinc. L. Bul. 220].

Pennsylvania.— Philadelphia *v.* Miskey, 68 Pa. St. 49; McClinton *v.* Pittsburg, etc., R. Co., 66 Pa. St. 404; Philadelphia *v.* Dyer, 41 Pa. St. 463.

Rhode Island.— Fisher *v.* Warwick R. Co., 12 R. I. 287.

Virginia.— Southern R. Co. *v.* Gregg, 101 Va. 308, 43 S. E. 570.

United States.— Bibber-White Co. *v.* White River Valley Electric R. Co., 111 Fed. 36; McKeoin *v.* Northern Pac. R. Co., 45 Fed. 464.

The requisites to such an action are: (1) That the owner has title to the land condemned; (2) a regular judgment fixing the amount of compensation; and (3) a taking of possession by the condemning party, after judgment and with the consent of the owner. Chicago *v.* Shepard, 8 Ill. App. 602.

The owner may maintain assumpsit if the damages awarded are not paid. Meeker *v.*

does not provide a special mode for enforcing the judgment.[74] But no action will lie against the condemning party if the award has been paid into court,[75] or if the condemnation proceedings were invalid.[76]

(II) *Requisites to Recovery.* The owner cannot sue for the compensation unless he has complied with the prerequisites prescribed by the statute,[77] one of the most usual of which is a demand.[78] Under some statutes he is required to show the regularity of the proceedings resulting in the condemnation,[79] including the adoption of the ordinance where an ordinance is necessary.[80] An actual appropriation of the land must be shown,[81] although in the case of land taken for a street it is not essential to show that the street has actually been opened.[82] Where the statute provides that in road cases the warrant shall be paid if there are sufficient funds in the treasury applicable thereto this fact must be shown.[83]

b. Action For Damages. The landowner may seek his remedy in an ordinary action for damages.[84]

c. Case. Case has also been held an appropriate remedy for the owner[85] in

Chicago, 96 Ill. App. 23; Evanston *v.* Clark, 77 Ill. App. 234; Chicago *v.* Hayward, 60 Ill. App. 582; Russell Mills *v.* Plymouth County Com'rs, 16 Gray (Mass.) 347; Leland *v.* Woodbury, 4 Cush. (Mass.) 245; Ganson *v.* Buffalo, 2 Abb. Dec. (N. Y.) 236, 1 Keyes (N. Y.) 454; Kyle *v.* Auburn, etc., R. Co., 2 Barb. Ch. (N. Y.) 489; Longworth *v.* Cincinnati, 48 Ohio St. 637, 29 N. E. 274; Toledo *v.* Groll, 2 Ohio Cir. Ct. 199, 1 Ohio Cir. Dec. 441; Cincinnati *v.* Kemper, 7 Ohio Dec. (Reprint) 251, 2 Cinc. L. Bul. 518.

74. Jamison *v.* Springfield, 53 Mo. 224; Jersey City *v.* Gardner, 33 N. J. Eq. 622.

75. Northern Pac. R. Co. *v.* Jackman, 6 Dak. 236, 50 N. W. 123; *In re* New York Cent., etc., R. Co., 90 N. Y. 342; Fisher *v.* New York, 57 N. Y. 344 [*reversing* 4 Lans. 451]. See also Stolze *v.* Milwaukee, etc., R. Co., 113 Wis. 44, 88 N. W. 919, 90 Am. St. Rep. 833.

Under the Nebraska statute the owner is not compelled to resort to the fund deposited with the county judge. Brown *v.* Chicago, etc., R. Co., 64 Nebr. 62, 89 N. W. 405.

Remedy against custodian of fund.— Where money is paid into the probate court under the Ohio statute, and is wrongfully retained by the probate judge, the party entitled to it may sue on the official bond of the judge, or may bring an ordinary action at law against him. State *v.* Meiley, 22 Ohio St. 534.

76. Nichols *v.* Bridgeport, 23 Conn. 189, 60 Am. Dec. 636; Anthony *v.* Granger, 22 R. I. 359, 47 Atl. 1091.

77. Ellis *v.* New York, 11 N. Y. Suppl. 394.

78. Botkin *v.* Livingston, 16 Kan. 39; Boston *v.* Robbins, 126 Mass. 384; Fisher *v.* New York, 67 N. Y. 73; Jones *v.* Franklin County, 130 N. C. 451, 42 S. E. 144.

Time for demand.— Under a statute providing that a city should pay the damages awarded within four months after confirmation of the award the owner could not maintain an action for the award without an application for payment made after the expiration of the four months. Fisher *v.* New York, 67 N. Y. 73.

79. Monroe County *v.* State, 156 Ind. 550, 60 N. E. 344; Lesieur *v.* Custer County, 61 Nebr. 612, 85 N. W. 892 (holding that in order to recover damages resulting from the location of a public road the burden is on plaintiff to show that his land has been regularly condemned, or at least that it has been physically appropriated to the use of the public by the county authorities); Pillsbury *v.* Springfield, 16 N. H. 565.

80. Akers *v.* Philadelphia, 4 Phila. (Pa.) 56.

81. Dimmick *v.* Council Bluffs, etc., R. Co., 58 Iowa 637, 12 N. W. 710.

82. Blake *v.* Dubuque, 13 Iowa 66; Shaw *v.* Charlestown, 3 Allen (Mass.) 538; Philadelphia *v.* Dyer, 41 Pa. St. 463.

83. Coburn *v.* Ames, 52 Cal. 385, 28 Am. Rep. 634.

84. Chicago, etc., R. Co. *v.* Patterson, 26 Ind. App. 295, 59 N. E. 688; Central Branch R. Co. *v.* Andrews, 41 Kan. 370, 21 Pac. 276; Covington, etc., El. R., etc., Co. *v.* Ruffin, 40 S. W. 383, 19 Ky. L. Rep. 284. See also Powers *v.* Manhattan R. Co., 120 N. Y. 178, 24 N. E. 295.

Where injunction obtained but not enforced. — In Michigan, when no compensation has been made abutting owners by a railroad proposing to occupy a street and an injunction is obtained against such use but is not enforced, and the railroad company uses such street without taking steps to determine the damages due to the owners, such owners are entitled to bring suit and recover the actual damages by them sustained between the time of laying the track and bringing suit. Taylor *v.* Bay City St. R. Co., 101 Mich. 140, 59 N. W. 447.

Successive actions.— Where land has been taken for a turnpike and afterward transferred by legislative authority to a railroad company without compensation by the latter to the owner of the fee, he may maintain successive actions for damages resulting from such occupation, as a continuing nuisance. Mahon *v.* New York Cent. R. Co., 24 N. Y. 658.

85. *District of Columbia.*—Dickson *v.* Baltimore, etc., R. Co., 3 MacArthur 362.

Illinois.— Chicago *v.* Jackson, 196 Ill. 496, 63 N. E. 1013, 1135 [*affirming* 88 Ill. App.

which he may recover all damages which he has suffered by reason of the acts complained of.[86]

d. Debt. Some cases have asserted the right of the owner to maintain an action of debt when the condemning party does not comply with the terms of the award.[87]

e. Ejectment. Ejectment will lie where there have been no condemnation proceedings or those had were defective, or the award has been set aside, or where possession has been taken before payment of the award.[88] Where a rail-

130]; Calumet, etc., Canal, etc., Co. *v.* Morawetz, 195 Ill. 398, 63 N. E. 165.

Maine.— Cushman *v.* Smith, 34 Me. 247.

Michigan.— See Hoffman *v.* Flint, etc., R. Co., 114 Mich. 316, 72 N. W. 167; Grand Rapids, etc., R. Co. *v.* Heisel, 47 Mich. 393, 11 N. W. 212.

New York.— Cornell *v.* Butternuts, etc., Turnpike Co., 25 Wend. 365.

Texas.— International, etc., R. Co. *v.* Malone, 1 Tex. App. Civ. Cas. § 232.

86. Chicago *v.* Jackson, 196 Ill. 496, 63 N. E. 1013, 1135 [*affirming* 88 Ill. App. 130]; Calumet, etc., Canal, etc., Co. *v.* Morawetz, 195 Ill. 398, 63 N. E. 165.

When there is no condemnation of a street by a railroad company its occupancy is a continuous wrong to abutting owners who may recover the amount of damages accruing year by year, and they may recover such special damages as they can prove. Grand Rapids, etc., R. Co. *v.* Heisel, 47 Mich. 393, 11 N. W. 212.

87. Blanchard *v.* Maysville, etc., Turnpike Co., 1 Dana (Ky.) 86; Bradbury *v.* Cumberland County, 52 Me. 27; Woodman *v.* Somerset County, 25 Me. 300; Jeffrey *v.* Blue-Hill Turnpike Corp., 10 Mass. 368; Bigelow *v.* Cambridge, etc., Turnpike Corp., 7 Mass. 202; Smart *v.* Portsmouth, etc., R. Co., 20 N. H. 233.

88. *Illinois.*— Meeker *v.* Chicago, 96 Ill. App. 23.

Iowa.— White *v.* Wabash, etc., R. Co., 64 Iowa 281, 20 N. W. 436.

Kansas.— St. Joseph, etc., R. Co. *v.* Callender, 13 Kan. 496.

Minnesota.— Pfaender *v.* Chicago, etc., R. Co., 86 Minn. 218, 90 N. W. 393.

Mississippi.— Illinois Cent. R. Co. *v.* Hoskins, 80 Miss. 730, 32 So. 150; Madden *v.* Louisville, etc., R. Co., 66 Miss. 258, 6 So. 181.

Missouri.— Anderson *v.* St. Louis, 47 Mo. 479.

New York.— Dater *v.* Troy Turnpike, etc., Co., 2 Hill 629; Meserole *v.* Brooklyn, 8 Paige 198.

Pennsylvania.— Wheeling, etc., R. Co. *v.* Warrell, 122 Pa. St. 613, 16 Atl. 20; Philadelphia, etc., R. Co. *v.* Cooper, 105 Pa. St. 239; Levering *v.* Philadelphia, etc., R. Co., 8 Watts & S. 459; Philadelphia, etc., R. Co. *v.* Pottsville Water Co., 18 Pa. Co. Ct. 501.

Washington.— Owen *v.* St. Paul, etc., R. Co., 12 Wash. 313, 41 Pac. 44.

Wisconsin.— Kuhl *v.* Chicago, etc., R. Co., 101 Wis. 42, 77 N. W. 155; Sherman *v.* Milwaukee, etc., R. Co., 40 Wis. 645.

If the award is increased on appeal, ejectment will lie if possession be taken before payment of the increase. Lake Erie, etc., R. Co. *v.* Kinsey, 87 Ind. 514; Dater *v.* Troy Turnpike, etc., Co., 2 Hill (N. Y.) 629.

Failure of person in interest to appear in condemnation proceedings.— Where the statute provides that the commissioners when appointed shall give notice by publication of the time and place of the commencement of the proceedings to condemn, one who has an interest in the land, but who fails to appear in the proceedings, cannot maintain ejectment against the company, after a final judgment and a deposit of the money, although he is in fact the owner of the property and the award was made to others. Chicago, etc., R. Co. *v.* Selders, 4 Kan. App. 497, 44 Pac. 1012; Kansas, etc., R. Co. *v.* Phipps, 4 Kan. App. 252, 45 Pac. 926.

Right of remainder-man.— One having an interest in the property as remainder-man, who has not been made a party, may maintain ejectment. Chicago, etc., R. Co. *v.* Smith, 78 Ill. 96.

Election of owner.— An owner of land which has been unlawfully appropriated by a corporation having the power of eminent domain may recover the land itself, or may if he prefers proceed to have his compensation assessed. Atlantic, etc., R. Co. *v.* Robbins, 35 Ohio St. 531.

An owner is not estopped to recover land taken by appearing before the commissioners and appealing from their award, if the award was made by persons one of whom was not legally appointed. Lewis *v.* St. Paul, etc., R. Co., 5 S. D. 148, 58 N. W. 580.

If a landowner acquiesces in the construction of a railroad on his land without condemnation proceedings, he will be estopped from interfering with the running of the road, and cannot maintain ejectment, but is confined to his action for damages to obtain compensation. St. Julien *v.* Morgan's Louisiana, etc., R., etc., Co., 39 La. Ann. 1063, 3 So. 280.

Railroad in street.— Ejectment will not lie for the recovery by an abutting owner of the possession of any part of the street from a railway company having a right of possession under the municipal authorities. Montgomery *v.* Santa Ana Westminster R. Co., 104 Cal. 186, 37 Pac. 786, 43 Am. St. Rep. 89, 25 L. R. A. 654.

English statute authorising stay of execution.— Lands Clauses Act (1845), § 124, provides that where lands, or an interest therein, have been omitted by mistake from the purchase by the company, the company may

road company wrongfully appropriates for its right of way a strip of land of a greater width than that authorized by statute, the owner can recover the excess in ejectment.[89] These rules have been held not applicable, however, where the land is taken by a city for a street,[90] or by the state for a canal,[91] or where the statute authorizes a taking of possession upon payment of the money into court.[92] A demand of payment must be made before the action can be instituted,[93] and if possession was taken with the owner's consent, a notice to quit is a prerequisite to the maintenance of ejectment.[94] The owner cannot in an action of ejectment raise the question whether petitioner was authorized to condemn the land, since that question was conclusively settled by the judgment in the condemnation proceedings.[95] Where damages assessed in condemnation proceedings have been paid to an administrator who has used them to pay off liens on the land, the heirs cannot recover the land without first offering to return the amount paid to the administrator.[96]

f. Injunction. The general rule is that injunction will not lie to restrain the condemnation of property where the party seeking it has an adequate remedy at law,[97] or the questions presented can be presented and passed on in the condemnation proceedings themselves,[98] nor unless the owner is in some way illegally

remain in undisputed possession for six months, provided that within that time, if the claim is not disputed, or if it is disputed then within six months after the right shall have been established, the company shall purchase. The effect of this section is not to prevent a claimant from bringing ejectment within six months, but to authorize the court to stay execution upon the judgment when it is obtained. Salisbury *v.* Great Northern R. Co., 5 C. B. N. S. 174, 5 Jur. N. S. 70, 28 L. J. C. P. 40, 7 Wkly. Rep. 75, 94 E. C. L. 174.

89. McKennon *v.* St. Louis, etc., R. Co., 69 Ark. 104, 61 S. W. 383.

90. Webber *v.* Toledo, 23 Ohio Cir. Ct. 237, holding that in such case the only remedy left to the owner is to seek to obtain the compensation which is allowed him.

91. North Branch Canal Co. *v.* Hireen, 44 Pa. St. 418.

92. Rudd *v.* Farmville, etc., R. Co., (Va. 1896) 24 S. E. 386.

93. Chicago, etc., R. Co. *v.* Smith, 78 Ill. 96; Syracuse Gas Light Co. *v.* Rome, etc., R. Co., 11 N. Y. Civ. Proc. 239.

94. Smith *v.* Chicago, etc., R. Co., 67 Ill. 191; Chicago, etc., R. Co. *v.* Knox College, 34 Ill. 195.

95. Chesapeake, etc., R. Co. *v.* Washington, etc., R. Co., 99 Va. 715, 40 S. E. 20.

96. Galveston, etc., R. Co. *v.* Blakeney, 73 Tex. 180, 11 S. W. 174.

97. *Alabama.*— Mobile, etc., R. Co. *v.* Alabama Midland R. Co., 87 Ala. 520, 6 So. 407; East, etc., R. Co. *v.* East Tennessee, etc., R. Co., 75 Ala. 275.

Georgia.— McDaniel *v.* Columbus, 87 Ga. 440, 13 S. E. 745; Remshart *v.* Savannah, etc., R. Co., 54 Ga. 579.

Maine.— Illsley *v.* Portland, etc., R. Co., 56 Me. 531.

Maryland.— Piedmont, etc., R. Co. *v.* Speelman, 67 Md. 260, 10 Atl. 77, 293.

Missouri.— Shoppert *v.* Martin, 137 Mo. 455, 38 S. W. 967.

New Jersey.— Trimmer *v.* Pennsylvania, etc., R. Co., (Ch. 1889) 17 Atl. 967; Jersey City *v.* Gardner, 33 N. J. Eq. 622.

New York.— Kyle *v.* Auburn, etc., R. Co., 2 Barb. Ch. 489.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Pottsville Water Co., 18 Pa. Co. Ct. 501.

Tennessee.—McNail *v.* Paducah, etc., R. Co., 3 Tenn. Cas. 580.

United States.— St. Louis, etc., R. Co. *v.* Southwestern Telephone, etc., Co., 121 Fed. 276, 58 C. C. A. 198.

See *supra*, XII, B, 1.

Injunction will not lie unless defendant is insolvent (Cooper *v.* Anniston, etc., R. Co., 85 Ala. 106, 4 So. 689; Evans *v.* Missouri, etc., R. Co., 64 Mo. 453; Colby *v.* Spokane, 12 Wash. 690, 42 Pac. 112) or full compensation for the trespass cannot be recovered at law (Colby *v.* Spokane, 12 Wash. 690, 42 Pac. 112).

Where certiorari properly lies, owing to errors or irregularities on the part of the commissioners, the owner cannot maintain injunction. Anderson *v.* St. Louis, 47 Mo. 479; Kelsey *v.* King, 32 Barb. (N. Y.) 410, 11 Abb. Pr. (N. Y.) 180; Buckley *v.* Drake, 9 N. Y. Civ. Proc. 336.

An abutting owner can invoke the interposition of a court of equity only in order to protect his property from direct injury by the use of the street on which it fronts for some additional public use. Chicago, etc., R. Co. *v.* General Electric R. Co., 79 Ill. App. 569.

Where no injury results.— An injunction will not lie to prevent the laying of a switch track in a street where it does not appear that this will impose any additional burden upon the plaintiff's soil or will present any additional impairment or interference to his use of the street. Indianapolis, etc., R. Co. *v.* Calvert, 110 Ind. 555, 11 N. E. 476.

98. *Alabama.*— Cooper *v.* Anniston, etc., R. Co., 85 Ala. 106, 4 So. 689.

California.— California Pac. R. Co. *v.* Central Pac. R. Co., 47 Cal. 549.

deprived of his rights in violation of the constitutional or statutory provisions governing the exercise of the power of eminent domain.[99] Injunction is the proper remedy where the condemning party is exceeding its powers,[1] or attempting to appropriate property in a mode other than that pointed out by statute,[2] or where the land is sought to be condemned ostensibly for a lawful purpose, but really for an unlawful[3] or improper one,[4] and it has been held that an injunction

Illinois.— Illinois Cent. R. Co. *v.* Chicago, 138 Ill. 453, 28 N. E. 740.

New York.— Kip *v.* New York, etc., R. Co., 6 Hun 24 [*affirmed* in 67 N. Y. 227], where an injunction sought on the ground that the statute authorizing the proceedings was unconstitutional was refused.

United States.— St. Louis, etc., R. Co. *v.* Southwestern Telephone, etc., Co., 121 Fed. 276, 58 C. C. A. 198.

Prior appropriation to public use.— Thus it is no ground for an injunction that the land sought to be taken has already been appropriated to a public use, since if this is a sufficient defense it may be set up in the condemnation proceedings. Smith *v.* Goodknight, 121 Ind. 312, 23 N. E. 148; Waterloo Water Co. *v.* Hoxie, 89 Iowa 317, 56 N. W. 499; State University *v.* St. Paul, etc., R. Co., 36 Minn. 447, 31 N. W. 936.

99. *Massachusetts.*— Nichols *v.* Salem, 14 Gray 490.

New York.— Watson *v.* New York, etc., R. Co., 64 How. Pr. 220.

Ohio.— Frevert *v.* Finfrock, 31 Ohio St. 621; Allison *v.* Cincinnati, 2 Cinc. Super. Ct. 462.

Pennsylvania.— Gaw *v.* Bristol, etc., R. Co., 196 Pa. St. 442, 46 Atl. 372; Campbell's Appeal, (1888) 12 Atl. 843; Wolbert *v.* Philadelphia, 48 Pa. St. 439; Rochester, etc., Coal, etc., Co. *v.* Berwind-White Coal Min. Co., 24 Pa. Co. Ct. 104; Heston *v.* Longstreth, Brightly 183, 1 Phila. 25; West Philadelphia Pass. R. Co. *v.* Perkins, 4 Brewst. 173.

Wisconsin.— Gilman *v.* Sheboygan, etc., R. Co., 40 Wis. 653.

Void order of condemnation.— Southern R. Co. *v.* Birmingham, etc., R. Co., 131 Ala. 663, 29 So. 191.

Facilitating freight business.— Slocum's Appeal, 12 Wkly. Notes Cas. (Pa.) 84.

1. *Kansas.*—Kansas Pac. R. Co. *v.* Streeter, 8 Kan. 133; Union Terminal R. Co. *v.* Kansas City Belt R. Co., 9 Kan. App. 281, 60 Pac. 541.

New Jersey.— Scudder *v.* Trenton Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756.

New York.— See Caro *v.* Metropolitan El. R. Co., 46 N. Y. Super. Ct. 138.

Ohio.— Moorhead *v.* Little Miami R. Co., 17 Ohio 340; Hathaway *v.* Springfield, etc., R. Co., 2 Ohio Dec. (Reprint) 349, 2 West. L. Month. 481.

Virginia.— Norfolk, etc., R. Co. *v.* Smoot, 81 Va. 495.

Wisconsin.— Gilman *v.* Sheboygan, etc., R. Co., 40 Wis. 653.

United States.— St. Louis, etc., R. Co. *v.* Southwestern Telephone, etc., Co., 121 Fed. 276, 58 C. C. A. 198.

England.— Lamb *v.* North London R. Co., L. R. 4 Ch. 522, 21 L. T. Rep. N. S. 98, 17 Wkly. Rep. 746.

If the avowed necessity is merely colorable, in order to the obtaining of land for another and different purpose, injunction will lie to restrain the taking. Lynch *v.* London Sewer Com'rs, 32 Ch. D. 72, 50 J. P. 548, 55 L. J. Ch. 409, 54 L. T. Rep. N. S. 699.

Slight excess.— Dowling *v.* Pontypool, etc., R. Co., L. R. 18 Eq. 714, 43 L. J. Ch. 761.

Preliminary injunction.— Where the sole purpose of the injunction is to restrain condemnation of land by a railroad company on the ground that it has no right to condemn, a temporary injunction should be granted, since a refusal to grant it would practically dispose of the case without a hearing on the merits. Riley *v.* Charleston Union Station Co., 67 S. C. 84, 45 S. E. 149.

2. *Alabama.*— Mobile, etc., R. Co. *v.* Alabama Midland R. Co., 123 Ala. 145, 26 So. 324.

Arkansas.— Niemeyer *v.* Little Rock Junction R. Co., 43 Ark. 111.

California.— O'Connor *v.* Southern Pac. R. Co., 122 Cal. 681, 55 Pac. 688.

Georgia.— Decatur County *v.* Humphrey, 47 Ga. 565.

Illinois.— Cincinnati, etc., R. Co. *v.* Danville, etc., R. Co., 75 Ill. 113.

Mississippi.— New Orleans, etc., R. Co. *v.* Frederic, 46 Miss. 1.

New York.— Mohawk, etc., R. Co. *v.* Artcher, 6 Paige 83.

Ohio.— Spring Grove Cemetery *v.* Cincinnati, etc., R. Co., 1 Ohio Dec. (Reprint) 343, 7 West. L. J. 392.

South Carolina.— Riley *v.* Charleston Union Station Co., 67 S. C. 84, 45 S. E. 149; Mauldin *v.* Greenville, 64 S. C. 444, 42 S. E. 202.

United States.— St. Louis, etc., R. Co. *v.* Southwestern Telephone, etc., Co., 121 Fed. 276, 58 C. C. A. 198.

See 18 Cent. Dig. tit. "Eminent Domain," § 767.

3. Forbes *v.* Delashmutt, 68 Iowa 164, 26 N. W. 56.

4. Carpenter *v.* Easton, etc., R. Co., 24 N. J. Eq. 249, 408; Colby *v.* La Grange, 65 Fed. 554 (holding that equity will restrain condemnation proceedings by a village to obtain an easement for the discharge of sewage over the land of an individual, where it is not sought to acquire the land for a drain, but merely to discharge the sewage on it for the owner to dispose of); Bostock *v.* North Staffordshire R. Co., 2 Jur. N. S. 248, 25 L. J. Ch. 325, 3 Smale & G. 283, 4 Wkly. Rep. 336.

may be granted where it appears that the lands proposed to be taken are not reasonably necessary for the purposes of the corporation,[5] or where there is an ulterior fraudulent purpose in the attempt to condemn.[6] It has also been held that an owner whose property has been damaged and who has obtained a judgment at law and issued execution, which has been returned no effects, may instantly appeal to a court of chancery to restrain the condemning party from further damaging his property until the damages awarded in the common-law suit are paid or secured.[7] While there is some conflict of opinion on the question whether a failure to make payment or tender of the compensation is a sufficient ground for an injunction, the weight of authority is in support of the proposition that, where the constitution or the statute makes payment of the compensation a condition precedent to taking possession of the property, the condemning party will be restrained from taking possession until payment is made or tendered,[8] especially where the

5. Biddle *v.* Wayne Water Works Co., 7 Del. Co. (Pa.) 373, attempt to condemn right of way and road of another company.

6. Cincinnati, etc., R. Co. *v.* Danville, etc., R. Co., 75 Ill. 113.

7. Ward *v.* Ohio River R. Co., 35 W. Va. 481, 14 S. E. 142.

8. *Alabama.*— Cowan *v.* Southern R. Co., 118 Ala. 554, 23 So. 754; Cooper *v.* Anniston, etc., R. Co., 85 Ala. 106, 4 So. 689.

Georgia.— Georgia, etc., R. Co. *v.* Archer, 87 Ga. 237, 13 S. E. 636; Chattanooga, etc., R. Co. *v.* Jones, 80 Ga. 264, 9 S. E. 1081; Gammage *v.* Georgia Southern R. Co., 65 Ga. 614; Rome *v.* Perkins, 30 Ga. 154.

Illinois.— Shute *v.* Chicago, etc., R. Co., 26 Ill. 436.

Indiana.— Ft. Wayne *v.* Ft. Wayne, etc., R. Co., 149 Ind. 25, 48 N. E 342; Norristown, etc., Turnpike Co. *v.* Burket, 26 Ind. 53; Smith *v.* Olmstead, 5 Blackf. 37.

Ohio.— Bentley *v.* Wabash, etc., R. Co., 61 Iowa 229, 16 N. W. 104; Irish *v.* Burlington, etc., R. Co., 44 Iowa 380; Richards *v.* Des Moines Valley R. Co., 18 Iowa 259; Horton *v.* Hoyt, 11 Iowa 496; Ragatz *v.* Dubuque, 4 Iowa 343.

Maine.— Mooers *v.* Kennebec, etc., R. Co., 58 Me. 279.

Maryland.— Western Maryland R. Co. *v.* Owings, 15 Md. 199, 74 Am. Dec. 563; Harness *v.* Chesapeake, etc., Canal Co., 1 Md. Ch. 248.

Massachusetts.— Elwell *v.* Eastern R. Co., 124 Mass. 160.

Mississippi.— Stewart *v.* Raymond R. Co., 7 Sm. & M. 568.

New Jersey.— Redman *v.* Philadelphia, etc., R. Co., 33 N. J. Eq. 165; Ross *v.* Elizabeth-Town, etc., R. Co., 2 N. J. Eq. 422.

Ohio.— Miller *v.* Logan County Com'rs, 3 Ohio Cir. Ct. 617, 2 Ohio Cir. Dec. 358.

Pennsylvania.— Keene *v.* Bristol, 26 Pa. St. 46.

Texas.— Travis County *v.* Trogdon, (Civ. App. 1895) 29 S. W. 46.

West Virginia.— Spencer *v.* Point Pleasant, etc., R. Co., 23 W. Va. 406.

Wisconsin.— Stolze *v.* Milwaukee, etc., R. Co., 113 Wis. 44, 88 N. W. 919, 90 Am. St. Rep. 833. See also Davis *v.* La Crosse, etc., R. Co., 12 Wis. 16; Sturtevant *v.* Milwaukee, etc., R. Co., 11 Wis. 63.

United States.— Northern Pac. R. Co. *v.* Barnsville, etc., R. Co., 4 Fed. 298, 2 McCrary 203; Eidemiller *v.* Wyandotte City, 8 Fed. Cas. No. 4,313, 2 Dill. 376.

See 18 Cent. Dig. tit. "Eminent Domain," § 768.

The non-payment of the award is not a ground for enjoining the condemning party (Masters *v.* McHolland, 12 Kan. 17; Mercer *v.* Williams, Walk. (Mich.) 85; Canal Co. *v.* Shimp, 2 Leg. Gaz. (Pa.) 181), especially where the land is condemned by a municipality (Hammerslough *v.* Kansas, 57 Mo. 219; Jersey City *v.* Gardner, 33 N. J. Eq. 622), and some statutes expressly forbid the issuance of an injunction in such cases (Andrews *v.* Farmers' L. & T. Co., 22 Wis. 288).

Obstruction of street.— The act of a street railroad company in tearing up the street preparatory to building its road, and piling ties and rails in the street, being a necessary incident to the construction of the road, is not such a damage to an abutting property-owner as will authorize an injunction to restrain the construction of the road. Nagel *v.* Lindell R. Co., 167 Mo. 89, 66 S. W. 1090.

Use by other than condemning party.— If a railway company sells its right of way before having made compensation, the purchasing company will be enjoined from constructing a road thereon until the owner is compensated. Drury *v.* Midland R. Co., 127 Mass. 571; Ft. Worth, etc., R. Co. *v.* Jennings, 76 Tex. 373, 13 S. W. 270, 8 L. R. A. 180. But *compare* Remshart *v.* Savannah, etc., R. Co., 54 Ga. 579. And this applies to a case where the second company has purchased at foreclosure sale. Gilman *v.* Sheboygan, etc., R. Co., 40 Wis. 653. Although the land is exclusively used by a company other than the condemning company, and although such use has been by sufferance of the owner, yet the owner may enjoin its further use until he is paid. Holbert *v.* St. Louis, etc., R. Co., 45 Iowa 23. Injunction will also lie against a foreign corporation which is using by sufferance the line of a domestic railroad corporation to restrain it from using that portion of the line running through the land of an owner who has not been compensated for the appropriation of the right of way, until such compensation shall be made. Holbert *v.* St. Louis, etc., R. Co., 45 Iowa 23.

owner would otherwise be subjected to an irreparable injury.[9] If the statute under which the proceedings are instituted fails to provide for the trial of all the rights involved, including the ascertainment of the compensation, the proceeding will be enjoined.[10] In England a temporary injunction will lie, where there is a conflict between the powers of two corporations, to prevent the exercise of the power pending the determination of the legal question of the effect of such conflicting powers.[11] The owner cannot resort to an injunction merely because the condemnation proceedings were irregular,[12] or where there was merely a defective description of the land,[13] or where there is a mere controversy as to damages,[14] or it is claimed that the damages are inadequate;[15] and an injunction will be denied where a tender of the award has been made and refused,[16] or where the owner has acquiesced in the taking,[17] or the condemning party has secured the payment by bond or by depositing the amount in court,[18] or where damages will adequately compensate for the injury.[19] Mere inconvenience to the

9. Southern R. Co. *v.* Birmingham, etc., R. Co., 131 Ala. 663, 29 So. 191; Cummings *v.* Kendall County, 7 Tex. Civ. App. 164, 26 S. W. 439; Eidemiller *v.* Wyandotte City, 8 Fed. Cas. No. 4,313, 2 Dill. 376.

10. Bonaparte *v.* Camden, etc., R. Co., 3 Fed. Cas. No. 1,617, Baldw. 205.

The court of common pleas has jurisdiction, in South Carolina, of a proceeding to enjoin condemnation proceedings by reason of the inadequacy of the statutory remedy. South Carolina, etc., R. Co. *v.* American Telephone, etc., Co., 63 S. C. 199, 41 S. E. 307.

11. Manchester, etc., R. Co. *v.* Great Northern R. Co., 9 Hare 284, 41 Eng. Ch. 284, holding that where one railway company has constructed its road over land of which it had legally acquired the possession, injunction will lie to restrain another railway company, to whom the legislature has granted power to purchase the same land, from exercising such power pending the determination of the legal question of the effect of such conflicting powers. See also Lancaster, etc., R. Co. *v.* Maryport, etc., R. Co., 4 R. & Can. Cas. 504; Bristol, etc., R. Co. *v.* Somerset, etc., R. Co., 22 Wkly. Rep. 601.

12. *Indiana.*— Bass *v.* Ft. Wayne, 121 Ind. 389, 23 N. E. 259.

Iowa.— Phillips *v.* Watson, 63 Iowa 28, 18 N. W. 659.

Michigan.— Detroit, etc., R. Co. *v.* Detroit, 91 Mich. 444, 52 N. W. 52.

Missouri.— Anderson *v.* St. Louis, 47 Mo. 479.

New Jersey.— Doughty *v.* Somerville, etc., R. Co., 7 N. J. Eq. 51.

New York.— Albany Northern R. Co. *v.* Brownell, 24 N. Y. 345.

Pennsylvania.— Penn Gas Coal Co. *v.* Versailles Gas Co., 2 Mona. 730.

South Carolina.— Greenville *v.* Mauldin, 64 S. C. 438, 42 S. E. 200.

Illustrations.— Mere irregularities in the survey of a public road (Decker *v.* Menard County, (Tex. Civ. App. 1894) 25 S. W. 727) or in the giving of notices (Akin *v.* Riley County, 36 Kan. 170, 13 Pac. 2) do not furnish ground for enjoining the opening of the road; nor is it sufficient that errors of law have been committed in the proceedings. Cooper *v.* Anniston, etc., R. Co., 85 Ala. 106, 4 So. 689.

13. Hutt *v.* Chicago, 187 Ill. 145, 58 N. E. 412; Woodbury *v.* Marblehead Water Co., 145 Mass. 509, 15 N. E. 282; Boyd *v.* Negley, 53 Pa. St. 387.

14. Spring Grove Cemetery *v.* Cincinnati, etc., R. Co., 1 Ohio Dec. (Reprint) 343, 7 West. L. J. 392; Davis *v.* Port Arthur Channel, etc., Co., 87 Fed. 512, 31 C. C. A. 99.

15. *Iowa.*— Lummery *v.* Braddy, 8 Iowa 33.

Maryland.— Brown *v.* Philadelphia, etc., R. Co., 58 Md. 539.

Nebraska.— Hopkins *v.* Keller, 16 Nebr. 569, 20 N. W. 874.

New York.— Kelsey *v.* King, 1 Transcr. App. 133, 33 How. Pr. 39. But *compare* Baldwin *v.* Buffalo, 29 Barb. 396.

Pennsylvania.— Heston *v.* Longstreth, 1 Phila. 25.

16. Creanor *v.* Nelson, 23 Cal. 464; Lionberger *v.* Pelton, 62 Nebr. 252, 86 N. W. 1067; Doughty *v.* Somerville, etc., R. Co., 7 N. J. Eq. 51.

17. Midland R. Co. *v.* Smith, 135 Ind. 348, 35 N. E. 284.

18. *Georgia.*— Chattanooga, etc., R. Co. *v.* Jones, 80 Ga. 264, 9 S. E. 1081.

New Jersey.— Trimmer *v.* Pennsylvania, etc., R. Co., (Ch. 1889) 17 Atl. 967.

North Carolina.— Wellington, etc., R. Co. *v.* Cashie, etc., R., etc., Co., 116 N. C. 924, 20 S. E. 964.

Pennsylvania.— Degen *v.* Meadowbrook Water Co., 3 Lack. Jur. 233.

Texas.— Hopkins *v.* Cravey, 85 Tex. 189, 19 S. W. 1067.

United States.—Davis *v.* Port Arthur Channel, etc., Co., 87 Fed. 512, 31 C. C. A. 99.

Where the damages have been awarded, but not deposited with the probate judge, as required by the laws of Nebraska, the owner may enjoin the operation of the road across his premises until payment is made. Ray *v.* Atchison, etc., R. Co., 4 Nebr. 439; Omaha, etc., R. Co. *v.* Menk, 4 Nebr. 21.

19. Burnett *v.* Nicholson, 72 N. C. 334.

Anticipated depreciation in value of property resulting from the erection of a fire-engine house on an adjacent lot is not sufficient to entitle the owner to an injunction.

owner arising from the appropriation of his property will not warrant the issuance of an injunction,[20] neither will the proceedings be enjoined on the ground that they are premature.[21] Residents of a city whose interest in a public park differs only in degree from that of all other residents, and whose property does not abut on the park, cannot maintain a suit to enjoin its condemnation for a railroad station.[22] Where an owner takes steps to have his damages assessed for the laying of water-pipes across his land, he cannot wait until the pipes are laid and then maintain an injunction suit for their removal, on the ground that there was an abuse of discretion in selecting the route.[23] Under the English statute, where there has been a decree for specific performance and for the enforcement of a vendor's lien, an injunction will not be granted, but if the company is insolvent a receiver will be appointed;[24] and it has been held that an injunction will not lie where the road is constructed and opened for traffic.[25] The right of the property-owner to an injunction to prevent the operation of a railroad in the street upon which his property abuts has been both asserted[26] and denied.[27] After an owner has presented his claim for damages, and has appealed from the award, it is too late for him to ask for an injunction to restrain the corporation from the exercise of its right to condemn.[28] After the repeal of the statute under which condemnation proceedings were commenced, an injunction is useless and unnecessary and should not be granted.[29] A mere denial of complainant's title, without a statement of facts going to show what the title is, is insufficient to prevent the relief sought.[30] Where the injunction is granted the decree should enjoin the taking of

Van de Vere *v.* Kansas City, 107 Mo. 83, 17 S. W. 695, 28 Am. St. Rep. 396.

20. Chicago, etc., R. Co. *v.* Chicago, 151 Ill. 348, 37 N. E. 842; Chicago, etc., R. Co. *v.* Illinois Cent. R. Co., 113 Ill. 156; Stahl *v.* Pennsylvania Co., 155 Pa. St. 309, 26 Atl. 437; Millroy *v.* Pittsburgh, etc., R. Co., 27 Pittsb. Leg. J. N. S. 377; Damon *v.* Baltimore, etc., R. Co., 2 Del. Co. (Pa.) 293.

Right of way.— This rule applies, although the injunction is sought by a railroad company against a telegraph company which threatens to interfere with the convenient use of the railroad right of way. Savannah, etc., R. Co. *v.* Postal Tel. Cable Co., 112 Ga. 941, 38 S. E. 353; South Carolina, etc., R. Co. *v.* American Telephone, etc., Co., 63 S. C. 199, 41 S. E. 307. Whether or not the manner in which the telegraph company proposes to construct its lines and locate its poles, wires, etc., on the railroad right of way, as indicated in the notice served on the railroad company, would so essentially injure or interfere with the necessary use by the railroad company of its right of way as to render the grant of a preliminary injunction proper, is a question to be determined by the trial judge under the facts and circumstances submitted for his consideration; and unless it appears that his discretion has been clearly abused the appellate court will not interfere. Savannah, etc., R. Co. *v.* Postal Tel. Cable Co., 112 Ga. 941, 38 S. E. 353.

21. Doughty *v.* Somerville, etc., R. Co., 7 N. J. Eq. 51.

22. Manson *v.* South Bound R. Co., 64 S. C. 120, 41 S. E. 832.

23. Biddle *v.* Wayne Waterworks Co., 190 Pa. St. 94, 42 Atl. 380.

24. Munns *v.* Isle of Wight R. Co., L. R. 5 Ch. 414, 39 L. J. Ch. 522, 23 L. T. Rep. N. S. 96, 18 Wkly. Rep. 781; Pell *v.* Northampton, etc., R. Co., L. R. 2 Ch. 100, 36 L. J. Ch. 319, 15 L. T. Rep. N. S. 169, 15 Wkly. Rep. 27. See also Lycett *v.* Stafford, etc., R. Co., L. R. 13 Eq. 261, 41 L. J. Ch. 474, 25 L. T. Rep. N. S. 870; Williams *v.* Aylesbury, etc., R. Co., 28 L. T. Rep. N. S. 547, 21 Wkly. Rep. 819. *Compare* Allgood *v.* Merrybent, etc., R. Co., 33 Ch. D. 571, 55 L. J. Ch. 743, 55 L. T. Rep. N. S. 835, 35 Wkly. Rep. 180.

Pendency of action.— When an unpaid vendor of land has commenced an action against the company to enforce his vendor's lien, an injunction will not be granted before judgment is rendered in such suit, nor will a receiver be appointed, although the company admits its liability. Latimer *v.* Aylesbury, etc., R. Co., 9 Ch. D. 385, 39 L. T. Rep. N. S. 460, 27 Wkly. Rep. 141.

25. See Munns *v.* Isle of Wight R. Co., L. R. 5 Ch. 414, 39 L. J. Ch. 522, 23 L. T. Rep. N. S. 96, 18 Wkly. Rep. 781; Pell *v.* Northampton, etc., R. Co., L. R. 2 Ch. 100, 36 L. J. Ch. 319, 15 L. T. Rep. N. S. 169, 15 Wkly. Rep. 27.

26. Harrington *v.* St. Paul, etc., R. Co., 17 Minn. 215; Craig *v.* Rochester City, etc., R. Co., 39 N. Y. 404; Syracuse Solar Salt Co. *v.* Rome, etc., R. Co., 67 Hun (N. Y.) 153, 22 N. Y. Suppl. 321.

27. Corcoran *v.* Chicago, etc., R. Co., 37 Ill. App. 417; Williams *v.* City Electric St. R. Co., 41 Fed. 556, an Arkansas case. See also Peoria, etc., R. Co. *v.* Schertz, 84 Ill. 135; Patterson *v.* Chicago, etc., R. Co., 75 Ill. 588.

28. Biddle *v.* Wayne Water Works Co., 7 Del. Co. (Pa.) 373.

29. Cohen *v.* Gray, 70 Cal. 85, 11 Pac. 508.

30. Birmingham Traction Co. *v.* Birmingham R., etc., Co., 119 Ala. 129, 24 So. 368.

the land only until compensation is made.[31] In some states damages may be ascertained and awarded in an injunction suit,[32] and where the owner of property institutes suit to enjoin a corporation from the continued use of his land which it has taken for a public improvement without the statutory condemnation proceedings, the court may in its discretion require such corporation to pay to the owner the damages sustained as a condition precedent to the continued operation of the improvement.[33]

g. Mandamus. Where the damages have been assessed for the opening of a street or road, or for any other municipal or county improvement, and the award has been confirmed or judgment rendered for the damages so that the owners of the land have a vested right to the money, the city or county officials may be compelled by mandamus to take the proper steps by making an assessment, issuing bonds, or otherwise, to raise the funds necessary to pay the award or judgment, and to pay the same to the persons entitled.[34] It has also been held that

31. Holbert *v.* St. Louis, etc., R. Co., 45 Iowa 23; Travis County *v.* Trogdon, (Tex. Civ. App. 1895) 29 S. W. 46.

Injunction not a bar to commencement of proceedings to condemn.— *In re* Metropolitan El. R. Co., 12 N. Y. Suppl. 506.

32. See Omaha Horse R. Co. *v.* Cable Tramway Co., 32 Fed. 727, decided under the Nebraska statute; and *infra*, XII, U.

33. *Iowa.*— Holbert *v.* St. Louis, etc., R. Co., 45 Iowa 23; Hibbs *v.* Chicago, etc., R. Co., 39 Iowa 340; Richards *v.* Des Moines Valley R. Co., 18 Iowa 259; Henry *v.* Dubuque, etc., R. Co., 10 Iowa 540.

Kentucky.— Cornwall *v.* Louisville, etc., R. Co., 104 Ky. 29, 46 S. W. 685, 20 Ky. L. Rep. 373.

Louisiana.— Fuselier *v.* Great Southern Tel., etc., Co., 50 La. Ann. 799, 24 So. 274.

Minnesota.— See Fish *v.* Chicago, etc., R. Co., 84 Minn. 179, 87 N. W. 606.

New Jersey.—Paterson, etc., R. Co. *v.* Kamlah, 47 N. J. Eq. 331, 21 Atl. 954 [*affirming* 42 N. J. Eq. 93, 6 Atl. 444].

New York.— Sperb *v.* Metropolitan El. R. Co., 137 N. Y. 155, 32 N. E. 1050, 20 L. R. A. 752; Hughes *v.* Metropolitan El. R. Co., 130 N. Y. 14, 28 N. E. 765 [*affirming* 57 N. Y. Super. Ct. 379, 8 N. Y. Suppl. 535]; Henderson *v.* New York Cent. R. Co., 78 N. Y. 423 [*affirming* 17 Hun 344]; Walsh *v.* Brooklyn Union El. R. Co., 69 N. Y. App. Div. 389, 74 N. Y. Suppl. 1019; Laue *v.* Metropolitan El. R. Co., 69 N. Y. App. Div. 231, 74 N. Y. Suppl. 595; Hedges *v.* West Shore R. Co., 80 Hun 310, 30 N. Y. Suppl. 92; Korn *v.* Metropolitan El. R. Co., 59 Hun 505, 13 N. Y. Suppl. 518; Eno *v.* Metropolitan El. R. Co., 56 N. Y. Super. Ct. 313, 8 N. Y. Suppl. 197; Purdy *v.* Manhattan R. Co., 3 Misc. 50, 634, 22 N. Y. Suppl. 943; Cunard *v.* Manhattan R. Co., 1 Misc. 151, 20 N. Y. Suppl. 724; Rauth *v.* New York El. R. Co., 23 N. Y. Suppl. 750, 23 N. Y. Civ. Proc. 95 (holding that where the owner cannot be found, the court may amend its judgment and order the payment of the money into court); Jones *v.* New York El. R. Co., 18 N. Y. Suppl. 952; Smith *v.* New York El. R. Co., 18 N. Y. Suppl. 132; Moss *v.* New York El. R. Co., 17 N. Y. Suppl. 586, 27 Abb. N. Cas. 318; Suarez *v.* Manhattan R. Co., 15 N. Y. Suppl. 222, 224. See also Wright *v.* New York El. R. Co., 78 Hun 450, 29 N. Y. Suppl. 223. *Compare* Peck *v.* Schenectady R. Co., 67 N. Y. App. Div. 359, 73 N. Y. Suppl. 794.

England.— See Griffiths *v.* Crystal Palace, etc., R. Co., 12 Jur. N. S. 560, 14 L. T. Rep. N. S. 753.

Purchase of easement.— It has been held in New York that a corporation may be restrained from further operation after a future day to be named, unless it buys the easement taken for the purposes of the road. Kearney *v.* Metropolitan El. R. Co., 14 N. Y. St. 854.

34. *Kentucky.*— Duncan *v.* Louisville, 8 Bush 98.

Michigan.—Balch *v.* Detroit, 109 Mich. 253, 67 N. W. 122.

New Jersey.— Minhinnah *v.* Haines, 29 N. J. L. 388.

New York.— Chapman *v.* Gates, 46 Barb. 313; People *v.* Westchester County, 4 Barb. 64; People *v.* Buffalo, 2 Misc. 7, 21 N. Y. Suppl. 601. See also Ganson *v.* Buffalo, 2 Abb. Dec. 236, 1 Keyes 454.

North Carolina.— McDowell *v.* Asheville, 112 N. C. 747, 17 S. E. 537.

Pennsylvania.— *In re* Kensington, etc., Turnpike Co., 97 Pa. St. 260 [*reversing* on other grounds 12 Phila. 611]. See also Boyer's Petition, 15 Pa. Co. Ct. 531.

Tennessee.— Williamson County *v.* Jefferson, 1 Coldw. 419.

Writ must show that condemnation proceedings were authorized. State *v.* School Dist. No. 1, 79 Mo. App. 103, where an alternative writ held to state no cause of action is set out in the opinion.

Delay in making application for mandamus held not fatal.— See People *v.* Syracuse, 78 N. Y. 56.

When remedy not exclusive.— Where a city charter makes the compensation for land taken for local improvements a general debt or charge on the city, an action will lie against the city for the same after the time limited for payment, although the city has not collected the amount from the parties assessed, and in such case those to whom compensation is due are not restricted to a remedy by mandamus, as would be the case

mandamus will lie to compel a railroad company to deposit with the county judge the amount of an award to the relator for damages on account of the location and operation of a railway across his premises,[35] or to compel the court to issue execution for the damages assessed to an owner whose property has been appropriated by a railroad company.[36]

h. Specific Performance. In England the owner is entitled to a decree for a specific performance of the award and a vendor's lien.[37]

i. Trespass. Trespass will lie if possession is taken without payment of the compensation having been made or secured, and without the consent of the owner or the condemnation proceedings are void,[38] but the mere fact that a railroad

if compensation were payable out of the assessments. Ganson *v.* Buffalo, 2 Abb. Dec. (N. Y.) 236, 1 Keyes (N. Y.) 454. See also Lewis *v.* Seattle, 5 Wash. 741, 32 Pac. 794.

Where right to payment not vested.— Where, under the statute, the city is merely prohibited from taking the property till the damages are paid and has the right after the assessment is made to desist from the undertaking upon payment of costs and leave the parties *in statu quo*, the assessment alone does not invest the city with the right of property nor divest the title of the property holder, and hence payment of such assessment cannot be enforced by mandamus. State *v.* Hug, 44 Mo. 116.

35. State *v.* Grand Island, etc., R. Co., 31 Nebr. 209, 47 N. W. 857, 27 Nebr. 694, 43 N. W. 419.

36. State *v.* Withrow, (Mo. Sup. 1891) 24 S. W. 638.

37. St. Germans *v.* Crystal Palace, etc., R. Co., L. R. 11 Eq. 568, 24 L. T. Rep. N. S. 288, 19 Wkly. Rep. 584. See also Wing *v.* Tottenham, etc., R. Co., L. R. 3 Ch. 740, 37 L. J. Ch. 654, 16 Wkly. Rep. 1098; Walker *v.* Ware, etc., R. Co., L. R. 1 Eq. 195, 35 Beav. 52, 12 Jur. N. S. 18, 35 L. J. Ch. 94, 13 L. T. Rep. N. S. 517, 14 Wkly. Rep. 158; Sutton *v.* Hoylake R. Co., 20 L. T. Rep. N. S. 214; Heriot *v.* London, etc., R. Co., 16 L. T. Rep. N. S. 473.

Enforcement of decree.— Where the vendor has obtained a decree for specific performance and for the payment of the purchase-money within three months, the vendor is in default of payment entitled to have the land sold, although the railroad has actually completed a road for traffic (Wing *v.* Tottenham, etc., R. Co., L. R. 3 Ch. 740, 37 L. J. Ch. 654, 16 Wkly. Rep. 1098; Williams *v.* Great Eastern R. Co., 18 L. T. Rep. N. S. 458, 16 Wkly. Rep. 821; Raper *v.* Crystal Palace, etc., R. Co., 18 L. T. Rep. N. S. 8, 16 Wkly. Rep. 413; Keane *v.* Athenry, etc., R. Co., 19 Wkly. Rep. 43), and this is true although the interest is only a leasehold (Sedgwick *v.* Watford, etc., R. Co., 36 L. J. Ch. 379). The decree may go against the lessee of the railroad company (Winchester *v.* Mid-Hants R. Co., L. R. 5 Eq. 17, 37 L. J. Ch. 64, 17 L. T. Rep. N. S. 161, 16 Wkly. Rep. 72), or against mortgagees or a company working the original road under a traffic agreement (Goodford *v.* Stonehouse, etc., R. Co., 38 L. J. Ch. 307, 20 L. T. Rep. N. S. 137, 17 Wkly. Rep. 515; Marling *v.* Stonehouse, etc., R. Co., 38 L. J. Ch. 306, 17 Wkly. Rep. 484; Drax *v.* Somerset, etc., R. Co., 38 L. J. Ch. 232, 19 L. T. Rep. N. S. 626).

38. *Connecticut.*— Nicholson *v.* New York, etc., R. Co., 22 Conn. 74, 56 Am. Dec. 390.

Georgia.— Atlantic, etc., R. Co. *v.* Fuller, 48 Ga. 423.

Illinois.— Indianapolis, etc., R. Co. *v.* Hartley, 67 Ill. 439, 16 Am. Rep. 624; Meeker *v.* Chicago, 96 Ill. App. 23; Doyle *v.* Baughman, 24 Ill. App. 614.

Iowa.— Henry *v.* Dubuque, etc., R. Co., 10 Iowa 540.

Maryland.— Baltimore, etc., R. Co. *v.* Boyd, 63 Md. 325.

Massachusetts.— Bishop *v.* North Adams Fire Dist., 167 Mass. 364, 45 N. E. 925.

Minnesota.— Hartz *v.* St. Paul, etc., R. Co., 21 Minn. 358; Hursh *v.* First Div. St. Paul, etc., R. Co., 17 Minn. 439.

Mississippi.— Illinois Cent. R. Co. *v.* Hoskins, 80 Miss. 730, 32 So. 150, 92 Am. St. Rep. 612.

Missouri.— Anderson *v.* St. Louis, 47 Mo. 479.

Nebraska.— Republican Valley R. Co. *v.* Fink, 18 Nebr. 82, 24 N. W. 439; Ray *v.* Atchison, etc., R. Co., 4 Nebr. 439; Omaha, etc., R. Co. *v.* Menk, 4 Nebr. 21.

New Jersey.— New Jersey Cent. R. Co. *v.* Hetfield, 29 N. J. L. 206.

New York.— Third Ave. R. Co. *v.* New York El. R. Co., 19 Abb. N. Cas. 261.

Pennsylvania.— White *v.* Fifth Ave., etc., Bridge Co., 189 Pa. St. 500, 42 Atl. 136; Thompson *v.* Citizens' Traction Co., 181 Pa. St. 131, 37 Atl. 205 [*followed* in Osborne *v.* Delaware County, etc., R. Co., 9 Pa. Super. Ct. 632]; Keil *v.* Chartiers Valley Gas Co., 131 Pa. St. 466, 19 Atl. 78, 17 Am. St. Rep. 823; Bethlehem South Gas, etc., Co. *v.* Yoder, 112 Pa. St. 136, 4 Atl. 42; Philadelphia, etc., R. Co. *v.* Pottsville Water Co., 18 Pa. Co. Ct. 501; Pittsburgh, etc., R. Co. *v.* Scully, 16 Wkly. Notes Cas. 213.

Rhode Island.— Pettis *v.* Providence, 11 R. I. 372.

Texas.— Buffalo Bayou, etc., R. Co. *v.* Ferris, 26 Tex. 588.

Wisconsin.— Sherman *v.* Milwaukee, etc., R. Co., 40 Wis. 645; Loop *v.* Chamberlain, 20 Wis. 135.

See 18 Cent. Dig. tit. "Eminent Domain," § 733.

company has so located its line through plaintiff's land as to greatly lessen the value of the land not taken furnishes no ground for an action of trespass, if it does not appear that the line could be as well located in some other way.[39]

j. Trespass to Try Title. Where the condemning party fails to comply with the judgment of condemnation, the owner may maintain trespass to try title.[40]

k. Trover. The owner of a private waterworks system taken by a city without condemnation proceedings may, in an action of trover, recover the value of the plant and interest thereon.[41]

C. Appropriation or Injuries Not Covered by Condemnation Proceedings — 1. In General. An action for damages is the proper remedy to recover for injuries to property not covered by the assessment of damages in the proceedings for condemnation or assessment.[42]

2. Land Taken or Damaged in Excess of That Condemned. Where land in excess of that condemned is taken or injured, the owner has his remedy against the condemning party,[43] which may be by an action on the case for the resulting damages,[44] by injunction,[45] or by ejectment.[46] In order to recover damages, the owner must show an absolute freehold title in himself; a mere possessory right is not sufficient,[47] and if the company has acquired a prescriptive title to the excess, the owner's right is gone.[48]

3. Improper or Illegal Use of Property Appropriated. Although a corporation exceeds its powers in the manner in which it occupies the land, yet the owner of the fee is not thereby disseized so as to entitle him to recover in a writ of entry if the land is used in part for the purposes for which it was condemned;[49] but as the original assessment of damages for property appropriated includes only such damages as will flow from a proper and lawful use, the owner is entitled to

Subsequent institution of proceedings and tender of damages.— The fact that the proceedings are instituted and the tender of damages is made after the railroad company went into possession will not relieve the company from liability in trespass, although compensation is awarded as of the date of entry, with interest from such date. Hursh *v.* First Div. St. Paul, etc., R. Co., 17 Minn. 439. See also McClinton *v.* Pittsburg, etc., R. Co., 66 Pa. St. 404.

39. Cleveland, etc., R. Co. *v.* Stackhouse, 10 Ohio St. 567.

40. Parker *v.* Ft. Worth, etc., R. Co., 84 Tex. 333, 19 S. W. 518; Asher *v.* Jones County, 29 Tex. Civ. App. 353, 68 S. W. 551; Galveston, etc., R. Co. *v.* Kinkead, (Tex. Civ. App. 1900) 60 S. W. 468; Texas, etc., R. Co. *v.* Ford, 9 Tex. Civ. App. 557, 30 S. W. 372.

41. Smith *v.* Chicago, 107 Ill. App. 270 [*affirmed* in 204 Ill. 356, 68 N. E. 395].

42. McDevitt *v.* People's Natural Gas Co., 160 Pa. St. 367, 28 Atl. 948, holding that an abutting owner who is injured by the proximity of a natural gas main laid in a city street must proceed by an action for damages and not under the natural gas act. See also Youghiogeny River Coal Co. *v.* Robertson, 1 Pa. Dist. 809, 12 Pa. Co. Ct. 1.

Unlawful acts prior to assessment of compensation.—Although the permanent damages which are to be paid as compensation for the taking of land must be determined in the manner prescribed by the statute, the landowner may maintain an action for damages for any unlawful acts committed prior to the assessment of compensation. Drady *v.* Des Moines, etc., R. Co., 57 Iowa 393, 10 N. W. 754.

43. Lodge *v.* Railroad Co., 1 Leg. Gaz. (Pa.) 131.

Where a canal company widens and deepens its canal so as to exceed the limits of its easement in the land appropriated, and the injury can be remedied at reasonable expense without interference with the performance by the company of its duties to the public, neither party can demand a submission to the jury of an issue as to the permanent damage sustained, since this would be in effect a statutory condemnation. Mullen *v.* Lake Drummond Canal, etc., Co., 130 N. C. 496, 41 S. E. 1027, 61 L. R. A. 833.

44. Jacksonville, etc., R. Co. *v.* Kidder, 21 Ill. 131.

45. Jacksonville, etc., R. Co. *v.* Kidder, 21 Ill. 131; Bass *v.* Ft. Wayne, 121 Ind. 389, 23 N. E. 259; Harrington *v.* St. Paul, etc., R. Co., 17 Minn. 215.

46. Lind *v.* Isle of Wight Ferry, 7 L. T. Rep. N. S. 416, 1 New Rep. 13.

47. Waltemeyer *v.* Wisconsin, etc., R. Co., 71 Iowa 626, 33 N. W. 140.

48. Sherlock *v.* Louisville, etc., R. Co., 115 Ind. 22, 17 N. E. 171.

49. Peirce *v.* Boston, etc., R. Corp., 141 Mass. 481, 6 N. E. 96, holding that no occupation of land taken for station purposes which is not inconsistent with its use for such purposes can support a claim to the fee, and that any occupation of it which is consistent with and does not exclude its occupation for station purposes must be presumed to be under that right. See also Hilt *v.* Philadelphia, etc., R. Co., 43 Wkly. Notes Cas. (Pa.) 429.

recover additional damages if he is injured by an unlawful use,[50] and in England the landowner is entitled to an injunction to restrain the use of the land for improper purposes.[51]

4. Improper or Negligent Construction. For any damages which the landowner may sustain by reason of the negligence of the company as to the manner of constructing its works, he has his remedy by an ordinary action, since such damages cannot be considered, nor can compensation therefor be made in the proceedings to condemn.[52]

D. What Damages Recoverable. The measure of compensation for land appropriated for public use is the same whether such compensation is assessed in a proceeding brought by the party appropriating the land for the condemnation thereof, or in some action or proceeding brought by the owner after the land has been taken or damaged without the payment of compensation.[53] The value

50. *Illinois.*— Pittsburg, etc., R. Co. *v.* Reich, 101 Ill. 157.

Indiana.— Lostutter *v.* Aurora, 126 Ind. 436, 26 N. E. 184, 12 L. R. A. 259.

Michigan.— Grand Rapids, etc., R. Co. *v.* Heisel, 47 Mich. 393, 11 N. W. 212.

New York.— Strong *v.* Brooklyn, 68 N. Y. 1; Mahon *v.* Utica, etc., R. Co., Lalor, 156.

United States.— Porterfield *v.* Bond, 38 Fed. 391.

Where a contractor engaged in improving a canal under a contract with the state piles earth upon private land adjacent to the canal which the state has taken no proceedings to appropriate the contractor and not the state is liable for the trespass. Van Alstyne *v.* Belden, 41 N. Y. App. Div. 123, 58 N. Y. Suppl. 521.

What is not an unlawful use.— A building on land expropriated for a railroad station was used as such, but a private nuisance was carried on in certain rooms by an agent of the railroad company, who received his compensation by being allowed the use of the rooms. Railroad freight was, however, stored in those rooms when necessary. It was held that this was no such diversion by the company of the use as to give the owner an action for damages. Hoggatt *v.* Vicksburg, etc., R. Co., 34 La. Ann. 624.

A release by the owner of the premises of all claims for damages thereto resulting from the construction of a railway in the streets in front of them will not debar him from recovering damages occasioned by a construction not necessary or proper for the operation of the railway as contemplated by the release. Missouri, etc., R. Co. *v.* Hopson, 15 Tex. Civ. App. 126, 39 S. W. 384.

51. Bostock *v.* North Staffordshire R. Co., 2 Jur. N. S. 245, 25 L. J. Ch. 325, 3 Smale & G. 283, 4 Wkly. Rep. 336.

52. *California.*—De Baker *v.* Southern California R. Co., 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237.

Indiana.—Princeton *v.* Giesky, 93 Ind. 102; Rozell *v.* Anderson, 91 Ind. 591; Anderson *v.* Neas, 88 Ind. 317; Cummins *v.* Seymour, 79 Ind. 491, 49 Am. Rep. 618; Terre Haute, etc., R. Co. *v.* McKinley, 33 Ind. 274, holding that where the charter of a railroad company provides for its taking possession of land, avoiding unnecessary damage, and then provides the mode of assessing the damages and for their payment, the remedy given by the charter is exclusive, so far as damage may result to the owner from the proper construction of the road; but for unnecessary damage, the owner might recover in a common-law action.

Iowa.— Miller *v.* Keokuk, etc., R. Co., 63 Iowa 680, 16 N. W. 567; Cummins *v.* Des Moines, etc., R. Co., 63 Iowa 397, 19 N. W. 268; King *v.* Iowa Midland R. Co., 34 Iowa 458. *Compare* Drake *v.* Chicago, etc., R. Co., 63 Iowa 302, 19 N. W. 215, 50 Am. Rep. 746.

Kentucky.—Louisville, etc., R. Co. *v.* Asher, 15 S. W. 517, 12 Ky. L. Rep. 815.

Massachusetts.— Peabody *v.* Boston, etc., R. Co., 181 Mass. 76, 62 N. E. 1047; Sprague *v.* Worcester, 13 Gray 193.

Mississippi.— Kansas City, etc., R. Co. *v.* Lackey, 72 Miss. 881, 16 So. 909, 48 Am. St. Rep. 589.

Missouri.— Moss *v.* St. Louis, etc., R. Co., 85 Mo. 86; Imler *v.* Springfield, 55 Mo. 119, 17 Am. Rep. 645; Thurston *v.* St. Joseph, 51 Mo. 510, 11 Am. Rep. 463.

New Hampshire.— Dearborn *v.* Boston, etc., R. Co., 24 N. H. 179; Greenwood *v.* Wilton R. Co., 23 N. H. 261.

Oregon.— Oregon, etc., R. Co. *v.* Barlow, 3 Oreg. 311.

The claimant must have suffered a special injury different from that suffered by the public at large. Ottawa, etc., R. Co. *v.* Peterson, 51 Kan. 604, 33 Pac. 606; Chicago, etc., R. Co. *v.* Union Invest. Co., 51 Kan. 600, 33 Pac. 378; Brewer *v.* Boston, etc., R. Co., 113 Mass. 52.

Damages presumed to have been estimated in condemnation proceedings.— A landowner whose land was taken for the ditch under condemnation proceedings, in which the value of the land, and "the damages consequent upon the construction of the proposed work," were assessed, cannot recover damages occasioned by the dirt from the ditch being placed on the land at a distance of several feet from it, thus interfering with cultivation, as it will be presumed that such damages were estimated in the condemnation proceedings. Doyle *v.* Baughman, 24 Ill. App. 614.

53. McElroy *v.* Kansas City, etc., Air Line R. Co., 172 Mo. 546, 72 S. W. 913; McRey-

of land appropriated, or compensation for a permanent depreciation in value cannot, however, be recovered in a common-law action sounding in tort, but the recovery must be limited to such damages as have accrued up to the time of the commencement of the action,[54] and a recovery will bar only such damages as were sustained previous to that time, leaving the owner with the right to recover in another action for subsequent injuries.[55] The actual and not merely nominal damages are recoverable;[56] but the mere fact that the land was taken or injured with-

nolds *v.* Kansas City, etc., R. Co., 110 Mo. 484, 19 S. W. 824; Allen *v.* Wabash, etc., R. Co., 84 Mo. 646; Combs *v.* Smith, 78 Mo. 32; Dodson *v.* Cincinnati, 34 Ohio St. 276; Hatch *v.* Cincinnati, etc., R. Co., 18 Ohio St. 92; Grafton *v.* Baltimore, etc., R. Co., 21 Fed. 309. See also White *v.* Fifth Ave., etc., Bridge Co., 189 Pa. St. 500, 42 Atl. 136; Thompson *v.* Citizens' Traction Co., 181 Pa. St. 131, 37 Atl. 205 [*followed* in Osborne *v.* Delaware County, etc., Electric R. Co., 9 Pa. Super. Ct. 632]. See *supra*, X, E.

54. *Indiana.*— Anderson, etc., R. Co. *v.* Kernodle, 54 Ind. 314.

Minnesota.— Hartz *v.* St. Paul, etc., R. Co., 21 Minn. 358.

Nebraska.— Republican Valley R. Co. *v.* Fink, 18 Nebr. 82, 24 N. W. 439.

New York.— Pappenheim *v.* Metropolitan El. R. Co., 128 N. Y. 436, 28 N. E. 518, 26 Am. St. Rep. 486, 13 L. R. A. 401; Hussner *v.* Brooklyn City R. Co., 114 N. Y. 433, 21 N. E. 1002, 11 Am. St. Rep. 679; Fond *v.* Metropolitan El. R. Co., 112 N. Y. 186, 19 N. E. 487, 8 Am. St. Rep. 734 [*reversing* 42 Hun 567]; Uline *v.* New York Cent., etc., R. Co., 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661; Reed *v.* Canastota Northern R. Co., 20 N. Y. Suppl. 241; Reming *v.* New York, etc., R. Co., 7 N. Y. Suppl. 516.

Pennsylvania.— Keil *v.* Chartiers Valley Gas Co., 131 Pa. St. 466, 19 Atl. 78, 17 Am. St. Rep. 823.

Wisconsin.— Carl *v.* Sheboygan, etc., R. Co., 46 Wis. 625, 1 N. W. 295; Sherman *v.* Milwaukee, etc., R. Co., 40 Wis. 645.

But *compare* Covington, etc., El. R., etc., Co. *v.* Ruffin, 40 S. W. 383, 19 Ky. L. Rep. 284.

See 18 Cent. Dig. tit. "Eminent Domain," § 815.

The measure of damages for the use of a public street by a railroad, without consent of the owner of a lot abutting thereon, is the difference between the value of the use of the lots with the railroad and without it, from the time of its being built to the commencement of the action. Carl *v.* Sheboygan, etc., R. Co., 46 Wis. 625, 1 N. W. 295.

Distinction between assessment of compensation and action for damages.— Assessment of compensation and an action for damages proceed on wholly different principles. One subserves the purpose of the contemplated improvement and equalizes its burden among those who enjoy its common benefit; the other without regard to the advantage done makes reparation for the damage sustained, and in so doing conclusively establishes between the parties a right which in future actions may be urged to the entire interruption of the public work. Where an assessment can be had against a company, the authority of the company to take is recognized and the equitable duty which the sovereign has devolved upon the company of making compensation to the individual from whom more than his just contribution for the public good has been taken is enforced; an action for damages denies the authority to take and is inconsistent with the right to have compensation, distinguished from damages. The two cannot be concurrent remedies. McLauchlin *v.* Charlotte, etc., R. Co., 5 Rich. (S. C.) 583 [*followed* in Ragsdale *v.* Southern R. Co., 60 S. C. 381, 38 S. E. 609].

In Kansas a property-owner may bring an action to recover damages for the permanent depreciation of land. Steinbuchel *v.* Kansas Midland R. Co., 7 Kan. App. 543, 51 Pac. 934.

New York rule as to suit for damages and injunction see *infra*, XII, U.

55. Carl *v.* Sheboygan, etc., R. Co., 46 Wis. 625, 1 N. W. 295.

56. *Illinois.*— See Indianapolis, etc., R. Co. *v.* Hartley, 67 Ill. 439, 16 Am. Rep. 624.

Kentucky.— See Pollock *v.* Maysville, etc., R. Co., 103 Ky. 84, 44 S. W. 359, 19 Ky. L. Rep. 1717.

Maryland.— Baltimore Belt R. Co. *v.* McColgan, 83 Md. 650, 35 Atl. 59.

Michigan.— Taylor *v.* Bay City St. R. Co., 101 Mich. 140, 59 N. W. 447.

Mississippi.— Illinois Cent. R. Co. *v.* Hoskins, 80 Miss. 730, 32 So. 150.

Wisconsin.— Loop *v.* Chamberlain, 20 Wis. 135.

If the entry increases the value of the property the owner cannot recover any more than nominal damages. How *v.* Chesapeake, etc., Canal Co., 5 Harr. (Del.) 245, action of trespass.

Freights.— Where a railroad company built a spur over plaintiff's land, plaintiff was entitled to a reasonable compensation for any use to which he might have put the land, and not to a portion of the freights earned in carriage of goods over the spur and to places on the main line, nor did the fact that the spur was not an essential part of the main line entitle plaintiff to such freights as compensation. Illinois Cent. R. Co. *v.* Hoskins, 80 Miss. 730, 32 So. 150.

Action by county for damages for appropriation of highway.— Under Tex. Rev. St. (1895) art. 4426, which provides that a railway may construct its road along or upon a highway which the route of such railway may intersect or touch, but that it shall restore such highway "to its former state, or to such state as not to necessarily impair its usefulness," where a railway thus appropriates a

out condemnation proceedings or that the proceedings were insufficient does not warrant a recovery of punitive or exemplary damages,[57] although it has been held otherwise where defendant acted in bad faith, or the taking or injury constituted a wilful or reckless trespass with the intention of invading the rights of another.[58] The fact that, after the owner has commenced an action of trespass against a corporation which has appropriated a part of his land without payment of damages, the corporation tenders a bond and begins condemnation proceedings, does not deprive plaintiff of his right to recover for the injury sustained prior to the tender of the bond.[59]

E. Limitations. Statute or charter provisions frequently fix the time within which the owner must move in order to avail himself of the remedy provided by statute for the recovery of compensation,[60] and the date from which, or the event

highway the county may maintain an action for any damages resulting from the appropriation, and the measure of damages is the amount required to put the new road in as good condition as the old road was in when appropriated. St. Louis, etc., R. Co. *v.* Grayson, 31 Tex. Civ. App. 611, 73 S. W. 64.

57. Greeley, etc., R. Co. *v.* Yeager, 11 Colo. 345, 18 Pac. 211; Louisville, etc., R. Co. *v.* Hart County, 50 S. W. 60, 20 Ky. L. Rep. 1820 (holding that in an action brought by a county against a railroad to recover damages for injury to a public road, the fact that the railroad company has placed posts or ties in the road by the side of its track to prevent the road from washing and undermining the road-bed does not make the railroad liable to punitive damages); Illinois Cent. R. Co. *v.* Hoskins, 80 Miss. 730, 32 So. 150, 92 Am. St. Rep. 612; Powers *v.* Manhattan R. Co., 120 N. Y. 178, 24 N. E. 295; Taylor *v.* Metropolitan El. R. Co., 50 N. Y. Super. Ct. 311.

Failure to institute condemnation proceedings.— In view of the fact that the decision in Story *v.* New York El. R. Co., 90 N. Y. 122, 43 Am. Rep. 146, that an abutting owner is entitled to damages caused by an elevated railroad in the street is not broad enough to necessarily cover the case of an abutting owner whose only property in the street is an easement of light, air, and access, the failure of an elevated railroad company to institute condemnation proceedings along its whole line, within two years after that decision, is not of itself such a wanton and oppressive act as to entitle an abutting owner to punitive damages. Powers *v.* Manhattan R. Co., 120 N. Y. 178, 24 N. E. 295.

58. Pittsburgh, etc., R. Co. *v.* Scully, 16 Wkly. Notes Cas. (Pa.) 213. See also Pollack *v.* Marysville, etc., R. Co., 44 S. W. 359, 19 Ky. L. Rep. 1717. *Contra*, Greeley, etc., R. Co. *v.* Yeager, 11 Colo. 345, 18 Pac. 211.

Statutory penalty for wilful damage to trees.— Corporations having the right of eminent domain are not exempt from the operation of the Alabama statute imposing penalties for wilfully and knowingly destroying, injuring, or removing trees on lands of another, without the consent of the owner, in respect of such depredations committed upon lands taken by them without condemnation and compensation or purchase, for quasi-public purposes. Farrow *v.* Nashville, etc., R. Co., 109 Ala. 448, 20 So. 303. But *compare* Bethlehem South Gas, etc., Co. *v.* Yoder, 112 Pa. St. 136, 4 Atl. 42, holding that the Pennsylvania statute giving double damages for unlawfully cutting timber, and treble damages for its conversion, does not apply to a technical trespass committed by a corporation which enters upon land for a public use and cuts timber thereon, prior to filing the bond required of it in such cases by statute.

Question for jury.— In an action of trespass brought for an entry made by a gas company without compliance with the conditions imposed by statute, where the evidence shows that the first entry upon the land was without the owner's consent and accompanied by physical violence, and that when the employees of such company were yet on the land of the owner under the original entry they resisted a constable who sought to arrest them, the question of punitive damages is properly for the jury. Studebaker *v.* New Castle Gas Co., 7 Pa. Super. Ct. 641.

59. Keil *v.* Chartiers Valley Gas Co., 131 Pa. St. 466, 19 Atl. 78, 17 Am. St. Rep. 823.

60. *Indiana.*— Indiana Cent. R. Co. *v.* Oakes, 20 Ind. 9 (holding, however, that the statute does not bar an infant owner's remedy until after he becomes of age); White Water Valley Canal Co. *v.* Ferris, 2 Ind. 331.

Iowa.— Jolly *v.* Des Moines Northwestern R. Co., 72 Iowa 759, 33 N. W. 668; Pratt *v.* Des Moines Northwestern R. Co., 72 Iowa 249, 33 N. W. 666.

Kansas.— Chase County *v.* Allen, 25 Kan. 616.

Louisiana.— Mitchell *v.* New Orleans, etc., R. Co., 41 La. Ann. 363, 6 So. 522, holding, however, that the statute only applies in cases of judicial expropriation.

Maine.— Davis *v.* Russell, 47 Me. 443. A petitioner for damages for laying out a highway may make his application to the county commissioners at their first regular session after laying out the road, or at any adjourned meeting of the second next regular session. Waterhouse *v.* Cumberland County Com'rs, 44 Me. 368.

Massachusetts.— McGrath *v.* Watertown, 181 Mass. 380, 63 N. E. 889; Sisson *v.* New Bedford, 137 Mass. 255; Tileston *v.* Brookline, 134 Mass. 438; Davis *v.* New Bedford, 133 Mass. 549 (holding that the owner's remedy is barred after the expiration of the

upon the occurrence of which, the limitation begins to run.[61] In the absence of some special statutory provisions applicable thereto, the general statute of limi-

statutory period, notwithstanding the fact that the injury did not appear until after the expiration of such period); Warner *v.* Franklin County, 131 Mass. 348; Chandler *v.* Jamaica Pond Aqueduct Corp., 114 Mass. 575; Ipswich Mills *v.* Essex County Com'rs, 108 Mass. 363; Cambridge *v.* Middlesex County Com'rs, 6 Allen (Mass.) 134; Eaton *v.* Framingham, 6 Cush. (Mass.) 245.

Minnesota.— Kanne *v.* Minnesota, etc., R. Co., 33 Minn. 419, 23 N. W. 854.

New York.— People *v.* Canal Appraisers, 9 Barb. 496; People *v.* Hayden, 6 Hill 359.

North Carolina.— Dargan *v.* Carolina Cent. R. Co., 131 N. C. 623, 42 S. E. 979; Gudger *v.* Richmond, etc., R. Co., 106 N. C. 481, 11 S. E. 515; Hendrick *v.* Carolina Cent. R. Co., 101 N. C. 617, 8 S. E. 236; Carolina Cent. R. Co. *v.* McCaskill, 94 N. C. 746; Vinson *v.* North Carolina R. Co., 74 N. C. 510; Cockran *v.* Wood, 28 N. C. 194. A reasonable time would be allowed the owner, after his property is taken, if it were impossible for him to make the application at a regular meeting of the county commissioners within thirty days after the taking, as required by the act of 1899. Jones *v.* Franklin County Com'rs, 130 N. C. 451, 42 S. E. 144.

Ohio.— Lawrence R. Co. *v.* O'Hara, 48 Ohio St. 343, 28 N. E. 175 (holding, however, that the two years' limitation does not apply in cases where a railroad company occupies a highway without permission of the public authorities); Lawrence R. Co. *v.* Cobb, 35 Ohio St. 94.

Pennsylvania.— Grugan *v.* Philadelphia, 158 Pa. St. 337, 27 Atl. 1000; Com. *v.* McAllister, 2 Watts 190; Com. *v.* Fisher, 1 Penr. & W. 462; Clayton's Case, 1 Walk. 527; Schepp *v.* Reading, 2 Woodw. 460; *Ex p.* Broomal, 1 Del. Co. 79. See also *In re* Grape St., 103 Pa. St. 121.

Rhode Island.— Smith *v.* Tripp, 14 R. I. 112, holding that where a statute empowered a city to take land for waterworks, and provided for a recovery of compensation by filing a petition within a year, the statutory remedy was exclusive, and a promise by the city to pay would not support an action after the year.

South Carolina.— The statute provides that a presumption of a grant of right of way shall arise where the owner fails for ten years to prosecute his right to the possession. Ragsdale *v.* Southern R. Co., 60 S. C. 381, 38 S. E. 609.

Texas.— Cunningham *v.* San Saba County, 1 Tex. Civ. App. 480, 20 S. W. 941.

Virginia.— Callison *v.* Hedrick, 15 Gratt. 244.

See 18 Cent. Dig. tit. "Eminent Domain," § 784.

Statute extending time.— It has been held in Massachusetts that the act of 1899 (St. (1899) c. 386) extending until Jan. 1, 1900, the time for filing petitions for damages from changes of grade made under the Boston Terminal Co. Act (St. (1896) c. 516) is not unconstitutional, on the ground that the constitutional provisions for the protection of property allow a certain limited degree of latitude in regard to the restoration of remedies extinguished by lapse of time, when the seeming infraction is not very great. Dunbar *v.* Boston, etc., R. Corp., 181 Mass. 383, 63 N. E. 916.

What amounts to limitation.— A provision in the charter of the appropriating corporation that all claims for damages for property taken by the corporation must be made within a prescribed period is a positive statute of limitations. Terre Haute, etc., R. Co. *v.* Scott, 74 Ind. 29; Livermon *v.* Roanoke, etc., R. Co., 109 N. C. 52, 13 S. E. 734; Carolina Cent. R. Co. *v.* McCaskill, 94 N. C. 746.

Objection may be taken by oral motion to dismiss. McGrath *v.* Watertown, 181 Mass. 380, 63 N. E. 889.

Successor of corporation whose charter contains limitation.— Where the charter of a railroad company authorized it to appropriate a right of way, and limited the right of the owners to apply for damages to five years after the road was completed, such limitation cannot avail its successor, which had never acquired a right of way over the land in dispute, since the successor can only appropriate land as prescribed by the constitution and laws under which it was organized. Organ *v.* Memphis, etc., R. Co., 51 Ark. 235, 11 S. W. 96.

61. *Indiana.*— Pickett *v.* Toledo, etc., R. Co., 131 Ind. 562, 31 N. E. 200; Porter *v.* Midland R. Co., 125 Ind. 476, 25 N. E. 556; Strickler *v.* Midland R. Co., 125 Ind. 412, 25 N. E. 455.

Massachusetts.— Brock *v.* Old Colony R. Co., 146 Mass. 194, 15 N. E. 555; Smith *v.* Concord, 143 Mass. 253, 9 N. E. 642; Northborough *v.* Worcester County Com'rs, 138 Mass. 263; Sisson *v.* New Bedford, 137 Mass. 255; Geraghty *v.* Boston, 120 Mass. 416; Buell *v.* Worcester County, 119 Mass. 372; Ipswich Mills *v.* Essex County Com'rs, 108 Mass. 363; Moore *v.* Boston, 8 Cush. 274; Charlestown Branch R. Co. *v.* Middlesex County Com'rs, 7 Metc. 78; Goddard *v.* Boston, 20 Pick. 407.

New York.— People *v.* Hayden, 6 Hill 359.

North Carolina.— Cockran *v.* Wood, 28 N. C. 194.

Ohio.— Fries *v.* Wheeling, etc., R. Co., 56 Ohio St. 135, 46 N. E. 516; Columbus, etc., R. Co. *v.* Mowatt, 35 Ohio St. 284; Cincinnati, etc., R. Co. *v.* Davis, 19 Ohio Cir. Ct. 589, 10 Ohio Cir. Dec. 745.

Pennsylvania.— Grugan *v.* Philadelphia, 158 Pa. St. 337, 27 Atl. 1000; Brower *v.* Philadelphia, 142 Pa. St. 350, 21 Atl. 828; O'Brien *v.* Pennsylvania Schuylkill Valley R. Co., 119 Pa. St. 184, 13 Atl. 74; Philadelphia *v.* Dickson, 38 Pa. St. 247; *In re* Whitby Ave., 22 Pa. Super. Ct. 526; Clayton's Case, 1 Walk. 527; *Ex p.* Broomal, 1 Del. Co. 79.

tations applies to proceedings by the owner of the land condemned,[62] and the general rule is that, as soon as the construction or operation of the improvement unreasonably abridges the enjoyment of the owner, his cause of action accrues, and the statute begins to run.[63]

F. Laches. The general rule is that mere acquiescence in the appropriation

Rhode Island.— Goff *v.* Pawtucket, 13 R. I. 471.

Texas.— Cunningham *v.* San Saba County, 1 Tex. Civ. App. 480, 20 S. W. 941.

Vermont.— Tunbridge *v.* Tarbell, 19 Vt. 453; Myers *v.* Pownal, 16 Vt. 415; Emerson *v.* Reading, 14 Vt. 279, holding that the owner's cause of action does not accrue until after the selectmen have filed in the town clerk's office their certificate that the road has been opened.

United States.— Frankle *v.* Jackson, 30 Fed. 398.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 784, 785.

62. *Alabama.*— Cowan *v.* Southern R. Co., 118 Ala. 554, 23 So. 754.

Arkansas.—Memphis, etc., R. Co. *v.* Organ, 67 Ark. 84, 55 S. W. 952.

California.— Robinson *v.* Southern California R. Co., 129 Cal. 8, 61 Pac. 947.

Indiana.— New York, etc., R. Co. *v.* Hammond, 132 Ind. 475, 32 N. E. 83; Shortle *v.* Terre Haute, etc., R. Co., 131 Ind. 338, 30 N. E. 1084; Shortle *v.* Louisville, etc., R. Co., 130 Ind. 505, 30 N. E. 639; Sherlock *v.* Louisville, etc., R. Co., 115 Ind. 22, 17 N. E. 171.

Kansas.—Atchison, etc., R. Co. *v.* Lauterback, 8 Kan. App. 15, 54 Pac. 11.

Kentucky.—Klosterman *v.* Chesapeake, etc., R. Co., 71 S. W. 6, 24 Ky. L. Rep. 1233.

Massachusetts.— Whoriskey *v.* Old Colony R. Co., 173 Mass. 432, 53 N. E. 1004; Sewall *v.* Eastern R. Co., 9 Cush. 5.

New Jersey.— Parisen *v.* New York, etc., R. Co., 65 N. J. L. 413, 47 Atl. 477.

New York.— Clark *v.* Amsterdam Water Com'rs, 148 N. Y. 1, 42 N. E. 414 [*reversing* 74 Hun 294, 26 N. Y. Suppl. 214]; Donnelly *v.* Brooklyn, 121 N. Y. 9, 24 N. E. 17; McCormack *v.* Brooklyn, 108 N. Y. 49, 14 N. E. 808; Silsbury Mfg. Co. *v.* State, 104 N. Y. 562, 11 N. E. 264; Sage *v.* Brooklyn, 89 N. Y. 189; Erie County *v.* Buffalo, 63 Hun 565, 18 N. Y. Suppl. 635.

North Carolina.—Land *v.* Wilmington, etc., R. Co., 107 N. C. 72, 12 S. E. 125.

Ohio.— Fries *v.* Wheeling, etc., R. Co., 56 Ohio St. 135, 46 N. E. 516; Lawrence R. Co. *v.* O'Harra, 48 Ohio St. 343, 28 N. E. 175.

Pennsylvania.— Keller *v.* Harrisburg, etc., R. Co., 151 Pa. St. 67, 25 Atl. 84; Delaware, etc., R. Co. *v.* Burson, 61 Pa. St. 369; Forster *v.* Cumberland Valley R. Co., 23 Pa. St. 371. See also McClinton *v.* Pittsburg, etc., R. Co., 66 Pa. St. 404, holding that the statute of limitations does not bar an action for compensation for subsequent use of the property.

Texas.— Galveston, etc., R. Co. *v.* Kinkead, (Civ. App. 1900) 60 S. W. 463; Cunningham *v.* San Saba County, 1 Tex. Civ. App. 480, 20 S. W. 941.

Wisconsin.— Green Bay, etc., Canal Co. *v.* Kaukauna Water-Power Co., 70 Wis. 635, 35 N. W. 529, 36 N. W. 828.

A claim for damages caused by the location of a public road must be made before the road is opened, so that the county or state may if the damages are too great change the location of the road or abandon it altogether. Ferris *v.* Ward, 9 Ill. 499.

Mandamus.— In Pennsylvania the statute of limitations does not apply to a mandamus proceeding brought against the county commissioners to compel them to pay the damages awarded upon the condemnation of land for the purposes of a street. Boyer's Petition, 15 Pa. Co. Ct. 531.

63. *Arkansas.*— Memphis, etc., R. Co. *v.* Organ, 67 Ark. 84, 55 S. W. 952.

Illinois.— Calumet, etc., Canal, etc., Co. *v.* Morawetz, 195 Ill. 398, 63 N. E. 165.

Indiana.— Pickett *v.* Toledo, etc., R. Co., 131 Ind. 562, 31 N. E. 200; Harshbarger *v.* Midland R. Co., 131 Ind. 177, 27 N. E. 352, 30 N. E. 1083; Midland R. Co. *v.* Smith, 125 Ind. 509, 25 N. E. 153.

Iowa.— Fowler *v.* Des Moines, etc., R. Co., 91 Iowa 533, 60 N. W. 116.

Kansas.—Atchison, etc., R. Co. *v.* Lauterback, 8 Kan. App. 15, 54 Pac. 11.

Kentucky.— Louisville, etc., R. Co. *v.* Zachritz, 13 Ky. L. Rep. 141; Louisville, etc., R. Co. *v.* Orr, 10 Ky. L. Rep. 677.

Massachusetts.— Patten *v.* Fitz, 138 Mass. 456, holding that the right of action for damages caused by the laying out of a street accrues to an abutter at the time of the laying out.

New Jersey.— Scudder *v.* Trenton Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756.

Ohio.— Strader *v.* Cincinnati, 1 Handy 446, 12 Ohio Dec. (Reprint) 229.

Pennsylvania.— Delaware, etc., R. Co. *v.* Burson, 61 Pa. St. 369.

Texas.— Gulf, etc., R. Co. *v.* Necco, (Sup. 1891) 15 S. W. 1102; Franklin County *v.* Brooks, 68 Tex. 679, 5 S. W. 819.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 784, 785.

When right finally fixed.— While the owner may if he wishes bring suit at the time of the taking of his land in condemnation proceedings, his rights are not finally fixed, and the statute does not begin to run against him until the work has been completed (Brower *v.* Philadelphia, 8 Pa. Co. Ct. 361), but where the value of a right of way is judicially ascertained, the finding is in the nature of a judgment, and the claim will be barred if not enforced within ten years thereafter (Blair *v.* St. Louis, etc., R. Co., 24 Fed. 539). Where commissioners to assess damages for land which had been taken by a railroad company were appointed upon application, but they never met, and nothing further was done in

of land does not bar the owner from obtaining by proper proceedings compensation for the land taken or injured, but where he stands by without objecting until the rights of the public or third persons have intervened, he is ordinarily held to have forfeited every other remedy, such as ejectment or injunction.[64] But even where no such rights have intervened the owner may lose his right to compensation by long delay or laches in seeking to enforce his remedy.[65]

G. Survival of Right of Action.[66] The right of action of an owner of property for damages for the appropriation of his property for public use does not abate upon his death, but survives to his personal representative;[67] and this is

the matter, these proceedings did not affect the running of the statute of limitations. Waring *v.* Cheraw, etc., R. Co., 16 S. C. 416.

64. *Alabama.*— Cowan *v.* Southern R. Co., 118 Ala. 554, 23 So. 754.

Indiana.— Porter *v.* Midland R. Co., 125 Ind. 476, 25 N. E. 556; Strickler *v.* Midland R. Co., 125 Ind. 412, 25 N. E. 455; Bravard *v.* Cincinnati, etc., R. Co., 115 Ind. 1, 17 N. E. 183.

Kentucky.— Maysville, etc., R. Co. *v.* Ingram, 30 S. W. 8, 16 Ky. L. Rep. 853. See also Snyder *v.* Lexington, 49 S. W. 765, 20 Ky. L. Rep. 1562.

Missouri.— Hosher *v.* Kansas City, etc., R. Co., 60 Mo. 329.

New York.— See Campbell *v.* New York, etc., R. Co., 35 Misc. 497, 71 N. Y. Suppl. 1105. But *compare* Embury *v.* Connor, 2 Sandf. 98.

Ohio.— Goodin *v.* Cincinnati, etc., Canal Co., 18 Ohio St. 169, 98 Am. Dec. 95.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Lawrence, 10 Phila. 604.

Texas.— San Antonio, etc., R. Co. *v.* Hunnicutt, 18 Tex. Civ. App. 310, 44 S. W. 535.

Wisconsin.— Kuhl *v.* Chicago, etc., R. Co., 101 Wis. 42, 77 N. W. 155.

England.— Mold *v.* Wheatcroft, 27 Beav. 510.

65. *Kansas.*— Chicago, etc., R. Co. *v.* Selders, 4 Kan. App. 497, 44 Pac. 1012, holding that if condemnation proceedings have been conducted in strict conformity to the law, and the compensation has been secured by a deposit with the county treasurer, and the owner fails to appeal or take any further action in the matter until the railroad has been completed and is in operation, he is then estopped from maintaining ejectment against the company.

Massachusetts.— Forward *v.* Hampshire, etc., Canal Co., 22 Pick. 462.

Missouri.— Gray *v.* St. Louis, etc., R. Co., 81 Mo. 126. See also Dietrich *v.* Murdock, 42 Mo. 279.

New York.— People *v.* Syracuse, 78 N. Y. 56; Sander *v.* New York, etc., R. Co., 42 N. Y. App. Div. 618, 59 N. Y. Suppl. 127.

Ohio.— Columbus, etc., R. Co. *v.* Mowatt, 35 Ohio St. 284; Webber *v.* Toledo, 23 Ohio Cir. Ct. 237.

Pennsylvania.— Lucas *v.* Washington Borough, 2 Pa. Co. Ct. 630.

Wisconsin.— Frey *v.* Duluth, etc., R. Co., 91 Wis. 309, 64 N. W. 1038.

Even a court of equity will refuse to grant relief where the owner has slept on his rights for a long period (Sommer *v.* Pacific R. Co., 4 Mo. App. 586; Sprague *v.* Rhodes, 6 R. I. 56, 75 Am. Dec. 678), but where the time elapsed has not been sufficient to divest the title of the owner by adverse possession, equity will enforce his claim to compensation as it does a vendor's lien (Organ *v.* Memphis, etc., R. Co., 51 Ark. 235, 11 S. W. 96; Duncan *v.* Missouri Pac. R. Co., 22 Mo. App. 614; Dargan *v.* Carolina Cent. R. Co., 113 N. C. 596, 18 S. E. 653).

Circumstances not showing laches.— Where a railroad company filed exceptions to the assessment and took possession of the land, but failed to bring the proceedings to final judgment so as to dispose of the exceptions, it could not charge the owner with laches in delaying for twelve years to move for the issue of an execution, since the owner was the only party injured by the delay. State *v.* Withrow, (Mo. Sup. 1891) 24 S. W. 638. Where a person whose land would be taken and injured by a raceway had refused to accept the amount awarded by commissioners and tendered to him, and given notice to the company that unless it paid him what he was willing to receive for the property he would contest the validity of its proceedings, it was not necessary for him to do more until his rights were invaded, and consequently he did not lose his right to an injunction restraining the company from entering upon his property, by standing by and seeing the company making contracts and expending large sums of money in the prosecution of its work elsewhere than on his property and taking no steps to restrain it. Scudder *v.* Trenton Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756. Where a corporation proposed to take land, and the owner refused the sum tendered him as compensation therefor, giving notice at the time that he would contest the validity of the corporation's right to take the land, and it was held that he was not guilty of laches, because he did nothing more until his lands were actually invaded. Scudder *v.* Trenton Delaware Falls Co., *supra*.

66. See, generally, ABATEMENT AND REVIVAL.

67. *Massachusetts.*— Moore *v.* Boston, 8 Cush. 274.

New Jersey.— See Columbia Delaware Bridge Co. *v.* Geisse, 35 N. J. L. 558, opinion by Beasley, C. J.

New York.— See Hirsch *v.* Manhattan R. Co., 84 N. Y. App. Div. 374, 82 N. Y. Suppl.

true whether his death occurs prior to the institution of the action or while it is pending.[68]

H. Defenses. Defendant will not be permitted to deny its power to condemn the land,[69] nor the actual condemnation;[70] nor can it set up as a defense any mere irregularities in the proceedings.[71] The facts that the assessments made to pay for the improvement have been exhausted in paying other awards, and that no additional assessments can be collected, constitute no defense.[72] Where the award was for land taken in laying out a public road, the fact that a part of the road has been vacated cannot be pleaded in defense, although the board of freeholders declared such part to be unnecessary.[73] Neither the repeal nor a material modification of a statute will constitute a defense to an action for the money awarded under its provisions.[74] The fact that there is statutory authority for a public improvement does not preclude the owner from recovering compensation for land taken or damages to that not taken.[75] The fact that after the commencement by the owner of an action in trespass or for damages defendant has instituted proceedings for condemnation constitute no defense to such action;[76] nor does the fact that such proceedings have resulted in its securing the right to appropriate the land.[77] It is also no defense that defendant has, subsequently to the bringing of the action against it, given the statutory security to pay the compensation which may be assessed.[78]

I. Parties — 1. Who May Institute Proceedings — a. In General. In the absence of some statutory enactment to the contrary, the person who owned the property at the time it was appropriated or injured is the proper person to insti-

754, 13 N. Y. Annot. Cas. 158; Jacobson *v.* Brooklyn El. R. Co., 22 Misc. 281, 48 N. Y. Suppl. 1072.

North Carolina.— Howcott *v.* Warren, 29 N. C. 20.

Virginia.— Upper Appomattox County *v.* Hardings, 11 Gratt. 1.

The action should be brought by the heirs at law and not by the executor or administrator of the deceased owner. Mountz *v.* Philadelphia, etc., R. Co., 203 Pa. St. 128, 52 Atl. 15.

68. Phillips *v.* Middlesex County, 122 Mass. 258; Darling *v.* Blackstone Mfg. Co., 16 Gray (Mass.) 187.

69. Cahill *v.* District of Columbia, 3 MacArthur (D. C.) 419.

70. Ragan *v.* Kansas City, etc., R. Co., 144 Mo. 623, 46 S. W. 602, holding that a railroad company cannot, after taking possession of a strip of land for a right of way, laying ties and rails thereon, and running its cars over the same for several years, enter a disclaimer of any interest in the land and abandon it, and, when called upon to respond in damages, claim that it is only liable as a trespasser, and thereby escape making compensation for appropriating the land and for damages to the rest of the lot caused by such appropriation.

71. State *v.* Grand Island, etc., R. Co., 31 Nebr. 209, 47 N. W. 857.

72. Sage *v.* Brooklyn, 8 Abb. N. Cas. (N. Y.) 279. See also Ganson *v.* Buffalo, 2 Abb. Dec. (N. Y.) 236, 1 Keyes (N. Y.) 454.

73. Reid *v.* Wall Tp., 34 N. J. L. 275.

74. Balch *v.* Detroit, 109 Mich. 253, 67 N. W. 122; People *v.* Westchester County, 4 Barb. (N. Y.) 64.

75. *Arkansas.*— Hughey *v.* Walker, 71 Ark. 644, 73 S. W. 1093.

Illinois.— Illinois Cent. R. Co. *v.* Kuehle, 95 Ill. App. 185.

Indiana.— Pittsburg, etc., R. Co. *v.* Harper, 11 Ind. App. 481, 37 N. E. 41.

Iowa.— Renwick *v.* Davenport, etc., R. Co., 49 Iowa 664.

Massachusetts.— Lincoln *v.* Com., 164 Mass. 368, 41 N. E. 489.

New Hampshire.— Greenwood *v.* Wilton R. Co., 23 N. H. 261.

North Carolina.— Phillips *v.* Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868.

Pennsylvania.— Lafean *v.* York County, 20 Pa. Super. Ct. 573.

Wisconsin.— Jones *v.* U. S., 48 Wis. 385, 4 N. W. 519.

76. Callanan *v.* Port Huron, etc., R. Co., 61 Mich. 15, 27 N. W. 718; Canton, etc., R. Co. *v.* French, 68 Miss. 22, 8 So. 512; Woolsey *v.* New York El. R. Co., 134 N. Y. 323, 30 N. E. 387, 31 N. E. 831; Hughes *v.* Metropolitan El. R. Co., 130 N. Y. 14, 28 N. E. 765 [*affirming* 57 N. Y. Super. Ct. 379, 8 N. Y. Suppl. 535]; Lawrence *v.* Metropolitan El. R. Co., 16 Daly (N. Y.) 501, 12 N. Y. Suppl. 546; Keil *v.* Chartiers Valley Gas Co., 131 Pa. St. 466, 19 Atl. 78, 17 Am. St. Rep. 823; McClinton *v.* Pittsburgh, etc., R. Co., 66 Pa. St. 404.

77. Missouri, etc., R. Co. *v.* Ward, 10 Kan. 352; Hursh *v.* First Div. St. Paul, etc., R. Co., 17 Minn. 439; Renwick *v.* New York El. R. Co., 59 N. Y. Super. Ct. 591, 15 N. Y. Suppl. 149.

78. Missouri, etc., R. Co. *v.* Ward, 10 Kan. 352; Keil *v.* Chartiers Valley Gas Co., 131

tute proceedings to recover compensation or damages.[79] Where mortgaged land is appropriated for public use, the mortgagor in whom the legal title remains, and not the mortgagee, is the proper person to institute proceedings for the assessment of damages.[80] In the case of a trust the holder of the legal title and not the *cestui que trust* is the proper person to maintain the action.[81]

b. Joint Actions. Several owners of distinct parcels of land cannot join in an action for damages for their respective holdings;[82] but persons holding several dis-

Pa. St. 466, 19 Atl. 78, 17 Am. St. Rep. 823; Bethlehem South Gas, etc., Co. *v.* Yoder, 112 Pa. St. 136, 4 Atl. 42.

79. *Colorado.*—Walley *v.* Platte, etc., Ditch Co., 15 Colo. 579, 26 Pac. 129.

Illinois.— Illinois Cent. R. Co. *v.* Ferrell, 108 Ill. App. 659.

Iowa.— See Forney *v.* Ralls, 30 Iowa 559.

Massachusetts.—Clapp *v.* Boston, 133 Mass. 367 (holding that a mere licensee has no right of action); Drury *v.* Midland R. Co., 127 Mass. 571. *Compare* Pinkerton *v.* Boston, etc., R. Co., 109 Mass. 527.

New Jersey.— New Jersey Cent. R. Co. *v.* Hetfield, 29 N. J. L. 206.

New York.— Shepard *v.* Manhattan R. Co., 169 N. Y. 160, 62 N. E. 151 [*affirming* 48 N. Y. App. Div. 452, 62 N. Y. Suppl. 977]; Levin *v.* New York El. R. Co., 165 N. Y. 572, 59 N. E. 261; Pope *v.* Manhattan R. Co., 79 N. Y. App. Div. 583, 80 N. Y. Suppl. 316; Stokes *v.* Manhattan R. Co., 47 N. Y. App. Div. 58, 62 N. Y. Suppl. 333, 30 N. Y. Civ. Proc. 177.

North Carolina.— Phillips *v.* Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868. *Compare* Livermon *v.* Roanoke, etc., R. Co., 109 N. C. 52, 13 S. E. 734. See also Pace *v.* Freeman, 32 N. C. 103.

Ohio.— Rapp *v.* Ohio Southern R. Co., 5 Ohio S. & C. Pl. Dec. 453, holding that in proceedings under the Ohio statute to compel a corporation to condemn certain lands upon which it has entered, the person seeking to compel condemnation proceedings must be the owner of the legal title. *Contra*, Cincinnati, etc., R. Co. *v.* Davis, 19 Ohio Cir. Ct. 589, 10 Ohio Cir. Dec. 745, holding that where the owner transfers his title, his right to any remedy for the recovery of damages is gone and his grantee is the only person entitled to bring the action.

Pennsylvania.— Arthur *v.* Pennsylvania R. Co., 27 Leg. Int. 237.

Texas.— Texas Cent. R. Co. *v.* Merkel, 32 Tex. 723.

Wisconsin.— Walton *v.* Green Bay, etc., R. Co., 70 Wis. 414, 36 N. W. 10; Pick *v.* Rubicon Hydraulic Co., 27 Wis. 433 (holding that a purchaser of property is entitled to recover damages which have been caused subsequent to the purchase, but that the right of action for previous damages is in his grantor); Pomeroy *v.* Chicago, etc., R. Co., 25 Wis. 641.

United States.— King *v.* Southern R. Co., 119 Fed. 1017.

Leased property.—Where at the time of the commission of the acts complained of the land was rented and in possession of a tenant, the landlord's right to recover was not affected thereby, since for the purposes of the action the possession of the tenant was the possession of the landlord. Chicago, etc., R. Co. *v.* Patterson, 26 Ind. App. 295, 59 N. E. 688.

Judgment creditor not an owner.— Williams *v.* Hutchinson, etc., R. Co., 62 Kan. 412, 63 Pac. 430, 84 Am. St. Rep. 408.

Plaintiff must show his title. Diedrich *v.* Northwestern Union R. Co., 42 Wis. 248, 24 Am. Rep. 399.

An assignee of a demand against a railroad company for occupation of land without purchase or condemnation is a party "interested in such land" within the meaning of a statuate which authorizes such parties to institute proceedings for condemnation if the company fails to do so. Tucker *v.* Chicago, etc., R. Co., 91 Wis. 576, 65 N. W. 515.

Right of purchaser after construction of road.— Where a railroad company, without condemnation proceedings, builds its road in the street, after a license from the city so to do subject to the rights of adjacent owners, an abutting owner may recover the amount of damages accruing year by year, although he did not own the property when the railroad was built, and no rights against the railroad were assigned by the one who did then own it. Hoffman *v.* Flint, etc., R. Co., 114 Mich. 316, 72 N. W. 167.

80. Farnsworth *v.* Boston, 126 Mass. 1; Vaugh *v.* Wetherell, 116 Mass. 138; Schuylkill Nav. Co. *v.* Thoburn, 7 Serg. & R. (Pa.) 411; *In re* Second St., 1 Del. Co. (Pa.) 413, holding that the mortgagee's remedy is in equity to have the damages impounded and paid to him in satisfaction or reduction of the mortgage debt. See also Camden, etc., Water Co. *v.* Ingraham, 85 Me. 179, 27 Atl. 94; Meacham *v.* Fitchburg R. Co., 4 Cush. (Mass.) 291. *Contra*, Harrison *v.* Sabina, 1 Ohio Cir. Ct. 49, 1 Ohio Cir. Dec. 30 (holding that a mortgagee may maintain an action against a corporation to recover damages for the conversion of mortgaged property which it appropriated without notice); Davis *v.* La Crosse, etc., R. Co., 12 Wis. 16.

81. Reed *v.* Hanover Branch R. Co., 105 Mass. 303; Davis *v.* Charles River Branch R. Co., 11 Cush. (Mass.) 506; Anderson *v.* Rochester, etc., R. Co., 9 How. Pr. (N. Y.) 553; Reese *v.* Addams, 16 Serg. & R. (Pa.) 40, holding likewise that if the land is charged with the payment of legacies or is subject to other liens the owner is a trustee for all who are thus interested.

82. *California.*—Guerkink *v.* Petaluma, 112 Cal. 306, 44 Pac. 570.

tinct interests in the same parcel of land may either maintain an action jointly,[83] or proceed separately.[84]

2. DEFENDANTS. If there are parties who have a substantial interest in the premises, but who have not been named as such in the petition, they may properly be brought in, or may be allowed to voluntarily become parties.[85] Where receivers are appointed for defendant company while the proceedings are pending, plaintiff is not bound to bring them in; they should intervene and make defense if they desire to do so.[86] Where a railroad mortgage has been foreclosed and the property bid in by the bondholders, who have formed a new corporation, vested with all the franchises, powers, and privileges of the former, such new corporation may properly be made a defendant to an action by one whose land was appropriated by the old corporation.[87]

J. Summons or Notice. Where proceedings are instituted by the owner for compensation for property taken for public use or for damages thereto, he should serve a summons upon or give notice to the corporation appropriating the land or causing the damage, substantially in the same manner as the petitioner is required to do in instituting condemnation proceedings.[88]

K. Petition or Complaint. Under the various statutes allowing compensation for land appropriated for public use, or damages for injury to land occasioned by a public work, strict rules of pleading are not usually applied, and it is held that the petition or statement filed by the owner in proceedings under the statute is sufficient, if the requirements of the statute are substantially complied with in the allegations therein. Such petition or statement, however, should show how the injury was caused, and that it falls within the remedy provided by the statute.[89] The petition or complaint should set forth the law under which the appro-

Iowa.— Chambers *v.* Lewis, 9 Iowa 583.

New York.— Moran *v.* Lydecker, 27 Hun 582.

Ohio.— Harrison *v.* Pike, 7 Ohio Dec. (Reprint) 603, 4 Cinc. L. Bul. 156.

Virginia.— Norfolk, etc., R. Co. *v.* Smoot, 81 Va. 495.

Wisconsin.— Younkin *v.* Milwaukee Light, etc., R. Co., 112 Wis. 15, 87 N. W. 861.

See 18 Cent. Dig. tit. "Eminent Domain," § 793.

Injunction proceedings.— Owners of separate tracts which will be permanently injured by a contemplated public improvement may unite to enjoin the improvements. Guerkink *v.* Petaluma, 112 Cal. 306, 44 Pac. 570.

83. Moor *v.* Shaw, 47 Me. 88; Reed *v.* Hanover Branch R. Co., 105 Mass. 303; Merrimack River Locks, etc. *v.* Nashua, etc., R. Corp., 10 Cush. (Mass.) 385; Ashby *v.* Eastern R. Co., 5 Metc. (Mass.) 368, 38 Am. Dec. 426; Getz *v.* Philadelphia, etc., R. Co., 105 Pa. St. 547; Harrisburg, etc., R. Co. *v.* Bucher, 7 Watts (Pa.) 33; Colcough *v.* Nashville, etc., R. Co., 2 Head (Tenn.) 171.

84. *Massachusetts.*— Watuppa Reservoir Co. *v.* Fall River, 134 Mass. 267; Dwight *v.* Hampden County Com'rs, 7 Cush. 533.

New York.— Korn *v.* New York El. R. Co., 129 N. Y. 648, 29 N. E. 1032 [*affirming* 13 N. Y. Suppl. 514]; Storms *v.* Manhattan R. Co., 77 N. Y. App. Div. 94, 79 N. Y. Suppl. 60.

North Carolina.— Hill *v.* Glendon, etc., Min., etc., Co., 113 N. C. 259, 18 S. E. 171.

Pennsylvania.— Reading R. Co. *v.* Boyer, 13 Pa. St. 496, holding that a tenant for life may sue without joining the remainder-man.

Tennessee.— Colcough *v.* Nashville, etc., R. Co., 2 Head 171.

But *compare* Tucker *v.* Campbell, 36 Me. 346.

85. Davidson *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 91; Matter of Munson, 9 N. Y. St. 126; Hill *v.* Glendon, etc., Min., etc., Co., 113 N. C. 259, 18 S. E. 171.

A mortgagee may be made a defendant after he has entered on the mortgaged premises and caused a tenant thereof to attorn to him. Abbott *v.* Upham, 13 Metc. (Mass.) 172.

86. Mercantile Trust Co. *v.* Pittsburg, etc., R. Co., 29 Fed. 732.

87. Drury *v.* Midland R. Co., 127 Mass. 571.

88. Cairo, etc., R. Co. *v.* Trout, 32 Ark. 17; Columbus, etc., R. Co. *v.* Richardson, 7 Ind. 543; *In re* Hinckley, 15 Pick. (Mass.) 447.

Sufficiency of notice of claim.— See Dickinson County *v.* Hogan, 39 Kan. 606, 18 Pac. 611.

89. *Georgia.*— See Bibb County *v.* Reese, 115 Ga. 346, 41 S. E. 636, holding that in an action against a county for damages sustained by a change in the grade of a road, the complaint must allege that such change was made under the authority of the officers of the county, and that they were authorized by law to do the work.

Illinois.— Townsend *v.* Chicago, etc., R. Co., 91 Ill. 545, holding that it was not an objection to the petition that it asked that the commissioners determine the damages which the owner "will sustain," whereas the statute required them to ascertain damages which the owners "have sustained," as the

priating party claims the right to the appropriation,[90] allege the facts as to the taking,[91] and the ownership of the land,[92] describe the land with sufficient precision to enable the appraisers to locate it,[93] and show a state of facts entitling the plaintiff or petitioner to compensation for damages.[94] Special damages must be pleaded.[95] It is not necessary that the petition or complaint shall negative the institution of condemnation proceedings,[96] nor that it should allege that plaintiff has demanded compensation and that defendant has refused to pay same,[97] nor set forth in detail all the elements of damages claimed.[98]

L. Plea or Answer. Defendant's plea or answer may set up any defense it may have to the owner's action, such as accord and satisfaction,[99] subject of course to the rule against duplicity;[1] but it cannot aver that the balance of plaintiff's land will be enhanced by the improvement, where plaintiff's claim for damages to

statute intended the damages to be as well for the occupation to continue as for that already begun. See also People *v.* Davis, 93 Ill. 133, holding that the petition is insufficient if it does not show what acts were done to lay out the highway, but simply describes the road as on the center section line of the township.

Indiana.— Church *v.* Grand Rapids, etc., R. Co., 70 Ind. 161; Indianapolis, etc., R. Co. *v.* Newsom, 54 Ind. 121; Martinsville, etc., R. Co. *v.* Bridges, 6 Ind. 400.

Massachusetts.— Wilbur *v.* Taunton, 123 Mass. 522.

Pennsylvania.—Union Canal Co. *v.* O'Brien, 4 Rawle 358.

South Carolina.— Aull *v.* Columbia, etc., R. Co., 42 S. C. 431, 20 S. E. 302.

90. Bibb County *v.* Reese, 115 Ga. 346, 41 S. E. 636; Indianapolis, etc., R. Co. *v.* Newsom, 54 Ind. 121.

91. Indianapolis, etc., R. Co. *v.* Newsom, 54 Ind. 121; Hartley *v.* Keokuk, etc., R. Co., 85 Iowa 455, 52 N. W. 352; *In re* Quigley, 3 Penr. & W. (Pa.) 139; Ryan *v.* Pennsylvania Schuylkill Valley R. Co., 2 Montg. Co. Rep. (Pa.) 31.

Petition alleging taking without owner's consent sufficient.— Aull *v.* Columbia, etc., R. Co., 42 S. C. 431, 20 S. E. 302.

92. Pittsburgh, etc., R. Co. *v.* Harper, 11 Ind. App. 481, 37 N. E. 41 (holding, likewise, that a complaint is not bad for insufficiency of allegation as to ownership, although such allegation is in the present tense, if it states that plaintiff claimed title, and the day before the alleged entry notified defendant thereof, and that he would claim damages); Plymouth *v.* Plymouth County Com'rs, 16 Gray (Mass.) 341.

93. Indianapolis, etc., R. Co. *v.* Newsom, 54 Ind. 121; Pittsburgh, etc., R. Co. *v.* Harper, 11 Ind. App. 481, 37 N. E. 41; Ætna Mills *v.* Waltham, 126 Mass. 422. See also Cox *v.* Mason City, etc., R. Co., 77 Iowa 20, 41 N. W. 475, holding that the proper description in a petition of certain lots appropriated by the railroad did not limit the petitioner's claim to damages to the particular lots described, and that he was entitled to recover the damages suffered by the whole tract.

Land should be described by metes and bounds. Central R. Co. *v.* Merkel, 32 Tex. 723.

94. Neal *v.* Posey County, 12 Ind. App. 533, 40 N. E. 708.

95. Wampach *v.* St. Paul, etc., R. Co., 21 Minn. 364; Mattlage *v.* New York El. R. Co., 17 N. Y. Suppl. 536; Bridgers *v.* Purcell, 23 N. C. 232.

96. Hennesy *v.* St. Paul, etc., R. Co., 30 Minn. 55, 14 N. W. 269 (holding that if any such right has been acquired, it is purely a matter of defense); Molitor *v.* First Div. St. Paul, etc., R. Co., 14 Minn. 285; Gray *v.* First Div. St. Paul, etc., R. Co., 13 Minn. 315. See also Hartley *v.* Keokuk, etc., R. Co., 85 Iowa 455, 52 N. W. 352.

97. Chicago, etc., R. Co. *v.* Patterson, 26 Ind. App. 295, 59 N. E. 688; Hill *v.* Glendon, etc., Min., etc., Co., 113 N. C. 259, 18 S. E. 171. See also Stone *v.* Heath, 135 Mass. 561.

98. *In re* Chew St., 1 Leg. Gaz. (Pa.) 19.

99. State *v.* Essex County Public Road Bd., 40 N. J. L. 138 (holding that a plea that as compensation for the taking of a dam a new dam was erected and accepted by the relator in full satisfaction of all his claims is good as a plea of accord and satisfaction); Searle *v.* Lead, 10 S. D. 312, 73 N. W. 101, 39 L. R. A. 345 (holding that a mere denial by defendant that plaintiff would suffer any damages, without denying fully and specifically all the equities of an appeal, does not justify the vacation of an injunction order).

In mandamus by a landowner whose dam has been taken down by a public road board, for the appointment of appraisers, a plea that the dam was taken down by leave and license of the relator is bad, as his consent is immaterial in such proceeding. State *v.* Essex County Public Road Bd., 40 N. J. L. 138.

Denial of insolvency in suit to enjoin.— Where, in a suit to enjoin a city from taking up a sidewalk in front of plaintiff's premises, it was alleged that the contractors were non-residents, had no property in the state, and were unable to respond to a judgment, and the answer admitted their non-residence and that they had no substantial property in the state but denied their inability to pay any judgment, the denials are insufficient to warrant a dissolution of an injunction restraining the work. Niehaus *v.* Cooke, 134 Ala. 223, 32 So. 728.

1. State *v.* Essex County Public Road Bd., 40 N. J. L. 138, holding a plea setting up a

such part of the land was stricken out.[2] In an action of trespass the plea or answer may be either in the form of a denial[3] or a justification.[4] If in justification it should aver compliance with all conditions precedent, as required by statute;[5] but not conditions subsequent to the right of entry.[6] In an action to assess value after condemnation it is not necessary for defendant to plead the statute under which the property was condemned.[7] Any outstanding interest or any assignment entitling any party other than plaintiff to recover damages should be pleaded in the answer.[8] Any special defense growing out of charter or statutory provisions must be specially pleaded.[9]

M. Issues and Proof. In an action by the landowner against the party or company who has taken or sought to condemn his property, evidence may be introduced and a decision had only on issues raised by the complaint[10]

former assessment for taking the same property and also an acceptance of the award found as compensation bad for duplicity.

Pleading generally see PLEADING.

2. Travis County *v.* Trogden, (Tex. Civ. App. 1895) 29 S. W. 405.

3. Pumpelly *v.* Green Bay, etc., Canal Co., 13 Wall. (U. S.) 166, 20 L. ed. 557.

4. Crawfordsville, etc., R. Co. *v.* Wright, 5 Ind. 252 (holding that the defense of justification must be specially pleaded); Pumpelly *v.* Green Bay, etc., Canal Co., 13 Wall. (U. S.) 166, 20 L. ed. 557.

5. Little Rock, etc., R. Co. *v.* Dyer, 35 Ark. 360; Bloodgood *v.* Mohawk, etc., R. Co., 18 Wend. (N. Y.) 9, 31 Am. Dec. 313 [*reversing* 14 Wend. 51]; Norton *v.* Peck, 3 Wis. 714 (holding that a plea justifying the taking of land for a highway is bad if it omits to set forth that any damages were awarded or compensation made for such taking according to the constitution); Thien *v.* Voegtlander, 3 Wis. 461 (holding that a plea justifying a flowing of land by virtue of an act authorizing defendant to make a mill-dam is bad for want of an averment that compensation was made therefor under the act); Pumpelly *v.* Green Bay, etc., Canal Co., 13 Wall. (U. S.) 166, 20 L. ed. 557.

Facts on which the court could construe the statute providing for certain requirements should be alleged. Pumpelly *v.* Green Bay, etc., Canal Co., 13 Wall. (U. S.) 166, 20 L. ed. 557.

Absence of notice.— A plea justifying the entry under proceedings in which notice was not given to the owner is insufficient to bar the action. Peoria, etc., R. Co. *v.* Warner, 61 Ill. 52.

Presenting petition.— An averment in the plea that there was a disagreement between plaintiff and defendant as to the price of the land and that while such disagreement existed a certain judge "on the petition of defendants in writing duly issued and delivered his warrant," etc., is a sufficient averment of the presenting of the petition. Polly *v.* Saratoga, etc., R. Co., 9 Barb. (N. Y.) 449.

Naming jurors.— Where the company's charter directs that in case of a disagreement between the company and the owner of any land taken for the improvement a jury shall be selected to appraise the damages, it is not necessary for the company in its plea to set out the names and places of abode of the jurors drawn, but it is sufficient to mention the names of those who were actually sworn. Polly *v.* Saratoga, etc., R. Co., 9 Barb. (N. Y.) 449.

6. Bloodgood *v.* Mohawk, etc., R. Co., 14 Wend. (N. Y.) 51 [*reversed* on other grounds in 18 Wend. 9, 31 Am. Dec. 313].

7. Emery *v.* Boston Terminal Co., 178 Mass. 172, 59 N. E. 763, 86 Am. St. Rep. 473.

8. Daley *v.* St. Paul, 7 Minn. 390.

9. Crawfordsville, etc., R. Co. *v.* Wright, 5 Ind. 252; People *v.* Myers, 73 Hun (N. Y.) 43, 25 N. Y. Suppl. 1034; McKeoin *v.* Northern Pac. R. Co., 45 Fed. 464.

10. Illinois Cent. R. Co. *v.* Smith, 61 S. W. 2, 22 Ky. L. Rep. 1655; Spencer *v.* St. Paul, etc., R. Co., 22 Minn. 29; Missouri, etc., R. Co. *v.* O'Connor, (Tex. Civ. App. 1899) 51 S. W. 511.

A complaint which alleges an injury to several parcels of property as a whole does not entitle the owner to an injunction upon a showing merely of injury to a separate parcel, but only upon a showing that their collective value is affected. Rich *v.* Manhattan R. Co., 19 N. Y. Suppl. 543. And see Sperb *v.* Metropolitan El. R. Co., 137 N. Y. 596, 33 N. E. 319 [*reversing* 60 N. Y. Super. Ct. 347, 17 N. Y. Suppl. 469].

Constitutionality of power.— An action to recover damages for destroying communications between different parts of plaintiff's land, by taking land for an improvement, proceeds on the ground that the power conferred was transcended or abused and not that the land was unlawfully taken and therefore presents no issue as to the constitutionality of the power. Mason *v.* Kennebec, etc., R. Co., 31 Me. 215.

Under a petition alleging that plaintiffs are the joint owners in equal interest of the land, it cannot be shown that the one of them whose claim is not barred by limitations owns more than half the land, entitling her to more than half the damages to the entire tract. Missouri, etc., R. Co. *v.* O'Connor, (Tex. Civ. App. 1899) 51 S. W. 511.

On the issue of damages to property from the construction of a railroad it cannot be shown that the city, although it had graded other streets contiguous to it, had not graded

or answer.[11] Thus in an action for damages the owner cannot introduce evidence of damages which did not result from the injuries specified in his complaint or from anything necessarily incident to them.[12]

N. Evidence — 1. Presumptions. In trespass against a railroad company for using land as a right of way it will be presumed that the condemnation proceedings were regular.[13] Where a railroad company is authorized by law to lay a double track with proper and necessary switches and turnouts in the streets of a city, the presumption is that a switch, turnout, and side-track laid down by the company are necessary and proper and the burden is upon the owner of a lot abutting on the street to establish an averment to the contrary.[14]

2. Burden of Proof. In an action or proceeding by the owner of property claimed to have been appropriated or damaged, the burden is upon him to show all the facts necessary to the relief sought, such as his title to the property,[15] especially where this is denied,[16] the location of the road,[17] that the land has been regularly condemned or at least physically appropriated,[18] actual damage[19] resulting from the railroad or other work,[20] that there has been no tender or payment of damages for lands appropriated,[21] and the existence of an ordinance for the opening of a street for which damages are claimed.[22] But a landowner seeking

the one in front of it, on account of the railroad. Missouri, etc., R. Co. *v.* O'Connor, (Tex. Civ. App. 1899) 51 S. W. 511.

11. Harrington *v.* St. Paul, etc., R. Co., 17 Minn. 215 (holding that in an action to enjoin the operation of an improvement and for damages the condemning company could not prove that plaintiff sold part of the land after commencement of suit without alleging the same by supplemental answer); Seeley *v.* Amsterdam, 54 N. Y. App. Div. 9, 66 N. Y. Suppl. 221; Storm *v.* New York, etc., R. Co., 83 Hun (N. Y.) 86, 31 N. Y. Suppl. 370 [*affirmed* in 159 N. Y. 538, 53 N. E. 1132]; Dallas *v.* Beeman, 18 Tex. Civ. App. 335, 45 S. W. 626; Smith *v.* Gould, 59 Wis. 631, 18 N. W. 457 (holding that in an action of tort by the landowner, it is error to exclude testimony showing justification of defendants by legislative authority, where the same is set up in the answer).

The direction in an interlocutory judgment sustaining a demurrer to defendant's answer for entry of final judgment on defendant's failure to serve an amended answer and pay costs is erroneous where the answer contains a general denial which leaves an issue to be disposed of. Seeley *v.* Amsterdam, 54 N. Y. App. Div. 9, 66 N. Y. Suppl. 221.

In ejectment against a railway company to recover land taken without compensation defendant cannot claim equitable title where none was pleaded in the answer. Pfaender *v.* Chicago, etc., R. Co., 86 Minn. 218, 90 N. W. 393.

12. Indiana Cent. R. Co. *v.* Hunter, 8 Ind. 74; Spencer *v.* St. Paul, etc., R. Co., 22 Minn. 29; Wampach *v.* St. Paul, etc., R. Co., 21 Minn. 364; Mattlage *v.* New York El. R. Co., 17 N. Y. Suppl. 536.

Where no question is raised as to the insufficiency of the averments in the complaint, acts and circumstances accompanying and characterizing the alleged trespass and their natural, proximate results may be shown by competent evidence, as may also improper conduct of the wrong-doer, as constituting part of the injury. Spencer *v.* St. Paul, etc., R. Co., 22 Minn. 29.

13. Galena, etc., R. Co. *v.* Pound, 22 Ill. 399.

14. Carson *v.* Central R. Co., 35 Cal. 325.

15. Schechter *v.* Denver, etc., R. Co., 8 Colo. App. 25, 44 Pac. 761 (holding that in an action to recover damages to the fee value of property abutting on a street over which defendant's road extends, plaintiff, in order to sustain his action, must show fee-simple title to the premises, and in default of such proof a nonsuit is properly granted); Walttemeyer *v.* Wisconsin, etc., R. Co., 71 Iowa 626, 33 N. W. 140 (holding that where a railroad takes and uses land outside its condemned right of way it is necessary for plaintiff, claiming damages for a permanent injury to the freehold, to prove an absolute freehold title in himself, and not merely possession, as in the case of trespass to a possessory right).

16. Fuller *v.* Elizabeth City, 118 N. C. 25, 23 S. E. 922.

17. Jackson *v.* Dines, 13 Colo. 90, 21 Pac. 918.

18. Lesieur *v.* Custer County, 61 Nebr. 612, 85 N. W. 892.

19. Cook *v.* Chicago, etc., R. Co., 83 Iowa 278, 49 N. W. 92.

20. Beck *v.* Brooklyn El. R. Co., 87 Hun (N. Y.) 30, 33 N. Y. Suppl. 764, holding that where the evidence shows that plaintiff's premises abutting on defendant's elevated railroad have increased in value since the road was built, plaintiff cannot recover for damages to such premises caused by construction and operation of the road, unless he shows that there has been a general advance in the value of property in the neighborhood, not attributable to defendant's road, of which plaintiff was deprived by the construction of the road.

21. New Albany *v.* Endres, 143 Ind. 192, 42 N. E. 683.

22. Akers *v.* Philadelphia, 4 Phila. (Pa.) 56, holding further that the absence of such

compensation for land already taken need not prove the necessity of the taking.[23] The appropriating party has the burden of proving matters on which it specifically depends in defense,[24] as for example special benefits resulting from the construction of the railroad,[25] that due compensation has been made for the easement appropriated,[26] or that the alleged trespass is justified by an authorized location of the railroad upon the land.[27] Where the consent of plaintiff is set up defendant must show that the structure is such as is covered by such consent.[28]

3. Admissibility — a. In General. The general rules as to the admissibility of evidence, its relevancy, and the like,[29] govern in actions or proceedings by a landowner based on the appropriation or damaging of his property for public use.[30]

b. Title. In order to show his title plaintiff may show in evidence a decree in

evidence cannot be supplied by evidence that viewers were appointed, and that damages were assessed, and that an award was made to plaintiff.

23. Babcock *v.* Chicago, etc., R. Co., 107 Wis. 280, 83 N. W. 316, 81 Am. St. Rep. 845.

24. See Mattlage *v.* New York El. R. Co., 14 Misc. (N. Y.) 291, 35 N. Y. Suppl. 704; Missouri, etc., R. Co. *v.* Austin, (Tex. Civ. App. 1897) 40 S. W. 35.

25. Pochila *v.* Calvert, etc., R. Co., 31 Tex. Civ. App. 398, 72 S. W. 255, holding that the burden is on the railroad to show to what extent the special benefits affect the property.

26. Watson *v.* Metropolitan El. R. Co., 57 N. Y. Super. Ct. 364, 8 N. Y. Suppl. 533, so holding in an action by an abutting owner to restrain an elevated railway company from appropriating and using plaintiff's easement in the street.

27. Hazen *v.* Boston, etc., R. Co., 2 Gray (Mass.) 574.

28. Unangst's Appeal, 55 Pa. St. 128, holding that where in a bill in equity to enjoin a company from constructing their railroad on plaintiff's land, defendants claimed a right to enter and build by permission of plaintiff, given substantially as follows: "If you go down there on the other side, and do my house no harm, and make the road high enough on this side not to interfere with my water power, go on," the burden was on defendants to prove the estimate of height alleged, and that the height in fact did no injury.

29. See, generally, EVIDENCE.

30. **Evidence held admissible** see St. Louis, etc., R. Co. *v.* Needles, 85 Ill. 462; St. Louis, etc., R. Co. *v.* Capps, 72 Ill. 188; Galena, etc., R. Co. *v.* Pound, 22 Ill. 399; Westcott *v.* New York, etc., R. Co., 152 Mass. 465, 25 N. E. 840; Adams *v.* Saratoga, etc., R. Co., 10 N. Y. 328 [*reversing* 11 Barb. 414]; Embury *v.* Conner, 3 N. Y. 511, 53 Am. Dec. 325; Lewis *v.* St. Paul, etc., R. Co., 5 S. D. 148, 58 N. W. 580, holding that where an award in condemnation proceedings taken by the railway company to obtain a right of way has been introduced in evidence by defendant, in ejectment by the landowner, plaintiff may introduce the written order of the judge appointing commissioners, for the purpose of showing that one of the persons who signed the award was not appointed by the judge.

Evidence held not admissible see the following cases:

Illinois.— Chicago *v.* Jackson, 196 Ill. 496, 63 N. E. 1013, 1035 [*affirming* 88 Ill. App. 130]; Chicago, etc., R. Co. *v.* McGinnis, 79 Ill. 269.

Indiana.— Lane *v.* Miller, 17 Ind. 58.

Massachusetts.— Newton *v.* Agricultural Branch R. Corp., 15 Gray 27.

Michigan.— Taylor *v.* Bay City St. R. Co., 101 Mich. 140, 59 N. W. 447.

Minnesota.— Pfaender *v.* Chicago, etc., R. Co., 86 Minn. 218, 90 N. W. 393.

Missouri.— Doyle *v.* Kansas City, etc., R. Co., 113 Mo. 280, 20 S. W. 970.

New York.— Wagner *v.* Metropolitan El. R. Co., 104 N. Y. 665, 10 N. E. 535; Lahr *v.* Metropolitan El. R. Co., 104 N. Y. 268, 10 N. E. 528; Laue *v.* Metropolitan El. R. Co., 69 N. Y. App. Div. 231, 74 N. Y. Suppl. 595 (holding that in an action to enjoin the operation of an elevated steam railroad, where damages are to be allowed, the passage of a resolution by the stock-holders of the company to change the motive power from steam to electricity is not competent to show that the company is actually engaged in making such change); Metropolitan Sav. Bank *v.* New York El. R. Co., 21 N. Y. Suppl. 286.

North Carolina.— Hodges *v.* Western Union Tel. Co., 133 N. C. 225, 45 S. E. 572, holding that in an action by a landowner against a telegraph company for damages because of the erection of poles on the right of way granted to a railroad, evidence that the telegraph line was necessary to the operation of the road is immaterial.

Pennsylvania.— Bigelow *v.* Pittsburg, 189 Pa. St. 455, 42 Atl. 110; Smith *v.* Pennsylvania Schuylkill Valley R. Co., 141 Pa. St. 68, 21 Atl. 505; Auman *v.* Philadelphia, etc., R. Co., 133 Pa. St. 93, 20 Atl. 1059; Duke *v.* Baltimore, etc., R. Extension Co., 129 Pa. St. 422, 18 Atl. 566.

Texas.— Parker *v.* Ft. Worth, etc., R. Co., 84 Tex. 333, 19 S. W. 518; St. Louis, etc., R. Co. *v.* Grayson County, 31 Tex. Civ. App. 611, 73 S. W. 64; Pochila *v.* Calvert, etc., R. Co., 31 Tex. Civ. App. 398, 72 S. W. 255; Missouri, etc., R. Co. *v.* O'Connor, (Civ. App. 1899) 51 S. W. 511; Galveston, etc., R. Co. *v.* Baudat, 18 Civ. App. 595, 45 S. W. 939.

See 18 Cent. Dig. tit. "Eminent Domain," § 804.

partition under which he claims,[31] or a lease under which he holds,[32] or he may establish his title by proof of adverse possession.[33]

c. Value. The value of property may be shown not only when it is appropriated, but also as bearing on the proper compensation for injury to an easement;[34] but in an action of trespass evidence of the market value of the land before and after the entry is inadmissible.[35] The general condition and value of property in the neighborhood of an elevated railroad may be proved,[36] as may also the general course of values in the locality;[37] but it has been held that the market value, as a measure of damages for land taken or injured by a railroad company, cannot be ascertained by evidence of particular sales of property alleged to be similarly situated.[38] In order to arrive at the value, before and after the erection of a public improvement, of a particular abutting lot and building thereon, evidence as to what the value of the lot would have been without the building is relevant,[39] as is also evidence as to the value of other abutting lots.[40] The price at which an

31. Tucker *v.* Chicago, etc., R. Co., 91 Wis. 576, 65 N. W. 515.

32. Witmark *v.* New York El. R. Co., 149 N. Y. 393, 44 N. E. 78, where it appeared that plaintiff in an action against an elevated railway for damages to abutting property had come into possession of the property in 1869 under a lease with covenants of renewals for two terms, and that the lease was renewed in 1881, after the completion of the road, and during the pendency of the action this lease expired, and a new lease was given, and it was held that the new lease was admissible in evidence to show that the title continued in plaintiff.

33. Lawrence R. Co. *v.* Cobb, 35 Ohio St. 94.

34. Korn *v.* Metropolitan El. R. Co., 59 Hun (N. Y.) 505, 13 N. Y. Suppl. 518.

Residents of a city who are acquainted with the property and know its value are competent to testify as experts as to such value. Union Elevator Co. *v.* Kansas City Suburban Belt R. Co., 135 Mo. 353, 36 S. W. 1071.

Examining witness as to knowledge of values.— A witness who testifies as to the value of land taken may be asked on cross-examination the value of other lots in the neighborhood to show his knowledge of values. Snouffer *v.* Chicago, etc., R. Co., 105 Iowa 681, 75 N. W. 501.

Evidence not showing depreciation.—Where, in a suit to recover damages to property occasioned by the construction of a railroad in the street in front of it, plaintiff, on direct examination, testified to an interference with his mercantile business and a loss of customers as a result of the running of trains in the street, and on cross-examination testified to an increase in his business, proof of the fact of a general improvement in business in the city was not admissible in rebuttal, as this would not support plaintiff's contention that the value of his property was lessened. Bover *v.* St. Louis, etc., R. Co., (Tex. Sup. 1903) 76 S. W. 441 [*reversing* (Civ. App. 1903) 72 S. W. 1038].

35. Keil *v.* Chartiers Valley Gas Co., 131 Pa. St. 466, 19 Atl. 78, 17 Am. St. Rep. 823, so holding on the ground that such evidence tends to prove the permanent injury to the land, damages for which can only be recovered in condemnation proceedings.

36. Roberts *v.* New York El. R. Co., 128 N. Y. 455, 28 N. E. 486, 13 L. R. A. 499.

The opinion of an expert as to the effect of the elevated structure and its operation generally upon property abutting on the streets through which it runs is admissible. Steigerwald *v.* Manhattan R. Co., 50 N. Y. App. Div. 487, 64 N. Y. Suppl. 125.

37. Levin *v.* New York El. R. Co., 165 N. Y. 572, 59 N. E. 261; Shepard *v.* Metropolitan El. R. Co., 48 N. Y. App. Div. 452, 62 N. Y. Suppl. 977; Douglas *v.* New York El. R. Co., 45 N. Y. App. Div. 596, 61 N. Y. Suppl. 411; Tabor *v.* New York El. R. Co., 8 Misc. (N. Y.) 17, 28 N. Y. Suppl. 68.

Evidence of an expert as to the general course and current of values for two or three blocks on either side of the premises off from the road is admissible. Shepard *v.* Manhattan R. Co., 169 N. Y. 160, 62 N. E. 151 [*affirming* 48 N. Y. App. Div. 452, 62 N. Y. Suppl. 977]; Muhlker *v.* New York, etc., R. Co., 60 N. Y. App. Div. 621, 69 N. Y. Suppl. 910.

38. Douglas *v.* New York El. R. Co., 14 N. Y. App. Div. 471, 43 N. Y. Suppl. 847; Becker *v.* Philadelphia, etc., R. Co., 177 Pa. St. 252, 35 Atl. 617, 35 L. R. A. 583; Pittsburgh R. Co. *v.* Patterson, 107 Pa. St. 461. But see Paducah *v.* Allen, 63 S. W. 981, 23 Ky. L. Rep. 701, holding that on the question of value evidence as to what adjoining properties of the same class and character sold for before or after the construction of the work for which damages are claimed is admissible.

When particular sales may be shown on reëxamination. Where a witness has on cross-examination been made to answer as to a very low sale of land in the neighborhood, it is proper to ask him on reëxamination as to a particularly high-priced sale of land in the neighborhood. Lorain St. R. Co. *v.* Sinning, 17 Ohio Cir. Ct. 649, 6 Ohio Cir. Dec. 753.

39. Hunt *v.* Atlanta, 100 Ga. 274, 28 S. E. 65.

40. Hunt *v.* Atlanta, 100 Ga. 274, 28 S. E. 65.

abutting owner purchased the property at public auction is competent evidence as bearing on the question of its value at that time.[41] A loss of rents resulting from the work complained of is admissible to show the diminution in value,[42] but it is not permissible to prove the evil effect of the erection complained of in diminishing values by the process of calling the owners of property in the vicinity and proving in each case what the particular premises owned by the witness rented for before and after the road was built.[43] In an action for injuries to land caused by the construction of a railroad, evidence as to the value of the land if cut up into lots, and of the value of lots in the same neighborhood, is inadmissible.[44]

d. Damages. Evidence of damages accruing after the commencement of the action and down to the time of the trial is admissible if defendant has not been misled,[45] but plaintiff cannot prove special damages not alleged in his complaint.[46] The better rule is that witnesses should state only the facts and leave entirely to the jury the question as to the amount of damages,[47] but the judgment will not be reversed merely because witnesses have been permitted to give their opinion as to the amount of the damages.[48] It is error, however, to permit witnesses to give their opinions as to the extent of damage done without reference to any measure of damage; the court should affix the measure of damages and confine the proof to this measure.[49] In an action for damages for the erection of a viaduct in a street by a railroad company, evidence tending to show the obstruction of the street to plaintiff's injury is admissible.[50] The amount of land disturbed by the laying of a pipe-line, the permanent occupancy of a part of it as a path to walk over for purposes of inspection and repair, and the injury to the crops are legitimate subjects of testimony.[51] Where defendant denies plaintiff's allegations that his house was shaken and the walls cracked by passing trains, it is competent for plaintiff, in corroboration of his testimony, to prove by the owner that a house back of his and further from the railroad was shaken by such trains.[52] Defendant may introduce proper evidence to show that the real damage is less than that claimed,[53] but an assessment of damages by commissioners which has

41. Rorke *v.* Kings County El. R. Co., 22 N. Y. App. Div. 511, 48 N. Y. Suppl. 42.

42. Chicago *v.* Loneigan, 196 Ill. 518, 63 N. E. 1018; Autenrieth *v.* St. Louis, etc., R. Co., 36 Mo. App. 254; Missouri, etc., R. Co. *v.* O'Connor, (Tex. Civ. App. 1899) 51 S. W. 511. See also Bischoff *v.* New York El. R. Co., 138 N. Y. 257, 33 N. E. 1073 [*affirming* 61 N. Y. Super. Ct. 211, 18 N. Y. Suppl. 865].

Rents of upper and lower stories.— In an action for damages to the rental valve of a building by the maintenance of an elevated railroad on a street in front, evidence that the upper part of the building produced better rents because light, air, and view were unobstructed is admissible. Shepard *v.* Metropolitan El. R. Co., 48 N. Y. App. Div. 452, 62 N. Y. Suppl. 977.

43. Jamieson *v.* Kings County El. R. Co., 147 N. Y. 322, 41 N. E. 693 [*reversing* 74 Hun 637, 26 N. Y. Suppl. 127, and *followed* in Douglas *v.* New York El. R. Co., 14 N. Y. App. Div. 471, 43 N. Y. Suppl. 847].

44. Denison, etc., R. Co. *v.* Scholz, (Tex. Civ. App. 1898) 44 S. W. 560.

45. New York Fifth Nat. Bank *v.* New York El. R. Co., 28 Fed. 231.

46. M. & B. S. R. Co. *v.* Urban, 10 Ky. L. Rep. 1061 (holding that in an action against a railroad for damages to property resulting from the construction of defendant's road in the street adjoining the property, the damages sought being for injury to the property from the obstruction of plaintiff's ingress and egress, it was incompetent to prove the flooding of his property, and that he was damaged on that account); Root *v.* Butte, etc., R. Co., 20 Mont. 354, 51 Pac. 155.

47. Union Elevator Co. *v.* Kansas City Suburban Belt R. Co., 135 Mo. 353, 36 S. W. 1071.

48. Union Elevator Co. *v.* Kansas City Suburban Belt R. Co., 135 Mo. 353, 36 S. W. 1071.

49. Illinois Cent. R. Co. *v.* Smith, 61 S. W. 2, 22 Ky. L. Rep. 1655.

50. Sander *v.* New York, etc., R. Co., 42 N. Y. App. Div. 618, 59 N. Y. Suppl. 127.

51. Wallace *v.* Jefferson Gas Co., 147 Pa. St. 205, 23 Atl. 416.

52. Henderson Belt R. Co. *v.* Dechamp, 14 Ky. L. Rep. 44.

53. Ottawa, etc., R. Co. *v.* Adolph, 41 Kan. 600, 21 Pac. 643 (holding that defendant may show in evidence an instrument signed by the husband of the owner of the property intending to convey the right of way for a sum much less than the amount he testified the property had been damaged, and a statement that he wished defendant would pay the sum named); Pennsylvania R. Co. *v.* Eby, 107 Pa. St. 166 (holding that in an action of trespass by a tenant against a railroad company to

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not become binding is not evidence against the owner.[54] Evidence on the part of plaintiff tending to show that the road was built in a manner which unnecessarily injured him may be rebutted by evidence showing the necessity for building in that manner.[55] It has been held that in an action by the owner of land abutting on a street, to restrain the taking of such street for the purpose of an elevated railroad without first acquiring the property in the manner prescribed by law, and compensating the owner therefor, evidence that the abutting property was not depreciated by such taking is inadmissible, since, the abutting owner being entitled to an easement in the street, the mere taking of the street entitles him to compensation.[56]

e. Benefits. In an action to enjoin the operation of an elevated railway, defendant should be allowed to introduce evidence of benefits to plaintiff, as he is entitled to an injunction only in case of substantial injury,[57] and evidence of benefits has also been held proper in an action for damages.[58]

f. Payment. Defendant may show that payment for the property taken or the damage done has been made to plaintiff or his authorized agent by itself or another company under which it claims;[59] but evidence of a payment made on a prior proceeding to condemn the land by another company of which defendant does not show itself to be the assignee is not admissible.[60]

O. Instructions. Instructions already covered by the general charge are properly refused,[61] and failure to charge in respect to matters on which no instructions are asked cannot be assigned as error.[62] Instructions should not assume as

recover damages for the appropriation by the company of a part of the leased land, the record of an action of ejectment by a third party against the lessor for the land leased, and a disclaimer filed by the lessor for part of said land, are admissible on the part of the company as affecting the measure of damages suffered by the tenant).

Stipulation as to use.— In a proceeding to fix compensation and damages for land taken for and the construction of an elevated passenger railroad, the company may show that it has bound itself by a stipulation to perpetually provide and make use of the best modern appliances calculated to render its road noiseless and smokeless and to prevent the escape of sparks and cinders. Lieberman *v.* Chicago, etc., R. Co., 141 Ill. 140, 30 N. E. 544.

54. Louisville, etc., R. Co. *v.* Thompson, 18 B. Mon. (Ky.) 735, holding that under the Kentucky statute which authorized the assessment of damages to owners of land through which a railroad might pass, and required the assessments to be filed in the county court, until which filing they were only private papers, not binding on the party for whose benefit they were made, and not pleadable in bar of such party's claim for damages, the report of such assessment was not evidence against the party claiming damages for right of way through his land.

55. Chicago, etc., R. Co. *v.* McGinnis, 79 Ill. 269.

56. Jewett *v.* Union El. R. Co., 1 N. Y. Suppl. 123.

57. Nette *v.* New York El. R. Co., 2 Misc. (N. Y.) 62, 20 N. Y. Suppl. 844.

58. Brush *v.* Manhattan R. Co., 17 N. Y. Suppl. 540, holding that in an action for damages resulting from the construction of an elevated railroad in the street in front of plaintiff's premises, the court properly admitted testimony on behalf of defendants as to the beneficial effect on the rental value of plaintiff's and other property, from the erection of an elevator near plaintiff's premises for the purpose of reaching defendant's station; such testimony consisting of facts open to the observation of the witnesses, and not mere expressions of opinion by them. But see Engard *v.* Frazier, 7 Ind. 294 (holding that defendant in an action for overflowing plaintiff's land by the erection and maintenance of a dam cannot show that the mill and dam were a public benefit, and a benefit to plaintiff); Harrisburg, etc., Ry. Co. *v.* Stayman, 2 Wkly. Notes Cas. (Pa.) 103 (holding that in an action to recover land taken for a railroad, defendant, in order to show advantages to complainant's land, cannot show that a hill on complainant's farm containing ore was part of a range of ore banks which had been profitably developed on adjoining properties).

59. Ragan *v.* Kansas City, etc., R. Co., 111 Mo. 456, 20 S. W. 234, holding that in an action against a railroad company for appropriating land for a right of way, proof that plaintiff's husband had been paid for the land by a company under which defendant claimed by mesne conveyances, and that he was the authorized agent of plaintiff, should have been admitted.

60. Tucker *v.* Chicago, etc., R. Co., 91 Wis. 576, 65 N. W. 515.

61. Central Branch Union Pac. R. Co. *v.* Andrews, 41 Kan. 370, 21 Pac. 276.

62. Doyle *v.* Kansas City, etc., R. Co., 113 Mo. 280, 20 S. W. 970, holding that in an action against a railroad company to recover for land taken for its road, the company can-

proved matters in controversy,[63] nor direct the jury to consider immaterial evidence[64] or matters outside of the issues made by the pleadings,[65] nor exclude from consideration matters proper to be considered in reaching a verdict.[66] Instructions assuming as proved matters which are not in dispute are not improper.[67] Error cannot be assigned to any particular instruction if all the instructions taken together present the law of the case correctly.[68] Instructions which in effect direct the jury to fix the damages as estimated by plaintiff are erroneous.[69] Where instructions do not distinguish between damages for which plaintiff is entitled to recover and those for which he is not, the error is not cured by directing the jury to disregard the improper elements of damage.[70]

P. Questions For Jury. In case of substantial conflict of evidence, the following questions are for the consideration of the jury and should under proper instructions be submitted to them for determination: Claim of license from owner;[71] depreciation in the value of the property;[72] substantial interference with plaintiff's right to ingress and egress to and from his premises;[73] question as to plaintiff's ownership of the property and extent of his title;[74] and as to whether there has been an abandonment of the right of way by defendant.[75]

Q. Findings. The findings must be within the issues made by the pleadings,[76] and where the court fails to find as to some of the averments at issue in the pleadings, and does find with respect to other matters entirely beyond and without the issues, as made by such pleadings, it is reversible error.[77] Under the rule that easements have no value in themselves,[78] it is error to find the value of easements apart from the property to which they are appurtenant.[79] In estimating

not complain that the court did not charge that any special benefits received by the landowner should have been deducted from damages suffered, where no such instruction was tendered the court.

63. Trenton Water Power Co. *v.* Raff, 36 N. J. L. 355.

64. Lake Roland El. R. Co. *v.* Hibernian Soc., 83 Md. 420, 34 Atl. 1017; Sternberger *v.* Manhattan R. Co., 16 N. Y. Suppl. 539.

65. Haislip *v.* Wilmington, etc., R. Co., 102 N. C. 376, 8 S. E. 926. And see Allen *v.* Wilmington, etc., R. Co., 102 N. C. 381, 9 S. E. 4.

66. Denver, etc., R. Co. *v.* Schmitt, 11 Colo. 56, 16 Pac. 842.

67. Ft. Worth, etc., R. Co. *v.* Pearce, 75 Tex. 281, 12 S. W. 864.

68. Ft. Worth, etc., R. Co. *v.* Downie, 82 Tex. 283, 17 S. W. 620.

69. Louisville, etc., R. Co. *v.* Hennen, 14 Ky. L. Rep. 526.

70. Atchison, etc., R. Co. *v.* Lenz, 35 Ill. App. 330.

71. Missouri, etc., R. Co. *v.* Ward, 10 Kan. 352.

72. *Kansas.*— Burlington, etc., R. Co. *v.* Johnson, 38 Kan. 142, 16 Pac. 125.

Massachusetts.— Cole *v.* Boston, 181 Mass. 374, 63 N. E. 1061.

New York.— Moore *v.* New York El. R. Co., 15 Daly 510, 8 N. Y. Suppl. 769, 24 Abb. N. Cas. 74.

Texas.— Eastern Texas R. Co. *v.* Scurlock, (Civ. App. 1903) 75 S. W. 366, holding that the submission to the jury of the question of damages to property when used for a particular purpose was correct, notwithstanding the evidence that the property was enhanced in the market value for general purposes.

United States.—New York Fifth Nat. Bank *v.* New York El. R. Co., 28 Fed. 231.

See 18 Cent. Dig. tit. "Eminent Domain," § 823.

73. *Kentucky.*— Chesapeake, etc., R. Co. *v.* Moats, 50 S. W. 31, 20 Ky. L. Rep. 1757; Henderson Belt R. Co. *v.* Stapp, 14 Ky. L. Rep. 111.

Missouri.— Stevenson *v.* Missouri Pac. R. Co., (Sup. 1895) 31 S. W. 793.

New Hampshire.— Greenwood *v.* Wilton R. Co., 23 N. H. 261.

Oregon.— McQuaid *v.* Portland, etc., R. Co., 18 Oreg. 237, 22 Pac. 899.

United States.— See also Paine Lumber Co. *v.* U. S., 55 Fed. 854.

See 18 Cent. Dig. tit. "Eminent Domain," § 823.

74. Pennell *v.* Card, 96 Me. 392, 52 Atl. 801; Kluender *v.* Milwaukee, 57 Wis. 636, 15 N. W. 805; Diedrich *v.* Northwestern Union R. Co., 42 Wis. 248, 24 Am. Rep. 399.

75. Tennessee, etc., R. Co. *v.* Taylor, 102 Ala. 224, 14 So. 379; Westcott *v.* New York, etc., R. Co., 152 Mass. 465, 25 N. E. 840; Muhle *v.* New York, etc., R. Co., 86 Tex. 459, 25 S. W. 607 [*reversing* (Civ. App. 1893) 23 S. W. 809].

76. Storm *v.* New York, etc., R. Co., 83 Hun (N. Y.) 86, 31 N. Y. Suppl. 370.

77. Robinson *v.* Pittsburg R. Co., 57 Cal. 417.

78. Porter *v.* Seaside, etc., El. R. Co., 91 Hun (N. Y.) 201, 36 N. Y. Suppl. 333.

79. Reilly *v.* Manhattan R. Co., 86 Hun (N. Y.) 618, 33 N. Y. Suppl. 391; Phyfe *v.* Metropolitan El. R. Co., 11 Misc. (N. Y.) 70, 31 N. Y. Suppl. 1018 (holding that a finding that easements appurtenant to abutting property taken by an elevated railway have a cer-

the fee value of the easements taken, it is error to include in the finding the effect of noise and vibration upon that value.[80] The findings should include an estimate of benefits resulting to the property, as well as of the damages suffered, and a finding for plaintiff without a finding on the question of benefits, where there is evidence on that point, does not justify a judgment in favor of plaintiff for damages.[81] However, a finding of the depreciation of fee and rental values over and above benefits resulting from the operation of a railroad is sufficient without specifying each of the benefits and advantages in detail;[82] and where it does not appear that the court adopted an incorrect rule in awarding fee damages, or excluded from consideration any benefits, general or special, a refusal to find that the easements impaired were of only nominal value, and that damages only to the extent that the disadvantages exceeded the advantages were recoverable, is not error.[83] Findings of an increase in value of plaintiff's property since the construction of the improvement complained of are not inconsistent with a judgment awarding him damages, where it appears that the property in the vicinity has increased in value in consequence of changes in its use which began before the improvement had its inception.[84]

tain value does not violate the above rule where a further finding states that such easements have themselves only a nominal value); Betjeman *v.* New York El. R. Co., 1 Misc. (N. Y.) 138, 20 N. Y. Suppl. 628.

80. American Bank-Note Co. *v.* New York El. R. Co., 129 N. Y. 252, 29 N. E. 302, 531; Kopetzky *v.* Metropolitan El. R. Co., 14 Misc. (N. Y.) 311, 35 N. Y. Suppl. 766; Steinert *v.* Metropolitan El. R. Co., 12 Misc. (N. Y.) 370, 33 N. Y. Suppl. 560; Kiep *v.* Metropolitan El. R. Co., 17 N. Y. Suppl. 804, holding, however, that a finding of damages resulting from the "permanent maintenance and operation" of the road cannot be construed to include damages for injuries incident to the running of trains such as noise, smoke, etc. See *supra*, X, E, 19, j.

81. Malcolm *v.* New York El. R. Co., 147 N. Y. 308, 41 N. E. 790 (holding that it is error in a suit against an elevated railroad company for damages caused by the construction of its road to refuse to find as a fact that land in that vicinity was prior to the construction of the road largely unimproved and vacant, where such fact is shown by uncontradicted evidence); Markert *v.* Manhattan R. Co., 87 Hun (N. Y.) 213, 33 N. Y. Suppl. 842; McCready *v.* Metropolitan El. R. Co., 76 Hun (N. Y.) 531, 28 N. Y. Suppl. 94.

Presumption of evidence of benefits.— It was held in Nette *v.* New York El. R. Co., 2 Misc. (N. Y.) 62, 20 N. Y. Suppl. 844, that although defendant did not ask the court to find that there were any benefits to the premises, yet a claim in requests to find that allowances should be made for benefits in the estimate of damages implies that on the evidence benefits were apparent.

82. Wagner *v.* New York El. R. Co., 79 Hun (N. Y.) 445, 29 N. Y. Suppl. 990, holding, likewise, that a request to find that the fee value of the property was greater than it was before the construction of the road, and has steadily increased ever since, was properly refused, being a request to find not relevant facts but mere evidence of the benefits to the property.

83. Steubing *v.* New York El. R. Co., 138 N. Y. 658, 34 N. E. 369 (holding that a refusal to find that the effect of the proximity of defendant's station to plaintiff's station is advantageous, and produces a special business benefit, is not error, since the subject of inquiry was not the proximity of such station to plaintiff's lots, but the effect on such lots of the construction of the road, in determining which the referee was bound to consider the proximity of the station); Bischoff *v.* New York El. R. Co., 138 N. Y. 257, 33 N. E. 1073; Herold *v.* Manhattan R. Co., 59 N. Y. Super. Ct. 564, 13 N. Y. Suppl. 610; Slater *v.* Manhattan R. Co., 18 N. Y. Suppl. 531. See also Lawrence *v.* Metropolitan El. R. Co., 126 N. Y. 483, 27 N. E. 765, 35 L. R. A. 102 [*affirming* 16 Daly 501, 12 N. Y. Suppl. 546], holding that in an action for loss in the diminution of rents by the construction of an elevated railway, where the testimony showed that the railway had diminished by the amount awarded the rents which would have been realized for the ordinary use of the property, requests to find that the house was used as a house of prostitution, and that for such purposes the rental value had not been diminished, were properly refused as immaterial.

84. Storck *v.* Metropolitan El. R. Co., 131 N. Y. 514, 30 N. E. 497 [*affirming* 59 N. Y. Super. Ct. 588, 14 N. Y. Suppl. 311]; Schmidt *v.* Manhattan R. Co., 11 Misc. (N. Y.) 18, 31 N. Y. Suppl. 832; Skelly *v.* New York El. R. Co., 7 Misc. (N. Y.) 88, 27 N. Y. Suppl. 304. See also Roberts *v.* New York El. R. Co., 155 N. Y. 31, 49 N. E. 262 (holding that there was no fatal discrepancy between a finding to the effect that the rental values of plaintiff's premises had been diminished in consequence of defendant's acts, and a finding to the effect that while the evidence did not disclose a decline in the fee or rental value thereof at the time of the construction of the road and subsequent thereto, nevertheless, both of these values would have increased had it not been for defendant's acts); Markert *v.* Manhattan R. Co., 87 Hun (N. Y.) 213, 33

R. Judgment — 1. In General.[85] A decree granting or dissolving an injunction may impose such terms as the court in the exercise of its discretion deems fit and proper under the circumstances.[86] A judgment for damages in favor of the landowner should be in accordance with the pleadings,[87] and with the verdict or report of the jury or referee;[88] and if for a permanent appropriation and injury should include damages for the entire injury.[89] It should also vest possession in defendant,[90] although it has been held that such a judgment of itself vests possession in defendant.[91] But the court cannot render judgment giving title to defendant of the land so appropriated,[92] except upon satisfaction of the judgment;[93] although the judgment may direct plaintiff to make a conveyance to defendant on payment of damages,[94] in which case it should also direct plaintiff to

N. Y. Suppl. 842 (holding that it is error to refuse, as immaterial, requests to find that the business portions of plaintiff's premises were benefited in a greater sum than the residence portions were injured; that the fee value of the premises, exclusive of the building, has steadily increased since the construction of defendant's road; and that since the building of the road the premises in suit and property in the neighborhood have come into greater demand for business uses, and that such demand has increased the value of such property).

85. Conclusiveness of judgment see, generally, Judgments.

Judgment or award in proceedings to condemn see *supra*, XI, N.

86. Chattanooga, etc., R. Co. *v.* Jones, 80 Ga. 264, 9 S. E. 1081.

An objection to the refusal of the court to direct that the injunction be conditioned on the failure of defendant to condemn the property taken is without merit where they have had ten years in which to proceed for that purpose. Woolsey *v.* New York El. R. Co., 9 N. Y. Suppl. 133.

A decree enjoining the maintenance of an elevated railroad may properly include a clause forbidding the running of trains on defendants' road, since the running of trains is one of the incidents to the maintenance of the road. Suarez *v.* Manhattan R. Co., 15 N. Y. Suppl. 222.

87. Herman *v.* Manhattan R. Co., 58 N. Y. App. Div. 369, 68 N. Y. Suppl. 1020, holding that a judgment in a suit to enjoin an elevated railroad company from trespassing on easements appurtenant to abutting property and to recover past damages occasioned thereby should determine the past damages sustained and the anticipated future damages as separate facts, and direct that an injunction issue if the future damages are not paid within a specified time; and a judgment which awards a gross sum to plaintiff, for both past and future damages, with the right to have execution therefor is erroneous, although it provides that if the amount awarded be paid within thirty days after service of a copy of the judgment plaintiff shall convey the easements.

88. Gulf, etc., R. Co. *v.* Poindexter, 70 Tex. 98, 7 S. W. 316.

An objection to a judgment entered on the report of the referee that it awarded "compensation for permanent depreciation of plaintiff's premises caused by the noise of defendant's railway" is not tenable where it appears from the referee's conclusions of law that no such element entered in his estimate of damages. Betjeman *v.* New York El. R. Co., 1 Misc. (N. Y.) 138, 20 N. Y. Suppl. 628.

89. Wichita, etc., R. Co. *v.* Fechheimer, 36 Kan. 45, 12 Pac. 362.

90. Central R. Co. *v.* Merkel, 32 Tex. 723. But it is erroneous to render judgment in an action of trespass that plaintiff be put in possession of the land in default of the company's paying damages. Galveston, etc., R. Co. *v.* Pfeuffer, 56 Tex. 66.

91. Richmond, etc., R. Co. *v.* Thomas, 43 S. W. 466, 19 Ky. L. Rep. 1488; San Antonio, etc., R. Co. *v.* Kanoepfli, 82 Tex. 270, 17 S. W. 1052, holding that where, in an action against a railroad company to recover land taken by it as a right of way, the issue as to the right of possession is raised by the pleadings, a judgment in favor of plaintiff for damages only amounts to a judgment in favor of the company's right to possession of the land.

A judgment awarding permanent damages to the landowner for the unauthorized appropriation by a telegraph company of a right of way confers the same rights on the company as a condemnation of the way. Phillips *v.* Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868 [new trial *awarded* on another point in 131 N. C. 225, 42 S. E. 587].

Dedication.— A judgment for damages against a city for trespass in taking private property for a street without lawful compensation operates as a dedication. Graf *v.* St. Louis, 8 Mo. App. 562.

92. Anderson, etc., R. Co. *v.* Kernodle, 54 Ind. 314.

93. East Dallas *v.* Barksdale, 83 Tex. 117, 18 S. W. 329; Dallas *v.* Miller, 7 Tex. Civ. App. 503, 27 S. W. 498, holding that a judgment compelling defendant city to pay for land wrongfully appropriated and vesting title thereto in defendant will not be disturbed where plaintiff makes no objection, although the court should have decreed to defendant an easement in the land.

94. Herman *v.* Manhattan R. Co., 58 N. Y. App. Div. 369, 68 N. Y. Suppl. 1020; Kissam *v.* Brooklyn El. R. Co., 86 Hun (N. Y.) 598, 33 N. Y. Suppl. 740; Hughes *v.* Metropolitan El. R. Co., 57 N. Y. Super. Ct. 379, 8 N. Y. Suppl. 535; Giordano *v.* Manhattan R. Co.,

furnish defendant with a release from encumbrances on the land.[95] Upon such conveyance plaintiff is not bound under the judgment to pay taxes assessed on the property after the date when it was taken.[96]

2. LIEN AND PRIVITY. A judgment against a railroad company for damages to property taken or abutting on the road is generally a lien upon the entire road,[97] and is entitled to priority over a lessee[98] or mortgage creditor[99] of the company. The time of enforcing such lien may be prescribed by special statute,[1] but in the absence of such statute it operates as a lien only for the time prescribed for the lien of ordinary judgments,[2] after which time it can be enforced only as an ordinary judgment.[3]

9 N. Y. Suppl. 258; Woolsey *v.* New York El. R. Co., 9 N. Y. Suppl. 133, deed of release.

Release of water-right.— Where a city has affected the natural flow of underground waters by the establishment of wells and pumping stations, a judgment in favor of the landowner for damages suffered and for permanent damages should also direct that the landowner on the payment thereof release to the city the right to retain its pumping stations. Westphal *v.* New York, 177 N. Y. 140, 69 N. E. 369 [*affirming* 75 N. Y. App. Div. 252, 78 N. Y. Suppl. 56].

Where a lessee recovers damages due to the erection of an elevated road in front of his property, the company is entitled to a release from him and a conveyance of the easement, not merely during the existing term, but during the future renewal stipulated in the lease. Storms *v.* Manhattan R. Co., 77 N. Y. App. Div. 94, 79 N. Y. Suppl. 60.

Joint conveyance.— Where, although plaintiff held a legal title to the property, another was a partner with him therein, a judgment that defendants on payment of a certain compensation should become entitled to a conveyance thereof should provide that plaintiff's partner join in such conveyance. Korn *v.* New York El. R. Co., 13 N. Y. Suppl. 514.

95. Kissam *v.* Brooklyn El. R. Co., 86 Hun (N. Y.) 598, 33 N. Y. Suppl. 740; Hull *v.* New York El. R. Co., 78 Hun (N. Y.) 616, 29 N. Y. Suppl. 113; Hughes *v.* Metropolitan El. R. Co., 57 N. Y. Super. Ct. 379, 8 N. Y. Suppl. 535; Giordano *v.* Manhattan R. Co., 9 N. Y. Suppl. 258, holding that such a decree sufficiently protects defendants against any claim arising out of the existence of a mortgage, notwithstanding an omission to bring in the mortgagees as parties.

An objection that no provision is made in the judgment for the protection of defendants from future loss by reason of an outstanding mortgage is without merit where the mortgagee is made a party to the suit. Woolsey *v.* New York El. R. Co., 9 N. Y. Suppl. 133.

96. Williams *v.* New York, 12 N. Y. Suppl. 501.

97. Ball *v.* Maysville, etc., R. Co., 102 Ky. 486, 43 S. W. 731, 19 Ky. L. Rep. 1540.

But under Ohio Rev. St. § 6448, a judgment for the value of land appropriated by a railroad company in favor of a landowner who has failed to take proceedings to prevent the construction of the road over his land or to obtain compensation is not a lien on the land. Central Trust Co. *v.* Valley R. Co., 79 Fed. 195.

In Texas if a railway, either with or without condemnation proceedings, takes the land of another for a right of way or other use, the owner will have a lien upon the land to secure the payment of all damages which the constitution and the law require to be paid before the right to use it vests, including the value of the land, damages caused to the balance of the tract, and any other damages that with reasonable certainty might be known as the result of the proper construction and operation of the railway, but not including damages arising from negligence or unskilful construction or operation of the road. St. Louis, etc., R. Co. *v.* Henderson, 86 Tex. 307, 24 S. W. 381.

98. Ball *v.* Maysville, etc., R. Co., 102 Ky. 486, 43 S. W. 731, 19 Ky. L. Rep. 1540, 80 Am. St. Rep. 362.

99. Epling *v.* Dickson, 170 Ill. 329, 48 N. E. 1101 [*reversing* 61 Ill. App. 78], holding that judgments obtained against a railroad company by owners of land for damages thereto are entitled to priority of payment over mortgage bonds, out of the fund produced by a sale of the road to foreclose the mortgage, and cannot be defeated by selling or mortgaging the property of the corporation that takes or damages the property.

1. Bibber-White Co. *v.* White River Valley Electric R. Co., 111 Fed. 36, holding that under Vt. St. §§ 3814, 3826, where a company has entered upon and used land, either under an agreement with the owner which it has failed to keep or without any agreement, the landowner cannot maintain a suit or proceeding in equity to enforce a lien upon the road for the damages before the expiration of two years.

2. Epling *v.* Dickson, 170 Ill. 329, 48 N. E. 1001 [*reversing* 61 Ill. App. 78]. See, generally, JUDGMENTS.

3. Epling *v.* Dickson, 170 Ill. 329, 48 N. E. 1001 [*reversing* 61 Ill. App. 78], holding that the fact that an ordinary judgment ceases to be a lien on land after seven years does not prevent property-owners from enforcing judgments for damages against a railroad at any time within twenty years, by an intervening petition in a proceeding in equity to sell the road to pay claims of creditors and for foreclosure. See, generally, JUDGMENTS.

S. Costs.[4] Costs incurred by a landowner in obtaining a judgment for damages to his property taken or damaged are a part of the judgment and must be allowed as a part of the just compensation to which he is entitled,[5] and in some jurisdictions it is so provided by statute.[6] He may be allowed costs incurred in former proceedings[7] except costs and attorneys' fees in and about another suit and which should have been, and presumably were, taxed in that suit.[8]

T. Appeal and Error — 1. In General. An appeal or writ of error in proceedings by the landowner against the corporation using his property must be taken from a final order or judgment, on the merits of the cause,[9] or which involves an adjudication upon any of the material questions in the principal controversy;[10] and must be in the manner[11] and time[12] prescribed by statute.

2. Questions Considered and Presumptions. The appeal brings up the whole case for review,[13] although the appellate court will consider only such questions or objections as were properly raised and preserved in the lower court,[14] which

4. Costs in condemnation proceedings see *supra*, XI, Q.

5. Epling *v.* Dickson, 170 Ill. 329, 48 N. E. 1001 [*reversing* 61 Ill. App. 78]; Stolze *v.* Milwaukee, etc., R. Co., 113 Wis. 44, 88 N. W. 919, 90 Am. St. Rep. 833. And see Campbell *v.* Pennsylvania Schuylkill Valley R. Co., 2 Montg. Co. Rep. (Pa.) 139.

6. Burrill *v.* Martin, 12 Me. 345, holding that where, under the Maine flowage statute, the report of the commissioners is not accepted and the question is referred to a jury, the landowner is entitled to costs if the jury award him any damages, although the amount is less than that assessed by the commissioners.

Minn. Gen. St. (1894) §§ 2661, 2664, allowing plaintiff reasonable attorney's fees in actions brought under the statute to recover possession of land taken without compensation by a railroad company for its right of way, is constitutional. Pfaender *v.* Chicago, etc., R. Co., 86 Minn. 218, 90 N. W. 393; Cameron *v.* Chicago, etc., R. Co., 63 Minn. 384, 65 N. W. 652, 31 L. R. A. 553.

7. Fitch *v.* Stevens, 2 Metc. (Mass.) 506, holding that where, on a complaint under Mass. Rev. St. c. 116, for flowing lands, the complainant obtains judgment on a verdict of the sheriff's jury, he is entitled to the costs of former trials in which the verdicts returned for him were set aside for irregularity not imputable to the complainant.

Attorneys' fees.— The damages in such cases may include a reasonable attorneys' fee paid by the landowner in a former condemnation proceeding which was voluntarily dismissed. Gibbons *v.* Missouri Pac. R. Co., 40 Mo. App. 146.

But counsel fees paid for arguing an appeal involving the right to maintain an elevated station, although properly pleaded as special damages, cannot be allowed as damages in an action against an elevated railroad for damages caused by the maintenance of its station opposite plaintiff's premises. Mattlage *v.* New York El. R. Co., 17 N. Y. Suppl. 536.

8. Taylor *v.* Bay City St. R. Co., 101 Mich. 140, 69 N. W. 447.

9. Iowa College *v.* Davenport, 7 Iowa 213.

An order of the special term granting a perpetual injunction affirmed by the appellate division is not reviewable as a question of law by the court of appeals. Peck *v.* Schenectady R. Co., 170 N. Y. 298, 63 N. E. 357 [*modifying* 67 N. Y. App. Div. 359, 73 N. Y. Suppl. 794].

10. Iowa College *v.* Davenport, 7 Iowa 213.

11. Spray *v.* Thompson, 9 Iowa 40 (holding that the judgment in the county court for damages sustained by the complainant by the removal of a roadway from his property should be taken to the district court by appeal, and not by certiorari); Nebraska L. & T. Co. *v.* Lincoln, etc., R. Co., 53 Nebr. 246, 73 N. W. 546 (holding that judgments, in proceedings by a railroad for the exercise of the right of eminent domain, must be brought up for review by petition in error and not by appeal).

12. Little Miami R. Co. *v.* Hopkins, 19 Ohio St. 279; Norwood *v.* Wooley, 9 Ohio Cir. Ct. 195, 4 Ohio Cir. Dec. 274, holding that under Rev. St. § 2259, providing that, in actions against a city for the wrongful appropriation of property to public use, the city shall have no right to appeal or prosecute error, except on obtaining leave of the reviewing court, such leave may be granted at any time within six months from the rendition of the judgment. And see Carpenter *v.* Cincinnati, etc., Canal Co., 35 Ohio St. 307.

13. Spray *v.* Thompson, 9 Iowa 40, holding that an appeal from a judgment for damages caused by a change in a roadway embraces not only the question of amount, but also the question whether any damages are recoverable.

14. Colorado Midland R. Co. *v.* Brown, 15 Colo. 193, 25 Pac. 87; Bissell *v.* Collins, 28 Mich. 277, 15 Am. Rep. 217; Drucker *v.* Manhattan R. Co., 106 N. Y. 157, 12 N. E. 568, 60 Am. Rep. 437; Shepherd *v.* Baltimore, etc., R. Co., 130 U. S. 426, 9 S. Ct. 598, 32 L. ed. 970. And see Dallas *v.* Miller, 7 Tex. Civ. App. 503, 27 S. W. 498.

Failure to join the owner of the legal title as a party to an action by the equitable owner for compensation will be disregarded on appeal where no objection thereto is made in

have not been waived,[15] and which are embodied in the record;[16] and on such grounds only as were considered below.[17] It will also entertain the usual presumptions in regard to the regularity of the proceedings in the lower court, as that the commissioners fully performed their duty.[18]

3. DETERMINATION AND DISPOSITION. The appellate court may affirm,[19] modify,[20] or amend[21] the judgment or order of the lower court; but it usually will not disturb it unless palpably erroneous.[22] It may remand the case for further proceed-

the pleadings. Hastings, etc., R. Co. *v.* Ingalls, 15 Nebr. 123, 16 N. W. 762.

15. Giordano *v.* Manhattan R. Co., 9 N. Y. Suppl. 258.

16. Ruston *v.* Grimwood, 30 Ind. 364, holding that where on appeal in an action for trespass defendant justified the entry under an order of county commissioners establishing a township road, the petition, remonstrance, report of the viewers, and the final order are a part of the record. And see Thorn *v.* Metropolitan R. Co., 132 N. Y. 555, 30 N. E. 866; Mitchell *v.* Metropolitan El. R. Co., 132 N. Y. 552, 30 N. E. 385 [*affirming* 9 N. Y. Suppl. 130].

On appeal from an order granting an injunction the question whether the order was properly granted on the evidence will not be reviewed where the evidence is not brought up in the record. Searle *v.* Lead, 10 S. D. 312, 73 N. W. 101, 39 L. R. A. 345.

17. Eno *v.* Manhattan R. Co., 21 N. Y. App. Div. 548, 48 N. Y. Suppl. 516; Shepherd *v.* Baltimore, etc., R. Co., 130 U. S. 426, 9 S. Ct. 598, 32 L. ed. 970.

18. Todemier *v.* Aspinwall, 43 Ill. 401 (holding that on appeal from a decree dismissing a bill for an injunction the supreme court cannot presume, in the absence of anything showing the fact, that the highway commissioners failed to report an assessment of damages or that no provision was made for the payment thereof); Graf *v.* St. Louis, 8 Mo. App. 562 (holding that in the absence of anything to the contrary in the record, it would be presumed that damages were assessed only for the period not barred by limitation).

19. *Georgia.*— Chattanooga, etc., R. Co. *v.* Jones, 80 Ga. 264, 9 S. E. 1081.

Illinois.— Hogan *v.* Chicago, etc., R. Co., 208 Ill. 161, 69 N. E. 853 [*affirming* 105 Ill. App. 136].

Kentucky.— Southern R. Co. *v.* Standiford, 53 S. W. 668, 21 Ky. L. Rep. 1023.

Michigan.—Gillison *v.* Cressman, 100 Mich. 591, 59 N. W. 321.

New York.— Golden *v.* Metropolitan El. R. Co., 1 Misc. 142, 20 N. Y. Suppl. 630, holding that a decision of the trial court fixing the damages, caused by the maintenance and operation of an elevated railroad, in excess of the estimate of plaintiff's witnesses, cannot be reversed on appeal where such estimate made no allowance for subsequent expenditures, and the evidence showed that the premises would have had the general advance in value which was shown in properties along adjacent streets not affected by the railroad.

See 18 Cent. Dig. tit. "Eminent Domain," § 833.

20. Storm *v.* New York, etc., R. Co., 83 Hun (N. Y.) 86, 31 N. Y. Suppl. 370 [*affirmed* in 159 N. Y. 538, 53 N. E. 1132]; McKee *v.* New York El. R. Co., 79 Hun (N. Y.) 366, 29 N. Y. Suppl. 457, judgment enjoining the operation of an elevated railroad unless certain damages were paid and a conveyance taken modified so as to allow condemnation proceedings to be taken.

Where the trial court, in computing the damages to abutting property, erroneously restricted the extent of defendant's right to use the street, and in determining to what extent defendant should be enjoined included a portion of the street which it had a right to use, the appellate court may modify such decision by limiting the injunction to that part of the street wrongfully appropriated, and by making a reasonable deduction from the damages allowed. Pape *v.* New York, etc., R. Co., 74 N. Y. App. Div. 175, 77 N. Y. Suppl. 725. But an allowance to an abutting owner of rental damages for the period subsequent to the condemning company's becoming owner by condemnation of the abutting property as well as before that cannot be cured on appeal by deduction of a *pro rata* amount from the whole amount allowed, it not appearing that it was intended to allow the same amount for each month of the entire period. Adams *v.* Manhattan R. Co., 15 Misc. (N. Y.) 17, 36 N. Y. Suppl. 426.

An injunction perpetually enjoining a railroad company from entering upon and constructing its road over private lands or streets must be modified so far as it prohibits the exercise of rights subsequently acquired by defendant under right of eminent domain. Southern Cal. R. Co. *v.* Southern Pac. R. Co., (Cal. 1896) 43 Pac. 1123; Peck *v.* Schenectady R. Co., 170 N. Y. 298, 63 N. E. 357 [*modifying* 67 N. Y. App. Div. 359, 73 N. Y. Suppl. 794].

21. Livingston *v.* Manhattan R. Co., 4 N. Y. App. Div. 165, 38 N. Y. Suppl. 751, holding that a judgment for damages may be amended so as to conform to the finding of fact and conclusions of law.

22. Chicago, etc., R. Co. *v.* Patterson, 26 Ind. App. 295, 59 N. E. 688; Roberts *v.* New York El. R. Co., 155 N. Y. 31, 49 N. E. 262; Tillson *v.* Manhattan R. Co., 24 N. Y. App. Div. 623, 48 N. Y. Suppl. 224; Betjeman *v.* New York El. R. Co., 1 Misc. (N. Y.) 138, 20 N. Y. Suppl. 628.

An assessment against an elevated railroad for damages to an abutting landowner will be sustained unless the conclusion reached by the trial court is palpably erroneous. Bon *v.* Kings County El. R. Co., 46 N. Y. App. Div. 626, 61 N. Y. Suppl. 675.

ings where the pleading or testimony is so confusing that from it it is unable to do justice between the parties,[23] or order a new trial where it appears that the jury fixed the amount of compensation contrary to the evidence.[24] A reversal of the judgment or order will be granted for errors in rulings or findings which are prejudicial to the appellant,[25] but not where such errors are harmless,[26] nor where the appellant is estopped to allege the error.[27] Although the appellate court may grant a supersedeas in a proper case it will not do so on grounds which may be interposed as a defense at law in the proceedings sought to be stayed.[28]

U. Condemnation in Proceedings by Owner. Under the statutes of some states, where the owner of property brings an action or proceeding based upon

A verdict for damages for injury to property will not be set aside as excessive where the evidence is conflicting and the jurors viewed the premises, and there is nothing to indicate that they were influenced by passion or prejudice. Denver, etc., R. Co. *v.* Bourne, 11 Colo. 59, 16 Pac. 839; Denver, etc., R. Co. *v.* Schmitt, 11 Colo. 56, 16 Pac. 842; Ludlow *v.* Macintosh, 53 S. W. 524, 21 Ky. L. Rep. 924.

23. Bailey *v.* New Orleans, 19 La. Ann. 271; Central R. Co. *v.* Merkel, 32 Tex. 723, remanded with directions to amend pleadings.

24. Morin *v.* St. Paul, etc., R. Co., 30 Minn. 100, 14 N. W. 460, holding this to be true where it appeared that the jury must have fixed plaintiff's compensation on the basis of his ownership of the entire tract of land, although he established title to an undivided interest only.

25. Roberts *v.* New York El. R. Co., 128 N. Y. 455, 28 N. E. 486, 13 L. R. A. 499 [*reversing* 59 N. Y. Super. Ct. 576, 12 N. Y. Suppl. 957]; Powers *v.* Manhattan R. Co., 120 N. Y. 178, 24 N. E. 295 (prejudicial instruction); Gutman *v.* New York El. R. Co., 91 Hun (N. Y.) 642, 36 N. Y. Suppl. 647; Phillips *v.* Postal Tel. Cable Co., 131 N. C. 225, 42 S. E. 587 [*reversing* 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868]; Shepherd *v.* Baltimore, etc., R. Co., 130 U. S. 426, 9 S. Ct. 598, 32 L. ed. 970 (reversed for failure to introduce evidence of ownership which was formerly denied, with directions for a new trial and for further proceedings consistent with the opinion).

Where the property alleged to have been injured consisted of two lots, one of them undoubtedly injured to some extent, but the other suffering only nominal damages, and the damages awarded were in a lump sum, and the decision of the trial court did not show how much he assessed as the damages to each lot, reversal of the entire judgment was necessary. Peak *v.* Kings County Electric R. Co., 83 N. Y. App. Div. 631, 81 N. Y. Suppl. 926.

Where it is impossible to determine from the verdict that the damages were such as the law gives a lien for, a decree foreclosing the lien should be reversed. St. Louis, etc., R. Co. *v.* Henderson, 86 Tex. 307, 24 S. W. 381 [*reversing* Civ. App. 1893) 32 S. W. 143].

26. Roberts *v.* New York El. R. Co., 155 N. Y. 31, 49 N. E. 262; Steubing *v.* New York El. R. Co., 138 N. Y. 658, 34 N. E. 369; Messenger *v.* Manhattan R. Co., 129 N. Y. 502, 29 N. E. 955 [*affirming* 59 N. Y. Super. Ct. 576, 13 N. Y. Suppl. 958]; Innes *v.* Manhattan R. Co., 3 N. Y. App. Div. 541, 38 N. Y. Suppl. 286; Walsh *v.* Brooklyn El. R. Co., 76 Hun (N. Y.) 24, 27 N. Y. Suppl. 605; Woolsey *v.* New York El. R. Co., 9 N. Y. Suppl. 133.

Refusal of referee to find in an action to restrain the maintenance and operation of an elevated railway in front of plaintiff's premises that the presence of defendant's station, two blocks distant from plaintiff's residence, brought a large number of persons daily in the immediate neighborhood of such premises, and that its proximity was advantageous to the business portion of said premises, and produced a special benefit to the same for business men, is not a ground for reversal, unless the evidence so clearly established the facts as to make the refusal an error of law. Slater *v.* Manhattan R. Co., 18 N. Y. Suppl. 531.

Refusal to direct conveyance.— A judgment for damages will not be reversed for failure of the court to direct a conveyance to defendant where defendant was in possession of the land, since such judgment in effect leaves defendant in lawful possession and no formal conveyance is necessary. Richmond, etc., R. Co. *v.* Thomas, 43 S. W. 466, 19 Ky. L. Rep. 1488.

Instances of harmless error in admitting or excluding evidence.— See Witmark *v.* New York El. R. Co., 149 N. Y. 393, 44 N. E. 78; Sixth Ave. R. Co. *v.* Metropolitan El. R. Co., 138 N. Y. 548, 34 N. E. 400; McGean *v.* Manhattan R. Co., 117 N. Y. 219, 22 N. E. 957; Rees *v.* Schuylkill River, etc., R. Co., 135 Pa. St. 629, 20 Atl. 149; Dallas *v.* Miller, 7 Tex. Civ. App. 503, 27 S. W. 498.

27. Autenrieth *v.* St. Louis, etc., R. Co., 36 Mo. App. 254, holding that a judgment in action for damages caused by the construction of a railroad will not be reversed for an erroneous instruction as to the measure of damages, where both parties requested the same.

28. Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 96 Ill. 125, holding that where on appeal from a decree dissolving an injunction the motion is made that the writ of error be made to operate as a supersedeas, and that an order be entered staying the condemnation proceedings until the determination of the cause on error, the appellate court will not

the appropriation of or injury to his property, defendant may by petition or cross bill seek a condemnation, which may accordingly be had;[29] and in New York a suit by the owner for damages and an alternative injunction is considered and treated as substantially a condemnation proceeding,[30] and both past, or rental, and future, or fee, damages may be awarded therein.[31]

XIII. TITLE OR RIGHTS ACQUIRED.

A. In General. In the absence of constitutional restrictions, the legislature, in the exercise of its power to authorize the taking of private property for a public use, is the exclusive judge of the extent, degree, and quality of interest which are proper to be taken.[1] It rests solely in the wisdom of the legislature to say what estate shall be taken.[2] In construing the statutes, however, it will not be

exercise such jurisdiction where the grounds on the motion were such as might be interposed as a defense at law in the proceedings sought to be stayed.

29. See Adolph *v.* Minneapolis, etc., R. Co., 42 Minn. 170, 43 N. W. 848; Morin *v.* St. Paul, etc., R. Co., 30 Minn. 100, 14 N. W. 460; Galveston, etc., R. Co. *v.* Kinkead, (Tex. Civ. App. 1900) 60 S. W. 468.

Damages should be assessed as of the time of trial in such case and not as of the time of actual possession. Adolph *v.* Minneapolis, etc., R. Co., 42 Minn. 170, 43 N. W. 848; Morin *v.* St. Paul, etc., R. Co., 30 Minn. 100, 14 N. W. 460.

30. Sperb *v.* Metropolitan El. R. Co., 137 N. Y. 155, 32 N. E. 1050, 20 L. R. A. 752; Hughes *v.* Metropolitan El. R. Co., 130 N. Y. 14, 28 N. E. 765; American Bank-Note Co. *v.* New York El. R. Co., 129 N. Y. 252, 29 N. E. 302; Pappenheim *v.* Metropolitan El. R. Co., 128 N. Y. 436, 28 N. E. 518, 26 Am. St. Rep. 486, 13 L. R. A. 401; Westphal *v.* New York, 75 N. Y. App. Div. 252, 78 N. Y. Suppl. 56; Purdy *v.* Manhattan R. Co., 3 Misc. (N. Y.) 50, 634, 22 N. Y. Suppl. 943; Cunard *v.* Manhattan R. Co., 1 Misc. (N. Y.) 151, 20 N. Y. Suppl. 724; Jones *v.* New York El. R. Co., 18 N. Y. Suppl. 952; Seebach *v.* Metropolitan El. R. Co., 18 N. Y. Suppl. 208; Smith *v.* New York El. R. Co., 18 N. Y. Suppl. 132.

31. Ketcham *v.* New York, etc., R. Co., 177 N. Y. 247, 69 N. E. 533 [*reversing* 76 N. Y. App. Div. 619, 79 N. Y. Suppl. 1135]; Uline *v.* New York Cent., etc., R. Co., 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661; Morrison *v.* Metropolitan El. R. Co., 49 N. Y. App. Div. 633, 63 N. Y. Suppl. 206; Shepard *v.* Metropolitan El. R. Co., 48 N. Y. App. Div. 452, 62 N. Y. Suppl. 977; Gray *v.* New York El. R. Co., 43 N. Y. App. Div. 104, 59 N. Y. Suppl. 386; Comesky *v.* Postal Tel. Cable Co., 41 N. Y. App. Div. 245, 58 N. Y. Suppl. 467; Lewis *v.* New York, etc., R. Co., 40 N. Y. App. Div. 343, 57 N. Y. Suppl. 1053 [*affirming* 25 Misc. 13, 54 N. Y. Suppl. 434]; Holy Apostles Church *v.* New York El. R. Co., 21 N. Y. App. Div. 47, 47 N. Y. Suppl. 418. See also German Evangelical Lutheran Synod Emigrant Mission *v.* Brooklyn El. R. Co., 165 N. Y. 604, 58 N. E. 756 [*affirming* 20 N. Y. App. Div. 596, 47 N. Y. Suppl. 344].

1. Burnett *v.* Com., 169 Mass. 417, 48 N. E. 758; Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; Raleigh, etc., R. Co. *v.* Davis, 19 N. C. 451; De Varaigne *v.* Fox, 7 Fed. Cas. No. 3,836, 2 Blatchf. 95. See also Fairchild *v.* St. Paul, 46 Minn. 540, 49 N. W. 325.

2. *Indiana.*— Logansport *v.* Shirk, 88 Ind. 563; Cromie *v.* Wabash, etc., Canal, 71 Ind. 208; Nelson *v.* Fleming, 56 Ind. 310; Indianapolis Water Works Co. *v.* Burkhart, 41 Ind. 364.

Iowa.— Smith *v.* Hall, 103 Iowa 95, 72 N. W. 427.

Louisiana.— New Orleans Pac. R. Co. *v.* Gay, 32 La. Ann. 471.

Massachusetts.—Titus *v.* Boston, 161 Mass. 209, 36 N. E. 793; Page *v.* O'Toole, 144 Mass. 303, 10 N. E. 851; Dingley *v.* Boston, 100 Mass. 544. "There are no sacramental words which must be used in a statutory power to take and hold lands in order to give a right to take the lands in fee. Any language in the statute which makes its meaning clear is sufficient, and in very little more than 'take and hold' has been held enough." Newton *v.* Perry, 163 Mass. 319, 321, 39 N. E. 1032, per Holmes, J.

Minnesota.—Fairchild *v.* St. Paul, 46 Minn. 540, 49 N. W. 325; Cotton *v.* Mississippi, etc., Boom Co., 22 Minn. 372; Scott *v.* St. Paul, etc., R. Co., 21 Minn. 322.

New York.— Eldridge *v.* Binghamton, 120 N. Y. 309; Tifft *v.* Buffalo, 82 N. Y. 204; Sweet *v.* Buffalo, etc., R. Co., 79 N. Y. 293; Rexford *v.* Knight, 15 Barb. 627.

North Carolina.— Raleigh, etc., R. Co. *v.* Davis, 19 N. C. 451.

Ohio.— Malone *v.* Toledo, 34 Ohio St. 541.

Virginia.— Roanoke City *v.* Berkowitz, 80 Va. 616.

United States.— De Varaigne *v.* Fox, 7 Fed. Cas. No. 3,836, 2 Blatchf. 95.

See 18 Cent. Dig. tit. "Eminent Domain," § 836.

Act authorizing a municipality to abate a nuisance.— The act of the legislature of Massachusetts of June 1, 1867, c. 308, to enable the city of Boston to abate a nuisance, and for the preservation of the public health in said city, and which provided for the taking of certain private lands therein and for their improvement, filling up, and complete draining, so as to abate an existing nuisance and preserve the health of the city, and which

implied that a greater interest or estate can be taken than is absolutely necessary to satisfy its language and object,[3] or than the constitution allows;[4] and although a taking of the fee may be authorized where necessary,[5] in the absence of express words the statute will not be so construed where its purposes will be satisfied by the taking of an easement.[6] But the condemnation can pass no greater right or title than the parties have against whom proceedings are had,[7] nor than is described in the condemnation proceedings.[8] Where the state condemns land it

further provided for the payment of the cost of the lots so taken through judicial proceedings, was within the constitutional power of the legislature of that state, and the fee in such lands when acquired by the city passed to it under the act, and the previous owners ceased to have any interest in them, but were only entitled to reasonable compensation to be ascertained in the manner provided by the act. Sweet *v.* Rechel, 159 U. S. 380, 16 S. Ct. 43, 40 L. ed. 188.

Foreign corporation.— It is for the legislature exclusively to determine as to the extent of the interest in the lands to be acquired by a foreign corporation. The right to take property to any extent, whether the full or entire title or only an easement, is implied in the constitutional provision. Morris Canal, etc., Co. *v.* Townsend, 24 Barb. (N. Y.) 658.

State canals.—In People *v.* White, 11 Barb. (N. Y.) 26, it was held that upon the abandonment of a section of the Erie canal the land reverted to the original owner; but in a later case it was held that the people acquierd a fee which survived the abandonment of the canal and which could be granted to the adjoining owner by the legislature (Birdsall *v.* Cary, 66 How. Pr. (N. Y.) 358); and the later view has been sustained by the court of appeals in regard to the Chenango canal (Eldridge *v.* Binghamton, 120 N. Y. 309, 24 N. E. 462).

3. Kelly *v.* Donahoe, 2 Metc. (Ky.) 482; Shreveport, etc., R. Co. *v.* Hinds, 50 La. Ann. 781, 24 So. 287; New Orleans Pac. R. Co. *v.* Gay, 32 La. Ann. 471; Sixth Ave. R. Co. *v.* Kerr, 72 N. Y. 330; Washington Cemetery *v.* Prospect Park, etc., R. Co., 68 N. Y. 591 [*affirming* 7 Hun 655]. And see People *v.* Blake, 19 Cal. 579; Fuselier *v.* Iberia Parish Police Jury, 109 La. 551, 33 So. 597.

"[The] language [of the statute] may be broad enough to vest an absolute title to lands, without being technical in its terms. If the expressions are such as that the whole force of them is not applied, unless a fee simple is created, that estate will be taken, though the exact words be not used." Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 242, 6 Am. Rep. 70.

4. Peoria, etc., R. Co. *v.* Birkett, 62 Ill. 332; Scott *v.* St. Paul, etc., R. Co., 21 Minn. 322; Union Depot Co. *v.* Frederick, 117 Mo. 138, 21 S. W. 1118, 1130, 26 S. W. 350.

5. *Connecticut.*— Driscoll *v.* New Haven, 75 Conn. 92, 52 Atl. 618.

Louisiana.— Shreveport, etc., R. Co. *v.* Hinds, 50 La. Ann. 781, 24 So. 287.

New York.—Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70.

Ohio.— Malone *v.* Toledo, 34 Ohio St. 541.

United States.— Newton *v.* Manufacturers' R. Co., 115 Fed. 781, 53 C. C. A. 599.

See 18 Cent. Dig. tit. "Eminent Domain," § 836.

Qualified fee.— Some of the cases hold that the title acquired is a qualified or terminable fee, for the land cannot be sold as such or devoted to any use other than that for which it was condemned and if the enterprise be abandoned will revert to the original owner. Fairchild *v.* St. Paul, 46 Minn. 540, 49 N. W. 325; Kellogg *v.* Malin, 50 Mo. 496, 11 Am. Rep. 426; Hooker *v.* Utica, etc., Turnpike Road Co., 12 Wend. (N. Y.) 371.

6. Shreveport, etc., R. Co. *v.* Hinds, 50 La. Ann. 781, 24 So. 287; Washington Cemetery *v.* Prospect Park, etc., R. Co., 68 N. Y. 591 [*affirming* 7 Hun 655]; Matter of New York, 74 N. Y. App. Div. 197, 77 N. Y. Suppl. 737 [*affirmed* in 174 N. Y. 26, 66 N. E. 584]; *In re* Wadsworth, 57 Hun (N. Y.) 419, 10 N. Y. Suppl. 705; Lyon *v.* Gormley, 53 Pa. St. 261; Newton *v.* Manufacturers' R. Co., 115 Fed. 781, 53 C. C. A. 599. And see Waterbury *v.* Platt, 75 Conn. 387, 53 Atl. 958, 60 L. R. A. 211; Cotton *v.* Mississippi, etc., Boom Co., 22 Minn. 372.

The fact that the particular purpose for which the land is to be taken is expressed in the title and body of the act does not necessarily qualify the estate taken; the purpose declared simply defines the use. Sweet *v.* Buffalo, etc., R. Co., 79 N. Y. 293.

A statute providing that the title to land condemned for a public park "shall vest in the people of the county" is valid, since in such case the words, "people of the county," may be regarded as interchangeable with the term "the county." St. Louis County Ct. *v.* Griswold, 58 Mo. 175.

Although the statute under which the land is taken provides that a fee shall vest, yet if the statement in the condemnation proceedings shows that it was intended to reserve to the owner all rights not necessary for the use to which the land was to be put, an easement only is taken. Conklin *v.* Old Colony R. Co., 154 Mass. 155, 28 N. E. 143.

7. Charleston, etc., R. Co. *v.* Hughes, 105 Ga. 1, 30 S. E. 972, 70 Am. St. Rep. 17; Anderson *v.* Rochester, etc., R. Co., 9 How. Pr. (N. Y.) 553.

If the party has only an equitable title at the time of the condemnation, if he subsequently acquires the legal title, it will pass by the condemnation proceedings. Buckwalter *v.* Neosho County School Dist. No. 42, 65 Kan. 603, 70 Pac. 605.

8. Shipley *v.* Western Maryland Tidewater R. Co., (Md. 1904) 56 Atl. 968, holding that

is not affected by any prior title of which it had no actual notice and as to which it is not chargeable with constructive notice.[9]

B. Nature of Title — 1. In General. The title acquired by condemnation proceedings is not one of privity, but of a character which is sometimes denominated a new title,[10] under which the land appropriated is held free from the lien of a prior judgment,[11] and the prevailing doctrine is that where lands are condemned for the purposes of a corporation the title vested in the corporation is a qualified one to the extent necessary for its purposes.[12]

2. Fee Simple. A fee simple title may be taken and acquired through the exercise of the power of eminent domain; but this occurs only where an absolute and unconditional price is paid for the property.[13] Under some statutes the condemnation is held to vest complete title in the condemning corporation;[14] and

notwithstanding Md. Code, art. 23, § 167, condemnation proceedings to acquire land abutting on a street, but described so as to exclude the street, would not vest in the condemning company title to the center of the thoroughfare.

9. Sturgis *v.* Moore, 13 Tex. Civ. App. 291, 35 S. W. 56.

10. Emery *v.* Boston Terminal Co., 178 Mass. 172, 59 N. E. 763, 86 Am. St. Rep. 473.

11. Gimbel *v.* Stolte, 59 Ind. 446; Williams *v.* Hutchinson, etc., R. Co., 62 Kan. 412, 63 Pac. 430, 84 Am. St. Rep. 408.

12. *California.*— People *v.* Blake, 19 Cal. 579.

Massachusetts.— Burnett *v.* Com., 169 Mass. 417, 48 N. E. 758.

North Carolina.— State *v.* Rives, 27 N. C. 297.

Pennsylvania.— Sholl *v.* Stump, 24 Pa. Super. Ct. 48.

Texas.— Palmer *v.* Harris County, 29 Tex. Civ. App. 340, 69 S. W. 229.

England.— Sydney Municipal Council *v.* Young, [1898] A. C. 457, 67 L. J. P. C. 40, 78 L. T. Rep. N. S. 365, 46 Wkly. Rep. 561; Bostock *v.* North Staffordshire R. Co., 2 Jur. N. S. 248, 25 L. J. Ch. 325, 3 Smale & G. 283, 4 Wkly. Rep. 336.

A corporation has no higher or better right to property obtained by condemnation proceedings than to that which it has acquired by purchase. Oregon Cascade R. Co. *v.* Baily, 3 Oreg. 164.

13. *Connecticut.*— Driscoll *v.* New Haven, 75 Conn. 92, 52 Atl. 618.

Michigan.— Detroit City R. Co. *v.* Mills, 85 Mich. 634, 48 N. W. 1007.

Missouri.— Kellogg *v.* Malin, 50 Mo. 496, 11 Am. Rep. 426.

New Jersey.— U. S. Pipe Line Co. *v.* Delaware, etc., R. Co., 62 N. J. L. 254, 41 Atl. 759, 42 L. R. A. 572.

New York.— Sweet *v.* Buffalo, etc., R. Co., 79 N. Y. 293 [*affirming* 13 Hun 643]; Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; Matter of Rochester, 24 N. Y. App. Div. 383, 48 N. Y. Suppl. 764.

Virginia.— Roanoke City *v.* Berkowitz, 80 Va. 616.

See 18 Cent. Dig. tit. "Eminent Domain," § 836.

Lands condemned by a state for its use vests a fee simple in the commonwealth. State *v.* Griftner, 61 Ohio St. 201, 55 N. E. 612; Delosier *v.* Pennsylvania Canal Co., (Pa. 1887) 11 Atl. 400.

A mill or other factory company cannot acquire a fee simple to land condemned for its use merely upon the payment of damages. Whitworth *v.* Puckett, 2 Gratt. (Va.) 528; Hunter *v.* Matthews, 1 Rob. (Va.) 468.

Under a power to condemn the fee in lands the right to condemn merely a use of water flowing through the land cannot be exercised. Charlottesville *v.* Maury, 96 Va. 383, 31 S. E. 520.

A city authorized to take real estate for public purposes, when its authority is not limited to a mere taking in trust for the particular purpose, may elect as to the nature of the title acquired; but the power to acquire title in fee for the construction of a bridge and approaches thereto does not necessarily operate to make a taking of property to construct a street alongside the bridge approaches pass title in fee to the city. Matter of New York, 74 N. Y. App. Div. 197, 77 N. Y. Suppl. 737.

14. *California.*— Fox *v.* Western Pac. R. Co., 31 Cal. 538. And see People *v.* Blake, 19 Cal. 579.

Georgia.— Powers *v.* Armstrong, 19 Ga. 427.

Illinois.— Peoria, etc., R. Co. *v.* Birkett, 62 Ill. 332; Res *v.* Chicago, 38 Ill. 322.

New York.— *In re* Amsterdam Water Com'rs, 96 N. Y. 351; Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70 [*affirming* 3 Lans. 429]; Heyward *v.* New York, 8 Barb. 486; Gearty *v.* New York, 49 How. Pr. 33.

North Carolina.— State *v.* Rives, 27 N. C. 297.

Ohio.— Dodson *v.* Cincinnati, 34 Ohio St. 276.

Pennsylvania.— Easton's Appeal, 47 Pa. St. 255; Crangle *v.* Harrisburg, 1 Pa. St. 132; Lebanon School-Dist. *v.* Lebanon Female Seminary, (1888) 12 Atl. 857; Levering *v.* Philadelphia, etc., R. Co., 8 Watts & S. 459; Schuler *v.* Northern Liberties, etc., R. Co., 3 Whart. 555; Philadelphia, etc., R. Co. *v.* Lawrence, 10 Phila. 604.

Tennessee.— Burnett *v.* Nashville, etc., R. Co., 4 Sneed 528.

Vermont.— Troy, etc., R. Co. *v.* Potter, 42 Vt. 265, 1 Am. Rep. 325; McAulay *v.* West-

the right so conferred is not affected by a change in the constitution pending the proceedings.[15] In some cases the right acquired is treated as a fee simple, but subject to return to the owner upon a discontinuance of the use.[16]

3. EASEMENT. In construing a statute authorizing the taking of private property for public use it will not be implied that a greater interest or estate can be taken than is absolutely necessary to satisfy the language and object of the act, and, where the constitution and statute are both silent on the subject, nothing more than an easement can be taken.[17] As a general rule an easement only is acquired in property condemned for a public highway,[18] a turnpike,[19] a street,[20]

ern Vermont R. Co., 33 Vt. 311, 78 Am. Dec. 627; Stacey *v.* Vermont Cent. R. Co., 27 Vt. 39.

Virginia.— Jones *v.* Miller, (1882) 23 S. E. 35.

United States.— Wood *v.* Mobile, 107 Fed. 846, 47 C. C. A. 9 [*affirming* 99 Fed. 615].

See 18 Cent. Dig. tit. "Eminent Domain," § 836.

Thus a title in fee may be taken by a city to land purchased or taken for the purpose of abating a nuisance (Dingley *v.* Boston, 100 Mass. 544), or constructing a sewer (Page *v.* O'Toole, 144 Mass. 303, 10 N. E. 851), or for streets (Hughes *v.* Mississippi, etc., R. Co., 12 Iowa 261; Milburn *v.* Cedar Rapids, 12 Iowa 246; Hamersley *v.* New York, 56 N. Y. 533; Sixth Ave. R. Co. *v.* Gilbert El. R. Co., 43 N. Y. Super. Ct. 292). But see cases cited *infra*, XIII, B, 3.

Presumption.— It has been held that where lands are condemned for public use it will be presumed that the commissioners intended to condemn the entire property and title including the fee simple of all lesser estates unless their report shows the contrary. Bonner *v.* Peterson, 44 Ill. 253; Story *v.* New York El. R. Co., 3 Abb. N. Cas. (N. Y.) 478.

15. Peoria, etc., R. Co. *v.* Birkett, 62 Ill. 332.

16. Chicago, etc., R. Co. *v.* Clapp, 201 Ill. 418, 66 N. E. 223; Kimball *v.* Kenosha, 4 Wis. 321.

17. *California.*— People *v.* Blake, 19 Cal. 579.

Connecticut.— Benham *v.* Potter, 52 Conn. 248.

Illinois.— Aden *v.* Union County Road Dist. No. 3, 97 Ill. App. 347.

Indiana.— Quick *v.* Taylor, 113 Ind. 540, 16 N. E. 588; Brookville, etc., Hydraulic Co. *v.* Butler, 91 Ind. 134, 46 Am. Rep. 580; Julien *v.* Woodsmall, 82 Ind. 568; Vaughn *v.* Stuzaker, 16 Ind. 338.

Louisiana.— Fuselier *v.* Iberia Parish Police Jury, 109 La. 551, 33 So. 597.

Massachusetts.— Newton *v.* Perry, 163 Mass. 319, 39 N. E. 1032; Conklin *v.* Old Colony R. Co., 154 Mass. 155, 28 N. E. 143; Atty.-Gen. *v.* Jamaica Pond Aqueduct Corp., 133 Mass. 361; Clark *v.* Worcester, 125 Mass. 226; Harback *v.* Boston, 10 Cush. 295.

Minnesota.— Gurney *v.* Minneapolis Union Elevator Co., 63 Minn. 70, 65 N. W. 136, 30 L. R. A. 534.

New York.— Washington Cemetery *v.* Prospect Park, etc., R. Co., 68 N. Y. 591; Strong *v.* Brooklyn, 68 N. Y. 1.

North Carolina.— State *v.* Bellamy, 120 N. C. 212, 27 S. E. 113; State *v.* Williams, 117 N. C. 753, 23 S. E. 250.

Ohio.— Vought *v.* Columbus, etc., R. Co., 58 Ohio St. 123, 50 N. E. 442; Corwin *v.* Cowen, 12 Ohio St. 629.

Oklahoma.— Guthrie, etc., R. Co. *v.* Faulkner, 12 Okla. 532, 73 Pac. 290.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Bruce, 102 Pa. St. 23; Heise *v.* Pennsylvania R. Co., 62 Pa. St. 67.

United States.— Harris *v.* Elliott, 10 Pet. 25, 9 L. ed. 333.

See 18 Cent. Dig. tit. "Eminent Domain," § 836.

Appropriation of land for lateral support. — Where a municipal corporation appropriates part of the land of an abutting owner for the purpose of lateral support to the street in front of it, this is merely an appropriation of an easement in the land, and does not divest the abutting owner of his general domination over it; he may still use it for all purposes not inconsistent with the special purpose of furnishing the necessary support to the street. Dodson *v.* Cincinnati, 34 Ohio St. 276.

18. *Illinois.*— Aden *v.* Union County Road Dist. No. 3, 97 Ill. App. 347.

Indiana.— Hagaman *v.* Moore, 84 Ind. 496.

Kansas.— Roberts *v.* Brown County, 21 Kan. 247; Shawnee County Com'rs *v.* Beckwith, 10 Kan. 603.

Michigan.— Paul *v.* Detroit, 32 Mich. 108.

Missouri.— Kellogg *v.* Malin, 50 Mo. 496, 11 Am. Rep. 426.

New York.— Higgins *v.* Reynolds, 31 N. Y. 151.

Rhode Island.— Rhode Island Hospital Trust Co. *v.* Hayden, 20 R. I. 544, 40 Atl. 421, 42 L. R. A. 107.

See 18 Cent. Dig. tit. "Eminent Domain," § 836.

But see Raleigh, etc., R. Co. *v.* Davis, 19 N. C. 451.

19. Kelly *v.* Donahoe, 2 Metc. (Ky.) 482; Adams *v.* Emerson, 6 Pick. (Mass.) 57; Wright *v.* Carter, 27 N. J. L. 76. And see Roanoke City *v.* Berkowitz, 80 Va. 616.

Condemnation of a quarry for the use of a turnpike passes the use only. Morris *v.* Schollsville Branch Red River Turnpike Road, 6 Bush (Ky.) 671.

20. Harris *v.* Chicago, 162 Ill. 288, 44 N. E. 437.

parks,[21] aqueducts,[22] or telegraph routes.[23] And this is usually true in regard to land condemned for railroad purposes,[24] although some statutes have been held to vest the fee in the company.[25] Where an easement only is acquired the exclusive right of property in the land, the trees and shrubbery upon its surface and minerals below it remain unchanged, subject of course to the right of the condemning company to construct and operate its road over and through it,[26] as well as the title to the buildings.[27]

C. Right to Land and Improvements — 1. In General. Condemnation passes the right to take the land as it existed at the time of the hearing,[28] and generally any improvements placed thereon after the institution of proceedings for condemnation or after the date of the appropriation are at the owner's risk, and cannot be considered in estimating the damages to which the owner is entitled.[29]

2. Duration of the Right. Ordinarily the right to the land acquired continues as long as it is required for the purpose for which it was condemned,[30] notwith-

The easements of the public in streets are greater than in country roads. Palmer *v.* Larchmont Electric Co., 6 N. Y. App. Div. 12, 39 N. Y. Suppl. 522.

21. Devine *v.* Lord, 175 Mass. 384, 56 N. E. 570; Newton *v.* Manufacturers' R. Co., 115 Fed. 781, 53 C. C. A. 599. But see Driscoll *v.* New Haven, 75 Conn. 92, 52 Atl. 618.

22. Harback *v.* Boston, 10 Cush. (Mass.) 295; Matter of Thompson, 57 Hun (N. Y.) 419, 10 N. Y. Suppl. 705.

23. Lockie *v.* Mutual Union Tel. Co., 103 Ill. 401; Postal Tel. Cable Co. *v.* Louisiana Western R. Co., 49 La. Ann. 1270, 22 So. 219, holding this the rule with regard to telegraph companies maintaining their lines on railroad rights of way.

24. *Colorado.*— Union Pac. R. Co. *v.* Colorado Postal Tel. Cable Co., 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106.

Illinois.— Chicago, etc., R. Co. *v.* Clapp, 201 Ill. 418, 66 N. E. 223; Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 15 Ill. App. 587.

Iowa.— Henry *v.* Dubuque, etc., R. Co., 2 Iowa 288.

Minnesota.— Gurney *v.* Minneapolis Union Elevator Co., 63 Minn. 70, 65 N. W. 136, 30 L. R. A. 534; Kaiser *v.* St. Paul, etc., R. Co., 22 Minn. 149; Scott *v.* St. Paul, etc., R. Co., 21 Minn. 322.

Missouri.— Union Depot Co. *v.* Frederick, 117 Mo. 138, 21 S. W. 1118, 1130, 26 S. W. 350; Kellogg *v.* Malin, 50 Mo. 496, 11 Am. Rep. 426, 62 Mo. 429.

New Hampshire.— Blake *v.* Rich, 34 N. H. 282.

New York.—Strong *v.* Brooklyn, 68 N. Y. 1. *Compare* Munger *v.* Tonawanda R. Co., 4 N. Y. 349, 53 Am. Dec. 384; Beal *v.* New York Cent., etc., R. Co., 41 Hun 172.

North Carolina.— Shields *v.* Norfolk, etc., R. Co., 129 N. C. 1, 39 S. E. 582.

Ohio.— Platt *v.* Pennsylvania Co., 43 Ohio St. 228, 1 N. E. 420.

Oregon.— Oregon R., etc., Co. *v.* Oregon Real Estate Co., 10 Oreg. 444.

Pennsylvania.— Ross *v.* Pennsylvania R. Co., (1886) 4 Atl. 850; Heise *v.* Pennsylvania R. Co., 62 Pa. St. 67.

South Carolina.— Tutt *v.* Port Royal, etc., R. Co., 28 S. C. 388, 5 S. E. 831. But see Charleston, etc., R. Co. *v.* Blake, 12 Rich. 634.

Texas.— Lyon *v.* McDonald, 78 Tex. 71, 14 S. W. 261, 9 L. R. A. 295.

See 18 Cent. Dig. tit. "Eminent Domain," § 836.

Rights of action.— A railroad company acquires by condemnation a sufficient title to sustain an action of ejectment (New York, etc., R. Co. *v.* Trimmer, 53 N. J. L. 1, 20 Atl. 761; Pittsburgh, etc., R. Co. *v.* Peet, 152 Pa. St. 488, 25 Atl. 612, 19 L. R. A. 467); to defeat an action of trespass (Maysville, etc., R. Co. *v.* Pelham, (Ky. 1892) 20 S. W. 384); and to recover damages for the obstruction of a street on which it abuts (Pennsylvania Schuylkill Valley R. Co. *v.* Reading Paper Mills, 149 Pa. St. 18, 24 Atl. 205); and also such title as to make animals which stray upon its tracks trespassers (Munger *v.* Tonawanda R. Co., 4 N. Y. 349, 53 Am. Dec. 384).

25. Challiss *v.* Atchison, etc., R. Co., 16 Kan. 117; Shawnee County Com'rs *v.* Beckwith, 10 Kan. 603; Troy, etc., R. Co. *v.* Potter, 42 Vt. 265, 1 Am. Rep. 325. And see Prather *v.* Western Union Tel. Co., 89 Ind. 501.

26. Blake *v.* Rich, 34 N. H. 282; Higgins *v.* Reynolds, 31 N. Y. 151.

Title to a spring along a right of way acquired for a plank-road is in the owner of the land. Upper Ten Mile Plank Road Co. *v.* Braden, 172 Pa. St. 460, 33 Atl. 562, 51 Am. St. Rep. 759.

27. Shields *v.* Norfolk, etc., R. Co., 129 N. C. 1, 39 S. E. 582.

28. Charleston, etc., R. Co. *v.* Hughes, 105 Ga. 1, 30 S. E. 972, 70 Am. St. Rep. 17; Fitchburg R. Co. *v.* New Haven, etc., Co., 134 Mass. 547; *In re* Paseo, 78 Mo. App. 518 (holding that, although the title to the land condemned remains in the owner until damages are paid, yet upon payment the divestiture of his title relates to the date of the judgment confirming the condemnation); Shields *v.* Pittsburg, 31 Pittsb. Leg. J. N. S. 327.

29. See *supra*, X, E, 19, n. (I), (B).

30. Pratt *v.* Brown, 3 Wis. 603, holding that the right to flow lands continues until

standing the life of the condemning corporation may be limited by special charter or general statute.[31]

3. TENURE The tenure of land condemned is sometimes said to be in the nature of a trust for public use,[32] and for this reason it is said to be subject to the supervision of the government.[33]

D. Use and Occupation — 1. IN GENERAL. Where the power of condemnation has been exercised in strict conformity to the statute the result is final, and the right to the use and occupation of the condemned property is conclusive.[34]

2. EXCLUSIVENESS OF THE RIGHT — a. In General. Condemnation of land usually precludes the owner from entering on or using any portion thereof without the consent of the party condemning the land,[35] except in case of an easement in so far as his use is not inconsistent with the use for which the land was appropriated.[36] The owner of land and water taken for a water-supply retains the right to make any use of the water or the land which does not interfere with such purpose.[37]

b. By Railroads. The use by a railway company of land condemned for its road is practically an exclusive one, and permanent in its nature,[38] unless the statute, or the court in its order, limits the easement to be acquired by reserving

the dissolution of the condemning corporation.

31. Shreveport, etc., R. Co. *v.* Hinds, 50 La. Ann. 781, 24 So. 287; Miner *v.* New York Cent., etc., R. Co., 46 Hun (N. Y.) 612 [*affirmed* in 123 N. Y. 242, 25 N. E. 339]; State *v.* Rives, 27 N. C. 297.

32. Swan *v.* Williams, 2 Mich. 427; Fairchild *v.* St. Paul, 46 Minn. 540, 49 N. W. 326; Matter of New York, 74 N. Y. App. Div. 197, 77 N. Y. Suppl. 737 [*affirmed* in 174 N. Y. 26, 66 N. E. 584].

33. Swan *v.* Williams, 2 Mich. 427.

34. Kansas, etc., R. Co. *v.* Phipps, 4 Kan. App. 252, 45 Pac. 926; Lyon *v.* McDonald, 78 Tex. 71, 14 S. W. 261, 9 L. R. A. 295.

The condemning corporation thereupon has a right to enter and use the soil, although title does not pass until the appraisement and payment of damages. Baker *v.* Johnson, 2 Hill (N. Y.) 342.

35. *Kansas.*— Dillon *v.* Kansas City, etc., R. Co., 67 Kan. 687, 74 Pac. 251.

Massachusetts.— Cleaveland *v.* Ware, 98 Mass. 409.

Nebraska.— Struve *v.* Republican Valley R. Co., (1902) 89 N. W. 604.

Pennsylvania.— Philadelphia *v.* Ward, 174 Pa. St. 45, 34 Atl. 458; Reading *v.* Davis, 153 Pa. St. 360, 26 Atl. 62.

Wyoming.— Whalon *v.* North Platte Canal, etc., R. Co., 11 Wyo. 318, 71 Pac. 995.

36. Conklin *v.* Old Colony R. Co., 154 Mass. 155, 28 N. E. 143; Livermore *v.* Jamaica, 23 Vt. 361.

The owner of a strip of land which has been condemned by a telegraph company in order to place its line cannot be excluded from the use of such strip. Lockie *v.* Mutual Union Co., 103 Ill. 401.

37. *Indiana.*— Bass *v.* Ft. Wayne, 121 Ind. 389, 23 N. E. 259.

Maine.— Jordan *v.* Woodward, 40 Me. 317.

Maryland.— Kane *v.* Baltimore, 15 Md. 240.

Massachusetts.— Fosgate *v.* Hudson, 178 Mass. 225, 59 N. E. 809.

Michigan.— Detroit City R. Co. *v.* Mills, 85 Mich. 634, 48 N. W. 1007.

Pennsylvania.—Philadelphia *v.* Spring Garden Com'rs, 7 Pa. St. 348.

A water company which has taken the use of a pond and river to supply a town with water is not entitled to exclude a railroad company from taking water for its engines, where the amount thus taken does not interfere with the obtaining of a sufficient supply by the water company. Framingham Water Co. *v.* Old Colony R. Co., 176 Mass. 404, 57 N. E. 680.

Where land is condemned for a reservoir the company has a right to inclose the reservoir and prohibit access to it by the former owner as well as others (Finn *v.* Providence Gas, etc., Co., 99 Pa. St. 631); and this is also true of land acquired as a protection to the water-supply (Newton *v.* Perry, 163 Mass. 319, 39 N. E. 1032).

38. *Colorado.*— St. Onge *v.* Day, 11 Colo. 368, 18 Pac. 278.

Kansas.— Dillon *v.* Kansas City, etc., R. Co., 67 Kan. 687, 74 Pac. 251.

Minnesota.— Lake Superior, etc., R. Co. *v.* Greve, 17 Minn. 322.

Missouri.— Chicago, etc., R. Co. *v.* George, 145 Mo. 38, 47 S. W. 11; St. Louis, etc., R. Co. *v.* Clark, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751; St. Louis, etc., R. Co. *v.* St. Louis Union Stock Yards Co., 120 Mo. 541, 25 S. W. 399.

New York.— Kings County El. R. Co. *v.* Cocks, 22 N. Y. Suppl. 1017.

Pennsylvania.—Philadelphia, etc., R. Co. *v.* Lawrence, 10 Phila. 604; Junction R. Co. *v.* Boyd, 8 Phila. 224; Bate *v.* Philadelphia, etc., R. Co., 1 Montg. Co. Rep. 47.

Tennessee.— Burnett *v.* N. & C. R. Co., 4 Sneed 528.

Vermont.— Connecticut, etc., R. Co. *v.* Holton, 32 Vt. 43; Hurd *v.* Rutland, etc., R. Co., 25 Vt. 116.

See 18 Cent. Dig. tit. "Eminent Domain," § 847.

The owner cannot dig and carry away the

certain rights and privileges to the landowner,[39] or unless such limitation is conceded by the company.[40] This rule has in some jurisdictions been so far modified as to allow the landowner to enter upon and use the land for any purpose not inconsistent with its use by the company for any of the objects which the railroad is intended to accomplish.[41] The owner has not the right to cross and recross the road except at places open to the public for such purposes,[42] unless the statute provides for such crossings.[43]

3. EXTENT OF THE RIGHT — a. In General. The use of land taken must be in accordance with and for the purposes which justified its taking,[44] although within such purpose the manner of the use and occupation is within the discretion of the condemning corporation.[45] If after condemnation and possession any other than the authorized use is made of the land, from which injury results, the owner is entitled to additional damages,[46] unless he has received as compensation the full market value of his land, and the other use to which the land is put is a public

turf on the right of way (Connecticut, etc., R. Co. *v.* Holton, 32 Vt. 43); nor use it for pasturage or otherwise (Hurd *v.* Rutland, etc., R. Co., 25 Vt. 116).

Where the land is taken for station purposes, the possession of the railroad company is more exclusive than where it is taken simply for the right of way, in the former case the possession being as exclusive and absolute as belongs to an easement in fee. Peirce *v.* Boston, etc., R. Corp., 141 Mass. 481, 6 N. E. 96.

39. *Iowa.*—Clayton *v.* Chicago, etc., R. Co., 67 Iowa 238, 25 N. W. 150.

Maine.— Fitzpatrick *v.* Boston, etc., R. Co., 84 Me. 33, 24 Atl. 432.

Massachusetts.— Conklin *v.* Old Colony R. Co., 154 Mass. 155, 28 N. E. 143.

Minnesota.— Hopkins *v.* Chicago, etc., R. Co., 76 Minn. 70, 78 N. W. 969.

New Jersey.— Marino *v.* New Jersey Cent. R. Co., 69 N. J. L. 628, 56 Atl. 306.

Pennsylvania.— Wilkesbarre, etc., R. Co. *v.* Danville, etc., R. Co., 29 Leg. Int. 373.

See 18 Cent. Dig. tit. "Eminent Domain," §§ 847–849.

The owner of land condemned by a railroad company subject to the duty to maintain suitable wagon ways, where its railroad intersects the land of such owner, has a right of way across the railroad appurtenant to each of his divided tracts; but this right is not transmitted to a grantee of a portion of the lands lying only on one side of the railroad. Marino *v.* New Jersey Cent. R. Co., 69 N. J. L. 628, 56 Atl. 306.

40. Conklin *v.* Old Colony R. Co., 154 Mass. 155, 28 N. E. 143; St. Louis, etc., R. Co. *v.* Knapp, etc., Co., 160 Mo. 396, 61 S. W. 300; St. Louis, etc., R. Co. *v.* Clark, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751.

41. Southern R. Co. *v.* Cowan, 129 Ala. 577, 29 So. 985; Guthrie, etc., R. Co. *v.* Faulkner, 12 Okla. 532, 73 Pac. 290; Hasson *v.* Oil Creek, etc., R. Co., 8 Phila. (Pa.) 556; Connecticut, etc., R. Co. *v.* Holton, 32 Vt. 43. See also Alabama, etc., R. Co. *v.* Burkett, 42 Ala. 83.

Use of highway, etc.— Where a railroad company acquires the right to construct its road upon or across any stream or watercourse, road or highway, railroad or canal, this gives to the railroad company only a joint use with the public in a highway over which its road is constructed, and does not allow such use by the company as will exclude the public from ordinary travel on the highway. Pittsburg, etc., R. Co. *v.* Reich, 101 Ill. 157; National Docks, etc., Connecting R. Co. *v.* State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. Rep. 421.

42. New York, etc., R. Co. *v.* Miller, 165 Mass. 514, 43 N. E. 499; St. Louis, etc., R. Co. *v.* Clark, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751; Lyon *v.* McDonald, 78 Tex. 71, 14 S. W. 261, 9 L. R. A. 295.

43. Clayton *v.* Chicago, etc., R. Co., 67 Iowa 238, 25 N. W. 150; Fitzpatrick *v.* Boston, etc., R. Co., 84 Me. 33, 24 Atl. 432.

44. Boston Mfg. Co. *v.* Burgin, 114 Mass. 340; Cape Girardeau, etc., Macadamized, etc., Road Co. *v.* Renfroe, 58 Mo. 265; Julia Bldg. Assoc. *v.* Bell Telephone Co., 13 Mo. App. 477; Lance's Appeal, 55 Pa. St. 16, 93 Am. Dec. 722; Jones *v.* Tatham, 20 Pa. St. 398.

A water company's right to take land for the purpose of enlarging a pond and to raise a dam thereon gives it no right to sink wells on the land for the purpose of intercepting underground streams for a source of water-supply. Atty.-Gen. *v.* Jamaica Pond Aqueduct Corp., 133 Mass. 261.

Where land condemned for railroad purposes is not legally appraised, the construction of the road and the recording of the survey and award confines the possession of the railroad to the land actually occupied, and does not extend it to the limits of the survey. Croft *v.* Bennington, etc., R. Co., 64 Vt. 1, 23 Atl. 922.

45. Peirce *v.* Boston, etc., R. Co., 141 Mass. 481, 6 N. E. 96; Hopkins *v.* Chicago, etc., R. Co., 76 Minn. 70, 78 N. W. 969.

46. Merrimack River Locks, etc. *v.* Nashua, etc., R. Co., 104 Mass. 1, 6 Am. Rep. 181; Cincinnati *v.* Penny, 21 Ohio St. 499, 8 Am. Rep. 73; Hatch *v.* Cincinnati, etc., R. Co., 18 Ohio St. 92; Porterfield *v.* Bond, 38 Fed. 391. *Compare* Hamilton *v.* Annapolis, etc., R. Co., 1 Md. Ch. 107.

But the use of the land for private purposes for a few days after an appeal from condemnation proceedings will not entitle

one.[47] These rules have been applied to lands condemned for purposes of a street or highway,[48] for a sewer,[49] or for a wharf.[50]

b. Railroads. Land condemned for railway purposes can be used only for such purposes or for purposes appertaining thereto,[51] although the condemnation of the right of way includes the right to make and maintain such way as is required for a railroad,[52] as well as everything necessary to the construction and operation of the road.[53]

c. Alienation or Mortgage of Property Condemned. Unless the title acquired in the exercise of the right of eminent domain is a complete fee simple title for all purposes, the condemning corporation cannot sell or dispose of the land except by legislative act for any other use[54] than one like the use for which it was

the owner of the fee to the mesne profits. Ross *v.* Pennsylvania R. Co., (Pa. 1886) 4 Atl. 850.

47. Detroit City R. Co. *v.* Mills, 85 Mich. 634, 48 N. W. 1007.

48. Doon *v.* Natick, 171 Mass. 228, 50 N. E. 616; Tucker *v.* Tower, 9 Pick. (Mass.) 109, 19 Am. Dec. 350 (holding that a turnpike company may make use of the land by erecting a toll-house); Cincinnati *v.* Penny, 21 Ohio St. 499, 8 Am. Rep. 73; Hyde Park *v.* Kilgour, 20 Ohio Cir. Ct. 451, 10 Ohio Cir. Dec. 837; Rhode Island Hospital Trust Co. *v.* Hayden, 20 R. I. 544, 40 Atl. 421, 42 L. R. A. 107; Clutter *v.* Davis, 25 Tex. Civ. App. 532, 62 S. W. 1107.

49. Butchers' Slaughtering, etc., Assoc. *v.* Com., 169 Mass. 103, 47 N. E. 599.

Agreeing to take into a sewer the sewage of other cities and towns is not a new appropriation of the land such as to entitle the owner to further compensation. Titus *v.* Boston, 161 Mass. 209, 36 N. E. 793.

50. Belcher Sugar Refining Co. *v.* St. Louis Grain Elevator Co., 82 Mo. 121, 101 Mo. 192, 13 S. W. 822, 8 L. R. A. 801, holding that land condemned for a wharf cannot be leased unconditionally for a term of years for a strictly private business.

But its use for a grain elevator is not inconsistent with its use as a wharf. Belcher Sugar Refining Co. *v.* St. Louis Grain Elevator Co., 82 Mo. 121, 101 Mo. 192, 13 S. W. 822, 8 L. R. A. 801.

51. *Illinois.*— Suburban R. Co. *v.* Metropolitan West Side El. R. Co., 193 Ill. 217, 61 N. E. 1090.

Iowa.— Stodghill *v.* Chicago, etc., R. Co., 43 Iowa 26, 22 Am. Rep. 210.

Kansas.— State *v.* Armell, 8 Kan. 288, holding that condemnation of land for a right of way gives a railroad company no right to enter and dig ditches to adjacent land, although such ditches are necessary for the proper drainage and protection of the railroad.

New Jersey.— National Docks, etc., Connecting R. Co. *v.* State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. Rep. 421.

Pennsylvania.— Ross *v.* Pennsylvania R. Co., (1886) 4 Atl. 850.

Texas.— Muhle *v.* New York, etc., R. Co., 86 Tex. 459, 25 S. W. 607; Lyon *v.* McDonald, 78 Tex. 71, 14 S. W. 261, 9 L. R. A. 295; Croley *v.* St. Louis Southwestern R. Co., (Civ. App. 1900) 56 S. W. 615.

See 18 Cent. Dig. tit. "Eminent Domain," § 841.

A railroad company may erect within the limits of its right of way telegraph poles, and operate a telegraph line along such right of way (Prather *v.* Western Union Tel. Co., 89 Ind. 501. See also Payne *v.* Kansas, etc., R. Co., 46 Fed. 546), or erect buildings, although they obstruct a private right of way (Boston Gaslight Co. *v.* Old Colony, etc., R. Co., 14 Allen (Mass.) 444). But it cannot use land so condemned for a bridge with a wagon and footway as well as for railroad purposes (Payne *v.* Kansas, etc., R. Co., 46 Fed. 546) or remove the lateral support of adjacent property (McCullough *v.* St. Paul, etc., R. Co., 52 Minn. 12, 53 N. W. 802); Mosier *v.* Oregon Nav. Co., 39 Oreg. 256, 64 Pac. 453, 87 Am. St. Rep. 652.

Depot.— It is not essential that lands condemned for depot purposes should be used for the depot building alone (Muhle *v.* New York, etc., R. Co., (Tex. Civ. App. 1893) 23 S. W. 809) or that the building should be used solely for railway purposes (Peirce *v.* Boston, etc., R. Corp., 141 Mass. 481, 6 N. E. 96).

Recovery of rent.— If a railroad company permits a party to store lumber and erect an office and shed on part of the land which it has condemned for depot purposes, the owner of the fee may recover from such party the rental value of the land so used. Lyon *v.* McDonald, 78 Tex. 71, 14 S. W. 261, 9 L. R. A. 295.

52. Chicago, etc., R. Co. *v.* Hogan, 105 Ill. App. 136; Henry *v.* Dubuque, etc., R. Co., 2 Iowa 288; Com. *v.* Hartford, etc., R. Co., 14 Gray (Mass.) 379; Dougherty *v.* Wabash, etc., R. Co., 19 Mo. App. 419.

A railroad company may use condemned land to any extent which the exigencies of its business may demand. Cummins *v.* Des Moines, etc., R. Co., 63 Iowa 397, 19 N. W. 268.

Where one lays out a private wagon road on his own land, the same title is acquired thereto by the condemnation of a right of way across it as to the remainder of the tract condemned. Charleston, etc., R. Co. *v.* Fleming, 118 Ga. 699, 45 S. E. 664.

53. Willey *v.* Norfolk Southern R. Co., 98 N. C. 263, 3 S. E. 485.

54. Western Union Tel. Co. *v.* American Union Tel. Co., 65 Ga. 160, 38 Am. Rep. 781; Fairchild *v.* St. Paul, 46 Minn. 540, 49 N. W. 325; Barker *v.* Hartman Steel Co., 6 Pa. Co.

condemned.[55] The land condemned may, however, be mortgaged for purposes connected with its use.[56]

4. Change of Use. Where a state has through the proper agencies appropriated land for a public use it may authorize a change in the use to another of a like character without working a reversion to the original owner;[57] and it seems that it is immaterial whether or not the fee passed by the condemnation.[58] But this power is in the legislature only and does not extend to the company having the original use,[59] except where it holds a title in fee to the land and the use to which it is changed is a public one.[60] A change in the method of use may be made, however, where the use itself is not changed.[61]

E. Abandonment — 1. Effect — a. In General. Except where the effect of condemnation proceedings was to divest the owner of his title,[62] an abandonment of the property condemned by the party condemning entitles the owner to

Ct. 183; Strong *v.* Brooklyn, 68 N. Y. 1. And it is immaterial that the railroad is under state control. Western Union Tel. Co. *v.* American Union Tel. Co., *supra*.

55. *Massachusetts.*—Westcott *v.* New York, etc., R. Co., 152 Mass. 465, 25 N. E. 840.

Minnesota.— Crolley *v.* Minneapolis, etc., R. Co., 30 Minn. 541, 16 N. W. 422.

Missouri.— Kansas City, etc., R. Co. *v.* Kansas City, etc., R. Co., 129 Mo. 62, 31 S. W. 451; Chouteau *v.* Missouri Pac. R. Co., 122 Mo. 375, 22 S. W. 458, 30 S. W. 299; Cory *v.* Chicago, etc., R. Co., 100 Mo. 282, 13 S. W. 346; Gray *v.* St. Louis, etc., R. Co., 81 Mo. 126.

New York.— Roby *v.* New York Cent., etc., R. Co., 142 N. Y. 176, 36 N. E. 1053 [*reversing* 65 Hun 522, 20 N. Y. Suppl. 551].

Ohio.— Pittsburg, etc., R. Co. *v.* Garlick, 20 Ohio Cir. Ct. 561, 11 Ohio Cir. Dec. 337.

Virginia.— Callison *v.* Hedrick, 15 Gratt. 244.

See 18 Cent. Dig. tit. "Eminent Domain," § 846.

56. Eldridge *v.* Smith, 34 Vt. 484. See Railroads; Street Railroads; Telegraphs and Telephones; Toll-Roads.

57. *Georgia.*— Western Union Tel. Co. *v.* American Union Tel. Co., 65 Ga. 160, 38 Am. Rep. 781.

Iowa.— Central Iowa R. Co. *v.* Moulton, etc., R. Co., 57 Iowa 249, 10 N. W. 639.

Kentucky.— Curran *v.* Louisville, 83 Ky. 628, 7 Ky. L. Rep. 734.

Louisiana.— Louisville Postal Tel. Cable Co. *v.* Louisiana Western R. Co., 49 La. Ann. 1270, 22 So. 219.

New York.— Eldridge *v.* Binghamton, 42 Hun 202 [*affirmed* in 120 N. Y. 309, 24 N. E. 462].

Ohio.— Malone *v.* Toledo, 28 Ohio St. 643.

England.— Astley *v.* Manchester, etc., R. Co., 2 De G. & J. 453, 4 Jur. N. S. 567, 27 L. J. Ch. 478, 6 Wkly. Rep. 561, 59 Eng. Ch. 359.

See 18 Cent. Dig. tit. "Eminent Domain," § 857.

58. Curran *v.* Louisville, 83 Ky. 628, 7 Ky. L. Rep. 734; Merrimack River Locks, etc. *v.* Nashua, etc., R. Co., 104 Mass. 1, 6 Am. Rep. 181; Sweet *v.* Buffalo, etc., R. Co., 13 Hun (N. Y.) 643.

59. Louisville Postal Tel. Cable Co. *v.* Louisiana Western R. Co., 49 La. Ann. 1270, 22 So. 219; Strong *v.* Brooklyn, 68 N. Y. 1.

In England if a railroad company abandons its undertaking and applies the land to a different purpose, the landowner has no new right which a court of equity will enforce. Astley *v.* Manchester, etc., R. Co., 2 De G. & J. 453, 4 Jur. N. S. 567, 27 L. J. Ch. 478, 6 Wkly. Rep. 561, 59 Eng. Ch. 359; Dover Harbor *v.* South-Eastern R. Co., 9 Hare 489, 21 L. J. Ch. 886, 41 Eng. Ch. 489.

60. Detroit City R. Co. *v.* Mills, 85 Mich. 634, 48 N. W. 1007, holding that where the owner receives as damages the full market value of his land there can be no such thing as damages to his reversionary interest by any use which is a public one. And see Hatch *v.* Cincinnati, etc., R. Co., 18 Ohio St. 92, holding that the owner might recover a full and fair compensation for additional burdens and inconveniences not common to the general public.

61. Dougherty *v.* Wabash, etc., R. Co., 19 Mo. App. 419; Hummel *v.* Cumberland Valley R. Co., 175 Pa. St. 537, 34 Atl. 848.

62. Merrimack River Locks, etc. *v.* Nashua, etc., R. Co., 104 Mass. 1, 6 Am. Rep. 181; Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70 [*reversing* 3 Lans. 429]; People *v.* Palatine, 53 Barb. (N. Y.) 70; Heyward *v.* New York, 8 Barb. (N. Y.) 486; De Varaigne *v.* Fox, 7 Fed. Cas. No. 3,836, 2 Blatchf. 95.

The fee-simple title to lands appropriated by the state or by the United States for public purposes remains in those governments respectively, although the use of the lands or the purpose for which they were appropriated has ceased. State *v.* Griftner, 61 Ohio St. 201, 55 N. E. 612; U. S. *v.* Seufert Bros. Co., 87 Fed. 35.

What is not an abandonment.— Under Ohio Rev. St. § 6434 a failure of the condemning company to comply within thirty days with an order of the probate court directing it to make payment or deposit of the amount of the verdict shall be held and considered as an abandonment by it of the property; but this rule has no application during the pendency of a proceeding in error, commenced by the corporation to review the verdict and order of confirmation in a probate court. State *v.* Waite, 25 Ohio Cir. Ct. 216.

reënter,[63] and he cannot be deprived of his reversionary interest either by an act of the condemning party or by the legislature without compensation.[64] But the condemning party should have a reasonable opportunity to remove its property from the land abandoned.[65]

b. On Right to Compensation. Upon the ground that by entering and using the land under proper proceedings the rights of the respective parties thereby become vested, the condemning company cannot avoid payment of the compensation or damages awarded by thereafter abandoning the land,[66] although the rule is otherwise if such abandonment takes place before such rights have become vested, as before the company has entered upon and used the land.[67] For the same reason the condemning company is not entitled after abandonment to recover from the owner or depositary the amount of compensation or damages awarded, and which has been paid or deposited, although the title reverts to the owner,[68] unless it has not entered on the land or injured it in any way,[69] or unless

63. *Connecticut.*— Waterbury *v.* Platt, 76 Conn. 435, 56 Atl. 856.

Illinois.—Chicago, etc., R. Co. *v.* Clapp, 201 Ill. 418, 66 N. E. 223.

Iowa.— Remey *v.* Iowa Cent. R. Co., 116 Iowa 133, 89 N. W. 218; Hastings *v.* Burlington, etc., R. Co., 38 Iowa 316.

Massachusetts.— Merrimack River Locks, etc. *v.* Nashua, etc., R. Co., 104 Mass. 1, 6 Am. Rep. 181.

Missouri.— Kellogg *v.* Malin, 50 Mo. 496, 11 Am. Rep. 426, 62 Mo. 429.

New York.— Strong *v.* Brooklyn, 68 N. Y. 1; Heard *v.* Brooklyn, 60 N. Y. 242; Roby *v.* Yates, 70 Hun 35, 23 N. Y. Suppl. 1108.

Pennsylvania.— Jessup *v.* Loucks, 55 Pa. St. 350. And see Sholl *v.* Stump, 24 Pa. Super. Ct. 48.

United States.— Newton *v.* Manufacturers' R. Co., 115 Fed. 781, 53 C. C. A. 599.

See 18 Cent. Dig. tit. "Eminent Domain," § 854.

Land taken for a public highway or turnpike is within this rule.

Connecticut.— Benham *v.* Potter, 52 Conn. 248.

Iowa.— Remey *v.* Iowa Cent. R. Co., 116 Iowa 133, 89 N. W. 218.

Nebraska.— Omaha Southern R. Co. *v.* Beeson, 36 Nebr. 361, 54 N. W. 557.

New York.—Dunham *v.* Williams, 36 Barb. 136; Hooker *v.* Utica, etc., Turnpike Road Co., 12 Wend. 371.

Wisconsin.— Kimball *v.* Kenosha, 4 Wis. 321.

United States.— Harris *v.* Elliott, 10 Pet. 25, 9 L. ed. 333.

Canada.— Gauthier *v.* Monarque, 19 Quebec Super. Ct. 93.

See 18 Cent. Dig. tit. "Eminent Domain," § 854.

A statute providing that land condemned for mill purposes shall revert to the former owner on a failure for one year to rebuild a destroyed mill does not apply where the owner of the mill owns the land on both sides of the stream. McDougle *v.* Clark, 7 B. Mon. (Ky.) 448.

64. Heard *v.* Brooklyn, 60 N. Y. 242.

Where a plank-road is abandoned, and the legislature takes it under the right of eminent domain for public use as a highway, the owners of the fee are entitled to be compensated for their entire reversionary interest therein, including the soil, the fences thereon, the right of way, and all the advantages arising from its former use. People *v.* Lawrence, 54 Barb. (N. Y.) 589. *Compare* Northern R. Co. *v.* Earhardt, 167 Mo. 612, 27 S. W. 229; Heath *v.* Barman, 49 Barb. (N. Y.) 496.

65. Wagner *v.* Cleveland, etc., R. Co., 22 Ohio St. 563, 10 Am. Rep. 770. See also Clements *v.* Philadelphia Co., 184 Pa. St. 28, 38 Atl. 1090, 39 L. R. A. 532, holding that if a gas company which has laid its pipes over private property discontinues their use it may enter upon the land and remove them.

66. Ragan *v.* Kansas City, etc., R. Co., 144 Mo. 623, 46 S. W. 602; Brown *v.* Chicago, etc., R. Co., 64 Nebr. 62, 89 N. W. 405; Babcock *v.* Chicago, etc., R. Co., 107 Wis. 280, 83 N. W. 316. And see Hawkins *v.* Rochester, 1 Wend. (N. Y.) 53, 19 Am. Dec. 462, holding that in proceedings relative to the laying out and opening of streets, under the act to incorporate the village of Rochester, the trustees of the village cannot discontinue such proceedings so as to avoid the payment of a sum of money awarded to an individual as damages by the verdict of a jury.

67. Stacey *v.* Vermont Cent. R. Co., 27 Vt. 39. But see Harrington *v.* Berkshire, 22 Pick. (Mass.) 263, 33 Am. Dec. 741, holding that where the county commissioners laid out a highway and passed the usual orders for making it, the owner of land over which it was laid out was entitled to the payment of damages awarded him, although the proceedings were discontinued before the proper time arrived for granting an order on the county treasurer for the payment of such damages, and although his land was never entered upon.

68. Shannahan *v.* Waterbury, 63 Conn. 420, 28 Atl. 611; Hastings *v.* Burlington, etc., R. Co., 38 Iowa 316; Hampton *v.* Coffin, 4 N. H. 517; Stiles *v.* Middlesex, 8 Vt. 436.

69. Reynolds *v.* Louisiana, etc., R. Co., 59 Ark. 171, 26 S. W. 1039; Atchison, etc., R. Co. *v.* Wilson, 66 Kan. 233, 69 Pac. 342 (holding that the fact that the proceedings have been conducted to a final termination

the proceedings under which the condemning corporation acquired its rights to the land were void.[70]

c. Retaking. On the other hand if after an abandonment by a railroad company it resumes possession and constructs its road the owner cannot recover compensation the second time;[71] and if another company condemns the abandoned right of way the owner is not entitled to compensation for any injury to the tract as a whole, but is only entitled to compensation for the strip actually appropriated.[72]

2. What Constitutes — a. In General. Where there has been an abandonment is a question of intention to be determined by the jury,[73] and to constitute it in general there must be a non-user and an intention to abandon.[74] Thus mere

does not preclude the condemning company from reclaiming the amount deposited if it has abstained from making an actual entry on the land, and has abandoned its intention to use the land for its purpose and has given notification of such abandonment); Stiles v. Middlesex, 8 Vt. 436.

A party who has once instituted condemnation proceedings is not bound to go on and complete the proceedings and take the property, and there is no charge upon a deposit for damages if none are sustained. Reynolds v. Louisiana, etc., R. Co., 59 Ark. 171, 26 S. W. 1039.

The theory upon which the above rule is based is that upon a final termination of the proceedings the right of the condemning company to take and hold the lands for its purposes and the right of the owner to the money are correlative and coincident, and vest simultaneously in them, and that no voluntary abandonment of the right to take and use the lands when once fully acquired will divest the owner of his right to the money which has once vested in him. Brattleboro First Nat. Bank v. West River R. Co., 49 Vt. 167.

70. Brattleboro First Nat. Bank v. West River Co., 49 Vt. 167. And see Gallatin v. Loucks, 21 Barb. (N. Y.) 578.

71. Chicago, etc., R. Co. v. Bean, 69 Iowa 257, 28 N. W. 585.

72. Central Iowa R. Co. v. Moulton, etc., R. Co., 57 Iowa 249, 10 N. W. 639 (holding that compensation shall not be paid to the owner the second time, where paid by the former company); Northern R. Co. v. Earhardt, 167 Mo. 612, 67 S. W. 229. *Compare* People v. Lawrence, 54 Barb. (N. Y.) 589.

73. Tennessee, etc., R. Co. v. Taylor, 102 Ala. 224, 14 So. 379; Westcott v. New York, etc., R. Co., 152 Mass. 465, 25 N. E. 840; Roby v. New York Cent., etc., R. Co., 142 N. Y. 176, 36 N. E. 1053 [*reversing* 65 Hun 532, 20 N. Y. Suppl. 551]; Muhle v. New York, etc., R. Co., 86 Tex. 459, 25 S. W. 607 [*reversing* (Tex. Civ. App. 1893) 23 S. W. 809].

It is competent to show, as bearing on the question of intention, that a railroad was built merely for hauling supplies and coal to and from a mine, and that the mine has become exhausted. Chicago, etc., R. Co. v. Clapp, 201 Ill. 418, 66 N. E. 223.

The expression of an intention not to abandon is not conclusive, but may be considered in connection with other acts and conduct. Chicago, etc., R. Co. v. Clapp, 201 Ill. 418, 66 N. E. 223.

A statute providing that an abandonment shall take effect under certain circumstances does not operate retrospectively. Skillman v. Chicago, etc., R. Co., 78 Iowa 404, 43 N. W. 275, 16 Am. St. Rep. 452.

The abandonment need not appear of record. Westcott v. New York, etc., R. Co., 152 Mass. 465, 25 N. E. 840.

74. *Alabama.*— Tennessee, etc., R. Co. v. Taylor, 102 Ala. 224, 14 So. 379.

Illinois.— Chicago, etc., R. Co. v. Clapp, 201 Ill. 418, 66 N. E. 223; Durfee v. Peoria, etc., R. Co., 140 Ill. 435, 30 N. E. 686.

Kentucky.— Curran v. Louisville, 83 Ky. 628, 7 Ky. L. Rep. 734.

New York.— New York v. Carleton, 113 N. Y. 284, 21 N. E. 55.

United States.— Newton v. Manufacturers' R. Co., 115 Fed. 781, 53 C. C. A. 599; Wood v. Mobile, 107 Fed. 846, 47 C. C. A. 9.

Canada.— Gauthier v. Monarque, 19 Quebec Super. Ct. 93.

See 18 Cent. Dig. tit. "Eminent Domain," § 860.

Presumption.— No abandonment or lapse of a railroad company's rights can be presumed when the company has promptly expended large sums of money in the survey, location, and partial construction of its road within the period prescribed by its charter. Wilkesbarre, etc., R. Co. v. Danville, etc., R. Co., 29 Leg. Int. (Pa.) 373.

A consolidation and merger of one railroad company with another, or the transfer of one to another of its franchises and rights, does not amount to an abandonment. Westcott v. New York, etc., R. Co., 152 Mass. 465, 25 N. E. 840; Crolley v. Minneapolis, etc., R. Co., 30 Minn. 541, 16 N. W. 422; Miner v. New York Cent., etc., R. Co., 123 N. Y. 242, 25 N. E. 339 [*affirming* 46 Hun 612]; Beal v. New York Cent., etc., R. Co., 41 Hun (N. Y.) 172; Terry v. New York Cent., etc., R. Co., 67 How. Pr. (N. Y.) 439; Callison v. Hedrick, 15 Gratt. (Va.) 244.

Partial abandonment.— There may be an abandonment of a part of a constructed railroad or highway, although the remainder of it is in operation.

Iowa.— Central Iowa R. Co. v. Moulton, etc., R. Co., 57 Iowa 249, 10 N. W. 639.

misuser,[75] or non-user,[76] unless accompanied with a failure to pay the compensation,[77] does not constitute an abandonment.

b. Sale or Lease. The sale of a part of the land constitutes an abandonment,[78] except where it is for another like purpose.[79] A lease of part, reserving control and possession in the condemning company, does not constitute an abandonment;[80] it is otherwise if the lessee is permitted to take exclusive possession.[81]

EMIT BILLS OF CREDIT. A phrase which conveys to the mind the idea of issuing paper, intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day.[1]

EMOLUMENT. See OFFICERS.

EMPIRICISM. A practice of medicine founded on mere experience without the aid of science or the knowledge of principles.[2]

EMPLOY. As a noun, EMPLOYMENT,[3] *q. v.* As a verb, to engage in a service;[4]

Massachusetts.— Westcott *v.* New York, etc., R. Co., 152 Mass. 465, 25 N. E. 840.

New York.— People *v.* Palatine, 53 Barb. 70.

Ohio.— Pennsylvania Co. *v.* Platt, 47 Ohio St. 366, 25 N. E. 1028; Platt *v.* Pennsylvania Co., 43 Ohio St. 228, 1 N. E. 420.

Canada.—Gauthier *v.* Monarque, 19 Quebec Super. Ct. 93.

Withdrawal of the deposit constitutes an abandonment of all future rights to the possession of the land. Hull *v.* Chicago, etc., R. Co., 21 Nebr. 371, 32 N. W. 162.

75. Dillon *v.* Kansas City, etc., R. Co., 67 Kan. 687, 74 Pac. 251; Hamilton *v.* Annapolis, etc., R. Co., 1 Md. Ch. 107; Peirce *v.* Boston, etc., R. Co., 141 Mass. 481, 6 N. E. 96; Merrimack River Locks, etc. *v.* Nashua, etc., R. Co., 104 Mass. 1, 6 Am. Rep. 181; Prospect Park, etc., R. Co. *v.* Williamson, 91 N. Y. 552.

76. *Illinois.*—Durfee *v.* Peoria, etc., R. Co., 140 Ill. 435, 30 N. E. 686.

Kentucky.— Curran *v.* Louisville, 83 Ky. 628, 7 Ky. L. Rep. 734.

Massachusetts.— Williams *v.* Nelson, 23 Pick. 141, 34 Am. Dec. 45, if for a period less than the statutory limitation.

Nebraska.— Struve *v.* Republican Valley R. Co., 2 Nebr. (Unoff.) 585, 89 N. W. 604.

New York.— Roby *v.* Yates, 70 Hun 35, 23 N. Y. Suppl. 1108.

Pennsylvania.— Ross *v.* Pennsylvania R. Co., 17 Phila. 339 [*affirmed* in (1886) 4 Atl. 850].

Texas.— Muhle *v.* New York, etc., R. Co., (Civ. App. 1893) 23 S. W. 809, holding that the fact that a depot was not erected on the land condemned for that purpose proves no abandonment of the land, if it was used in connection with the depot.

United States.— Wood *v.* Mobile, 107 Fed. 846, 47 C. C. A. 9.

77. Coburn *v.* Sands, 150 Ind. 141, 48 N. E. 786; State *v.* Cincinnati, etc., R. Co., 17 Ohio St. 103. *Compare* Stevens *v.* Norfolk, 42 Conn. 377.

78. Strong *v.* Brooklyn, 68 N. Y. 1. But *compare* New York *v.* Carleton, 113 N. Y. 284, 21 N. E. 55.

79. Westcott *v.* New York, etc., R. Co., 152 Mass. 465, 25 N. E. 840; Crolley *v.* Minneapolis, etc., R. Co., 30 Minn. 541, 16 N. W. 422; Pittsburgh, etc., R. Co. *v.* Garlick, 20 Ohio Cir. Ct. 561, 11 Ohio Cir. Dec. 337; Callison *v.* Hedrick, 15 Gratt. (Va.) 244. But see Pennsylvania Co. *v.* Platt, 47 Ohio St. 366, 25 N. E. 1028, 43 Ohio St. 228, 1 N. E. 420.

80. Dillon *v.* Kansas City, etc., R. Co., 67 Kan. 687, 74 Pac. 251; Roby *v.* New York Cent., etc., R. Co., 142 N. Y. 176, 36 N. E. 1053 [*reversing* 65 Hun 532, 20 N. Y. Suppl. 551]. And see Curran *v.* Louisville, 83 Ky. 628, 7 Ky. L. Rep. 734.

81. Roby *v.* Yates, 70 Hun (N. Y.) 35, 23 N. Y. Suppl. 1108. But see Merrimack River Locks, etc. *v.* Nashua, etc., R. Co., 104 Mass. 1, 6 Am. Rep. 181.

1. Craig *v.* Missouri, 4 Pet. (U. S.) 410, 432, 7 L. ed. 903 [*quoted* in McFarland *v.* State Bank, 4 Ark. 44, 49, 37 Am. Dec. 761; Linn *v.* State Bank, 2 Ill. 87, 91, 25 Am. Dec. 71; Houston, etc., R. Co. *v.* Texas, 177 U. S. 66, 85, 20 S. Ct. 545, 44 L. ed. 673], where Marshall, C. J., said: "The word 'emit' is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated 'bills of credit.'" See also Briscoe *v.* Kentucky Bank, 11 Pet. (U. S.) 257, 328*d*, 9 L. ed. 709, 928.

2. Parks *v.* State, 159 Ind. 211, 226, 64 N. E. 862, 59 L. R. A. 190; Nelson *v.* State Bd. of Health, 108 Ky. 769, 777, 57 S. W. 501, 22 Ky. L. Rep. 438, 50 L. R. A. 383.

3. Century Dict. And see *Ex p.* Branfill, 9 Morr. Bankr. Cas. 157, 158, 40 Wkly. Rep. 670.

4. Emmens *v.* Elderton, 13 C. B. 495, 517, 76 E. C. L. 495, 4 H. L. Cas. 624, 10 Eng. Reprint 606, 26 Eng. L. & Eq. 1. As to employ a minister (Robinson *v.* Cocheu, 18 N. Y. App. Div. 325, 328, 46 N. Y. Suppl. 55) or a teacher (Malloy *v.* Board of Education, 102 Cal. 642, 646, 36 Pac. 948).

to engage in one's service;[5] to have in service; to cause to be engaged in doing something; to have or keep at work; to give employment or occupation to;[6] to retain in service, or to give actual work to be done by the person employed;[7] to hire;[8] to engage or use another as an agent or substitute in transacting business, or the performance of some service;[9] to use as an agent or substitute in transacting business; to commission and intrust with the management of one's affairs;[10] to intrust;[11] to intrust with some duty or behest;[12] to entrust with the management of any affairs;[13] to intrust with some agency or duty; making use of, intrusting with some agency or duty;[14] to use[15]—as an instrument or means of effecting an object,[16] as means, as materials—to commission;[17] to make use of;[18] to put to a purpose;[19] to select, or to designate;[20] to occupy;[21] to occupy the time, attention and labor of; to keep busy or at work, etc.[22] (See, generally, MASTER AND SERVANT; PRINCIPAL AND AGENT.)

EMPLOYED. As applied to persons, engaged or about to be engaged;[23] engaged or occupied in the performance of work or duties;[24] hired to perform

5. McCluskey *v.* Cromwell, 11 N. Y. 593, 599; Elderton *v.* Emmons, 6 C. B. 160, 176, 17 L. J. C. P. 307, 60 E. C. L. 158 [*citing* Johnson Dict.; Webster Dict.]; Webster Dict. [*quoted* in State *v.* Foster, 37 Iowa 404, 407; People *v.* McKinney, 10 Mich. 54, 83].

6. Mousseau *v.* Sioux City, 113 Iowa 246, 249, 84 N. W. 1027 [*quoting* Webster Dict., and *citing* McCluskey *v.* Cromwell, 11 N. Y. 593; Emmens *v.* Elderton, 13 C. B. 495, 76 E. C. L. 495, 4 H. L. Cas. 624, 10 Eng. Reprint 606, 18 Jur. 21, 26 Eng. L. & Eq. 1].

7. Turner *v.* Sawdon, [1901] 2 K. B. 653, 659, 70 L. J. K. B. 897, 85 L. T. Rep. N. S. 222, 49 Wkly. Rep. 712 [*citing* Fechter *v.* Montgomery, 33 Beav. 22]; Emmens *v.* Elderton, 13 C. B. 495, 76 E. C. L. 495, 4 H. L. Cas. 624, 10 Eng. Reprint 606, 18 Jur. 21, 26 Eng. L. & Eq. 1, where it is said: "There are many cases in which the nature of the work to be done shews which of these meanings should be adopted."

8. Bingham *v.* Scott, 177 Mass. 208, 211, 58 N. E. 687, where it is said: "There are various senses in which the verb 'employ' and its derivatives are used. But when used in connection with matters of ordinary business, as in this statute [relative to the employment of a broker to effect a sale], it means, we think, service rendered or to be rendered for compensation, and is nearly or quite synonymous with 'hire,' though, as said by the authors of the Standard Dictionary, a word of more dignity than that."

"Employ" carries with it the idea, and almost the essence, of a contract, when used to the effect that a person has been employed. U. S. *v.* Nourse, 27 Fed. Cas. No. 15,901, 4 Cranch C. C. 151.

"Employing" is distinguished from "hiring" in Mousseau *v.* Sioux City, 113 Iowa 246, 249, 84 N. W. 1027; McCloskey *v.* Cromwell, 11 N. Y. 593, 605.

9. Gurney *v.* Atlantic, etc., R. Co., 58 N. Y. 358, 371.

10. McCluskey *v.* Cromwell, 11 N. Y. 593, 599; Webster Dict. [*quoted* in State *v.* Foster, 37 Iowa 404, 407].

11. Murray *v.* Walker, 83 Iowa 202, 208, 48 N. W. 1075.

12. Webster Dict. [*quoted* in Mousseau *v.* Sioux City, 113 Iowa 246, 249, 84 N. W. 1027].

13. Johnstone Dict. [*quoted* in Kearney *v.* Oakes, 20 Nova Scotia 30, 38].

14. Worcester Dict. [*quoted* in Nashville, etc., R. Co. *v.* State, 83 Ala. 71, 76, 3 So. 702].

15. Murray *v.* Walker, 83 Iowa 202, 208, 48 N. W. 1075; U. S. *v.* The Anjer Head, 46 Fed. 664; Webster Dict. [*quoted* in Mousseau *v.* Sioux City, 113 Iowa 246, 249, 84 N. W. 1072].

16. McCluskey *v.* Cromwell, 11 N. Y. 593, 605, where it is said: "This is one of the senses in which the word is commonly and frequently used."

17. Johnstone Dict. [*quoted* in Kearney *v.* Oakes, 20 Nova Scotia 30, 38].

18. Nashville, etc., R. Co. *v.* State, 83 Ala. 71, 76, 3 So. 702; U. S. *v.* The Anjer Head, 46 Fed. 664.

19. U. S. *v.* The Anjer Head, 46 Fed. 664.

20. *In re* Astor, 50 N. Y. 363, 368, under a statute authorizing the common council to employ newspapers to publish official matters, etc.

21. Murray *v.* Walker, 83 Iowa 202, 208, 48 N. W. 1075.

22. Webster Dict. [*quoted* in People *v.* McKinney, 10 Mich. 54, 83].

23. Carpenter *v.* Strickland, 20 S. C. 1, 5.

As defined under a statute relative to trades unions, the term includes any servant or workman who has entered into a contract of service with an employer (Reg. *v.* Bunn, 12 Cox C. C. 316, 349); and under a workshop regulation act, occupied in any handicraft, whether for wages or not, under a master or under a parent (Beadon *v.* Parrott, L. R. 6 Q. B. 718, 719, 40 L. J. M. C. 200, 19 Wkly. Rep. 1144).

24. Oxford Tp. School Dist. No. 2 *v.* Dilman, 22 Ohio St. 194, 195 (employed as teacher); Com. *v.* Binns, 17 Serg. & R. (Pa.) 219, 220; King *v.* U. S., 32 Ct. Cl. 234, 244 (employed in postal service); Hopkinson *v.* Caunt, 14 Q. B. D. 592, 595, 54 L. J. Q. B. 284, 49 J. P. 550, 33 Wkly. Rep. 522 ("employed in the mine"); Hoyle *v.* Oran, 12 C. B. N. S. 124, 138, 8 Jur. N. S. 1154, 31 L. J. M. C. 213, 104 E. C. L. 124 (employed in print

labor;[25] a term which means not only the act of doing a thing, but also to be engaged to do it, to be under contract or orders to do it;[26] either busy or occupied at work, or commissioned or intrusted with the management of an affair.[27] As applied to tangible objects, used,[28] destined to be used,[29] habitually used.[30] As applied to capital, used, kept at work or busy;[31] invested.[32] (See EMPLOY; EMPLOYMENT.)

EMPLOYED IN SLAVE TRADE. Employed in the traffic or business and not merely the actual transportation of slaves.[33]

EMPLOYEE.[34] One who works for an employer; a person working for salary

works); Reg. *v.* Reason, 6 Cox C. C. 227, 2 C. L. R. 120, Dears. C. C. 226, 7 Jur. 1014, 23 L. J. M. C. 11, 13, 2 Wkly. Rep. 54 (employed in postal service); Higham *v.* Wright, 2 C. P. D. 397, 402, 46 L. J. M. C. 223, 37 L. T. Rep. N. S. 187 ("employed in or about the mine").

Employed as attorney or solicitor see Baile *v.* Baile, L. R. 13 Eq. 497, 501, 41 L. J. Ch. 300, 26 L. T. Rep. N. S. 283, 20 Wkly. Rep. 534. See also *In re* Muldaur, 17 Fed. Cas. No. 9,905, 8 Ben. 65 ("necessarily employed by the assignee" in bankruptcy); *Ex p.* Moses, L. R. 9 Q. B. 1, 3, 43 L. J. Q. B. 13, 29 L. T. Rep. N. S. 420, 22 Wkly. Rep. 57 ("actually employed").

"Employed on [the] police force" see People *v.* York, 43 N. Y. App. Div. 444, 447, 60 N. Y. Suppl. 208.

25. McCluskey *v.* Cromwell, 11 N. Y. 593, 605. See also Drake *v.* State, 144 N. Y. 414, 416, 39 N. E. 342 ("employed by the state, or any officer thereof"); Reg. *v.* Foulkes, L. R. 2 C. C. 150, 152, 13 Cox C. C. 63, 39 J. P. 501, 44 L. J. M. C. 65, 32 L. T. Rep. N. S. 407, 23 Wkly. Rep. 696 ("employed . . . in the capacity of a clerk or servant").

26. U. S. *v.* Morris, 14 Pet. (U. S.) 464, 475, 10 L. ed. 543 [*quoted* in Ritchie *v.* People, 155 Ill. 98, 103, 40 N. E. 454, 46 Am. St. Rep. 315, 29 L. R. A. 79; McCunney *v.* New York, 40 N. Y. App. Div. 482, 484, 58 N. Y. Suppl. 138; King *v.* U. S., 32 Ct. Cl. 234, 244; U. S. *v.* The Catharine, 25 Fed. Cas. No. 14,755, 2 Paine 721, 735].

27. Brugier *v.* Moussier, 5 La. 93, 95.

28. U. S. *v.* The Anjer Head, 46 Fed. 664. As used in the phrase "employed in the military service," etc. Craig *v.* Nicholas, [1900] 2 Q. B. 444, 447, 64 J. P. 569, 69 L. J. Q. B. 608, 82 L. T. Rep. N. S. 765, 49 Wkly. Rep. 48. See also Wilson *v.* Gray, 127 Mass. 98, 99 ("regularly employed in the coasting trade"); The Emperor, 49 Fed. 751, 753 ("used or employed" in violating the federal statute against illegal dumping).

29. Reg. *v.* Freke, 7 Cox C. C. 32, 34, 5 E. & B. 944, 2 Jur. N. S. 162, 25 L. J. M. C. 64, 4 Wkly. Rep. 264, 85 E. C. L. 943. And see Electric Traction Co. *v.* New Orleans, 45 La. Ann. 1475, 1477, 14 So. 231; Martin *v.* New Orleans, 38 La. Ann. 397, 400, 58 Am. Rep. 194; New Orleans *v.* Arthurs, 36 La. Ann. 98, 99; Ingram *v.* Cowles, 150 Mass. 155, 156, 23 N. E. 48; Foster *v.* Tucker, L. R. 5 Q. B. 224, 39 L. J. M. C. 72, 22 L. T. Rep. N. S. 124.

"Employed by authority of law" used in reference to a ship placed in the service of a state for the purpose of nautical instruction under a statute see Barnette *v.* U. S., 30 Ct. Cl. 197, 206.

"Employed for Her Majesty's use or service" as used in a statute exempting persons erecting a building from giving the customary notice of an intention to build see Reg. *v.* Jay, 8 E. & B. 469, 477, 92 E. C. L. 469.

30. Hartranft *v.* Langfeld, 125 U. S. 128, 134, 8 S. Ct. 732, 31 L. ed. 672. See also Wilson *v.* Gray, 127 Mass. 98, 99.

31. People *v.* Wemple, 63 Hun (N. Y.) 444, 449, 18 N. Y. Suppl. 511.

"Employed within the state" as used in a statute relative to taxation see People *v.* Morgan, 86 N. Y. App. Div. 577, 579, 83 N. Y. Suppl. 998; People *v.* Knight, 75 N. Y. App. Div. 164, 166, 77 N. Y. Suppl. 398.

32. State *v.* Board of Assessors, 46 La. Ann. 859, 861, 15 So. 384, as used in a tax exemption statute. *Contra*, People *v.* Wemple, 63 Hun (N. Y.) 444, 449, 18 N. Y. Suppl. 511.

33. The Alexander, 1 Fed. Cas. No. 165, 3 Mason 175, under a statute rendering it unlawful for a vessel to engage in such traffic. See also U. S. *v.* Gooding, 12 Wheat. (U. S.) 460, 476, 6 L. ed. 693; The Alexander, 1 Fed. Cas. No. 165, 3 Mason 175, 177.

34. **Origin of term.** — The word is one adopted from the French. Stone *v.* U. S., 3 Ct. Cl. 260, 262. And see Johnston *v.* Barrills, 27 Oreg. 251, 258, 41 Pac. 656, 50 Am. St. Rep. 717, where it is said: "The words 'employer' and 'employé' are doubtless the outgrowth of the old terms of 'master' and 'servant,' and have been adopted by reason of and in deference to the exalted position labor has acquired by the education of the masses."

"The term 'employee' is the correlative of 'employer,' and neither term has, either technically or in general use, a restricted meaning by which any particular employment or service is indicated." People *v.* Buffalo, 57 Hun (N. Y.) 577, 581, 14 N. Y. Suppl. 314. See also Watson *v.* Watson Mfg. Co., 30 N. J. Eq. 588, 589; Brown *v.* A. B. C. Fence Co., 52 Hun (N. Y.) 151, 5 N. Y. Suppl. 95.

That the word may have different meanings in different connections admits of no doubt. People *v.* Buffalo, 57 Hun (N. Y.) 577, 579, 4 N. Y. Suppl. 314.

Regular and continual service is implied within the meaning of the term "employee." Clark *v.* Renninger, 89 Md. 66, 42 Atl. 928, 44 L. R. A. 413; Lewis *v.* Fisher, 80 Md. 139, 30 Atl. 608, 45 Am. St. Rep. 327, 26 L. R. A. 278; Louisville, etc., R. Co. *v.* Wilson, 138 U. S. 501, 11 S. Ct. 405, 34 L. ed. 1023.

or wages;[35] a person employed;[36] one who is employed;[37] a person who is employed; one who works for wages or salary or who is engaged in the service of another;[38] one whose time and skill are occupied in the business of his employer;[39] one who works for another for hire;[40] a person hired to work for wages as the employer may direct;[41] a laborer, when engaged in services under a contract for compensation.[42] And it seems that the term may include an attorney,[43] a bookkeeper,[44] a builder or contractor,[45] a civil engineer,[46] a clerk,[47] a collector,[48] a day laborer,[49] a drayman,[50] a fireman,[51] an insurance adjuster,[52] a keeper of accounts,[53] a

"Family of employee" is not included within the meaning of the term. *Ex p.* Koehler, 31 Fed. 315, 321, 12 Sawy. 446.

35. Applied to any one so working, but usually only to clerks, workmen, laborers, etc., but rarely to the higher officers of a government or corporation or to domestic servants. Century Dict. [*quoted* in Palmer v. Van Santvoord, 153 N. Y. 612, 614, 47 N. E. 915, 38 L. R. A. 402; People v. Buffalo, 57 Hun (N. Y.) 577, 579, 4 N. Y. Suppl. 314 (where it is said: "Among lexicographers the definition given by Professor Whitney in the Century Dictionary of the word 'employee' seems to me to be the most lucid and comprehensive").; Farmer v. St. Croix Power Co., 117 Wis. 76, 87, 93 N. W. 830, 98 Am. St. Rep. 914].

36. Jellett Cr. L. [*quoted* in State v. Sarlls, 135 Ind. 195, 34 N. E. 1129].

37. *In re* Stryker, 158 N. Y. 526, 53 N. E. 525, 70 Am. St. Rep. 489; People v. Beveridge Brewing Co., 91 Hun (N. Y.) 313, 36 N. Y. Suppl. 525; Matter of Fitzgerald, 21 Misc. (N. Y.) 226, 229, 45 N. Y. Suppl. 630; Webster Dict. [*quoted* in Ritter v. State, 111 Ind. 324, 326, 12 N. E. 501; Nichols v. State, 28 Ind. App. 674, 63 N. E. 783, 785; Farmer v. St. Croix Power Co., 117 Wis. 76, 86, 93 N. W. 830, 98 Am. St. Rep. 914; Stone v. U. S., 3 Ct. Cl. 260, 262]; Worcester Dict. [*quoted* in Stone v. U. S., 3 Ct. Cl. 260, 262].

38. Standard Dict. [*quoted* in Matter of Fitzgerald, 21 Misc. (N. Y.) 226, 229, 45 N. Y. Suppl. 630; Farmer v. State, 117 Wis. 76, 86, 93 N. W. 830, 98 Am. St. Rep. 914].

39. Texas, etc., R. Co. v. Smith, 67 Fed. 524, 527, 14 C. C. A. 509, 31 L. R. A. 321.

40. Cochran v. A. S. Baker Co., 30 Misc. (N. Y.) 48, 49, 61 N. Y. Suppl. 724.

41. Campfield v. Lang, 25 Fed. 128, 131.

42. Moore v. Heaney, 14 Md. 558, 562.

43. Gurney v. Atlantic, etc., R. Co., 58 N. Y. 358, 366; People v. Buffalo, 57 Hun (N. Y.) 577, 581, 11 N. Y. Suppl. 314; Pennsylvania Finance Co. v. Charleston, etc., R. Co., 52 Fed. 526, 527.

When does not include attorney see Clark v. Renninger, 89 Md. 66, 42 Atl. 928, 44 L. R. A. 413; Lewis v. Fisher, 80 Md. 139, 30 Atl. 608, 45 Am. St. Rep. 327, 26 L. R. A. 278; Narramore v. Clark, 63 N. H. 166, 167; Bristor v. Smith, 158 N. Y. 157, 53 N. E. 42; People v. Remington, 45 Hun (N. Y.) 329 [*affirmed* in 109 N. Y. 631, 16 N. E. 680]; Bristor v. Kretz, 22 Misc. (N. Y.) 55, 49 N. Y. Suppl. 404; Louisville, etc., R. Co. v. Wilson, 138 U. S. 501, 11 S. Ct. 405, 34 L. ed. 1023; Latta v. Lonsdale, 107 Fed. 585, 47 C. C. A. 1, 52 L. R. A. 479.

44. People v. Beveridge Brewing Co., 91 Hun (N. Y.) 313, 315, 36 N. Y. Suppl. 525; Brown v. A. B. C. Fence Co., 52 Hun (N. Y.) 151, 5 N. Y. Suppl. 95.

When does not include bookkeeper see *In re* Stryker, 158 N. Y. 526, 53 N. E. 525, 70 Am. St. Rep. 489; Malcomson v. Wappoo Mills, 86 Fed. 192, 198.

45. Moore v. Heaney, 14 Md. 558, 562.

Independent contractor or agent is not ordinarily included within the meaning of the term.

Iowa.— Foley v. Chicago, etc., R. Co., 64 Iowa 644, 21 N. W. 124; Ney v. Dubuque, etc., R. Co., 20 Iowa 347, 351.

Maine.— State v. Emerson, 72 Me. 435, 456.

Mississippi.— Ballard v. Mississippi Cotton Oil Co., 81 Miss. 507, 34 So. 533, 95 Am. St. Rep. 476, 62 L. R. A. 407.

Nebraska.— Maryland Fidelity, etc., Co. v. Parkinson, (1903) 94 N. W. 120, 122.

New Jersey.— Lehigh Coal, etc., Co. v. New Jersey Cent. R. Co., 29 N. J. Eq. 252, 255.

New York.— Balch v. New York, etc., R. Co., 46 N. Y. 521.

Pennsylvania.— Com. v. Behle, 1 Lack. Leg. N. 303.

Wisconsin.— Farmer v. St. Croix Power Co., 117 Wis. 76, 93 N. W. 830, 98 Am. St. Rep. 914; Lang v. Simmons, 64 Wis. 525, 25 N. W. 650.

United States.— Vane v. Newcombe, 132 U. S. 220, 10 S. Ct. 60, 33 L. ed. 310; Malcomson v. Wappoo Mills, 85 Fed. 907, 911; Tod v. Kentucky Union R. Co., 52 Fed. 241, 243, 3 C. C. A. 60, 18 L. R. A. 305; Campfield v. Lang, 25 Fed. 128, 131.

46. Texas, etc., R. Co. v. Smith, 67 Fed. 524, 527, 14 C. C. A. 509, 31 L. R. A. 321.

47. State v. Sarlls, 135 Ind. 195, 34 N. E. 1129; Worcester Dict. [*quoted* in Matter of Fitzgerald, 21 Misc. (N. Y.) 226, 229, 45 N. Y. Suppl. 630; Stone v. U. S., 3 Ct. Cl. 260, 262]. But see People v. Buffalo, 57 Hun (N. Y.) 577, 11 N. Y. Suppl. 314.

48. State v. Sarlls, 135 Ind. 195, 34 N. E. 1129.

49. People v. Buffalo, 57 Hun (N. Y.) 577, 581, 11 N. Y. Suppl. 314.

50. Watson v. Watson Mfg. Co., 30 N. J. Eq. 588, 589.

51. Wright v. Hartford, 50 Conn. 546, 547. But see People v. Buffalo, 57 Hun (N. Y.) 577, 11 N. Y. Suppl. 314.

52. American Casualty Ins. Co.'s Case, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97, in a general sense only, however, and not in a limited and restricted meaning of the term.

53. State v. Sarlls, 135 Ind. 195, 34 N. E. 1129.

laborer,[54] a mechanic,[55] an official,[56] a physician,[57] a policeman,[58] a railroad conductor, railroad agent, railroad superintendent, those engaged in operating the road and the like,[59] a servant,[60] a stockholder engaged in the service of a corporation,[61] a traveling salesman,[62] whether employed on a salary[63] or selling on commission,[64] or a workman,[65] especially where, applying the familiar maxim, *Noscitur a sociis*,[66] it clearly appears from the context that such is the meaning intended. (Employee: Embezzlement by, see EMBEZZLEMENT. Injury to, see MASTER AND SERVANT. Lien of, see MASTER AND SERVANT; MECHANICS' LIENS. See also EMPLOY; EMPLOYER; EMPLOYMENT; and, generally, MASTER AND SERVANT.)

EMPLOYEE IN OFFICE. A person who is engaged in the performance of the proper duties of an office.[67]

EMPLOYEE OF MUNICIPALITY. A term which has been used and employed to designate a person who is employed as an agent or servant of the local

54. Watson *v.* Watson Mfg. Co., 30 N. J. Eq. 588, 589; People *v.* Buffalo, 57 Hun (N. Y.) 577, 579, 14 N. Y. Suppl. 314; Cochran *v.* A. S. Baker Co., 30 Misc. (N. Y.) 48, 49, 61 N. Y. Suppl. 724; People *v.* Myers, 11 N. Y. Suppl. 217, 25 Abb. N. Cas. (N. Y.) 368; Farmer *v.* St. Croix Power Co., 117 Wis. 76, 88, 93 N. W. 830, 98 Am. St. Rep. 914.

Distinguished from "laborer" in Watson *v.* Watson Mfg. Co., 30 N. J. Eq. 588, 589; Bristor *v.* Kretz, 22 Misc. (N. Y.) 55, 58, 49 N. Y. Suppl. 404. "Employee" is broader than "laborer" in that it includes persons in a higher degree of employment. Farmer *v.* St. Croix Power Co., 117 Wis. 76, 88, 93 N. W. 830, 98 Am. St. Rep. 914 [*citing* Watson *v.* Watson Mfg. Co., 30 N. J. Eq. 588; Gurney *v.* Atlantic, etc., R. Co., 58 N. Y. 358].

55. Cochran *v.* A. S. Baker Co., 30 Misc. (N. Y.) 48, 49, 61 N. Y. Suppl. 724.

56. Worcester Dict. [*quoted* in Matter of Fitzgerald, 21 Misc. (N. Y.) 226, 229, 45 N. Y. Suppl. 630; Stone *v.* U. S., 3 Ct. Cl. 260, 262].

Public officers are not usually included within the meaning of the term. Moll *v.* Sbisa, 51 La. Ann. 290, 25 So. 141; People *v.* Board of Police, 75 N. Y. 38; People *v.* Buffalo, 57 Hun (N. Y.) 577, 11 N. Y. Suppl. 314; People *v.* Myers, 11 N. Y. Suppl. 217, 25 Abb. N. Cas. (N. Y.) 368; Com. *v.* Fitler, 147 Pa. St. 288, 23 Atl. 568, 15 L. R. A. 205. a hospital physician. *Compare* White *v.* Alameda, 124 Cal. 95, 56 Pac. 795. A public officer is distinguished from an employee in the greater importance, dignity, and independence of his position. State *v.* Johnson, 123 Mo. 43, 27 S. W. 399.

57. People *v.* Buffalo, 57 Hun (N. Y.) 577, 581, 11 N. Y. Suppl. 314.

58. Mallory *v.* U. S., 3 Ct. Cl. 257, 259.

When does not include policeman see People *v.* Board of Police, 75 N. Y. 38, 41; People *v.* Buffalo, 57 Hun (N. Y.) 577, 11 N. Y. Suppl. 314.

59. Foley *v.* Chicago, etc., R. Co., 64 Iowa 644, 21 N. W. 124; Ney *v.* Dubuque, etc., R. Co., 20 Iowa 347, 351; Ballard *v.* Mississippi Cotton Oil Co., 81 Miss. 507, 34 So. 533, 62 L. R. A. 407, 95 Am. St. Rep. 476.

A locomotive engineer is an employee. Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 730, 736, 19 L. R. A. 387.

60. White *v.* Alameda, 124 Cal. 95, 56 Pac. 795; State *v.* Sarlls, 135 Ind. 195, 34 N. E. 1129; People *v.* Buffalo, 57 Hun (N. Y.) 577, 579, 14 N. Y. Suppl. 314; People *v.* Myers, 11 N. Y. Suppl. 217, 25 Abb. N. Cas. (N. Y.) 368; Johnston *v.* Barrills, 27 Oreg. 251, 258, 41 Pac. 656, 50 Am. St. Rep. 717; Worcester Dict. [*quoted* in Matter of Fitzgerald, 21 Misc. (N. Y.) 226, 229, 45 N. Y. Suppl. 630; Stone *v.* U. S., 3 Ct. Cl. 260, 262].

Distinguished from "servant" in Bristor *v.* Kretz, 22 Misc. (N. Y.) 55, 58, 49 N. Y. Suppl. 404.

61. Conlee Lumber Co. *v.* Ripon Lumber, etc., Co., 66 Wis. 481, 29 N. W. 285.

Managers, officers, and superintendents of corporations are not ordinarily included within the meaning of the term. South, etc., R. Co. *v.* Falkner, 49 Ala. 115, 118; Weatherby *v.* Saxony Woolen Co., (N. J. Ch. 1894) 29 Atl. 326; *In re* Stryker, 158 N. Y. 526, 53 N. E. 525, 70 Am. St. Rep. 489; Palmer *v.* Van Santvoord, 153 N. Y. 612, 47 N. E. 915, 38 L. R. A. 402; *In re* American Lace, etc., Works, 30 N. Y. App. Div. 321, 51 N. Y. Suppl. 818; People *v.* Remington, 45 Hun (N. Y.) 329 [*affirmed* in 109 N. Y. 631, 16 N. E. 580]; Malcomson *v.* Wappoo Mills, 86 Fed. 192, 198.

62. *In re* Lawlor, 110 Fed. 135, 136.

63. Palmer *v.* Van Santvoord, 153 N. Y. 612, 47 N. E. 915, 38 L. R. A. 402; Matter of Fitzgerald, 21 Misc. (N. Y.) 226, 45 N. Y. Suppl. 630.

64. Matter of Luxton, etc., Co., 35 N. Y. App. Div. 243, 54 N. Y. Suppl. 778; Matter of Ginsburg, 27 Misc. (N. Y.) 745, 59 N. Y. Suppl. 656; *In re* Smith, 59 N. Y. Suppl. 799.

65. People *v.* Buffalo, 57 Hun (N. Y.) 577, 579, 14 N. Y. Suppl. 314; Cochran *v.* A. S. Baker Co., 30 Misc. (N. Y.) 48, 49, 61 N. Y. Suppl. 724.

66. This maxim should be applied in ascertaining the import and meaning of the term. Dukes *v.* Love, 97 Ind. 341, 344.

67. Stone *v.* U. S., 3 Ct. Cl. 260, 262, within the meaning of a statute relating to compensation of certain government officers.

government, who, by contract express or implied, is to be paid for whatever service he may perform.[68]

EMPLOYEE OF THE POSTAL SERVICE. A term which includes employees who are hired and paid by postal contractors or other persons having charge of mail matter sworn as mail carriers, etc.[69]

EMPLOYER. One who employs;[70] one who engages or keeps in service;[71] one who uses or engages the services of other persons for pay.[72] Construing the word according to the context[73] it may include not only a master,[74] but also a client,[75] a farmer,[76] a firm, a joint-stock association, a company, or a corporation,[77] a master mechanic,[78] a patient,[79] a subcontractor,[80] and the like. (Employer: Liability to Employee, see MASTER AND SERVANT. See also EMPLOY; EMPLOYEE; EMPLOYMENT; and, generally, EMPLOYERS' LIABILITY INSURANCE; MASTER AND SERVANT.)

EMPLOYERS' LIABILITY ACTS. See MASTER AND SERVANT.

68. Com. *v.* Fitler, 147 Pa. St. 288, 297, 23 Atl. 568, 15 L. R. A. 205.

69. U. S. *v.* Hanna, 4 N. M. 216, 4 Pac. 79.

One sworn as a deputy postmaster who handled mail whenever he was about the office and felt like it was an employee within the meaning of the statute relating to employees in the postal service. U. S. *v.* Brent, 24 Fed. Cas. No. 16,640.

70. Standard Dict. [*quoted* in Matter of Fitzgerald, 21 Misc. (N. Y.) 226, 229, 45 N. Y. Suppl. 630].

71. Webster Dict. [*quoted* in State *v.* Foster, 37 Iowa 404, 407].

72. Matter of Fitzgerald, 21 Misc. (N. Y.) 226, 229, 45 N. Y. Suppl. 630.

73. State *v.* Foster, 37 Iowa 404, 407, where it is said: The words "employer" and "employment" "are not of the technical language of the law or of any science or pursuit, and must, therefore, be construed according to the context and the approved usage of the language."

74. People *v.* Buffalo, 57 Hun (N. Y.) 577, 581, 11 N. Y. Suppl. 314.

75. People *v.* Buffalo, 57 Hun (N. Y.) 577, 581, 11 N. Y. Suppl. 314.

76. People *v.* Buffalo, 57 Hun (N. Y.) 577, 581, 11 N. Y. Suppl. 314.

77. Mich. Comp. Laws (1897), § 568.

"Employer" as defined under a manufacturing act see 37 & 38 Vict. c. 48, § 7.

78. People *v.* Buffalo, 57 Hun (N. Y.) 577, 581, 11 N. Y. Suppl. 314.

79. People *v.* Buffalo, 57 Hun (N. Y.) 577, 581, 11 N. Y. Suppl. 314.

80. Chawner *v.* Cummings, 8 Q. B. 311, 321, 10 Jur. 454, 15 L. J. Q. B. 161, 55 E. C. L. 310.

EMPLOYERS' LIABILITY INSURANCE

By Alexander Stronach

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CROSS-REFERENCES

For Matters Relating to:
Accident Insurance, see Accident Insurance.
Insurance in General, see Insurance.

I. DEFINITION.

Employers' liability insurance is the general designation of a certain kind or branch of the insurance business,[1] which provides indemnity to employers against liability for accidents to employees.[2]

II. ORIGIN AND HISTORY.

Employers' liability insurance is a recent form of accident insurance and is the outgrowth of a demand for indemnity to employers against the liability of their employees for injuries occurring in the prosecution of business or industrial enterprises.[3]

III. KINDRED RISKS.

Companies issuing policies for employers' liability insurance also frequently issue other policies of a kindred nature, such as "general liability policies,"[4]

1. Employers' Liability Assur. Corp. *v.* Employers' Liability Ins. Co., 61 Hun (N. Y.) 552, 554, 16 N. Y. Suppl. 397 [*reversing* 10 N. Y. Suppl. 845], where it was held that the term cannot be exclusively appropriated by an insurance company.

2. Ross *v.* American Employers' Liability Ins. Co., 56 N. J. Eq. 41, 42, 38 Atl. 22.

3. Employers' Liability Assur. Corp. *v.* Merrill, 155 Mass. 404, 29 N. E. 529.

4. "'General liability policies' insure against claims for accidental personal injuries to any persons other than employees or persons injured by elevators, for which the assured may be legally liable in his capacity as landlord or tenant of certain described

"railroad liability policies,"[5] "outside liability policies,"[6] "elevator policies,"[7] and "horse and vehicle policies."[8]

IV. AUTHORITY TO INSURE.

Power to issue these policies like all others, depends upon the charter of the company proposing to issue them and the statutes of the jurisdiction in which the company proposes to do business;[9] and in Massachusetts it has been decided that under the statutes of that state policies covering liability of this kind may be issued by any company with authority to issue accident policies.[10]

V. NATURE OF CONTRACT.

A policy of insurance binding the insurer to pay an employer all sums for which he shall become liable on account of personal injuries to his employees is not merely a contract of indemnity but is also a contract to pay liabilities, so that payment by the employer of a personal injury claim is not a condition precedent to his right to recover against the insurer.[11] The measure of damages is the amount of the accrued liability.[12]

premises." Employers' Liability Assur. Corp. *v.* Merrill, 155 Mass. 404, 407, 29 N. E. 529.

5. A "railroad liability policy" usually contains the following covenant: "That said company will pay to the insured, or their legal representatives, all damages with which the insured may be legally charged, or which the insured may be required to pay (not exceeding the amounts hereinafter limited) for or by reason of any liability on account of injuries inflicted upon the person or property of any person or persons whomsoever while traveling on the railroad of the insured," etc. Ross *v.* American Employers' Liability Ins. Co., 56 N. J. Eq. 41, 42, 38 Atl. 22.

Validity of policy.— A policy indemnifying a common carrier against liability for injuries to passengers and employees is not void as being in contravention of public policy. *In re* American Casualty Ins. Co.'s Case, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97.

Street railway policy.— Phillipsburg Horse Car Co. *v.* New York Fidelity, etc., Co., 160 Pa. St. 350, 28 Atl. 823.

6. "Outside liability policies" are issued to builders and contractors, and insure against claims for compensation for accidental personal injuries to workmen employed by other contractors, and to the public, caused by the assured and by his own workmen, but not caused by a subcontractor or his workmen. Employers' Liability Assur. Corp. *v.* Merrill, 155 Mass. 404, 407, 29 N. E. 529.

7. "Elevator policies" insure against claims for compensation for accidental personal injuries to persons by the elevator of the assured, or its appurtenances, and for which injuries he shall become liable. Employers' Liability Assur. Corp. *v.* Merrill, 158 Mass. 404, 407, 29 N. E. 529.

8. "Horse or vehicle policies" are contracts by which "the employer is insured against claims for compensation for accidental personal injuries to others than employees, caused by any horses, teams, or vehicles owned by the assured, if engaged in his business and in charge of his employees, the injuries being those for which the assured is legally liable." Employers' Liability Assur. Corp. *v.* Merrill, 155 Mass. 404, 407, 29 N. E. 529.

Meaning of "accident."— In such a policy when the amount of liability for "any one accident" is limited, accident means injury in respect of which a person claims compensation. The limitation applies to the amount for which the company is liable, because of an injury to any one person, and the insurance company is liable for the aggregate claims of all persons injured, no one claim exceeding the sum limited. South Staffordshire Tramways Co. *v.* Sickness, etc., Assur. Assoc., [1891] 1 Q. B. 402, 408, 55 J. P. 168, 60 L. J. Q. B. 47, 63 L. T. Rep. N. S. 807.

9. See, generally, INSURANCE, and the insurance titles.

10. Employers' Liability Assur. Corp. *v.* Merrill, 155 Mass. 404, 29 N. E. 529.

11. *Arkansas.*— American Employers' Liability Ins. Co. *v.* Fordyce, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305.

Minnesota.— Anoka Lumber Co. *v.* New York Fidelity, etc., Co., 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689.

New Jersey.— Beacon Lamp Co. *v.* Travelers' Ins. Co., 61 N. J. Eq. 59, 47 Atl. 579.

Oregon.— Fenton *v.* Fidelity, etc., Co., 36 Oreg. 283, 56 Pac. 1096, 48 L. R. A. 770.

South Carolina.—Pickett *v.* New York Fidelity, etc., Co., 60 S. C. 477, 38 S. E. 160, 629.

Wisconsin.— Hoven *v.* Employers' Liability Assur. Corp., 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388.

Aliter, by terms of policy. Frye *v.* Bath Gas, etc., Co., 97 Me. 241, 54 Atl. 395, 94 Am. St. Rep. 500, 59 L. R. A. 444.

12. American Employers' Liability Ins. Co. *v.* Fordyce, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305.

Liable for amount of judgment recovered by employee.— Anoka Lumber Co. *v.* New York Fidelity, etc., Co., 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689; Hoven *v.* Employers' Liability Assur. Corp., 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388. **Aliter,** by terms of policy. Travelers' Ins. Co. *v.* Moses, 63 N. J. Eq. 260, 49 Atl. 720, 92 Am. St. Rep. 663.

VI. CONSTRUCTION OF POLICY.

Policies of insurance should be construed like other contracts so as to give effect to the intention and express language of the parties.[13] If there is any doubt as to the construction of such a policy, or if it be susceptible of two interpretations, then it should be most strongly construed against the insurance company because it prepared the contract and is responsible for the words used in it.[14] The provisions of a policy which operate upon the parties prior to the loss are regarded as matters of substance, upon which the liability of the insurer depends, and are to receive a fair construction according to the intention of the parties, while as to those prescribing formal requisites by which the previously vested right is made available a rigid construction is not allowed.[15]

VII. INJURIES INCLUDED IN POLICY.

Where a policy insures against claims for damages by reason of injuries incurred by employees in certain designated operations it cannot be extended to include claims for injuries happening to employees while engaged in work other than that specified.[16] A policy issued to indemnify against injuries caused by certain things used in a particular business and described in the application covers only accidents occurring in the use of such described things and does not cover those occurring in the use of things which may be employed in the business which is described in the application.[17] A policy insuring against accidental

13. Travellers' Ins. Co. *v.* Myers, 62 Ohio St. 37, 57 N. E. 458, 49 L. R. A. 760. See also Ward *v.* Maryland Casualty Co., 71 N. H. 262, 51 Atl. 900, 93 Am. St. Rep. 514.

Where parties have placed a construction upon a policy by treating a previous accident as included therein this construction will be followed by the court. Fuller Bros. Toll Lumber, etc., Co. *v.* New York Fidelity, etc., Co., 94 Mo. App. 490, 68 S. W. 222. In this case the agent having been told by the assured that he wanted everything insured except injuries to teamsters and the agent having written in the policy "on all employes in the factory" and the insurer having treated a previous accident owing to an elevator as covered the insurer was held liable for injuries from an elevator.

14. Anoka Lumber Co. *v.* New York Fidelity, etc., Co., 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689; Cornell *v.* Travelers' Ins. Co., 66 N. Y. App. Div. 559, 73 N. Y. Suppl. 341; Fenton *v.* Fidelity, etc., Co., 36 Oreg. 283, 56 Pac. 1096, 48 L. R. A. 770; Hoven *v.* Employers' Liability Assur. Corp., 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388.

15. Employers' Liability Assur. Corp. *v.* New Albany Light, etc., Co., 28 Ind. App. 437, 62 N. E. 54.

16. In People's Ice Co. *v.* Employers' Liability Assur. Corp., 161 Mass. 122, 36 N. E. 754, the application for insurance stated that the operations carried on by the work-people were cutting and handling ice and that the machinery used was such as was necessary in cutting ice. It was decided that the erection of new buildings for the enlargement or better accommodation of the business was not an operation connected with the business within the meaning of the policy and application and that the insurance company was not liable when an employee was injured, while engaged in erecting such buildings. *Compare* Hoven *v.* Employers' Liability Assur. Corp., 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388, holding that a policy indemnifying an employer from liability for claims for personal injuries to its employees while engaged in "operations connected with the business of iron and steel works," covers injuries received by an employee by reason of the construction of a building by the employer for the use of his business. In Wollman *v.* New York Fidelity, etc., Co., 87 Mo. App. 677, an insurance company issued a policy indemnifying an employer against common-law and statutory liability for bodily injuries to employees growing out of his negligence and described his business and the machinery used therein, as that usual in buildings occupied for wholesaling dry goods and general merchandise. Afterward the assured put in machinery for polishing rusted cutlery and hired an adept polisher who was injured in running such machinery and recovered damages therefor of the assured. It was held that the risk was not included in the policy.

17. A policy indemnifying a horse-car company for damages on account of injuries to persons not employees, resulting from "accident to or caused by the cars, horses, plants, ways, works, machinery or appurtenances used in the business of the insured and described in the application," does not insure against injuries caused by the use of sleighs, not described in the application, although customary in the neighborhood when the tracks are obstructed by snow and ice. Phillipsburg Horse Car Co. *v.* Fidelity, etc., Co., 160 Pa. St. 350, 356, 28 Atl. 823.

personal injuries and loss of human life occasioned by machinery of all kinds does not include injuries caused by fire.[18]

VIII. RIGHTS OF EMPLOYEE UNDER POLICY.

Insurance under a policy of this kind is a matter wholly between the insurance company and the assured in which the employee has no legal or equitable interest any more than in any other property belonging absolutely to the assured. The assured may use the proceeds of a settlement made by him with the insurance company as he sees fit, as there is no privity of contract between the assured and the employee.[19]

IX. NOTICE OF ACCIDENT.

A provision requiring immediate notice of an accident is of the essence of the contract,[20] and an agent cannot waive it without authority therefor.[21] Immediate notice means notice within a reasonable time under the circumstances of the case.[22] If the facts are undisputed, whether notice of an accident was given within a reasonable time is a question of law for the court.[23] Notice need not be given by the assured until there has been both an accident and a claim for damages made on account thereof by the person injured.[24]

X. DESCRIPTION OF ACCIDENT AND INFORMATION.

A provision in such a policy that in case of accident full particulars thereof shall be given the insurer does not call for unnecessary details, but only such as

18. Under a clause insuring against accidental "personal injury and loss of human life," for which the assured is liable in damages, and "which shall be caused by said boilers or any machinery of whatever kind, connected therewith or operated thereby," the insured cannot recover the amount it has paid out for loss of life and injuries caused by an explosion in a starch kiln, caused by fire, although the kiln was heated by steam-pipes connected with the boilers. American Steam Boiler Ins. Co. *v.* Chicago Sugar Refining Co., 57 Fed. 294, 6 C. C. A. 336, 21 L. R. A. 572 [*reversing* 48 Fed. 198].

19. Bain *v.* Atkins, 181 Mass. 240, 63 N. E. 414, 92 Am. St. Rep. 411; Anoka Lumber Co. *v.* New York Fidelity, etc., Co., 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689. See also Embler *v.* Hartford Steam Boiler Inspection, etc., Co., 158 N. Y. 431, 53 N. E. 212, 44 L. R. A. 512 [*affirming* 8 N. Y. App. Div. 186, 40 N. Y. Suppl. 450].

In equity the insurer under such a policy becomes the principal debtor to an injured employee, and the assured the surety, so that a bill would lie by the latter to establish the principal's liability and compel it to perform its contract of indemnity; such a proceeding is not, however, based upon any privity of contract between the insurance company and the employee. And an injured employee who has recovered judgment against the assured may sue the insurer in equity as principal debtor to compel payment of the full amount of the judgment notwithstanding the insolvency of the assured. Beacon Lamp Co. *v.* Travelers' Ins. Co., 61 N. J. Eq. 59, 47 Atl. 579 [*affirmed* in 63 N. J. Eq. 260, 49 Atl. 720, 92 Am. St. Rep. 663].

Not an asset of employee's estate.— Money paid by an insurance company to an employer on account of an injury to an employee does not constitute assets of the latter's estate after his death. Hawkins *v.* McCalla, 95 Ga. 192, 22 S. E. 141.

Subject of garnishment.— Where by the entry of judgment against an employer in an action for damages by an injured employee the indebtedness of an insurance company becomes absolute, such indebtedness is subject to garnishment in a proceeding commenced by such employee against the insurance company as garnishee. Hoven *v.* Employers' Liability Assur. Corp., 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388. See also Anoka Lumber Co. *v.* New York Fidelity, etc., Co., 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689.

20. Employers' Liability Assur. Corp. *v.* New Albany Light, etc., Co., 28 Ind. App. 437, 63 N. E. 54.

21. Travelers' Ins. Co. *v.* Myers, 62 Ohio St. 529, 57 N. E. 458, 49 L. R. A. 760.

22. Employers' Liability Assur. Corp. *v.* New Albany Light, etc., Co., 28 Ind. App. 437, 63 N. E. 54, 55; Ward *v.* Maryland Casualty Co., 71 N. H. 262, 267, 51 Atl. 900, 93 Am. St. Rep. 514; Travelers' Ins. Co. *v.* Myers, 62 Ohio St. 529, 539, 57 N. E. 458, 49 L. R. A. 760.

23. Employers' Liability Assur. Corp. *v.* New Albany Light, etc., Co., 28 Ind. App. 437, 63 N. E. 54; Travelers' Ins. Co. *v.* Myers, 62 Ohio St. 529, 57 N. E. 458, 49 L. R. A. 760. *Compare* Ward *v.* Maryland Casualty Co., 71 N. H. 262, 51 Atl. 900, 93 Am. St. Rep. 514, in which it is held that whether a notice is reasonably immediate like the kindred question of what is a reasonable time is a question of fact.

24. Grand Rapids Electric Light, etc., Co. *v.* New York Fidelity, etc., Co., 111 Mich. 148, 69 N. W. 249; Anoka Lumber Co. *v.* New

would enable the insurance company to determine whether a claim was likely to be made against the assured; nor does it call upon the assured to make an exhaustive investigation of the circumstances attending the accident or to decide what the facts were upon a consideration of conflicting evidence.[25] Under a provision that the assured when requested by the insurance company shall aid in securing evidence, the company's liability under the policy is not ended by the failure of the assured to forward to the company's counsel upon his request the summons or paper served upon the assured by the injured party immediately after its service, there being no provision making such failure a cause of forfeiture.[26]

XI. WHEN LIABILITY ACCRUES.

Under a policy of this character it has been decided that the liability of the insurer accrues whenever the amount of the assured's liability is determined.[27] But on the other hand it has been held that under such a policy the insurer's liability arises on the happening of the injury and not at the date of the recovery of a judgment against the assured.[28]

XII. DURATION OF RISK.

When a policy insures against such claims for a certain number of months from a specified date to another date named, the former date is excluded in determining the duration of the risk.[29]

XIII. LIMITATIONS AS TO ACTIONS.

The contract may limit the time within which action shall be brought.[30] Where underwriters severally and in equal sums insure a corporation against liability for bodily injury and from loss of life suffered by its employees, a stipulation that suit shall not be brought or maintained upon any claim arising out of the insurance in question against more than one of the underwriters at one time, and further that a final decision in any suit thus brought shall be decisive of the claim of the assured against each of the underwriters, is valid.[31]

York Fidelity, etc., Co., 63 Minn. 286, 55 N. W. 353, 30 L. R. A. 689.

25. Ward *v.* Maryland Casualty Co., 71 N. H. 262, 51 Atl. 900, 93 Am. St. Rep. 514.

26. Ward *v.* Maryland Casualty Co., 71 N. H. 262, 51 Atl. 900, 93 Am. St. Rep. 514.

27. Fidelity, etc., Co. *v.* Fordyce, 64 Ark. 174, 41 S. W. 420, holding that during the pendency of an action for damages or of an appeal from a judgment therefor the liability of the assured is not determined so as to render the insurer liable to pay such damages.

28. Ross *v.* American Employers' Liability Ins. Co., 56 N. J. Eq. 41, 44, 38 Atl. 22, in which the court said: "The recovery of the judgment against the insured by the injured party is not the injury against which the insurer insures him, but it is the liability for the consequences of the accident against which he is insured, and of which liability the judgment is a mere test or mode of proof. In fact, the recovery of the judgment is a mere mode by which the insured proves to the insurer that the intrinsic character of the accident was such that he was liable for the consequences of it. In this respect the judgment resembles the proof of loss to be furnished to an ordinary insurer against fire or shipwreck before action brought, or proof of death in case of life insurance. These are usually prerequisites to liability to action, but do not constitute the cause of action."

29. South Staffordshire Tramways Co. *v.* Sickness, etc., Assur. Assoc., [1891] 1 Q. B. 402, 408, 55 J. P. 168, 60 L. J. Q. B. 47, 63 L. T. Rep. N. S. 807.

30. The period in which a suit may be brought dates from the termination of the action by the injured person. People *v.* American Steam Boiler Ins. Co., 10 N. Y. App. Div. 9, 41 N. Y. Suppl. 631; People *v.* American Steam Boiler Ins. Co., 89 Hun (N. Y.) 456, 35 N. Y. Suppl. 322. A claim against a casualty insurance company for disbursement for surgical aid to a person injured, and for the defense of an action by such person for the injuries, is governed by the same limitation as is prescribed by the policy for the losses arising under the policy; no independent contract by the insurer to pay such items being shown. People *v.* American Steam Boiler Ins. Co., 10 N. Y. App. Div. 9, 41 N. Y. Suppl. 631.

31. New Jersey, etc., Concentrating Works *v.* Ackermann, 6 N. Y. App. Div. 540, 39

XIV. WAIVER BY INSURER.

The requirements of such a policy may be waived by a duly authorized agent of the insurance company.[32] A breach of warranty in an indemnity insurance policy is voidable only, and the assumption by the insurance company of a defense to an action for personal injuries against the assured, after knowledge of the facts in the case, is a waiver of the breach.[33] The acceptance of a policy containing a stipulation that "no agent has authority to waive or alter anything in this policy contained" is both notice to and an agreement by the assured that an agent has no authority to waive or alter anything contained in the policy.[34]

XV. EXPENSES OF SUIT.

Where by the terms of the policy the insurer is obligated to defend in behalf of the insured any proceedings to recover for personal injuries and it refuses to defend such a suit, the insured may upon conducting the defense recover from the company the expenses in connection therewith,[35] including reasonable attorney's fees.[36]

XVI. MEDICAL ASSISTANCE.

Such policies sometimes include liability for medical assistance.[37]

XVII. SETTLEMENT BY EMPLOYEE AND ASSURED.

An agreement between an employee and the assured pending a suit for injuries that the amount recovered in excess of the policy should be settled for a certain amount is not such a violation of a provision that the assured should not settle any claim with an injured employee without the insured's consent as will constitute a defense to a suit thereon.[38]

XVIII. PLEADINGS.

The complaint in an action on such a policy should allege that the insurer has performed all of the conditions of the policy on his part to be performed, or that performance has been waived, and this requirement is not properly met by alleging that he has complied with the policy in that respect, except where the same has been waived. If he has performed, then that fact must be alleged without qualification. If he has not performed for the reason that the insurance company has waived performance, then the conditions waived and the facts and circum-

N. Y. Suppl. 585 [*reversing* 15 Misc. 605, 37 N. Y. Suppl. 489].

32. Fuller Bros. Toll Lumber, etc., Co. *v.* New York Fidelity, etc., Co., 94 Mo. App. 490, 68 S. W. 222, holding that a provision in a policy that it covered no loss for injuries from elevators unless enumerated in the policy was waived where the general agent of the company made out the application and failed to enumerate the elevators, although he knew of them.

33. Glens Falls Portland Cement Co. *v.* Travelers' Ins. Co., 11 N. Y. App. Div. 411, 42 N. Y. Suppl. 285.

34. Travelers' Ins. Co. *v.* Myers, 62 Ohio St. 529, 57 N. E. 458, 49 L. R. A. 760.

35. Cornell *v.* Travelers' Ins. Co., 66 N. Y. App. Div. 559, 73 N. Y. Suppl. 341; Hoven *v.* Employers' Liability Assur. Corp., 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388. See also Anoka Lumber Co. *v.* New York Fidelity, etc., Co., 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689.

36. Ross *v.* American Employers' Liability Ins. Co., 56 N. J. Eq. 41, 38 Atl. 22.

37. **Immediate medical assistance.**—Where an employers' liability insurance policy provided that if an accident was sufficiently serious to necessitate "immediate" medical assistance, such assistance might be rendered at the cost of the insurer, the insurer was liable for medical attention rendered within a reasonable time after the accident; such time in no event extending beyond the period within which the notice of the accident was or should have been forwarded and such further interval as might be necessary to enable the insurer to act in the matter. The liability of the company for medical services could in no case extend to and include living expenses of the injured employee during his sickness. Employers' Liability Assur. Corp. *v.* New Albany Light, etc., Co., 28 Ind. App. 437, 63 N. E. 54, 56.

38. Pickett *v.* New York Fidelity, etc., Co., 60 S. C. 477, 38 S. E. 160, 629.

stances constituting such waiver must be alleged.[39] The action of a trial court in refusing the motion of an insurance company for leave to file a supplemental answer will not be reversed on appeal, when such motion did not make a *prima facie* showing of facts material to the defense, accruing subsequent to the former pleading, or of which the party was ignorant when the former pleading was made.[40]

XIX. EVIDENCE.

When an answer to a complaint alleging the performance of all the conditions of a policy denies such allegations, but does not specifically allege any matter of forfeiture, all testimony tending to show a forfeiture should be stricken out.[41]

XX. APPEAL.

Where an employer is insured against loss for injuries to his employees and the company defends an action against the employer by one injured, it is under the same obligation to take an appeal from a judgment against the employer as any other agent would be in undertaking a like duty.[42]

EMOTIONAL INSANITY.[1] A term applied to the case of one in the possession of his ordinary reasoning faculties who allows his passions to convert him into a temporary maniac.[2] (Emotional Insanity: As a Defense, see CRIMINAL LAW; HOMICIDE. As an Element of Crime, see CRIMINAL LAW. See also, generally, INSANE PERSONS.)

EMPLOYMENT.[3] The act of employing or using;[4] the state of being

39. Todd *v.* Union Casualty, etc., Co., 70 N. Y. App. Div. 52, 74 N. Y. Suppl. 1062.

Pleading generally see PLEADING.

40. In a suit on an employers' liability policy, defendant moved for leave to file a supplemental answer setting up a settlement of the insured's liability to the injured employee for an amount less than the policy, before judgment, without defendant's knowledge or consent, in violation of the policy. Before the settlement plaintiff's attorneys informed defendant of its intention to make such settlement, and after judgment in the action by the employee a consent order was entered directing the payment of the amount of the policy to the receiver of plaintiff because of the judgment in favor of the employee against it. It was held that the refusal of the motion was proper. Pickett *v.* New York Fidelity, etc., Co., 60 S. C. 477, 38 S. E. 160, 629.

41. Pickett *v.* New York Fidelity, etc., Co., 60 S. C. 477, 38 S. E. 160, 629.

Evidence generally see EVIDENCE.

42. Getchell, etc., Lumber Mfg. Co. *v.* Employers' Liability Assur. Corp., 117 Iowa 180, 90 N. W. 616, 62 L. R. A. 617, holding that the presumption that the judgment of the lower court was correct makes a *prima facie* case to the effect that the employer has not been damaged by failure of the insurance company to perfect an appeal, even though the company has the burden of proof to show such fact.

Appeal generally see APPEAL AND ERROR.

1. Or "mania transitoria." Mutual L. Ins. Co. *v.* Terry, 15 Wall. (U. S.) 580, 583, 21 L. ed. 236.

2. Mutual L. Ins. Co. *v.* Terry, 15 Wall. (U. S.) 580, 583, 21 L. ed. 236.

3. "It is a common word, generally used in relation to the most common pursuits, and, therefore, ought to be received by this court as understood in common parlance." Charleston *v.* Lee, 3 Brev. (S. C.) 226, 227 [*quoted* in Lynchburg *v.* Norfolk, etc., R. Co., 80 Va. 237, 248, 56 Am. Rep. 592].

Distinguished from "office" in Mousseau *v.* Sioux City, 113 Iowa 246, 249, 84 N. W. 1027; Moll *v.* Sbisa, 51 La. Ann. 290, 291, 25 So. 141; Opinion of Judges, 3 Me. 481, 482 [*quoted* in Guthrie Daily Leader *v.* Cameron, 3 Okla. 677, 683, 41 Pac. 635]; U. S. *v.* Maurice, 30 Fed. Cas. No. 15,747, 2 Brock. 96, 103 [*quoted* in Bunn *v.* People, 45 Ill. 397, 402; State *v.* May, 106 Mo. 488, 506, 17 S. W. 660; Guthrie Daily Leader *v.* Cameron, 3 Okla. 677, 682, 41 Pac. 635].

"Employment" and "retainer."— In Bowman *v.* Tallman, 27 How. Pr. (N. Y.) 212, 285, it is said: "'Employment' (Monell *v.* Marshall, 25 How. Pr. (N. Y.) 425), and 'Retainer,' seem to imply a personal obligation (Hill *v.* Tucker, 1 Taunt. 7, 9; Wilson *v.* Burr, 25 Wend. (N. Y.) 386)."

"Place" and "employment."— As used in a statute forbidding the buying of offices, including nominations to an office, commission, or "place or employment," would include a cadetship in the Madras infantry. Lord Denman, C. J., said: "The words 'place and employment' are so general as to comprehend those, and every other advantageous position that the party can gain by nomination to a specific thing." Reg. *v.* Charretie, 13 Q. B. 447, 461, 66 E. C. L. 447.

4. Webster Dict. [*quoted* in Ritchie *v.* People, 155 Ill. 98, 103, 40 N. E. 454, 46 Am. St. Rep. 315, 29 L. R. A. 79; State *v.* Foster, 37 Iowa 404, 407; Short *v.* Bullion-Beck, etc.,

employed;[5] avocation;[6] business, calling, commission, occupation, office, profession, service, trade, vocation, work;[7] that which engages the head or hands; object of industry;[8] use;[9] agency or service for another or for the public;[10] the act of hiring;[11] appointment;[12] engagement;[13] the word may mean either the act of being employed for one's self, in attending to his own affairs, or in attending to the duties and services of another.[14] As defined by a constitution, an agency for a temporary purpose, which ceases when that purpose is accomplished.[15] (Employment:[16] Embezzlement Within, see EMBEZZLEMENT. On Sunday, see SUNDAY. See also EMPLOY; EMPLOYER; and, generally, MASTER AND SERVANT; OFFICERS; PRINCIPAL AND AGENT.)

EMPLOYMENT AGENCY. As defined by statute, the term includes the business of keeping an intelligence office, employment bureau, or other agency for procuring work or employment for persons seeking employment, or for acting as agent for procuring such work or employment where a fee or other valuable thing is exacted, charged, or received for registration, or for procuring or assisting to procure employment, work, or a situation of any kind, or for procuring or providing help for any person.[17]

EMPLOYMENT IN THE SERVICE. As applied to the militia when called into the federal service, the term includes some acts of organization, mustering or marching, done or recognized, in obedience to the call in the public service.[18]

EMPOWER. See PRINCIPAL AND AGENT.

EMPRESARIOS. In Mexican law, a name given to individuals to whom were granted very large bodies of land in consideration that they should bring emigrants into the country and settle them on the lands, with a view of increasing the population, and securing the protection thus afforded against the wild Indians on the Mexican borders.[19]

EMPTIO ET VENDITO CONTRAHITUR SIMULATQUE DE PRETIO CONVENERIT. A maxim meaning "The buying and selling is complete when the price is agreed upon."[20]

EMPTOR. See CAVEAT EMPTOR.

EMPTOR EMIT QUAM MINIMO POTEST; VENDITOR VENDIT QUAM MAXIMO POTEST. A familiar maxim, frequently applied to purchases by persons who

Min. Co., 20 Utah 20, 24, 33, 57 Pac. 720, 45 L. R. A. 603].

5. People *v.* Hyde, 25 Hun (N. Y.) 190 [*reversed* in 89 N. Y. 11]; Webster Dict. [*quoted* in Ritchie *v.* People, 155 Ill. 98, 103, 40 N. E. 454, 46 Am. St. Rep. 315, 29 L. R. A. 79; Short *v.* Bullion-Beck, etc., Min. Co., 20 Utah 20, 24, 33, 57 Pac. 720, 45 L. R. A. 603].

6. Worcester Dict. [*quoted* in State *v.* Canton, 43 Mo. 48, 51].

7. Webster Dict. [*quoted* in Travellers' Preferred Acc. Assoc. *v.* Kelsey, 46 Ill. App. 371, 373]; Worcester Dict. [*quoted* in State *v.* Canton, 43 Mo. 48, 51].

Keeping swine is an "employment" within the meaning of a statute directing the board of health to assign certain places for the exercise of any trade or employment which is a nuisance, etc. Com. *v.* Young, 135 Mass. 526, 529.

8. Webster Dict. [*quoted* in State *v.* Canton, 43 Mo. 48, 51].

9. Hightower *v.* State, 72 Ga. 482, 484 [*citing* Webster Dict.].

Employment of a vessel under a charter-party see Ripley *v.* Scaife, 5 B. & C. 167, 170, 11 E. C. L. 414, 2 C. & P. 132, 12 E. C. L. 490, 7 D. & R. 818.

10. Webster Dict. [*quoted* in State *v.* Foster, 37 Iowa 404, 407].

11. Hightower *v.* State, 72 Ga. 482, 484; People *v.* Hyde, 89 N. Y. 11, 16.

12. Stutzbach *v.* Coler, 168 N. Y. 416, 420, 61 N. E. 697, as used in a civil service law.

13. Worcester Dict. [*quoted* in State *v.* Canton, 43 Mo. 48, 51]; Kearney *v.* Oakes, 20 Nova Scotia 30, 35.

14. State *v.* Canton, 43 Mo. 48, 51.

15. Ill. Const. art. 5, § 24 [*quoted* in Lasher *v.* People, 183 Ill. 226, 235, 55 N. E. 663, 75 Am. St. Rep. 103, 47 L. R. A. 802; People *v.* Loeffler, 175 Ill. 585, 600, 51 N. E. 758; Wilcox *v.* People, [illegible] Ill. 186, 192].

16. **Conspiracy to prevent employment** see 8 Cyc. 637, 638, 654, 656 note 43.

Discrimination in employment on account of race see 7 Cyc. 167.

Employment of minors see 9 Cyc. 479 note 23.

Employment under eight-hour law see 9 Cyc. 479 note 23.

17. Conn. Gen. St. (1902) § 4609.

18. Houston *v.* Moore, 5 Wheat. (U. S.) 1, 64, 5 L. ed. 19, where it is said: "The terms 'call forth' and 'employed in service,' cannot, in any appropriate sense, be said to be synonymous."

19. U. S. *v.* Maxwell Land-Grant Co., 121 U. S. 325, 361, 7 S. Ct. 1015, 30 L. ed. 949.

20. Morgan Leg. Max.

have accepted a trust, meaning "The buyer buys for as little as possible; the vender sells for as much as possible."[21]

EMPTY.[22] In its ordinary signification, as a verb, to make void; to exhaust; to deprive of the contents.[23] As used in respect to a vessel, as an adjective, without a cargo.[24]

ENABLE. In the case of a person under any disability as to dealing with another, the term has the meaning of removing that disability, not of conferring compulsory power as against that other.[25]

ENABLING STATUTE. See STATUTES.

ENACT. To establish by law; to perform or effect; to decree.[26] (See, generally, STATUTES.)

ENACTMENT. A term sometimes used in the sense of taking effect.[27] (Enactment: Of Ordinance or By-Law, see MUNICIPAL CORPORATIONS. Of Statutes, see STATUTES.)

ENAGENACION. In Mexican law, the act by which the property in a thing, by lucrative title, is transferred, as a donation; or onerous title, as by sale or barter;[28] ALIENATION,[29] *q. v.*

ENAGENAR. To alienate, to transfer, or to give away property.[30]

ENCLOSE. See INCLOSE.

ENCLOSURE. See INCLOSURE.

ENCOURAGE. To intimate, to incite to anything, to give courage to, to inspirit, to embolden, to raise confidence, to make confident.[31] (See, generally, CRIMINAL LAW; INDICTMENTS AND INFORMATIONS.)

ENCROACH. To intrude upon, make gain upon, occupy, or use the land, right, or authority of another;[32] to gain unlawfully upon the lands, property, or authority of another.[33] (See ENCROACHMENT.)

ENCROACHMENT. A gradual entering on and taking possession by one of what is not his own; the lawful gaining upon the rights or possessions of another;[34]

21. Bouvier L. Dict.

Applied in: *Arkansas.*—Hindman *v.* O'Connor, 54 Ark. 627, 633, 16 S. W. 1052, 13 L. R. A. 490 [*citing* Michoud *v.* Girod, 4 How. (U. S.) 503, 504, 11 L. ed. 1076].

Maryland.— Raisin *v.* Clark, 41 Md. 158, 160, 20 Am. Rep. 66.

New Jersey.— Scott *v.* Gamble, 9 N. J. Eq. 218, 235.

New York.— Gardner *v.* Ogden, 22 N. Y. 327, 343, 78 Am. Dec. 192; Cumberland Coal, etc., Co. *v.* Sherman, 30 Barb. 553, 562; Star F. Ins. Co. *v.* Palmer, 41 N. Y. Super. Ct. 267, 269; Davoue *v.* Fanning, 2 Johns. Ch. 252, 256.

Ohio.— Welsh *v.* Perkins, 8 Ohio 52, 55.

Pennsylvania.— Lazarus *v.* Bryson, 3 Binn. 54, 62; Hallman's Estate, 1 Chest. Co. Rep. 141.

Virginia.— Carter *v.* Harris, 4 Rand. 199, 204.

Wisconsin.— Suessenguth *v.* Bingenheimer, 40 Wis. 370, 372.

Canada.— Brunskill *v.* Wilson, 25 U. C. Q. B. 248, 253.

22. **Distinguished from "loaded"** in Merrick *v.* Phelps, 5 Conn. 465, 467, construing the phrase "every wagon must be either loaded or empty."

23. U. S. *v.* Buchanan, 9 Fed. 689, 690, 4 Hughes 487.

24. Perrine *v.* Chesapeake, etc., Canal Co., 9 How. (U. S.) 172, 189, 13 L. ed. 92.

25. West Derby Union *v.* Metropolitan L. Assur. Soc., 66 L. J. Ch. 199, 208, per Rigby, L.

26. Bouvier L. Dict. [*quoted* in *In re* Senate File 31, 25 Nebr. 864, 876, 41 N. W. 981, where it is said: "If we take any of these definitions it would be of equal force to the word 'resolved.' . . . The formula, 'Be it enacted,' therefore, includes the formula, 'Be it resolved'"].

27. *In re* Hendricks, 60 Kan. 796, 801, 57 Pac. 965.

28. Escriche Dict. [*quoted* in Mulford *v.* Le Franc, 26 Cal. 88, 103, where it is said: "This word, taken in a more extended sense, comprises also the *enfiteusis* (lease), the pledge, the mortgage, and even the creation of a *servidumbre* (servitude), on an estate"].

29. Seoane N. & B. Dict. (by Valazquez) [*quoted* in Mulford *v.* Le Franc, 26 Cal. 88, 105].

30. Seoane N. & B. Dict. (by Valazquez) [*quoted* in Mulford *v.* Le Franc, 26 Cal. 88, 105].

31. Reg. *v.* Most, 7 Q. B. D. 244, 258, 14 Cox C. C. 583, 45 J. P. 696, 50 L. J. M. C. 113, 44 L. T. Rep. N. S. 823, 29 Wkly. Rep. 758. See also Comitez *v.* Parkerson, 50 Fed. 170; Rex *v.* Royce, 4 Burr. 2073, 2083.

32. "As if by a gradual or partial assumption of right." Johnston *v.* Long Island Invest., etc., Co., 85 N. Y. App. Div. 60, 64, 82 N. Y. Suppl. 961 [*citing* Anderson L. Dict.].

33. Johnston *v.* Long Island Invest., etc., Co., 85 N. Y. App. Div. 60, 64, 82 N. Y. Suppl. 961 [*citing* Bouvier L. Dict.].

34. Chase *v.* Oshkosh, 81 Wis. 313, 319, 51 N. W. 560, 29 Am. St. Rep. 898, 15 L. R. A. 553.

an unlawful gaining upon the right or possession of another.[35] In the statutory sense, a fixture which intrudes into or invades the highway, but does not necessarily prevent public travel.[36] (Encroachment: By Adjoining Owner — In General, see ADJOINING LANDOWNERS; As Basis of Adverse Possession, see ADVERSE POSSESSION; As Ground of Action, see ACTIONS; ADJOINING LANDOWNERS; Injunctions Against, see INJUNCTIONS. Of Structure as Affecting Title, see VENDOR AND PURCHASER. On Highway or Street, see STREETS AND HIGHWAYS; MUNICIPAL CORPORATIONS. On Waters, see NAVIGABLE WATERS; WATERS.)

ENCUMBER. See INCUMBER.

ENCUMBRANCE. See INCUMBRANCE.

END.[37] The extreme point of a line or anything that has more length than breadth.[38] (See ENDED.)

ENDEAVOR.[39] To use efforts, to attempt, to try, to strive.[40]

ENDEAVOR TO MAKE A REVOLT. The endeavor of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, with intent to remove him from his command, or against his will to take possession of the vessel by assuming the government and navigation of her, or by transferring their obedience from the lawful commander to some other person.[41]

EN DECLARATION DE SIMULATION. See QUIETING TITLE.

ENDED. Final, DEFINITE, *q. v.*, COMPLETE, *q. v.*, CONCLUSIVE, *q. v.*[42]

The term may include: a barn occupying nearly one half of a highway in a populous village (State *v.* Leaver, 62 Wis. 387, 393, 22 N. W. 576); a building upon a public park (Chicago *v.* Ward, 169 Ill. 392, 422, 48 N. E. 927, 61 Am. St. Rep. 185, 38 L. R. A. 849); a worm rail fence (Barton *v.* Campbell, 54 Ohio St. 147, 148, 42 N. E. 698); a roof or cornice projected beyond the division wall (Pierce *v.* Lemon, 2 Houst. (Del.) 519, 523); a watercourse, with growing trees thereon (Schenectady *v.* Furman, 61 Hun (N. Y.) 171, 175, 15 N. Y. Suppl. 724).

35. State *v.* Kean, 69 N. H. 122, 126, 45 Atl. 256, 48 L. R. A. 102 [*citing* Bouvier L. Dict.].

36. State *v.* Pomeroy, 73 Wis. 664, 665, 41 N. W. 726.

37. **"End area"** as used in a construction contract in reference to a tunnel see Daly *v.* Busk Tunnel R. Co., 129 Fed. 513, 517.

"End" as used in an ejectione firmæ see Wrotesley *v.* Adams, 1 Plowd. 187, 198.

"End of a term" see Parkhurst *v.* Smith, Willes 327, 334.

"End of a will" used in connection with the statutory requirements as to the due execution of the instrument see Flood *v.* Pragoff, 79 Ky. 607, 614; Younger *v.* Duffie, 94 N. Y. 535, 540, 46 Am. Rep. 156; *In re* O'Neil, 91 N. Y. 516, 520; *In re* Dayger, 47 Hun (N. Y.) 127, 129; Baker's Appeal, 107 Pa. St. 381, 388, 52 Am. Rep. 478. See also, generally, WILLS.

"End of each block" see Chiniquy *v.* People, 78 Ill. 570, 575.

"End of the year" see Brown *v.* Anderson, 77 Cal. 236, 238, 19 Pac. 487. And see Reg. *v.* Income Tax Com'rs, 21 Q. B. D. 313, 317, 57 L. J. Q. B. 513, 59 L. T. Rep. N. S. 455, 36 Wkly. Rep. 776.

"End of your current year" see Doe *v.* Culliford, 4 D. & R. 248, 16 E. C. L. 202.

"End on" defined see 7 Cyc. 349 note 43.

38. Webster Dict. [*quoted* in Kennebec Ferry Co. *v.* Bradstreet, 28 Me. 374, 377].

Sometimes used in the sense of "side."— In Read *v.* Lincoln, [1892] A. C. 644, 665, 56 J. P. 725, 62 L. J. P. C. 1, 67 L. T. Rep. N. S. 128, Halsbury, L. C., in speaking of the position and use of a table at communion service said: "It is true that a quadrilateral, whatever its form, is rightly described as having four sides, and the word 'side' may without impropriety be applied to each of them. But it is obvious, from the arguments which were common at the time when the table began to be placed in what has been called the altarwise position, that the word 'end' was then as now more usually employed than the word 'side' to describe the shorter sides of the quadrilateral. Their Lordships are of opinion that, even assuming that what would be more commonly spoken of as 'ends' may properly be called 'sides,' yet where a position at the 'north side' was enjoined by the rubric, one of the longer sides of the table was in contemplation."

39. **Best "endeavors"** as used in a contract see Vickers *v.* Overend, 7 H. & N. 92, 94, 30 L. J. Exch. 388.

40. Goldsmith *v.* Goldsmith, 46 W. Va. 426, 428, 33 S. E. 266, where it is said: "Generally it means that, but that depends on the place, context and circumstances under which it is found."

41. U. S. *v.* Kelly, 11 Wheat. (U. S.) 417, 418, 6 L. ed. 508 [*quoted* in U. S. *v.* Huff, 13 Fed. 630, 635].

As to what will constitute an endeavor to make a revolt upon shipboard within the meaning of the acts of congress see U. S. *v.* Smith, 27 Fed. Cas. No. 16,345, 3 Wash. 525; U. S. *v.* Savage, 27 Fed. Cas. No. 16,225, 5 Mason 460; U. S. *v.* Nye, 27 Fed. Cas. No. 15,906, 2 Curt. 225; U. S. *v.* Gardner, 25 Fed. Cas. No. 15,188, 5 Mason 402.

42. Bonsack Mach. Co. *v.* Woodrum, 88 Va. 512, 515, 13 S. E. 994, where it is said:

END LINES As used in mining, where a claim crosses the course of the lode or vein instead of being "along the vein or lode," these words are used to designate those lines which measure the width of the claim as it crosses the lode.[43] (See, generally, MINES AND MINERALS.)

END OF A PARALLELOGRAM. The line extending from one side line to the other at their extremities.[44]

END OF VOYAGE. As applied to navigation, the arrival of a vessel in port.[45] (See, generally, ADMIRALTY; SHIPPING.)

ENDORSE. See INDORSE.

ENDORSEMENT. See INDORSEMENT.

ENDOW.[46] To bestow upon;[47] to give; to bestow; to furnish with a portion of goods or estate; to settle on, as a permanent possession; to furnish with a permanent fund or property;[48] to make provisions for the support of a corporation or institution by appropriating lands or funds as a source of regular and reliable income.[49] (See ENDOWMENT.)

ENDOWED SCHOOL. A school which is (or if it were not in abeyance would be) wholly or partly maintained by means of any endowment.[50] (See, generally, COLLEGES AND UNIVERSITIES; SCHOOLS AND SCHOOL-DISTRICTS; ENDOWED SCHOOL; ENDOWMENT; ENDOWMENT INSURANCE; ENDOWMENT POLICY.)

ENDOWMENT.[51] Property or pecuniary means bestowed as a permanent fund; as the endowments of a college, a hospital or a library.[52] In domestic relations,

"It imports what will be, when the Apocalyptic Angel, with one foot on the Sea and the other upon the Earth, shall lift his hand to Heaven, and swear, by Him that liveth forever and ever, that there shall be 'Time no longer.'"

"Ended, and debt and costs paid" in as used in a docket entry see Phillips *v.* Israel, 10 Serg. & R. (Pa.) 391, 392.

43. Argentine Min. Co. *v.* Terrible Min. Co., 122 U. S. 478, 485, 7 S. Ct. 1356, 30 L. ed. 1140. And see Fitzgerald *v.* Clark, 17 Mont. 100, 131, 42 Pac. 273, 52 Am. St. Rep. 665, 30 L. R. A. 803; Walrath *v.* Champion Min. Co., 171 U. S. 293, 306, 18 S. Ct. 909, 43 L. ed. 170; Del Monte Min., etc., Co. *v.* Last Chance Min., etc., Co., 171 U. S. 55, 70, 18 S. Ct. 895, 43 L. ed. 72; Iron Silver Min. Co. *v.* Elgin Min., etc., Co., 118 U. S. 196, 208, 6 S. Ct. 1177, 30 L. ed. 98; Consolidated Wyoming Gold Min. Co. *v.* Champion Min. Co., 63 Fed. 540, 549.

44. "And the width of the end is the length of such line." Kennebec Ferry Co. *v.* Bradstreet, 28 Me. 374, 377, where it is said: "If the line connecting the extreme points of parallel side lines, make an angle with one greater than that made with the other, as for instance, one being ten and the other one hundred and seventy degrees, it might not be proper to regard this line the width of the end of the figure presented or even as the end itself. In figures having side lines irregular or not parallel with each other, a line connecting them where they terminate, may be the end, and its length the width of the end, or otherwise according to the peculiar shape of each figure."

45. Bradford *v.* Drew, 5 Metc. (Mass.) 188, 191.

46. **"The word endow, or endowed,** is not limited to the technical sense of giving 'dower.' It has a larger scope than that. To what it shall extend, then, is a matter of construction in reference to the object for which it was used, and the connection in which it was found." Gupton *v.* Gupton, 3 Head (Tenn.) 488, 490.

"Found and endow" an institution see Floyd *v.* Rankin, 86 Cal. 159, 168, 24 Pac. 936.

47. Liggett *v.* Ladd, 17 Oreg. 89, 105, 21 Pac. 133 (where it is said: "The word 'endow,' said the lord chancellor in Edwards *v.* Hall, 6 De G. M. & G. 74, 83, 1 Jur. N. S. 1189, 25 L. J. Ch. 82, 4 Wkly. Rep. 111, 55 Eng. Ch. 58, 43 Eng. Reprint 1158, 'means giving a benefit to some existing thing'"); Sinnett *v.* Herbert, L. R. 12 Eq. Cas. 201, 205, 19 Wkly. Rep. 946.

48. Gupton *v.* Gupton, 3 Head (Tenn.) 488, 489 [*citing* Richardson Dict.; Webster Dict.], where it is said: "The old marriage ceremony of England concluded with the words, 'with all my worldly goods I do thee endow.'"

49. Liggett *v.* Ladd, 17 Oreg. 89, 104, 21 Pac. 133.

50. St. 32 & 33 Vict. § 6.

51. **"Endowment" defined** as used in the English Charitable Trust Act of 1853 see 6 Cyc. 917 note 7.

"Charitable endowment" as used in a will see Salusbury *v.* Denton, 3 Jur. N. S. 740, 3 Kay & J. 529, 26 L. J. Ch. 851, 853.

"Endowment" is not an apt word to describe "a gratuitous conveyance of the title to a piece of real estate," under a tax-exemption statute. Wagner Inst.'s Appeal, 116 Pa. St. 555, 563, 11 Atl. 402.

52. Worcester Dict. [*quoted* in Wagner Inst.'s Appeal, 116 Pa. St. 555, 564, 11 Atl. 402].

As applied to a church, it is a stipend, rents, emoluments and advantages, of any kind, given and secured to the minister during the time he shall officiate as minister of a church or meeting-house, as a compensa-

the provision made by law by the way of dower.[53] (Endowment: In General, see DOWER. Insurance, see ENDOWMENT INSURANCE. Of Charity, see CHARITIES. Of College, see COLLEGES AND UNIVERSITIES. Policy, see ENDOWMENT POLICY.)

ENDOWMENT INSURANCE. A contract to pay a certain sum to the insured if he lives a certain length of time, or, if he dies before that time, to some other person indicated;[54] an insurance payable at the expiration of a fixed period.[55] (See ENDOWMENT POLICY; and, generally, INSURANCE; LIFE INSURANCE.)

ENDOWMENT POLICY. A policy payable at a certain time at all events, or sooner if the party should die sooner;[56] an insurance into which enters the elements of life. In one respect it is a contract payable in the event of a continuance of life; in another, in the event of death before the period specified.[57] (See ENDOWMENT INSURANCE; and, generally, INSURANCE; LIFE INSURANCE.)

ENEMY.[58] A nation which is at war with another;[59] a public enemy,[60] with whom the nation is at open war;[61] one with whom a nation is at open war.[62] (Enemy: Alien, see WAR. Effect on Liability of — Carrier, see CARRIERS; Insurer, see INSURANCE; MARINE INSURANCE. See also INTERNATIONAL LAW; TREASON; WAR.)

ENEMY PROPERTY.[63] A term applied to property engaged in any illegal

tion for his services. Runkel *v.* Winemiller, 4 Harr. & M. (Md.) 429, 451, 1 Am. Dec. 411. See also Nevin *v.* Krollman, 38 N. J. L. 574; New Brunswick First Reformed Dutch Church *v.* Lyon, 32 N. J. L. 360, 361; *In re* Robinson, [1892] 1 Ch. 95, 100, 61 L. J. Ch. 17, 66 L. T. Rep. N. S. 81, 40 Wkly. Rep. 137.

As applied to a school, a hospital, or a chapel, as commonly understood, it is not the building, or providing a site for a school, or hospital, or chapel, but the providing of a fixed revenue for the support of those by whom the institutions are conducted. Edwards *v.* Hall, 6 DeG M. & G. 74, 83, 1 Jur. N. S. 1189, 25 L. J. Ch. 82, 4 Wkly. Rep. 111, 55 Eng. Ch. 58, 43 Eng. Reprint 1158 [*citing* Chapman *v.* Brown, 6 Ves. Jr. 404, 409, 5 Rev. Rep. 351, 31 Eng. Reprint 1115]. See also Massachusetts Agricultural College *v.* Marden, 156 Mass. 150, 155, 30 N. E. 155; Liggett *v.* Ladd, 17 Oreg. 89, 21 Pac. 133; Gupton *v.* Gupton, 3 Head (Tenn.) 488, 489.

53. Stearns *v.* Perrin, 130 Mich. 456, 459, 90 N. W. 297.

54. Union Cent. L. Ins. Co. *v.* Woods, 11 Ind. App. 335, 37 N. E. 180, 181, 39 N. E. 205 [*citing* Bliss Ins. (2d ed.) p. 6, § 6] (where it is said: "Such a policy is, in many of its characteristics respecting the rights of the parties under it, different from an ordinary life policy, procured by a husband for the sole benefit of his wife"); State *v.* Federal Investment Co., 48 Minn. 110, 111, 50 N. W. 1028 [*citing* Briggs *v.* McCullough, 36 Cal. 542] (where it is said: "In either of these forms the contract is, strictly speaking, an insurance on the life of the party, although the latter is generally denominated 'endowment' insurance").

55. Joyce Ins. § 2518 [*quoted* in State *v.* Orear, 144 Mo. 157, 168, 45 S. W. 1081].

"Sometimes the contract to pay on the death of the insured is conjoined with a contract to pay on the expiration of a fixed period, should he live so long. Such a contract is called a contract of endowment insurance, though, so far as concerns the contract to pay on the expiration of a fixed period, it is not, strictly speaking, a contract of life insurance at all." Cooke L. Ins. § 107 [*quoted* in State *v.* Orear, 144 Mo. 157, 168, 45 S. W. 1081]. See also Levy *v.* Van Hagen, 69 Ala. 17.

56. Carr *v.* Hamilton, 129 U. S. 252, 253, 9 S. Ct. 295, 32 L. ed. 669.

57. Union Cent. L. Ins. Co. *v.* Woods, 11 Ind. App. 335, 37 N. E. 180, 181, 39 N. E. 205 [*citing* Anderson L. Dict.]; Brummer *v.* Cohn, 86 N. Y. 11, 17, 40 Am. Rep. 503.

58. **As defined by statute,** the term includes all armed mutineers, armed rebels, armed rioters, and pirates. St. 44 & 45 Vict. c. 58, § 190, subs. 20.

59. Bouvier L. Dict. [*cited* in Monongahela Ins. Co. *v.* Chester, 43 Pa. St. 491, 492].

60. Monongahela Ins. Co. *v.* Chester, 43 Pa. St. 491, 493.

61. State *v.* Moore, 74 Mo. 413, 418, 41 Am. Rep. 322.

62. Grinnan *v.* Edwards, 21 W. Va. 347, 357. See also Griswold *v.* Waddington, 16 Johns. (N. Y.) 438, 447; U. S. *v.* Greathouse, 26 Fed. Cas. No. 15,254, 4 Sawy. 457, 466.

Sometimes the term is applied to nations in a qualified state of hostility, or, not fully engaged in a general war within the full signification of that term. Bas *v.* Tingy, 4 Dall. (U. S.) 37, 46, 1 L. ed. 731.

63. "In defining the meaning of the term 'enemies' property,' we will be led into error if we refer to Fleta and Lord Coke for their definition of the word 'enemy.'" *In re* Prize Cases, 2 Black (U. S.) 635, 674, 17 L. ed. 459. "It is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law. Whether the property be liable to capture as 'enemies' property' does not in any manner depend on the personal allegiance of the owner. It is the illegal traffic that stamps it as 'enemies' property.'" *In re* Prize Cases, 2 Black (U. S.) 635, 674, 17

intercourse with the enemy,[64] or property belonging to an enemy of the country.[65] (See ENEMY; and, generally, INTERNATIONAL LAW; WAR.)

ENERET. A Danish word meaning a grant of a monopoly.[66]

ENERGY. As defined by a statute relative to electricity, electrical energy.[67] (See, generally, ELECTRICITY.)

EN ESCHANGE IL COVIENT QUE LES ESTATES SOIENT ÉGALES. A maxim meaning "In an exchange it is necessary that the estates be equal."[68]

ENFEOFFMENT. See DEEDS.

ENFITEUSIS. In Mexican law, a lease.[69]

ENFORCE. To put in execution, to cause to take effect.[70] As applied to process, the term implies execution of process.[71] (See, generally, EXECUTIONS; PROCESS.)

ENFORCEABLE. As applied to legal remedies, a term which indicates that some compulsory power is to be invoked.[72] (See, generally, EXECUTIONS; PROCESS.)

ENFORCEABLE TRUST. A trust in which some person or class of persons have a right to all or a part of a designated fund, and can demand its conveyance to them.[73] (See, generally, TRUSTS.)

ENFORCED IN AN ACTION. As applied to a contract relative to land, to enforce specific performance of the contract.[74] (See, generally, SPECIFIC PERFORMANCE.)

ENGAGE.[75] To take part;[76] to embark; to take a part;[77] to devote attention and effort;[78] to employ one's self; to enlist;[79] to carry on; to conduct;[80] to agree;[81] to agree with or bind by contract;[82] to promise.[83] (See ENGAGED; ENGAGEMENT.)

L. ed. 459 [*quoted* in The Benito Estenger, 176 U. S. 568, 571, 20 S. Ct. 489, 44 L. ed. 592].

64. The Benito Estenger, 176 U. S. 568, 571, 20 S. Ct. 489, 44 L. ed. 592.

65. Taylor *v.* Jenkins, 24 Ark. 337, 339, 88 Am. Dec. 773.

66. Atlas Glass Co. *v.* Simonds Mfg. Co., 102 Fed. 643, 646, 42 C. C. A. 554; Atlas Glass Co. *v.* Simonds Mfg. Co., 102 Fed. 338, 342.

67. St. 62 & 63 Vict. c. 19.

68. Bouvier L. Dict. [*citing* Coke Litt. 50].

69. Escriche Dict. [*quoted* in Mulford *v.* Le Franc, 26 Cal. 88, 103].

70. Ticknor *v.* Kennedy, 3 Abb. Pr. N. S. (N. Y.) 387.

"Enforce obedience" to rules in bankruptcy proceedings see *In re* Royle, 50 L. J. Q. B. 656.

"Enforce the collection of fines" as used in a statute see People *v.* Christerson, 59 Ill. 157, 158.

"Enforce the payment of debts" in a statute defining the powers of the surrogate courts, etc., see Wilson *v.* Baptist Education Soc., 10 Barb. (N. Y.) 308, 316.

71. Breitenbach *v.* Bush, 44 Pa. St. 313, 320, 84 Am. Dec. 442. And *compare* Emery *v.* Emery, 9 How. Pr. (N. Y.) 130, 133.

72. "And such power is vested in the Court or a Judge thereof." *Re* Snure, 4 Ont. L. Rep. 82, 88.

73. "And in case such demand is refused may sue the trustee in a court of equity and compel compliance with the demand." Tilden *v.* Green, 130 N. Y. 29, 65, 28 N. E. 880, 27 Am. St. Rep. 487, 14 L. R. A. 33.

74. Agnew *v.* Usher, 14 Q. B. D. 78, 81, 54 L. J. Q. B. 371, 51 L. T. Rep. N. S. 576, 33 Wkly. Rep. 126 [*distinguished* in Kaye *v.* Sutherland, 20 Q. B. D. 147, 151, 57 L. J. Q. B. 68, 58 L. T. Rep. N. S. 56, 36 Wkly. Rep. 508].

75. Engage as occasional or single act see Smith *v.* State, 50 Ala. 159.

When not equivalent to "interested" see People *v.* Gregg, 59 Hun (N. Y.) 107, 111, 13 N. Y. Suppl. 114.

"Engaging in guaranty" see Norton *v.* Powell, 4 M. & G. 42, 46, 11 L. J. C. P. 202, 43 E. C. L. 31.

76. Century Dict. [*quoted* in People *v.* Corbalis, 86 N. Y. App. Div. 531, 534, 83 N. Y. Suppl. 782, 17 N. Y. Cr. 469].

77. Webster Dict. [*quoted* in Roberts *v.* State, 26 Fla. 360, 362, 7 So. 861; The Alexander, 60 Fed. 914, 917].

78. Webster Dict. [*quoted* in The Alexander, 60 Fed. 914, 917].

"Engaged in killing fur-seals" see The Ocean Spray, 18 Fed. Cas. No. 10,412, 4 Sawy. 105, 107.

79. Webster Dict. [*quoted* in Roberts *v.* State, 26 Fla. 360, 362, 7 So. 861].

80. Roberts *v.* State, 26 Fla. 360, 362, 7 So. 861.

81. Packard *v.* Richardson, 17 Mass. 122, 131, 9 Am. Dec. 123.

82. Martin *v.* Martin, 3 Pinn. (Wis.) 272, 274, 3 Chandl. (Wis.) 303.

As used in an indenture requiring a person to do something, the word has the same force as "covenant." Rigby *v.* Great Western R. Co., 15 L. J. Exch. 60, 62, 14 M. & W. 811.

83. Rue *v.* Rue, 21 N. J. L. 369, 375.

ENGAGED.[84] Occupied.[85] (See ENGAGE; ENGAGEMENT.)

ENGAGEMENT.[86] A contract.[87] In the law of insurance, a policy.[88] (Engagement: In General, see CONTRACTS. Marriage Promise, see BREACH OF MARRIAGE PROMISE.)

ENGINE.[89] Any ingenious or skillful contrivance used to effect a purpose, and is often used as synonymous with the term "machine."[90] As used in connection with trade, it means the utensil by which the trade is carried on,[91] in a larger sense the term is applied to the agencies used in the carrying on of various manufactures.[92] As applied to patents, method.[93]

ENGINE-DRIVER. An ENGINEER,[94] *q. v.*

ENGINEER. As applied to civil matters, the term refers to a person employed in the construction of fixed public works,[95] or to the designing and construction of public works.[96] As applied to mechanical operations, one who manages an

84. **"Engaged in any business,"** etc., may include a patentee so long as he receives royalties under his patent, even though he does not himself manufacture *In re* Ralph's Trade-Mark, 25 Ch. D. 194, 199, 48 J. P. 135, 53 L. J. Ch. 188, 49 L. T. Rep. N. S. 504, 32 Wkly. Rep. 168.

"Engaged in any capacity on board any ship" as used in a statute in relation to seamen see Corbett *v.* Pearce, [1904] 2 K. B. 422, 424.

"Engaged in commerce or navigation" within the meaning of the rule that, in order to authorize salvage, there must be a service rendered to a vessel see The Hendrick Hudson, 11 Fed. Cas. No. 6,355, 3 Ben. 419.

"Engaged in working mines" see *In re* Silver Valley Mines, 18 Ch. D. 472.

"Engaged principally" in **manufacturing pursuits** used in a statute relative to a corporation and involuntary bankruptcy of the same see *In re* Moench, 130 Fed. 685, 686.

That "engaged in" may not be equivalent to or synonymous with the words "transacted and carried on" see Inyo County *v.* Erro, 119 Cal. 110, 121, 51 Pac. 32 [*citing* El Dorado County *v.* Meiss, 100 Cal. 268, 34 Pac. 716; *Ex p.* Mirande, 73 Cal. 365, 14 Pac. 888].

85. Guiltinan *v.* Metropolitan L. Ins. Co., 69 Vt. 469, 473, 38 Atl. 315.

The term implies continuous occupation. Fleckenstein Bros. Co. *v.* Fleckenstein, (N. J. Ch. 1904) 57 Atl. 1025, 1026. See also Gillman *v.* State, 55 Ala. 248, 250.

86. **That "money payable under any engagement"** under a statutory definition **"is constituted 'property'"** see Atty.-Gen. *v.* Monteflore, 21 Q. B. D. 461, 465, 59 L. T. Rep. N. S. 534, 37 Wkly. Rep. 237.

87. Bouvier L. Dict. See also Haviland *v.* Chace, 39 Barb. (N. Y.) 283, 287; Maynard *v.* Valentine, 2 Wash. Terr. 3, 3 Pac. 195; Twycross *v.* Dreyfus, 5 Ch. D. 605, 617, 46 L. J. Ch. 510, 36 L. T. Rep. N. S. 752.

88. People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 384, 8 Am. Dec. 243.

89. **"Fixed engine"** used in a statute regulating salmon fisheries see Thomas *v.* Jones, 5 B. & S. 916, 919, 11 Jur. N. S. 306, 34 L. J. M. C. 45, 11 L. T. Rep. N. S. 450, 13 Wkly. Rep. 154, 117 E. C. L. 916.

90. Lefler *v.* Forsberg, 1 App. Cas. (D. C.) 36, 42 [*citing* Webster Dict.; Worcester Dict.], where it is said: "The latter term is of larger definition, but one of the most commonly accepted definitions of that term is, any mechanical contrivance, as the wooden horse with which the Greeks entered Troy; a coach; a bicycle, &c." But in Blanchard *v.* Sprague, 3 Fed. Cas. No. 1,517, 3 Sumn. 279, 283, the term is not considered synonymous with "machine" as used in an application for a patent.

Means a complete machine.— Brown *v.* Benson, 101 Ga. 753, 757, 29 S. E. 215.

The term does not include frames for the manufacture of frame-work lace, within the meaning of a statute giving a remedy against the hundred for the riotous demolition of such articles. Orgill *v.* Smith, 6 M. & S. 182, 192, where Abbott, J., said: "The word engine is a word of very general signification, and its meaning here must be sought out from the act itself, and the language which surrounds it, and also from other acts, *in pari materiâ*, in which it occurs."

A gun is not an engine to kill game. Wingfield *v.* Stratford, 1 Wils. C. P. 315. See also Rex *v.* Gardner, 2 Str. 1098.

"[Engine] calculated to destroy human life or to inflict grievous bodily harm" as used in a statute see Wootten *v.* Dawkins, 2 C. B. N. S. 412, 414, 5 Wkly. Rep. 469, 89 E. C. L. 412.

"Engine or instrument of destruction" used in a statute relative to game includes a snare. Allen *v.* Thompson, L. R. 5 Q. B. 336, 339, 39 L. J. M. C. 102, 22 L. T. Rep. N. S. 472, 18 Wkly. Rep. 1196.

91. Orgill *v.* Smith, 6 M. & S. 182, 188.

92. Orgill *v.* Smith, 6 M. & S. 182, 191.

93. Hornblower *v.* Boulton, 8 T. R. 95, 106, 3 Rev. Rep. 439, where Lawrence, J., said: "Engine and method mean the same thing, and may be the subject of a patent."

94. Century Dict. [*quoted* in Devere *v.* Delaware, etc., R. Co., 60 Fed. 886, 887].

95. Webster Dict. [*quoted* in Kollock *v.* Dodge, 105 Wis. 187, 214, 80 N. W. 608].

96. Standard Dict. [*quoted* in Kollock *v.* Dodge, 105 Wis. 187, 214, 80 N. W. 608]. *Compare* Herrick *v.* Belknap, 27 Vt. 673, 681.

"Architect or engineer" see 6 Cyc. 6.

"Civil engineer" distinguished from **"workman"** in Leuffer *v.* Pennsylvania, etc., R. Co., 11 Phila. (Pa.) 548.

"Engineer in charge" used in connection with a railway construction contract see Reilly *v.* Lee, 16 N. Y. Suppl. 313, 317.

engine; a person who has charge of an engine and its connected machinery,[97] as used in connection with railroads, the party in charge of the locomotive.[98] (Engineer: See MASTER AND SERVANT; RAILROADS.)

ENGINEERING WORK.[99] Any work of construction or alteration or repair of a railroad, harbor, dock, canal, or sewer.[1]

ENGINE-HOUSE or **ROUND-HOUSE.** In common parlance, a place where locomotive engines are kept.[2] (See ENGINE; and, generally, RAILROADS.)

ENGINE-MAN. An ENGINEER, *q. v.*; an engine-driver.[3]

ENGINE-ROOM. In common parlance, the room or compartment in a mill, factory or other building where stationary engines are stationed or placed; a room in or attached to a building in which the engine is situated and operated.[4]

ENGLAND. As defined by statute, a term which means and includes England, Wales, and Berwick-upon-Tweed;[5] the Isle of Man and the Channel Islands.[6]

ENGLISH. The language of the peoples of England and of the peoples derived from them.[7] (See, generally, NEWSPAPERS; PLEADING; PROCESS.)

ENGLISH CHANNEL DISTRICT. As defined by statute, that district consisting of the seas between Dungeness and Isle of Wight.[8]

ENGLISH EDUCATION. An education acquired through the medium of the English language.[9]

That engineers of works, master mechanics, etc., are not included within statutes extending certain protection to "laborers," etc., see 10 Cyc. 689.

97. Century Dict. [*quoted* in Devere *v.* Delaware, etc., R. Co., 60 Fed. 886, 887].

98. Whitehouse *v.* Grand Trunk R. Co., 29 Fed. Cas. No. 17,565, 2 Hask. 189 [*quoting* Webster Dict.; Worcester Dict.]. And see Hartford *v.* Northern Pac. R. Co., 91 Wis. 374, 378, 64 N. W. 1033.

99. **"Engineering purposes"** see McRoberts *v.* Southern Minnesota R. Co., 18 Minn. 108; Reg. *v.* Caledonian R. Co., 16 Q. B. 19, 31, 15 Jur. 396, 20 L. J. Q. B. 147, 71 E. C. L. 19.

1. Chambers *v.* Whitehaven Harbour Com'rs, [1899] 2 Q. B. 132, 135, 68 L. J. Q. B. 740, 80 L. T. Rep. N. S. 586, 47 Wkly. Rep. 533. And see Fletcher *v.* London United Tramways, [1902] 2 K. B. 269, 272, 66 J. P. 596, 71 L. J. K. B. 653, 86 L. T. Rep. N. S. 700, 50 Wkly. Rep. 597.

"Engineering work" includes a bridge forming part of the line of railway itself under a statute. Atty.-Gen. *v.* Tewkesbury, etc., R. Co., 1 De G. J. & S. 423, 9 Jur. N. S. 951, 32 L. J. Ch. 482, 483, 8 L. T. Rep. N. S. 682, 66 Eng. Ch. 328 [*citing* Reg. *v.* Caledonian R. Co., 16 Q. B. 19, 15 Jur. 396, 20 L. J. Q. B. 147, 71 E. C. L. 19].

2. Kincaid *v.* People, 139 Ill. 213, 217, 28 N. E. 1060, where it is said: "We are not aware, however, of any common usage or understanding which would designate such a place as an engine room."

3. Whitehouse *v.* Grand Trunk R. Co., 29 Fed. Cas. No. 17,565, 2 Hask. 189 [*quoting* Webster Dict; Worcester Dict.]; Morrison *v.* Grand Trunk R. W. Co., 4 Ont. 43, 49.

4. Kincaid *v.* People, 139 Ill. 213, 217, 28 N. E. 1060.

That an "engine-room" is not necessarily a building see 6 Cyc. 192 note 29.

5. St. 9 & 10 Vict. c. 56, § 3.

6. St. 37 & 38 Vict. c. 77, § 14.

"England" and the jurisdiction of its sovereigns "except where given expressly by some particular statute, . . . does not extend beyond low water mark." Harris *v.* The Steamship Franconia, 2 C. P. D. 173, 46 L. J. C. P. 363, 365 [*citing* Reg. *v.* Keyn, 13 Cox C. C. 403, 2 Ex. D. 63, 46 L. J. M. C. 17]. But in respect to judicial proceedings the term does not include Scotland and Ireland because those countries "have their own separate legal tribunals." *Ex p.* Cunningham, 13 Q. B. D. 418, 423, 53 L. J. Ch. 1067, 51 L. T. Rep. N. S. 447, 33 Wkly. Rep. 22.

7. Century Dict.

Arabic numeral figures in universal use may for some purposes be considered a part of the English language. Clark *v.* Stoughton, 18 Vt. 50, 51, 44 Am. Dec. 361, where it is said: "How far a mark, point, or other sign, prefixed, or added to the figures, to show the application and sense of the number expressed, should also be recognized as English language, must depend much on usage and custom."

Contractions, initials, and symbols are not English words. Hedges *v.* Boyle, 7 N. J. L. 68, 71.

Figures and initials to represent the year, as A. D. 1830, are a part of the English language, within the meaning of statutes requiring judicial proceedings to be in the English language. State *v.* Hodgeden, 3 Vt. 481, 485.

The signs degrees (°) and minutes (′) are no part of the English language within a statute requiring pleadings to be drawn in the English language. State *v.* Jericho, 40 Vt. 121, 122, 94 Am. Dec. 387.

Latin terms, such as "*actio non*," "*versus*," etc., may become engrafted upon the English language, at least so far as they are used in legal proceedings. Smith *v.* Butler, 25 N. H. 521, 522. *Compare* Berry *v.* Osborn, 28 N. H. 279, 287.

8. St. 57 & 58 Vict. § 618.

9. Powell *v.* Board of Education, 97 Ill. 375, 380, 37 Am. Rep. 123.

ENGLISH MARRIAGE. A marriage solemnised in England.[10] (See, generally, MARRIAGE.)

ENGLISH TABLES. Tables constructed from the official records of the registrar general for England and Wales showing the average duration of life.[11] (See CARLISLE TABLES.)

ENGRAVING.[12] The act or art of producing upon hard material incised or raised patterns, characters, lines, and the like; an impression from an engraved plate, block of wood, or other material;[13] an engraved plate; an impression from an engraved plate;[14] a print.[15] (Engraving: Copyright of, see COPYRIGHT.)

ENGROSSING. See MONOPOLIES.

ENHANCED.[16] Increased.[17] (Enhanced: In Value, see DOWER.)

ENITIA PARS SEMPER PRÆFERANDA EST PROPTER PRIVILEGIUM AETATIS. A maxim meaning "The part of the eldest sister is always to be preferred on account of the privilege of age."[18]

ENJOIN. To command;[19] to require;[20] to direct earnestly; to order or direct with urgency; to urge; to admonish; to admonish or instruct with authority; to direct with authority; to prescribe.[21] (See, generally, INJUNCTIONS.)

ENJOY. To have the benefit of;[22] to have the advantage of using.[23] (See, generally, WILLS.)

ENJOYMENT.[24] Occupation;[25] use and occupation.[26] (Enjoyment: Covenant for Quiet, see COVENANTS. Of Easement, see EASEMENTS.)

ENLARGE. To extend; to widen;[27] to increase, as to increase the space in

10. Harvey *v.* Farnie, L. R. 6 P. D. 35, 43, 51, where, however, Lush, L. J. [*citing* Lolley's Case, 2 Cl. & F. 567, Russ. & Ry. 177, 6 Eng. Reprint 1268], said: "The phrase . . . may refer to the place where the marriage was solemnised, or it may refer to the nationality and domicil of the parties between whom it was solemnised, the place where the union so created was to have been enjoyed."

11. Cooper *v.* Lake Shore, etc., R. Co., 66 Mich. 261, 268, 3 N. W. 306, 11 Am. St. Rep. 482, where it is said that these tables "differ from those based upon the American experience."

12. **"Copy" compared with "engrave, etch, or work"** see 9 Cyc. 887 note 43.

13. Webster Dict. [*quoted* in Matter of American Bank-Note Co., 27 Misc. (N. Y.) 572, 575, 58 N. Y. Suppl. 275, distinguishing "engraving" from "printing"].

14. Wood *v.* Abbott, 30 Fed. Cas. No. 17,938, 5 Blatchf. 325, 328.

15. Wood *v.* Abbott, 30 Fed. Cas. No. 17,938, 5 Blatchf. 325, 328; Webster Dict. [*quoted* in Matter of American Bank-Note Co., 27 Misc. (N. Y.) 572, 575, 58 N. Y. Suppl. 275].

"Engraving" may include prints and colored prints within a statute. Boys *v.* Pink, 8 C. & P. 361, 34 E. C. L. 780.

16. **Enhanced as to dower** see 2 Hill Laws Oreg. § 2960.

17. The word taken in an unqualified sense comprehends any increase of value, however caused or arising. Thornburn *v.* Doscher, 32 Fed. 810, 812.

18. Adams Gloss. [*citing* Coke Litt. 166*b*].

19. Bouvier L. Dict. [*quoted* in Lawrence *v.* Cooke, 32 Hun (N. Y.) 126, 134]; Webster Dict. [*quoted* in Lawrence *v.* Cooke, 32 Hun (N. Y.) 126, 129].

20. Bouvier L. Dict. [*quoted* in Lawrence *v.* Cooke, 32 Hun (N. Y.) 126, 134, where it is said: "And this is substantially the sense in which the word is popularly used"].

Implies a command and injunction.— Lawrence *v.* Cooke, 32 Hun (N. Y.) 126, 133.

It is a mandatory word, in legal parlance, always; in common parlance, usually. Clifford *v.* Stewart, 95 Me. 38, 47, 49 Atl. 52 [*citing* Bouvier L. Dict.; Webster Dict.].

21. Lawrence *v.* Cooke, 32 Hun (N. Y.) 126, 129 [*quoting* Webster Dict.; Worcester Dict.].

More authoritative than "direct," and less imperious than a command, the word has the force of pressing admonition with authority. Johnson Dict. [*quoted* in Lawrence *v.* Cooke, 32 Hun (N. Y.) 126, 133].

22. Rountree *v.* Dixon, 105 N. C. 350, 11 S. E. 158, as used in a will.

23. Cooper *v.* Straker, 40 Ch. Div. 21, 27, 58 L. J. Ch. 26, 59 L. T. Rep. N. S. 849, 37 Wkly. Rep. 137.

24. **"Enjoyment as of right"** used in connection with an easement see Battishill *v.* Reed, 18 C. B. 696, 714, 25 L. J. C. P. 290, 4 Wkly. Rep. 603, 86 E. C. L. 696; Onley *v.* Gardiner, 4 M. & W. 496, 499.

25. Ward *v.* Crane, 118 Cal. 676, 679, 50 Pac. 839 [*quoting* Tunis *v.* Lakeport Agricultural Park Assoc., 98 Cal. 285, 286, 33 Pac. 63]. See also Bodenham *v.* Pritchard, 1 B. & C. 350, 354, 8 E. C. L. 150.

Open enjoyment may be implied. In Tickle *v.* Brown, 4 A. & E. 369, 382, 1 Hurl. & W. 769, 5 L. J. K. B. 119, 6 N. & M. 230, 31 E. C. L. 174 [*cited* in Lehigh Valley R. Co. *v.* McFarlan, 43 N. J. L. 605, 627].

26. As the enjoyment of a homestead by one with his family. Baker *v.* State, 17 Fla. 406, 418.

27. Marshall *v.* Vultee, 1 E. D. Smith (N. Y.) 294, 306. See also James *v.* McMillan, 55 Mich. 136, 137, 20 N. W. 826. And *compare* Western New York, etc., R. Co. *v.*

which the market is held.[28] (To Enlarge: An Estate, see DEEDS; ESTATES. A Term — Of Court, see COURTS; Of Lease, see LANDLORD AND TENANT.)

ENLARGING STATUTE. See STATUTES.

ENLIST.[29] To enroll for military service.[30] (See ENLISTMENT.)

ENLISTED. Any one whose name is duly entered upon the military rolls;[31] mustered and received into the military service.[32] (See ENLIST; ENLISTMENT.)

ENLISTED MAN.[33] As defined by statute, the term includes a non-commissioned officer, musician, or private, unless otherwise expressed or implied.[34] (See ENLIST; ENLISTMENT.)

ENLISTMENT.[35] The act of making a contract to serve the government in a subordinate capacity, either in the army or navy;[36] a voluntary engagement to serve as a private soldier for a certain number of years.[37] (Enlistment: In Army or Navy, see ARMY AND NAVY. Bounty, see BOUNTIES.)

ENORMOUS. A word of richer, deeper color than the word "great."[38]

ENROLMENT.[39] In English law, the registering or entering on the rolls of chancery, king's bench, common pleas, or exchequer, or by the clerk of the peace in the records of the quarter sessions, of any lawful act.[40] (Enrolment: In General, see RECORDS. Of Bill, see STATUTES. Of Decree — In Admiralty, see ADMIRALTY; In Equity, see EQUITY. Of Judgment, see JUDGMENTS. Of Statute, see STATUTES. Of Vessel, see SHIPPING.)

EN ROUTE. On the way.[41]

ENSUING. Following.[42]

ENTAIL. See ESTATES.

Buffalo, etc., R. Co., 193 Pa. St. 127, 145, 44 Atl. 242.

28. Atty.-Gen. *v.* Cambridge, L. R. 6 H. L. 303, 310, 22 Wkly. Rep. 37.

29. **"The word is to be taken in the popular sense of it."** It was borrowed from England. Franklin Beneficial Assoc. *v.* Com., 10 Pa. St. 357, 360.

"Volunteering or enlisting" as used in a statute see Wood *v.* Springfield, 43 Vt. 617, 624.

30. Webster Dict. [*quoted* in Erichson *v.* Beach, 40 Conn. 283, 286].

In England, as well as in the American states, the word means not merely to enrol the name, but to sign a written contract of military service made on the part of the government by a recruiting officer. Franklin Beneficial Assoc. *v.* Com., 10 Pa. St. 357, 360.

31. And it applies to those who are drafted as well as to those who volunteer. Sheffield *v.* Otis, 107 Mass. 282, 284.

Under the English Mutiny Act there is no "distinction in point of law between a person who, . . . is to be 'deemed to be enlisted as a soldier in Her Majesty's service,' and a person who is actually in all respects a soldier *de facto*." Wolton *v.* Gavin, 16 Q. B. 48, 81, 15 Jur. 329, 20 L. J. Q. B. 73, 71 E. C. L. 48.

32. Barker *v.* Chesterfield, 102 Mass. 127, 130, as used in Mass. St. (1864) c. 103, § 2.

33. **Enrolé** "which is the equivalent of an 'enlisted man'" is defined as an "'enrolé volontaire.'" Babbitt *v.* U. S., 16 Ct. Cl. 202, 213 [*citing* Littere].

34. N. H. Pub. St. (1901) p. 331, c. 59, § 131.

35. **"A technical word,** derived from Great Britain, with a technical meaning." Babbitt *v.* U. S., 16 Ct. Cl. 202, 213.

36. Bouvier L. Dict. [*quoted* in Erichson *v.* Beach, 40 Conn. 283, 286].

"Enlistment must be deemed to be a contract between the party and the government." U. S. *v.* Thompson, 28 Fed. Cas. No. 16,491, 2 Sprague 103, 105. And it "is not a contract only, but effects a change of status." Morrissey *v.* Perry, 137 U. S. 157, 159, 11 S. Ct. 57, 34 L. ed. 644 [*citing* U. S. *v.* Grimley, 137 U. S. 147, 11 S. Ct. 54, 34 L. ed. 636].

37. English Cyclopedia [*quoted* in Babbitt *v.* U. S., 16 Ct. Cl. 202, 213].

As used in the United States army, the term refers to a voluntary entering of the army by men ordinarily known as common soldiers. Babbitt *v.* U. S., 16 Ct. Cl. 202, 213.

In common usage, the term may signify either the complete fact of entering into the military service, or the first step taken by the recruit towards that end. Tyler *v.* Pomeroy, 8 Allen (Mass.) 480, 485.

38. McDonald *v.* State, 89 Tenn. 161, 163, 14 S. W. 487 [*quoted* in Ritchey *v.* People, 23 Colo. 314, 321, 324, 47 Pac. 272, 384], where the term as used in an instruction relative to an assault was held to be misleading and erroneous. *Compare* Stiles *v.* Coxe, Vaugh. 111, 115, where the expression "so enormous a trespass" is used.

"Enormous crimes" will not generally include the crime of "soliciting the chastity of women." Oswald *v.* Everard, 1 Ld. Raym. 637.

39. **"Enrolled for service"** in the militia used in respect to a horse see Shields *v.* Craney, 3 Wend. (N. Y.) 274, 275.

40. Black L. Dict.

41. McLean *v.* U. S., 17 Ct. Cl. 83, 90, as applied to troops in pursuit.

42. Century Dict.

ENTAILMENT. A word sometimes used in the same sense as devise.[43]

ENTER. Primarily, to go in, or to come in.[44] As applied to records, to set down in writing;[45] to register,[46] the essential facts concerning the things said to be entered;[47] to inscribe; to enroll; to record;[48] as to enter a name, a date, or a statement of fact; to enter a debt in a ledger, a manifest of a ship, or of merchandise in a custom-house, and the like.[49] In practice, to place a thing properly before a court, and usually in writing; to put upon, or among its records.[50] Sometimes used in the sense of to file or duly deposit;[51] to get on;[52] to go upon;[53] to purchase;[54] to render.[55] (See ENTRY.)

ENTER A CITY. As applied to railroads, a term which refers not to the entrance of the railroad, but to its presence in the city.[56]

ENTERED INTO. Under statutory provisions, the term may mean executed; but in its ordinary sense, to become bound; or obligated by a bond, recognizance, contract, etc.[57] (See ENTER; and, generally, BONDS; CONTRACTS; RECOGNIZANCES.)

ENTERED OF RECORD.[58] Copied into the record of the court.[59] (See ENTER; and, generally, RECOGNIZANCES.)

"**Ensuing year**" see State *v.* Chase, 20 N. J. L. 218, 219; Hull *v.* Winnebago County, 54 Wis. 291, 294, 11 N. W. 486.

43. Den. *v.* Dubois, 16 N. J. L. 285, 293.

44. Oakland Pav. Co. *v.* Tompkins, 72 Cal. 5, 7, 12 Pac. 801, 1 Am. St. Rep. 17.

Distinguished from "arrive" in U. S. *v.* Open Boat, 27 Fed. Cas. No. 15,967, 5 Mason 120.

To "enter and remain" in a liquor store see Minter *v.* State, (Tex. Civ. App. 1903) 76 S. W. 312, 313.

"**To enter into an agreement**" see St. Louis *v.* Babcock, 156 Mo. 154, 157, 56 S. W. 731; Blanchard *v.* Blanchard, 33 Misc. (N. Y.) 284, 286, 67 N. Y. Suppl. 478 [*distinguishing* Hardie *v.* Andrews, 13 N. Y. Civ. Proc. 413], (construing N. Y. Code Civ. Proc. § 2356); Reg. *v.* Pratt, 4 E. & B. 860, 864, 82 E. C. L. 860.

"**Enter and use land**" see Indianapolis Water Co. *v.* Kingan, 155 Ind. 476, 479, 58 N. E. 715; McCombs *v.* Stewart, 40 Ohio St. 647, 664.

45. Bissell *v.* Beckwith, 32 Conn. 509, 517; Worcester Dict. [*quoted* in Koehler *v.* Hill, 60 Iowa 543, 582, 14 N. W. 738, 15 N. W. 609].

"**Entering on the docket of the justice**" as applied to an undertaking in replevin means to write the undertaking upon the docket as other judgments are written upon, or recorded in, such docket. Lockwood *v.* Dills, 74 Ind. 56, 60, where it is said: "To write the undertaking upon a separate piece of paper and attach it to the docket, by pinning it thereto, is not 'entering' it upon the docket."

46. Oakland Pav. Co. *v.* Tompkins, 72 Cal. 5, 7, 12 Pac. 801, 1 Am. St. Rep. 17; Worcester Dict. [*quoted* in Koehler *v.* Hill, 60 Iowa 543, 582, 14 N. W. 738, 15 N. W. 609].

47. Oakland Pav. Co. *v.* Tompkins, 72 Cal. 5, 7, 12 Pac. 801, 1 Am. St. Rep. 17; Koehler *v.* Hill, 60 Iowa 543, 582, 14 N. W. 738, 15 N W. 609.

Distinguished from "copy" in Oakland Pav. Co. *v.* Tompkins, 72 Cal. 5, 8, 12 Pac. 801, 1 Am. St. Rep. 17.

48. Thomason *v.* Ruggles, 69 Cal. 465, 475, 11 Pac. 20 [*citing* Webster Dict.]; Uhe *v.* Chicago, etc., R. Co., 4 S. D. 505, 517, 57 N. W. 484, where it is said: "Webster says it is 'the act of committing to writing, or of recording in a book.'" *Compare* Lent *v.* New York, etc., R. Co., 130 N. Y. 504, 509, 29 N. E. 988.

49. Webster Dict. [*quoted* in Koehler *v.* Hill, 60 Iowa 543, 582, 14 N. W. 738, 15 N. W. 609].

50. As to enter an appearance, rule, or judgment. Burrill L. Dict. See also Cooley *v.* Lawrence, 5 Duer (N. Y.) 605, 610.

51. Knox *v.* State, 113 Ga. 929, 931, 39 S. E. 330, as used in a statute authorizing the docketing of a case in court.

Distinguished from "file" see Lent *v.* New York, etc., R. Co., 130 N. Y. 504, 509, 29 N. E. 988.

52. Sawtelle *v.* Railway Pass. Assur. Co., 21 Fed. Cas. No. 12,392, 15 Blatchf. 216, as to enter a public conveyance.

53. As to enter land. McCusker *v.* Mitchell, 20 R. I. 13, 16, 36 Atl. 1123. See also Kellogg *v.* Robinson, 32 Conn. 335, 342.

54. Goodnow *v.* Wells, 67 Iowa 654, 658, 25 N. W. 864, as applied to the acquisition of lands from the government.

55. As the term is sometimes used in connection with a judgment. Conwell *v.* Kuykendall, 29 Kan. 707, 710; McClain *v.* Davis, 37 W. Va. 330, 336, 16 S. E. 629, 18 L. R. A. 634.

56. Morris, etc., Dredging Co. *v.* Jersey City, 64 N. J. L. 587, 590, 46 Atl. 609.

57. Philadelphia F. Assoc. *v.* Ruby, 60 Nebr. 216, 220, 82 N. W. 629. See also Hall *v.* Gilman, 77 N. Y. App. Div. 458, 461, 79 N. Y. Suppl. 303.

58. **The expression is not obscure.** Waldron *v.* Dickerson, 52 Iowa 171, 175, 2 N. W. 1088.

59. Waldron *v.* Dickerson, 52 Iowa 171, 175, 2 N. W. 1088, under a statute relating to recognizances.

"**Entering of record**" is a term which uniformly means writing. Naylor *v.* Moody, 2 Blackf. (Ind.) 247, 248.

Distinguished from "filing" or "filed" see Naylor *v.* Moody, 2 Blackf. (Ind.) 247, 248;

ENTERED OR INVOICED VALUE. The value as it is stated in or upon the invoice.[60] (See, generally, CUSTOMS DUTIES.)

ENTERING ON THE REFERENCE. Not merely making an appointment to hear the parties, but actually beginning to hear them.[61] (See, generally, REFERENCES.)

ENTERING SHORT. In London a custom for bankers to receive bills for collection and to enter them immediately in their customers' accounts, but never to carry out the proceeds in the column to their credit until actually collected.[62] (See, generally, BANKS AND BANKING.)

ENTERPRISE. An undertaking of hazard; an arduous attempt.[63]

ENTERTAINED.[64] Received into the house of a friend in a hospitable manner.[65] (See ENTERTAINMENT.)

ENTERTAINING. Affording entertainment.[66]

ENTERTAINMENT.[67] The act of furnishing accommodation, refreshment, good cheer, or diversion; mental enjoyment; instruction or amusement afforded by anything seen or heard, as a spectacle, a play, etc.; the act of providing gratification or diversion;[68] the act of receiving as host, or amusing, admitting, or cherishing; hospitable reception; hospitable provision for the wants of a guest; especially provision for a table — a feast; a formal or elegant meal, etc.; that which amuses or diverts;[69] a hospitable repast; a banquet;[70] a public reception;[71] the receiving and accommodating guests, either with or without reward,[72] not BOARD,[73]

Waldron *v.* Dickerson, 52 Iowa 171, 175, 2 N. W. 1088; State *v.* Lamm, 9 S. D. 418, 419, 69 N. W. 592.

"Entered on the records" in respect to an assignment of errors is complied with under the statute if pasted to the transcript. Moore *v.* Hammons, 119 Ind. 510, 511, 21 N. E. 1111.

60. Arthur *v.* Goodard, 96 U. S. 145, 146, 24 L. ed. 814, as used under the customs revenue laws.

61. Baring-Gould *v.* Sharpington Pick, etc., Syndicate, [1898] 2 Ch. 633, 67 L. J. Ch. 622, 79 L. T. Rep. N. S. 185, 47 Wkly. Rep. 23 [*citing* Baker *v.* Stephens, L. R. 2 Q. B. 523, 8 B. & S. 438, 36 L. J. Q. B. 236, 15 Wkly. Rep. 902].

62. Blaine *v.* Bourne, 11 R. I. 119, 121, 23 Am. Rep. 429 [*citing* Giles *v.* Perkins, 9 East 12; *Ex p.* Thompson, 1 Mont. & M. 102].

63. U. S. *v.* Ybanez, 53 Fed. 536, 538.

"Enterprise" interpreted as used in connection with a lottery scheme as violating the postal laws see Horner *v.* U. S., 147 U. S. 449, 459, 13 S. Ct. 409, 37 L. ed. 237. And as used in a statute authorizing the formation of corporations see Maxwell *v.* Akin, 89 Fed. 178, 180.

64. "Entertain" and "shelter" distinguished from "harbor" in Van Metre *v.* Mitchell, 28 Fed. Cas. No. 16,865, 2 Wall. Jr. 311.

65. Howes *v.* Board of Inland Revenue, 1 Ex. D. 385, 393, 46 L. J. M. C. 15, 35 L. T. Rep. N. S. 584, 24 Wkly. Rep. 897.

66. *In re* Breslin, 45 Hun (N. Y.) 210, 213 [*citing* Webster Dict.; Worcester Dict.].

67. Compared with and distinguished from "refreshment" in Howes *v.* Board of Inland Revenue, 1 Ex. D. 385, 393, 46 L. J. M. C. 15, 35 L. T. Rep. N. S. 584, 24 Wkly. Rep. 897; Taylor *v.* Oram, 1 H. & C. 370, 376, 8 Jur. N. S. 748, 31 L. J. M. C. 252, 7 L. T. Rep. N. S. 68, 10 Wkly. Rep. 800.

"Refresher fee" as used in connection with a trial see Hargreaves *v.* Scott, 4 C. P. D. 21, 24, 40 L. T. Rep. N. S. 35, 27 Wkly. Rep. 323.

68. Century Dict. [*quoted* in Mason *v.* Perry, 22 R. I. 475, 492, 48 Atl. 671, where it is said: "These definitions are sufficient to show that 'entertainment' is by no means synonymous with charity in its legal sense"].

"Entertainment of the stage" may include a performance consisting of songs, glees, recitations, selections from operas and oratorios, and solos, trios and quartettes of various musical instruments (Juvenile Delinquents Reformation Soc. *v.* Neusbach, 16 N. Y. Wkly. Dig. 349); or ballet dancing (Gallini *v.* Laborie, 5 T. R. 242, 244); but does not include a "ballet divertissement" (Wigan *v.* Strange, L. R. 1 C. P. 175, 184, 1 Harr. & R. 41, 12 Jur. N. S. 9, 35 L. J. M. C. 31, 13 L. T. Rep. N. S. 371, 14 Wkly. Rep. 103) or tumbling (Rex *v.* Handy, 6 T. R. 286, 287).

What may constitute an "entertainment" within the provisions of a Sunday observance act see Terry *v.* Brighton Aquarium Co., L. R. 10 Q. B. 306, 44 L. J. M. C. 173, 174, 32 L. T. Rep. N. S. 458.

69. Webster Dict. [*quoted* in Mason *v.* Perry, 22 R. I. 475, 492, 48 Atl. 671].

70. *In re* Breslin, 45 Hun (N. Y.) 210, 213 [*citing* Webster Dict.; Worcester Dict.].

71. Muir *v.* Keay, L. R. 10 Q. B. 594, 597, 44 L. J. M. C. 143, 23 Wkly. Rep. 700.

72. Webster Dict. [*quoted* in Bonner *v.* Welborn, 7 Ga. 296, 334].

"The distinction between entertaining a friend at one's home, or a hotelkeeper entertaining a traveler at his hotel, and entertaining a large number of strangers, constituting an organized body, by the residents and business men of a city, is quite apparent." Lasar *v.* Johnson, 125 Cal. 549, 555, 58 Pac. 161.

73. Scattergood *v.* Waterman, 2 Miles (Pa.) 323. See also Lasar *v.* Johnson, 125 Cal. 549, 555, 58 Pac. 161, where "board" is compared with and distinguished from "entertainment."

q. v., the correlative of resort — the reception and accommodation of the public who resort to a place;[74] a shop where the public are received, sheltered, and refreshed.[75] (Entertainment: In General, see THEATERS AND SHOWS. House of, see INN-KEEPERS. Of Arbitrators as Affecting Award, see ARBITRATION AND AWARD. Of Jurors as Affecting Verdict, see CRIMINAL LAW; NEW TRIAL.)

ENTICE.[76] To allure to ill, to attract, to seduce, to coax.[77] A word which may import an initial, active, and wrongful effort.[78] (To Entice: Apprentice, see APPRENTICES. Child or Other Person, see KIDNAPPING. Female, see ABDUCTION. Husband or Wife, see HUSBAND AND WIFE. Seaman, see SEAMEN. Servant, see MASTER AND SERVANT.)

ENTIRE. Undivided;[79] unmingled, complete in all its parts;[80] whole, not participated in with others.[81] (Entire: Contract, see CONTRACTS.)

ENTIRE CONTRACT. See CONTRACTS.

ENTIRETY. A word which denotes the whole, in contradistinction to "moiety," which denotes the half part.[82] (Entirety: Estate by, see HUSBAND AND WIFE; JOINT TENANCY; TENANCY IN COMMON.)

ENTIRE USE. See TRUSTS.

74. Muir *v.* Keay, L. R. 10 Q. B. 594, 597. 44 L. J. M. C. 143, 23 Wkly. Rep. 700 [*quoted* in Howes *v.* Board of Inland Revenue, 1 Ex. D. 385, 394, 46 L. J. M. C. 15, 35 L. T. Rep. N. S. 584, 24 Wkly. Rep. 897].

75. Howes *v.* Board of Inland Revenue, 1 Ex. D. 385, 393, 46 L. J. M. C. 15, 35 L. T. Rep. N. S. 584, 24 Wkly. Rep. 897.

76. "Enticer" distinguished from "procurer" see 1 Cyc. 144 note 24.

"Enticing and dangerous machine" considered as an act of negligence toward children see Travell *v.* Bannerman, 71 N. Y. App. Div. 439, 445, 75 N. Y. Suppl. 866.

77. Worcester Dict. [*quoted* in U. S. *v.* Ancarola, 1 Fed. 676, 683, 17 Blatchf. 423].

78. Nash *v.* Douglass, 12 Abb. Pr. N. S. (N. Y.) 187, 190.

79. Williams *v.* Vancleve, 7 T. B. Mon. (Ky.) 388, 393; Heathman *v.* Hall, 38 N. C. 414, 421.

80. Williams *v.* Vancleve, 7 T. B. Mon. (Ky.) 388, 393.

81. Heathman *v.* Hall, 38 N. C. 414, 421.

"Entire action" see Hawkins *v.* Filkins, 24 Ark. 286, 324.

"Entire benefit" see Heathman *v.* Hall, 38 N. C. 414, 421.

"Entire charge" see Seymour *v.* Warren, 179 N. Y. 1, 5, 71 N. E. 260.

"Entire community" see West *v.* State, 71 Ark. 144, 149, 71 S. W. 483.

"Entire crop" see Holst *v.* Harmon, 122 Ala. 453, 460, 26 So. 157; Comer *v.* Lehman, 87 Ala. 362, 368, 6 So. 264.

"Entire day" see Robertson *v.* State, 43 Ala. 325, 329; Chick *v.* Pillsbury, 24 Me. 458, 478, 41 Am. Dec. 394; Den *v.* Fen, 8 N. J. L. 303, 304; Lawrence *v.* State, 7 Tex. App. 192, 194.

"Entire exclusion" see Atty.-Gen. *v.* Worrall, [1895] 1 Q. B. 99, 105, 59 J. P. 467, 64 L. J. Q. B. 141, 71 L. T. Rep. N. S. 807, 14 Reports 1, 43 Wkly. Rep. 118.

"Entire interest" see White *v.* White, 52 Conn. 518, 521; McLeroy *v.* Duckworth, 13 La. Ann. 410, 411; Uniontown First Nat. Bank *v.* Stauffer, 1 Fed. 187, 188.

"Entire rents and profits" see Guthrie *v.* Wheeler, 51 Conn. 207, 213.

"Entire satisfaction" see Sloan *v.* Hayden, 110 Mass. 141, 143. See also, generally, CONTRACTS.

"Entire stock" see Jaffrey *v.* Brown, 29 Fed. 476, 481.

"Entire term" see Carlisle *v.* May, 75 Ala. 502, 504.

"Entire tract" see 2 Lewis Em. Dom. § 475 [*quoted* in Houston, etc., R. Co. *v.* Postal Tel. Cable Co., 18 Tex. Civ. App. 502, 505, 45 S. W. 179; Sultan Water, etc., Co. *v.* Weyerhauser Timber Co., 31 Wash. 558, 561, 72 Pac. 114]. See also, generally, EMINENT DOMAIN.

"Entire, unconditional, and sole ownership" see Imperial F. Ins. Co. *v.* Dunham, 117 Pa. St. 460, 475, 12 Atl. 668, 2 Am. St. Rep. 686; Franklin F. Ins. Co. *v.* Crockett, 7 Lea (Tenn.) 725, 728; Boutelle *v.* Westchester F. Ins. Co., 51 Vt. 4, 11, 31 Am. Rep. 666; Johannes *v.* Standard Fire Office, 70 Wis. 196, 198, 35 N. W. 298, 5 Am. Rep. 159; Lycoming F. Ins. Co. *v.* Haven, 95 U. S. 242, 247, 24 L. ed. 473; Friezen *v.* Allemania F. Ins. Co., 30 Fed. 352, 358.

"Entirely free from fault" used in a charge in a criminal prosecution has been held to mean no more than "free from fault." Ellis *v.* State, 120 Ala. 333, 337, 25 So. 1.

"Entirely ignorant of the facts" considered in connection with the question of the sufficiency of a bill of particulars see Garfield Nat. Bank *v.* Peck, 1 Misc. (N. Y.) 126, 129, 20 N. Y. Suppl. 650.

"Entirely for my daughter's benefit and her children," used in a will. Furlow *v.* Merrell, 23 Ala. 705, 716.

"Entirely satisfied" or "entirely satisfactory" as used in a charge to the jury see People *v.* Phipps, 39 Cal. 326, 335; State *v.* Ferguson, 9 Nev. 106, 118.

82. Bouvier L. Dict. [*quoted* in Joos *v.* Fey, 9 N. Y. Suppl. 275, where it is said: "A husband and wife, when jointly seised of land, are seised by entireties, and not *pur mie*, as joint tenants are"].

ENTITLE. To give a claim, right,[83] or title to; to give a right to demand or receive; to furnish with grounds for claiming, with a direct object of the person claiming, and a remote object of the thing claimed.[84] (To Entitle: An Affidavit, see AFFIDAVITS. An Indictment or Information, see INDICTMENTS AND INFORMATIONS. A Motion, see MOTIONS. A Pleading, see EQUITY; PLEADING. A Statute, see STATUTES.)

ENTITLED. Qualified.[85]

ENTRANCE. A door, a gate, an opening, and, perhaps, a passage.[86] (Entrance: To Place Where Liquor Is Sold, see INTOXICATING LIQUORS.)

ENTREAT. A precatory word sometimes sufficient to create a trust.[87] (See, generally, TRUSTS.)

ENTRY. As applied to a building, a passage leading into a house or other building or to a room; a vestibule.[88] As applied to writings, in general, that which is written, be it words or figures.[89] As used with reference to books of account, reports, and statements, a setting down in writing;[90] the act of setting down or causing to be set down, in writing; recording or causing to be recorded, in due form;[91] the act of making or entering a record, that is to say, the act of making a record of a fact or transaction.[92] As applied to judicial proceedings, recording in due form and order a thing done in court.[93] In the law of real estate the act of going on land, or doing something equivalent, with the intention[94] of asserting a right in the land;[95] taking possession of lands by the legal owner;[96] and as applied generally to public lands, a term which signifies a settlement with a view to purchase or homesteading;[97] that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country,

83. Conoly *v.* Gayle, 54 Ala. 269, 270 [*quoted* in Com. *v.* Moorhead, 7 Pa. Co. Ct. 513, 517] (where it is also said that this "is a strong word"); People's Trust Co. *v.* Smith, 30 N. Y. Suppl. 342, 344, 31 Abb. N. Cas. (N. Y.) 422.

84. People's Trust Co. *v.* Smith, 30 N. Y. Suppl. 342, 344, 31 Abb. N. Cas. (N. Y.) 422, where it is said: "It is directly opposed to the idea of imposing an obligation or limitation, but gives to the person named a right to demand or receive."

85. As "entitled to vote." Davis *v.* Dawson, 90 Ga. 817, 820, 17 S. E. 110. And *compare* Whiteley *v.* Chappell, L. R. 4 Q. B. 147, 148. 11 Cox C. C. 307, 38 L. J. M. C. 51, 19 L. T. Rep. N. S. 355, 17 Wkly. Rep. 175.

"Entitled to" as applied to estates, generally embraces every interest of every kind which the party in question has any title to whatever, whether it be an estate or interest in possession, in remainder, or reversion, either vested or contingent. Wilton *v.* Colvin, 3 Drew. 617, 2 Jur. N. S. 867, 25 L. J. Ch. 850, 853, 4 Wkly. Rep. 759. And see Myers *v.* Cann, 95 Ga. 383, 386, 22 S. E. 611 (where it is said: "We think the term person entitled to an estate means the person in whom the legal right is vested"); *In re* Clinton, L. R. 13 Eq. 295, 304, 41 L. J. Ch. 191, 26 L. T. Rep. N. S. 159, 20 Wkly. Rep. 326; Archer *v.* Kelly, 1 Dr. & Sm. 300, 6 Jur. N. S. 814, 29 L. J. Ch. 911, 8 Wkly. Rep. 684. See also, generally, ESTATES.

"Entitled to hold" the homestead see Holbrook *v.* Wightman, 31 Minn. 168, 171, 17 N. W. 280. See, generally, HOMESTEADS.

"Entitled to share" in estate of decedent see Matter of Seymour, 33 Misc. (N. Y.) 271, 272, 68 N. Y. Suppl. 638; Steere *v.* Wood, 15 R. I. 199, 200, 2 Atl. 551. See, generally, EXECUTORS AND ADMINISTRATORS.

86. Roberts *v.* Trujillo, 3 N. M. 50, 51, 1 Pac. 855.

87. Curd *v.* Field, 103 Ky. 293, 297, 45 S. W. 92, 19 Ky. L. Rep. 2016; Major *v.* Herndon, 78 Ky. 123, 129. See also Prevost *v.* Clarke, 2 Madd. 458.

88. Webster Dict. [*quoted* in Guild *v.* Ohio Lodge No. 132, 6 Kan. App. 67, 49 Pac. 684, 685].

89. U. S. *v.* Crecilius, 34 Fed. 30, 31 [*citing* Webster Dict.].

90. Bissell *v.* Beckwith, 32 Conn. 509, 517.

91. Abbott L. Dict. [*quoted* in Thomason *v.* Ruggles, 69 Cal. 465, 475, 11 Pac. 20].

92. Webster Dict. [*quoted* in U. S. *v.* Crecilius, 34 Fed. 30, 31].

"Entry of a foreclosure," as used in a fire-insurance policy see McIntire *v.* Norwich F. Ins. Co., 102 Mass. 230, 232, 3 Am. Rep. 458.

93. State *v.* Lamm, 9 S. D. 418, 420, 69 N. W. 592 [*quoting* Anderson L. Dict., and *citing* Bouvier L. Dict.; Webster Dict.] *Compare* Hatcher *v.* Gammell, 49 Ga. 576, 578; Laundon *v.* Denman, 18 Ohio Cir. Ct. 857, 4 Ohio Cir. Dec. 65, 860.

94. The intention of persons making entry see Moore *v.* Hodgdon, 18 N. H. 144, 149.

95. Rapalje & L. L. Dict. [*quoted* in Johnson *v.* Cobb. 29 S. C. 372, 380, 7 S. E. 601].

At common law, it was an assertion of title by going on the land: or if that was hazardous, by making continual claim. Innerarity *v.* Mims, 1 Ala. 660, 674.

96. Bouvier L. Dict. [*quoted* in Guion *v.* Anderson, 8 Humphr. (Tenn.) 298, 306].

97. St. Paul, etc., R. Co. *v.* Greenhalgh, 26 Fed. 563, 567.

by filing his claim in the office of an officer known, in the legislation of several states, by the epithet of an entry-taker, and corresponding very much in his functions with the registers of land-offices, under the acts of the United States.[98] As used in statutes regulating the collection of customs revenue, the entire transaction by which an importer obtains the entrance of his goods into the body of the merchandise of a country;[99] and in this sense it includes entry for consumption,[1] entry for transportation,[2] entry for warehouse,[3] entry for withdrawal,[4] etc. But the word is most frequently used in the statutes, as it is in the practice of the custom-house and in common speech, as referring to the particular documents which the statutes *in pari materia* require, and which they designate as "entries."[5] (Entry: Burglarious, see BURGLARY. By Grantor on Breach of Condition, see DEEDS. By Landlord, see LANDLORD AND TENANT. Conveyance of Land Held Adversely by One Having Right of, see CHAMPERTY AND MAINTENANCE. Fees of Clerk for Making, see CLERKS OF COURTS. Forcible, see FORCIBLE ENTRY AND DETAINER. For Copyright, see COPYRIGHT. In Books of Account, see EVIDENCE. Of Appeal, see APPEAL AND ERROR. Of Appearance, see APPEARANCES. Of Cause for Trial, see TRIAL. Of Decree, see EQUITY. Of Execution, see EXECUTIONS. Of Judgment in Civil Action — Generally, see JUDGMENTS; After Death of Party, see ABATEMENT AND REVIVAL; In Justice's Court, see JUSTICES OF THE PEACE; On Appeal, see APPEAL AND ERROR. Of Judgment in Criminal Prosecutions, see CRIMINAL LAW. Of Land and Adverse Possession Thereof, see ADVERSE POSSESSION. Of Public Lands, see PUBLIC LANDS. Of Satisfaction — Of Judgment, see JUDGMENTS; Of Mortgage, see CHATTEL MORTGAGES; MORTGAGES. Of Special Bail, see BAIL. Of Statute on Journal, see STATUTES. To Foreclose Mortgage, see MORTGAGES. Under Right of Eminent Domain, see EMINENT DOMAIN. Writ of, see ENTRY, WRIT OF.)

ENTRY OF AN ACTION. The time that it is placed on the prothonotary's docket.[6] (See, generally, ACTIONS.)

ENTRY OF ARRAIGNMENT. In criminal law, the record of the defendant's appearance in court for the purpose of being tried.[7] (See, generally, CRIMINAL LAW.)

98. Goddard *v.* Storch, 57 Kan. 714, 717, 48 Pac. 15 [*quoting* 2 Copp Pub. Land Laws (1882), p. 961]; Chotard *v.* Pope, 12 Wheat. (U. S.) 586, 588, 6 L. ed. 737 [*quoted* in McGuire *v.* Brown, 106 Cal. 660, 666, 39 Pac. 1060, 30 L. R. A. 384; McMichael *v.* Murphy, 12 Okla. 155, 160, 70 Pac. 189; Northern Pacific R. Co. *v.* Nelson, 22 Wash. 521, 535, 61 Pac. 703; Sturr *v.* Beck, 133 U. S. 541, 549, 10 S. Ct. 350, 33 L. ed. 761; U. S. *v.* Four Bottles of Sour-Mash Whisky, 90 Fed. 720, 723; Northern Pac. R. Co. *v.* Sanders, 47 Fed. 604, 607; Denny *v.* Dodson, 32 Fed. 899, 910, 13 Sawy. 68, where it is said: "The term entry, as applied to appropriations of lands, was probably borrowed from the state of Virginia, in which we find it used in that sense at a very remote period"]. *Compare* Moriarty *v.* Boone County, 39 Iowa 634, 639 (entry under the homestead act); Lockwitz *v.* Larson, 16 Utah 275, 279, 52 Pac. 279 (appropriation of land for a town site).

99. U. S. *v.* Baker, 24 Fed. Cas. No. 14,500, 5 Ben. 251. See also CUSTOMS DUTIES, 12 Cyc. 1184 note 13. *Compare* Ullman *v.* Murphy, 24 Fed. Cas. No. 14,325, 11 Blatchf. 354.

1. **"Entry for consumption and warehouse"** see U. S. Customs Reg. (1899) art. 393.

"Entry for consumption or in bond" see U. S. Customs Reg. (1899) art. 384.

2. **"Entry for warehouse and immediate exportation by sea"** see U. S. Customs Reg. (1899) art. 896.

3. **"Entry for warehouse"** as used in the regulations for the collection of customs revenue is the original entry of imported goods at the custom-house. U. S. *v.* Seidenberg, 17 Fed. 227, 230 [*citing* Westray *v.* U. S., 18 Wall. (U. S.) 322, 21 L. ed. 763], where it is said: "The entry for warehouse is the original entry, but the term 'entry for withdrawal' is a misnomer."

4. **"Entry for withdrawal"** is an application for permission to withdraw goods already entered at a custom-house. U. S. *v.* Seidenberg, 17 Fed. 227, 230. See also U. S. *v.* Baker, 24 Fed. Cas. No. 14,500, 5 Ben. 251.

"Entry in bond" see U. S. Customs Reg. (1899) art. 386.

5. U. S. *v.* Legg, 105 Fed. 933, 45 C. C. A. 134.

6. Hertzog *v.* Ellis, 3 Binn. (Pa.) 209, 212 [*cited* in Fehr *v.* Reich, 36 Pa. St. 472, 474], where Tilghman, C. J., said: "The entering or bringing the action is one thing; the appearance in court another."

7. And it is necessary only where he must appear in person. Jacobs *v.* Com., 5 Serg. & R. (Pa.) 315, 317 [*quoted* in Lynch *v.* Com., 88 Pa. St. 189, 193, 32 Am. Rep. 445].

ENTRY, WRIT OF

By CHARLES M. HEPBURN
Professor of Law, Indiana University *

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CROSS-REFERENCES

For Matters Relating to:
Action For Recovery of Specific Real Property Based on:
Forcible Entry or Unlawful Detainer, see FORCIBLE ENTRY AND DETAINER.
Right of Possession and Damages For Detention, see EJECTMENT; TRESPASS TO TRY TITLE.
Right of Property, see REAL ACTIONS.
Writ of Entry to Foreclose Mortgage, see MORTGAGES.

I. DEFINITION.

The writ of entry, as defined by the common law, is to be sharply distinguished from the writ of entry which now exists, by virtue of statutory enactment, in a very few states of the Union. At common law, in England and America, a writ of entry was a possessory real action which turned upon the question whether the adverse occupant of a freehold was in possession under a certain unlawful entry alleged to have been made by him or those under whom he held. The cardinal feature of the action was the alleged entry of the occupant; the purpose of the action was to disprove the occupant's right of possession by showing the unlawful nature of its commencement.[1] Under modern statutes the writ of entry has become a mixed action designed for the recovery of possession of land upon the strength of plaintiff's legal title, and not on the weakness of the title or the possession of defendant.[2] Through this modern development not merely the possession but the title is in issue in the writ of entry; and the demandant can recover only to the extent to which he proves title.[3]

II. HISTORY.

A. In General. As a term of the common law the "writ of entry" denoted, not one form of action alone, like the action of debt or the action of assumpsit, but a distinctive group of different forms of action. Each of these had the general characteristics indicated above; but each differed from every other in one or more procedural features, and each had its own range of application.[4]

1. See 3 Blackstone Comm. 180, 185; Booth Real Act. 172; Jacob L. Dict; 4 Minor Inst. (2d ed.) 373.

2. See Me. Rev. St. (1903) c. 106, §§ 1–46; Mass. Rev. Laws (1902), c. 179, §§ 1–43. *Compare* Hall v. Decker, 48 Me. 255; Bruce v. Mitchell, 39 Me. 390; Webster v. Hill, 38 Me. 78; Thayer v. McLellan, 23 Me. 417; Bussey v. Grant, 20 Me. 281; Butrick v. Tilton, 141 Mass. 93, 96, 6 N. E. 563; Swan v. Stephens, 99 Mass. 7, 10 ("*nul disseisin* puts the whole title in issue. This issue may be maintained by the tenant on his part, either negatively, by disproof of the title set up by the demandant, or affirmatively, by proof of title in himself"); Weston v. Nevers, 72 N. H. 65, 54 Atl. 703; Lear v. Durgin, 64 N. H. 618, 15 Atl. 128 ("the plaintiff, to recover, must rely on the strength of her own title, and not upon the weakness of the defendant's. . . . The plaintiff having failed to prove a title to the demanded premises, a verdict for the defendant was properly ordered"); Goulding v. Clark, 34 N. H. 148, 155; Atherton v. Johnson, 2 N. H. 31, 35. And see 2 Greenleaf Ev. (16th ed.) §§ 303, 553.

3. See remarks of Morton, C. J., in Butrick v. Tilton, 141 Mass. 93, 96, 6 N. E. 563.

4. Hence the question in early American law whether the admitted adoption of certain writs of entry by the colonists meant the adoption of all the writs of entry known in the English law. See 3 Am. Jur. 65; 2 Am. Jur. 181.

For different species of the writ of entry see Booth Real Act.; Jackson Real Act.; Stearns Real Act., each *passim*.

B. In England. The writs of entry came into our law at different times. Some were of the earliest common law; others were of comparatively recent origin. Some were purely non-statutory, their appearance marking an achievement of judicial legislation, or a development of the common law itself; others were the direct result of early statutes. Some became obsolete at an early day; others remained in use for centuries. In one form or another the writ of entry continued for generations as the almost universal remedy to recover possession of a freehold.[5] After the rise of the action of ejectment as a method of trying a freehold title all the writs of entry fell into disuse. They were quite obsolete in England by the middle of the eighteenth century, and their learning well nigh forgotten.[6] Finally they were abolished in the mother country with most of the other real actions by the sweeping legislation of 1833.[7]

C. In America. The history of the writs of entry in the United States differs materially from their later history on the other side of the Atlantic. When the English colonization of America began, the action of ejectment was already the favorite method of trying freehold titles in England, and almost the only method there; but the writs of entry, although disused, were still legal remedies in the mother country. They were part of the inheritance of Englishmen in America.[8] From causes which it is not now easy or important to trace, these writs of entry, or some of them, continued in use among the colonists, notwithstanding the growing popularity of the action of ejectment.[9] In several states they survived the Revolution. In one or two states they appeared for the first time in actual use even this side of the year 1800.[10] In more recent years the writs of entry as such have for the most part disappeared from the working systems of American procedure. Occasionally they have been abolished by the express declaration of the legislature.[11] In many states, especially those of the west, the writs of entry have never been recognized as a part of the existing procedure, the action of ejectment having silently taken the place of all real

5. 3 Blackstone Comm. 183, where it is said: "It were, therefore, endless to recount all the several divisions of writs of entry, which the different circumstances of the respective demandants may require, and which are furnished by the laws of England: being plainly and clearly chalked out in that most ancient and highly venerable collection of legal forms, the *registrum omnium brevium*."

6. "When once it [the action of ejectment] was allowed, notwithstanding all the complaints of Coke and his contemporary judges, it became universally followed, and is now [i. e. about the year 1772] so established, and the higher actions so much out of use, that I question whether there is a lawyer living who would be able, without a great deal of study, to conduct a cause in one of these antiquated real actions." Sullivan Lectures, lect. 40. And see 1 Am. Jur. 189.

7. St. 3 & 4 Wm. IV, c. 27, § 36.

8. See Witherow *v.* Keller, 11 Serg. & R. (Pa.) 271.

9. See Jackson Real Act. *passim*; 3 Am. Jur. 65; 2 Am. Jur. 181. It has been suggested as one cause of this survival that the puritan nature could not tolerate the series of fictions in ejectment.

10. In the year 1824 a writ of entry *sur disseisin* came for the first time before the supreme court of Pennsylvania, in Witherow *v.* Keller, 11 Serg. & R. (Pa.) 271, 272. The majority of the court were of the opinion that the action lay in Pennsylvania. Said Tilghman, C. J., delivering the opinion: "The main argument against this action is, that this is the first instance of its having been brought. . . . As to the inference which is attempted to be drawn from the circumstance, . . . I do not think it well founded. The first settlers of Pennsylvania brought with them the common law, in general, except such parts thereof as were unfit for colonies. It might be expected, that in a young country, many years might elapse before there would be a necessity to make use of all the forms of action in practice in an old country, far advanced in arts, commerce, and civilization; accordingly, we find that such has been the case. The action of ejectment, being the most simple and convenient for the trial of titles to land, is almost the only one which has been used; but that is no reason for excluding all other actions; some of which may be found, in particular cases, not only useful, but necessary. . . . Even if the writ of entry had never been used before, it would be no answer to the action, to say, that it was the first of the kind. We have several instances of writs and remedies, known to the common law, and never introduced into practice here, till since our independence."

11. So in Virginia, by the code of 1849 (see Va. Code (1873), c. 131, § 38), the action having long before been disused in that state. 4 Minor Inst. 374.

actions. As the law of procedure now stands in most of the United States the possibility of the writ of entry as a distinct form of common-law action has disappeared before the modern principle of one form of civil action established by the codes.[12] On the other hand the writs of entry still survive as a distinct form of remedy in a few states.[13]

D. The Writ of Entry and the Cause of Action. There is another respect, however, in which the writ of entry has had a very extensive survival. Its underlying principle finds a place in all the states of the Union which look to the substantive common law of England. The writ of entry was itself the outward manifestation of a definite cause of action.[14] And this cause of action has not been destroyed by mutation in the law of procedure. The writ of entry no longer exists as a distinct form of action in any of the states which have adopted the principle of the one form of action, the "code states" so called, but the cause of action which was defined and enforced through the writ of entry still endures even in these states. When such a cause is set up under the code, the civil action is in substantial effect rather nearer akin to the writ of entry than it is to the common-law action of ejectment.[15]

III. NATURE AND SCOPE OF THE REMEDY.

A. At Common Law — 1. In General. As a possessory real action, the writ of entry was grounded in a two-fold distinction: (1) The distinction between possession and a right of possession; (2) the distinction between a right of possession and a mere right of property.[16] For instance A, the owner in fee simple of a tract of land, is in actual possession of it; B, who has no right whatever to the land, enters upon it, ejects A *vi et armis* and keeps him out of possession by violence. In this state of things B has possession, but for the time being he has as against A no right of possession. Within a certain limited time

12. So notably in the states and territories of Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Washington, Wisconsin, Wyoming.

13. Maine for instance and Massachusetts and New Hampshire; but the survival here is with such radical changes in the substantial theory of the remedy that it is properly to be classed by itself, not merely as a survival in name rather than in substance, but as a statutory writ of entry peculiar in each instance to the state creating it. Even in the code states mentioned above (see *supra*, note 12), notwithstanding their adoption of the one form of civil action, it is of course possible for a statutory writ of entry to appear as a distinct form of remedy, under the guise of a special proceeding or a special action; but the tendency in legislation is quite the other way.

14. So marked was this that a judgment against plaintiff in a writ of entry was no bar to his claim against the same defendant for the same land, and because of the same occurrence, if asserted through a writ of right. Ferrer's Case, 6 Coke 7*a*, 7*b*, where it is said: "If any one be barred by judgment in any real action of the seisin of his ancestor or of his own possession he may have a writ of right, in which the matter shall be tried and determined again." And *compare* Outram *v.* Moorewood, 3 East 345, 357, 7 Rev. Rep. 473.

The strictly possessory character of the writ of entry is illustrated in 2 Pollock & M. Hist. Eng. L. 67, 74.

15. "From habit, and as a matter of convenience, we ordinarily speak of the action, in a general sense, as an action of ejectment. This is well enough, so long as we do not suffer ourselves to be misled by confounding the action to recover real estate in use in this State, with the action of ejectment at common law, and as a consequence embarrass ourselves by attempting to apply the rules of law peculiar to the latter action to the former. Technically, and substantially, we have no action of ejectment. The forms constitute the substance of that action at common law. True, practically, the possession of the land was recovered. But this was equally true of the writ of entry, and an assize. All these were possessory actions merely. And there would be just as much propriety in calling our action to recover the possession of land a writ of entry, or an assize, as an ejectment. The pleadings are more nearly assimilated to the pleadings in a writ of entry, or an assize, than to the pleadings in an action of ejectment." Caperton *v.* Schmidt, 26 Cal. 479, 496, 85 Am. Dec. 187.

16. For this distinction see Bacon Abr. tit. "Actions in General," A.

A had a right, in the early common law, to return and peaceably but summarily take possession of his land without invoking the aid of the courts.[17] But the period within which this extrajudicial remedy could be used was very short.[18] If A did not act within this period B's possession grew into a right of possession. Because of his delay A's right of entry has "tolled."[19] B's possession, although unlawful in its origin, has generated a kind of title. He has now not only a bare possession, which may be destroyed by a bare entry, but also a *prima facie* right of possession. But while A has lost both possession and this *prima facie* right of possession, he still has rights which may be enforced through the orderly course of the law. He has the actual right of possession; he has also the mere right of property.[20] For the enforcement of the mere right of property the common law furnished the proprietary action known as the writ of right.[21] For the enforcement of the right of possession the common law furnished a series of possessory actions, of which the writ of entry was the oldest and the most complex.[22]

2. IN WHAT WAY THE WRIT OF ENTRY WAS POSSESSORY. Although possessory rather than proprietary at common law, the writ of entry was not possessory in the sense that its cardinal fact was a direct violation of plaintiff's possession of the freehold. This was the characteristic of the writs of assize. The writ of entry, in its historic form, was possessory in the sense that the scope of both claim and defense under it were limited to the entry which plaintiff alleged that defendant had made upon the land. The vital question was whether defendant had entered as plaintiff alleged. This entry plaintiff must prove or fail in his action. On the other hand defendant could not in the writ of entry rely upon a higher right; he must answer to the entry charged against him. It might be that he had indeed made an unlawful entry as alleged, but that he possessed from other sources the

17. 3 Blackstone Comm. 5, 175 *et seq.*; 2 Pollock & M. Hist. Eng. L. 49.

18. It was apparently four days according to Bracton's count if A was present on the land when B wrongfully took possession; it might run to fifteen days if A was then absent. Maitland "The Beatitude of Seisin," 4 L. Q. Rev. 29.

19. It might be tolled also by other things than the lapse of time — as by B's death in possession of the land, and its descent to his heir. "If B, the wrongdoer, dies seised of the lands, then B's heir advances one step farther towards a good title: he hath not only a bare possession, but also an apparent *jus possessionis*, or right of possession. For the law presumes that the possession which is transmitted from the ancestor to the heir, is a rightful possession until the contrary be shewn; and therefore the mere entry of A is not allowed to evict the heir of B; but A is driven to his action at law to remove the possession of the heir, though his entry alone would have dispossessed the ancestor." 3 Blackstone Comm. 177.

20. 3 Blackstone Comm. 180. The mere right of property, however, need not be in him who has been dispossessed. "The right of possession [i. e. the actual right of possession], (though it carries with it a strong presumption) is not always conclusive evidence of the right of property, which may still subsist in another man. For, as one man may have the possession, and another the right of possession, which is recovered by these possessory actions; so one man may have the right of possession, and so not be liable to eviction by any possessory action, and another may have the right of property, which cannot be otherwise asserted than by the great and final remedy of a writ of right, or such correspondent writs as are in the nature of a writ of right." 3 Blackstone Comm. 190. And see 2 Pollock & M. Hist. Eng. L. 74. *Compare* also Maitland "The Beatitude of Seisin," 4 L. Q. Rev. 286, where it is said: "Does the law protect possession against property? If we ask this question in Bracton's day, the answer must be: 'Yes, it protects possession, untitled and even vicious possession; if O, the owner, has been ousted by P, he must re-eject P at once or not at all; should he do so after a brief delay, then P will bring the Novel Disseisin against him and will be put back into possession.' But if we ask the question in the days of Littleton, the answer must be: 'No, the common law does not protect possession against ownership, except in these comparatively rare cases in which there has been a descent cast or a discontinuance — one of those acts in the law (their number is very small) which have the effect of tolling an entry.'" This doctrine that descent tolled entry held its place in English law until Jan. 1, 1834. St. 3 & 4 Wm. IV, c. 27, § 39. It appears to have continued in Massachusetts, as modified by 32 Hen. VIII, c. 28, § 6, until 1836, and in Vermont and New York until 1839. See Maitland "The Beatitude of Seisin," 4 L. Q. Rev. 290 note. *Compare* Emerson v. Thompson, 2 Pick. (Mass.) 473.

21. 3 Blackstone Comm. 190; 2 Pollock & M. Hist. Eng. L. 62, 74.

22. 3 Blackstone Comm. 179–180 *et seq.*; 2 Pollock & M. Hist. Eng. L. 74.

better ultimate right to the land; but if so he was precluded from relying upon this ultimate right in the writ of entry. If he would assert it he must resort to the writ of right. In other words the writ of entry was possessory at common law in that it left open the question as to the ultimate or proprietary right to the freehold. The vanquished defendant in a writ of entry might be a victorious plaintiff in a writ of right.[23]

3. NOMENCLATURE. As in other real actions the claimant of the freehold was commonly designated in the writ of entry as the demandant; the adverse holder of the land was commonly known as the tenant. In late cases the former often became plaintiff, the latter defendant. The demandant's statement of his claim was properly a "count," but in later cases acquires the name of "declaration."[24]

B. Under Modern Statutes — 1. IN GENERAL. The common-law differentiation in the writ of entry survived in several American states for many years.[25] But where the writ of entry now exists as a distinct form of remedy, the law bearing upon it has for the most part been reduced to statutory provisions which at once widen its scope and simplify its procedure.[26]

2. LEADING CHARACTERISTICS OF THE STATUTORY WRIT OF ENTRY. The result of these enactments is to make the existing writ of entry in most of its features a local statutory action. Its details vary somewhat in the different statutes, but in the main this statutory writ of entry has the following characteristics. It is no longer a group of possessory real actions, but the name of a distinct form of mixed action.[27] It looks to the recovery of any estate in fee simple, fee tail, or for life, from any one in possession thereof, irrespective of the manner of his original entry.[28] It goes to the recovery of all the land described in the writ or of any specific part of it. It permits the recovery not merely of the land itself, but of its rents and profits,[29] as against the occupant, and of betterments,[30] as against the claimant. Its procedure has been simplified with a view to trying the whole title as between the parties litigant.[31] As a remedy for the trial of title to land, the statutory writ of entry is to be distinguished from the strictly possessory remedy of modern legislation, the civil action or proceeding for forcible entry and detainer.[32] So too the leading characteristics of the statutory writ of entry

23. 3 Blackstone Comm. 185 *et seq.*; 2 Pollock & M. Hist. Eng. L. 46, 74. In this connection see also 2 Pollock & M. Hist. Eng. L. *passim*.

Writ of entry compared with assize see Sherman *v.* Dilley, 3 Nev. 21, 26 [*quoting* 5 Chitty Bl. Comm. 184].

24. See 3 Blackstone Comm. 180 *et seq.*; and *infra*, X, B, 1.

25. It is reflected in a considerable body of older cases from the courts of Maine, Massachusetts, and New Hampshire, and in occasional cases from a few other states, Alabama for instance and Pennsylvania.

Alabama.— Lyon *v.* Mottuse, 19 Ala. 463.

Maine.— Bussey *v.* Grant, 20 Me. 281.

Massachusetts.— Wells *v.* Prince, 4 Mass. 64.

New Hampshire.—Potter *v.* Baker, 19 N. H. 166.

Pennsylvania.— Witherow *v.* Keller, 11 Serg. & R. 271.

See 18 Cent. Dig. tit. "Entry, Writ of," § 1 *et seq.*

26. See in particular the partial codification of the writ of entry in Me. Rev. St. (1903) c. 106, §§ 1–46; Mass. Rev. Laws (1902), c. 179, §§ 1–43. This tendency, however, began in the courts. Tappan *v.* Tappan, 36 N. H. 98.

27. See *supra*, II; *infra*, V.

28. See *infra*, V.

29. See *infra*, V, D.

30. See *infra*, V, E.

31. Croacher *v.* Oesting, 143 Mass. 195, 9 N. E. 532, where it is said that the plea of *nul disseisin* "puts the whole title in issue; the tenant can maintain the issue, either upon the failure of the demandant to show title in himself, or by evidence of title in the tenant." And see Me. Rev. St. (1903) c. 106; Mass. Rev. Laws (1902), c. 179.

32. See, generally, FORCIBLE ENTRY AND DETAINER. And see Lecatt *v.* Stewart, 2 Stew. (Ala.) 474; Potts *v.* Magnes, 17 Colo. 364, 365, 30 Pac. 58 ("in actions of forcible entry and detainer, the gist of the controversy depends upon possession. . . . The ownership of the premises is not involved and title cannot be tried"); White *v.* Bailey, 14 Conn. 271; Dutton *v.* Tracy, 4 Conn. 79; Shoudy *v.* School Directors, 32 Ill. 290; Walker *v.* Sharpe, 14 Allen (Mass.) 43; Green *v.* Tourtellott, 11 Cush. (Mass.) 227; Fuhr *v.* Dean, 26 Mo. 116, 69 Am. Dec. 484; Sitton *v.* Sapp, 62 Mo. App. 197; Craig *v.* Donnelly, 28 Mo. App. 342; Barnes *v.* Nicholson, 2 N. J. L. 326; Kelly *v.* Sheehy, 60 How. Pr. (N. Y.) 439; Eastman *v.* White, 3 Pinn. (Wis.) 180, 3 Chandl. (Wis.) 196.

distinguish it as a remedy from the action of ejectment in its modern form as well as in its common-law form.[33]

IV. THE DISSEIZIN IN THE WRIT OF ENTRY.

A. The Importance of the Fact of Disseizin — 1. AT COMMON LAW. It was characteristic of the writ of entry at common law that the demandant declared specifically upon a disseizin by the tenant. The action in its original design was a challenge of the tenant's possession with respect to a certain alleged disseizin. As in the writ of right the distinguishing feature was the averment of seizin in the demandant, so in the writ of entry the stress lay on the averment of disseizin by the tenant.[34] The action turned upon this disseizin as its cardinal fact. A failure to allege seizin in the demandant was not necessarily fatal, if his disseizin by the tenant was alleged and proven.[35]

2. UNDER MODERN STATUTES. This characteristic of the writ of entry has been materially modified by statute. With the giving way of the differentiation of common-law pleading, and the widening of the scope of the writ of entry, the tendency has been to make the demandant's estate and right of entry the cardinal fact in this action, as it was formerly in the writ of right.[36]

B. The Nature of the Disseizin Sufficient to Support a Writ of Entry — 1. IN GENERAL. Notwithstanding the change of doctrine noticed above, the question what constitutes a disseizin within the scope of the writ of entry is still of practical importance in our law. It is not necessary in order to constitute such an ouster or disseizin that the demandant shall have been actually expelled from the land, nor is it necessary that the tenant should have actually intended to assert an adverse title[37] or that the demandant should have had actual notice of the fact of disseizin.[38] On the other hand there can be no disseizin either by

33. See, generally, EJECTMENT, 15 Cyc. 1; and *infra*, V, D. A devise of land gave a trustee a legal estate in the land devised but not an interest in fee. It was held that he could not maintain a writ of entry for the premises, but could maintain a writ of ejectment. Fay *v.* Taft, 12 Cush. (Mass.) 448, 453.

For the older difference between the two remedies see Witherow *v.* Keller, 11 Serg. & R. (Pa.) 271, 274, where it is said: "By laying down a sweeping principle, that an ejectment is the only action for the recovery of real property, we should, in my opinion, not only transcend the powers of this court, but throw away a treasure, the value of which would not be fully known till we experienced the want of it. Cases may arise in which an ejectment would not be an adequate remedy; nay, there are rights, at this moment existing, which, in case of a disseisin, could not be recovered by an ejectment: such are rents, commons and all incorporeal hereditaments, for none of which an ejectment lies."

The two actions have become so closely related, however, that the writ of entry under the Massachusetts doctrine may be amended into an action of ejectment. Fay *v.* Taft, 12 Cush. (Mass.) 448, 454.

34. Plummer *v.* Walker, 24 Me. 14. And *compare dictum* in Lyon *v.* Mottuse, 19 Ala. 463.

35. "This declaration, though it alleges no seisin in the demandant, avers that he was disseised by the tenant. Now it is plain that such a verdict could not have been returned without proof of a seisin by the demandant, for he could not be disseised without having been seised; and no court could have allowed, nor could any jury have agreed in that verdict, unless there was sufficient evidence of the fact without proof of which the demandant could not have advanced a step on the trial. It is true that a seisin only can be inferred from the declaration, plea and verdict, and that the case is still left destitute of any averment or even implication of the nature and extent of the seisin; but if seised and disseised, the demandant is entitled to judgment, and it may be a subject of future inquiry to what extent this judgment will affirm his title; if only to a freehold, still he is entitled to be reseised." Ward *v.* Bartholomew, 23 Mass. 409, 413. And see Lyon *v.* Mottuse, 19 Ala. 463; Elliot *v.* Heath, 6 N. H. 426.

36. Thus under the Massachusetts statutes it is not necessary in order to maintain a writ of entry to show an actual wrongful dispossession or exclusion of the demandant, or an adverse possession by the tenant, but the demandant is required to prove only that he is entitled to such an estate as he claims, and that he has a right of entry; and if he proves such estate and right of entry he can recover, unless the tenant proves a better title in himself. Twomey *v.* Linnehan, 161 Mass. 91, 36 N. E. 590.

37. Allen *v.* Holton, 20 Pick. (Mass.) 458.

38. Poignard *v.* Smith, 6 Pick. (Mass.) 172.

mere words, however formally or definitely asserting an adverse title,[39] or by mere possession, however open.[40] There must be in some form an actual occupation or possession of the land by defendant, the "tenant," and this possession must be characterized by one or the other of these two things: (1) It must be coupled with an actual claim of title adverse to the demandant's title; or (2) it must be accompanied by some act which in the eye of the law is in derogation of the demandant's ownership.[41]

2. WHAT IS NOT A DISSEIZIN — **a. Naked Words Are No Disseizin.** A deed to land, however clearly adverse to the demandant's title, and although formally delivered between the parties, does not *per se* create a disseizin; nor did the recording of the deed, or an avowed claim of title under the deed, affect the principle. The grantee must in some form enter upon the land.[42]

b. Naked Possession Is No Disseizin. On the other hand the fact that the tenant is in actual possession does not *per se* amount to a disseizin of the adverse demandant. It must appear that the possession, if not itself under an adverse claim of title, was yet wrongful, as being in derogation of the demandant's ownership.[43]

39. Favour *v.* Sargent, 6 Pick. (Mass.) 5. See *infra*, IV, B, 2, a.

40. Draper *v.* Monroe, 18 R. I. 398, 28 Atl. 340. See *infra*, IV, B, 2, b.

41. Towle *v.* Ayer, 8 N. H. 57; and cases cited *infra*, note 42 *et seq.*

42. C conveys A's land to B. A enters upon the land. Afterward A asks B what he intends to do with respect to the land claimed under his deed from S. B replied that he had bought the land and intended to hold it. But it did not appear that B had at any time after A's entry been upon the land, or done anything except to declare that he intended to hold it. There has been no disseizin of A by B. Towle *v.* Ayer, 8 N. H. 57.

Without actual occupation of some portion of the premises by the grantee under a recorded deed the real owner is not disseized thereby. Putnam Free School *v.* Fisher, 38 Me. 324.

To a plea of disclaimer in a writ of entry the demandant replied that at the time of the purchase of the writ the tenant claimed to have title by virtue of a deed from a collector of taxes; upon a special demurrer, because it was not alleged that the tenant ever had possession, the replication was adjudged had. Favour *v.* Sargent, 6 Pick. (Mass.) 5. And see Field *v.* Hawley, 126 Mass. 327.

The principle holds in the giving of a mortgage.— When the mortgagor is in possession of the land belonging to another but his possession is not adverse, the fact that he mortgages the land will not *per se* work a disseizin; the mortgagee must enter under the mortgage. W entered under C who pretended that he owned the land; the land really belonged to J; when W learned this he recognized J's title and agreed to buy the land of him, and so continued on the land; afterward W mortgaged the land to a stranger; the latter never entered into the actual and open possession of any part of the land. There was no disseizin because of the mortgage. Peters *v.* Foss, 5 Me. 182.

43. B occupies a vacant lot belonging to A; if there is nothing to show that the occupation was adverse to A, there is no disseizin. Draper *v.* Monroe, 18 R. I. 398, 28 Atl. 340. *Compare* Glezen *v.* Haskins, 23 R. I. 601, 605, 51 Atl. 219. A allows himself to remain disseized of his land; B goes upon it, without having or claiming a freehold; his possession does not permit him to be charged as a disseizor and tenant of the freehold, until he has had notice in some form of B's claim and opportunity to yield to it. See Tappan *v.* Tappan, 36 N. H. 98, 118. So, where one held a title bond from the owners of the land, conditioned to make him a conveyance on his payment of a certain sum of money for which he has given his promissory notes payable on demand, and to permit him to take the profits until such conveyance, the fact that he is in actual possession taking the profits, but without having paid any money or taken up his promissory notes, does not authorize a writ of entry against him. Township No. 6 *v.* McFarland, 12 Mass. 325, 327. "It is true," said the court, "that McFarland [the tenant] was in possession of the premises. But, as he did not acquire that possession by ousting the present demandants, they were bound to inquire how he first entered. This would be necessary to enable them to declare rightly, even if he had acquired a freehold estate. It is also necessary, in order to ascertain whether he is liable to their action at all." The practical bearing of this is illustrated in the suggestion of the court that "if the demandants have not lost their right of entry, they may save themselves this trouble, by making an actual entry on the person whom they find in possession. If then he should abandon the premises to them, they will have attained all the objects of a suit. If he resists and ousts them, they may then maintain their action against him on that ouster and disseizin." See also Rickard *v.* Williams, 7 Wheat. (U. S.) 59, 5 L. ed. 398.

Under Mass. Rev. St. c. 101, § 7, a writ of entry may be maintained against a tenant at will who refuses to surrender the premises on demand. Dolby *v.* Miller, 2 Gray (Mass.) 135.

C. Kinds of Disseizin — 1. In the Early Common Law — "Actual Disseizin." At the outset there was but one kind of disseizin recognized in English law — that rudimentary disseizin which is characterized by an actual expulsion in fact.[44]

2. In the Matured Common Law — a. In General. But the theory of the common law early grew beyond this narrow view. Actual disseizin came to include a constructive disseizin, that which arose from possession without actual expulsion, but under an adverse claim of title. And to this "actual" disseizin in both its forms there was added in time the disseizin by election.[45]

b. Actual Disseizin — (I) *Disseizin Through Corporeal Eviction.* In its rudimentary form actual disseizin takes effect in corporeal eviction from the land.[46]

(II) *Disseizin Through Entry Under Adverse Title.* Actual disseizin, however, went further than this. If B holds from one in possession a deed duly acknowledged, delivered, and recorded, any act of entry by B under this deed works an actual disseizin, to the extent of the land thus purported to be conveyed, of all who claim the same land under a different title; a corporeal eviction is not necessary.[47]

c. Disseizin by Election. The notion of an elective disseizin was originally a juridical invention for the sake of a remedy.[48] As such it acquired a very wide scope. Almost any interference with the possession of the land in derogation of the rights of the true owner came to be regarded as a disseizin if he chose so to consider it.[49] Although one is rightfully on land not his own, if he usurps a

44. See remarks of Perley, C. J., in Tappan *v.* Tappan, 36 N. H. 98, 112.

45. On the ancient doctrine of disseizin see Lord Mansfield's opinion in Taylor *v.* Horde, 1 Burr. 60, 108. See also Chancellor Kent's remarks in Smith *v.* Burtis, 6 Johns. (N. Y.) 197, 215, 5 Am. Dec. 206; Judge Story's remarks in Prescott *v.* Nevers, 19 Fed. Cas. No. 11,390, 4 Mason 326, 329; and Chief Justice Perley's remarks in Tappan *v.* Tappan, 36 N. H. 98, 108.

46. B, having no deed or other color of title, enters upon the land and actually turns the owner out of possession, or being in possession actually keeps the owner out of possession; the disseizin is actual to the extent of B's occupation. Riley *v.* Jameson, 3 N. H. 23, 14 Am. Dec. 325; Wendell *v.* Blanchard, 2 N. H. 456.

47. Warren *v.* Childs, 11 Mass. 222; Higbee *v.* Rice, 5 Mass. 344, 4 Am. Dec. 63.

48. Nature of disseizin by election.— "Though the term 'disseisin' used, happens to be the same; the thing signified by that word, as applied to the two cases of actual disseisin or disseisin by election, is very different. This distinction of disseisin at election, is made in the case of Blunden *v.* Baugh, Cro. Car. 302. . . . The three Judges, with whom agreed the four Judges of the Common Pleas, argued and held, 'That the lessee for years of the tenant at will, was a disseisor at the election of the original lessor, for the sake of his remedy.'" Taylor *v.* Horde, 1 Burr. 60, 111, per Lord Mansfield. "There is, then, an actual disseizin whenever one man wrongfully enters upon the land of another, with intent to usurp the possession, and retaining the possession actually turns the owner out, or at least keeps him out. But there is another species of disseizin, called a disseizin by election; which is a very different thing from an actual disseizin. The distinction between a disseizin by election and disseizin in fact, was taken originally for the benefit of the owner of the land, and in order to extend to him in certain cases the remedy by assize. And it is still continued with us to enable the owner, whenever any trespass or injury is done to his real estate in derogation of his right, or whenever there is any obstruction to his full enjoyment of his lands, tenements or hereditaments, to settle his title with the wrong doer in a writ of entry. By a disseizin at the election of a party is not to be understood an act which in itself is a disseizin, but which the party supposed to be disseized may if he pleases consider as not amounting to a disseizin: On the contrary, an act which is capable of being made a disseizin by election is no disseizin till the party in question by his election makes it such." Towle *v.* Ayer, 8 N. H. 57, 60, per Richardson, C. J. And see Pollock & W. Possession, § 15, where it is said: "An act of 'disseisin at election,' if the right owner did not elect to be disseised, was no disseisin at all and the *de facto* possession was said to be non-adverse. This distinction was founded on a principle quite intelligible in itself, namely, that a person who is lawfully in possession for a limited estate or interest cannot change the character of his own possession to the detriment of the true owner. A tenant for years could not make himself a disseisor, for the same reason that a bailee could not make himself a trespasser by asportation in respect to the subject of the bailment."

49. An enumeration of cases in which an owner was permitted to consider himself as disseized, although not actually turned out of

dominion over it, or claims in it an estate which is inconsistent with the rights of the true owner, whether this be done by words or by acts, the owner may elect to consider it a disseizin.[50] The doctrine found a special application at common law when the tenant claimed less than a freehold. Strictly a writ of entry lay only against a freehold tenant; but if the true owner's possession was opposed by a tenant for years or at will, the latter, it was held, could not qualify his own wrong, but for the sake of the owner's remedy would be regarded as a disseizor in fee.[51]

3. In the Modern Law, Common and Statutory — a. The Elasticity of the Term. The practical importance of the theory of an elective disseizin as a procedural

the freehold, may be found in Booth Real Act. 285, 286; Coke Litt. 256*b*; Comyns Dig. tit. "Seisin;" Viner Abr. tit. "Disseisin." And *compare* Mass. Rev. Laws (1902), c. 179.

50. Instances of disseizin by election. In the historic case of Blunden *v.* Baugh, Cro. Car. 302, the facts were these: A father, being seized of an estate, permitted his son to enter into the lands and occupy them as a tenant at will; the son afterward leased the land by indenture for twenty-five years, rendering rent; there was no actual disseizin, but this demise, it was held, might be construed at the father's option as a disseizin or as not a disseizin. A goes upon the land and requests B, who resided in the family of R on the land, to surrender the possession; B replies that she has no possession to surrender; but she continues to remain upon the land. A may elect to consider B's act of remaining as a disseizin. Walker *v.* Wilson, 4 N. H. 217. In order to protect a crop on his own land B fenced in a part of A's land; B also cut a tree and brush-wood on the land thus fenced in; but B had no intention to claim title to this land, or to exclude A from it; there has been no actual disseizin, but A may elect to consider himself disseized. Allen *v.* Holton, 20 Pick. (Mass.) 458, 466. The case just given, Allen *v.* Holton, *supra*, is a typical aspect of disseizin by election. Its nature and the reason for it appear more clearly in the opinion of Wilde, J., speaking for the court: "There was a small piece of land disclaimed by the tenant [the defendant], which adjoined the part claimed, in a corner between the road and the river; and there was evidence tending to show that a fence was made from the road to the river for the purpose of protecting the crop on the tenant's land; so that in fact this piece was inclosed by the fence with the land of the tenant. This fence was erected by persons in the employment of the tenant; and there was evidence tending to show that the tenant, and those in his employment, had cut a tree and some brush upon this piece. . . . The jury should have been instructed, that upon the facts proved, the demandant had a right to elect to consider himself disseised for the sake of his remedy, although no actual disseisin was proved. Almost every injury which can be done to real estate may entitle a party to recover in a writ of entry, if he will admit himself to be disseised. Varick *v.* Jackson, 2 Wend. (N. Y.) 166, 177, 19 Am. Dec. 571. To a plea of disclaimer or non-tenure it is a sufficient reply, that the tenant was at the commencement of the action in the possession of the premises disclaimed. If the law were not so, a party could not commence an action to recover his lands in the possession of another, without exposing himself to the liability to pay costs, if the tenant should disclaim, unless there had been an actual disseisin. In the present case the tenant was clearly in possession of the part of the premises disclaimed, and whether he intended to hold it adversely to the demandant's claim, or merely for his own convenience, the demandant could not determine, nor is it material." But it does appear among the facts of the case that the tenant's possession was not a naked possession but accompanied by acts in derogation of the demandant's ownership — the building of a fence, the cutting of timber.

For an instance of what is not such a dispossession see Searby *v.* Tottenham R. Co., L. R. 5 Eq. 409. And *compare* Pollock & W. Possession, § 14.

51. S, who has no title to the land, leases it for three years to B, who enters and begins a building upon it. A, the owner of the land, enters, declares himself the owner, and forbids B to go on with the building. A may bring a writ of entry against B. "Persisting, as it appears he did, in the occupation of the land, was a wrong to the demandants, which he has not justified. This was at their election, a disseizin. It was not for the tenant, under the facts, to qualify his own wrong; and to set the true owners at defiance, and to keep them out of possession, without rendering himself liable to this action." Dow *v.* Plummer, 17 Me. 14, 16, per Weston, C. J. See also Township No. 6 *v.* McFarland, 12 Mass. 325; Wheeler *v.* Bates, 21 N. H. 460; Rickard *v.* Williams, 7 Wheat. (U. S.) 59, 5 L. ed. 398.

Under Mass. Rev. St. c. 101, § 7, a writ of entry may be maintained against a tenant at will who refuses to surrender the premises on demand. Dolby *v.* Miller, 2 Gray (Mass.) 135.

For the limits of the doctrine here see Wheelwright *v.* Freeman, 12 Metc. (Mass.) 154. See also Matthews *v.* Demerritt, 22 Me. 312, 317, holding that a tenant for years cannot be considered as withholding premises from another under this principle, "unless he has been requested to relinquish the possession to him and has refused, or has in some other way manifested an intention to

device has largely passed away; but the elasticity which that theory gave to the legal concept of disseizin is still of importance.[52]

b. Disseizin Distinguished From Interference. There is, however, a marked tendency in modern law to draw a distinction between a disseizin and a mere interference; in other words there may be acts which confessedly amount to an interference with the property but which do not amount to any assumption of ownership.[53]

V. NATURE OF THE PROPERTY RECOVERABLE.

A. Real Estate. The writ of entry lay only for the recovery of lands, tenements, and hereditaments.[54]

B. Freeholds. The writ of entry again lay only for the recovery of a freehold.[55]

C. Easements. The application of the rule was closely drawn. An easement or right of way could not be recovered in a writ of entry.[56]

D. Mesne Profits. Under the older practice the successful demandant in a writ of entry could not in that action recover damages for the mesne rents and profits which had accrued through his wrongful possession of the land. But "to complete the remedy when the possession has been long detained from him that hath the right to it" an action of trespass lay to recover these profits from the wrongful occupant.[57] This auxiliary action was properly trespass *quare*

resist the title of the demandant, before the commencement of the action."

52. Thus it was early enacted in Massachusetts, in the case of land set off on appraisal, that if the debtor tendered the sum justly due, and the creditor would not release, a writ of entry might be brought; so when a purchaser at a sale on execution of an equity of redemption of mortgaged real estate refused to release the mortgage upon the debtor's tender of the sum due, this refusal was by statute a disseizin. Mass. Rev. St. (1837) c. 73, §§ 26, 44, 46. See Hooker *v.* Hudson, 19 Pick. (Mass.) 467. See also Gregory *v.* Tozier, 24 Me. 308. By statute law to-day, a person who is in possession of the land demanded in a writ of entry, claiming an estate of freehold therein, may be considered a disseizor for the purpose of trying the right, irrespective of the manner of his original entry. Mass. Rev. Laws (1902), c. 179, § 5.

53. Searby *v.* Tottenham R. Co., L. R. 5 Eq. 409. *Compare* Pollock & W. Possession, § 14, where it is said: "As between neighbors there are occasional acts of interference which, even if not strictly justified by necessity, are naturally explained by the desire of the person doing them to protect his own undoubted property. Boundary fences, hedges, and the like are often mended in this way without any claim of right: it is less trouble to repair the breach and say nothing than to call on an absentee owner or trustee to do so. Such acts are not adverse to the existing title, or rather are not acts of possession at all."

54. That which is not in a legal sense real property is not within the scope of the writ, although possibly attached to the soil. A house when a chattel is not within the writ. One may have a freehold in a house, a shop, a barn, on the land of another (Mills *v.* Peirce, 2 N. H. 9); but the mere fact that he has entered such a structure on another's land will not authorize a writ of entry to recover it; the structure, under the action of the parties, may have taken on the attributes of a personal chattel; and if so the writ of entry is not available (Aldrich *v.* Parsons, 6 N. H. 555, where A had built a shop on the land of B, under a license from him permitting its removal). *Compare* Bean *v.* Brackett, 34 N. H. 102, 118.

55. So under the Massachusetts statute permitting the statutory writ of entry for all estates of freehold in fee simple, fee tail, or for life. Mass. Rev. Laws (1902), c. 179, § 1. The principle is rudimentary; its application is suggestively shown in Fay *v.* Taft, 12 Cush. (Mass.) 448, where T devised land to his minor daughter "to have and to hold to her sole use and behoof forever, subject, however, to the condition of the trust, herein mentioned, to wit: I hereby authorize the trustee hereinafter named, to receive, hold, and manage said property, until said daughter shall arrive at the age of twenty-one years, or shall marry." It was held that while the trustee took a legal estate in the premises, it did not amount to a freehold, and therefore that he could not maintain a writ of entry.

56. Smith *v.* Wiggin, 48 N. H. 105, holding that if therefore the demandant shows only an easement in the property, he cannot maintain a writ of entry. So a recovery by the demandant will not affect an easement by a tenant. Cole *v.* Eastham, 124 Mass. 307; Morgan *v.* Moore, 3 Gray (Mass.) 319; Kenniston *v.* Hannaford, 58 N. H. 28.

57. 3 Blackstone Comm. 205; Bacon Abr. tit. "Ejectment," H. See Emerson *v.* Thompson, 2 Pick. (Mass.) 473, 484 (where Wilde,

clausum fregit, and could not be maintained without proof of the trespass.[58] But when the demandant has recovered a judgment in a writ of entry, and been put into possession under the judgment, it was conclusive in favor of his right to recover in trespass against the same defendant, for the mesne profits accruing from the time of the commencement of the writ.[59] This common-law doctrine, however, was early abrogated by statute.[60]

E. Betterments.[61] As the demandant may now have damages, in his writ of entry, for mesne rents and profits, so a defendant in the modern writ of entry, who has been in actual, *bona fide*, peaceable, and adverse possession of the land for a certain minimum time, beginning before the date of plaintiff's writ, may claim and have in his defense to the writ compensation for betterments made by himself or those under whom he claims.[62]

VI. NATURE OF DEMANDANT'S INTEREST OR TITLE.

A. Seizin as Distinct From Paper Title — 1. At Common Law. A mere paper title in the demandant is not sufficient at common law for the maintenance

J., said: "A disseisee, therefore, cannot maintain trespass against the disseisor for an injury done to the land after the disseisin, until he shall have gained possession by reentry; after which he may have an action of trespass for the intermediate damages or mesne profits during the time of the tortious dispossession"); Withington *v.* Corey, 2 N. H. 115. And see Osbourn *v.* Osbourn, 11 Serg. & R. (Pa.) 55, illustrating the doctrine as applied under ejectment.

For a limitation on the rule see Cox *v.* Callender, 9 Mass. 533.

58. The principle, it will be remembered, held even in the action of ejectment, notwithstanding its origin as a species of trespass *quare clausum fregit*. 3 Blackstone Comm. 205. See also Thompson *v.* Bower, 60 Barb. (N. Y.) 463; Beach *v.* Beach, 20 Vt. 83. And *compare* Bacon Abr. tit. "Ejectment," H. See also *supra*, III, B, 2; and EJECTMENT, *ante*, p. 200 *et seq.*

59. Emerson *v.* Thompson, 2 Pick. (Mass.) 473.

60. For enactments as to mesne profits made with special reference to the writ of entry see Me. Rev. St. (1903) c. 106, §§ 11–14; Mass. Rev. Laws (1902), c. 179, § 12 *et seq.*

In England the separate action for mesne profits was abrogated with respect to the action of ejectment by 1 Geo. IV, c. 87, § 2.

For instruction as to the right of demandant to rents and profits under Mass. Rev. Laws, c. 179, §§ 12–15, see statement of case in Hawks *v.* Davis, (Mass. 1904) 69 N. E. 1072.

In Massachusetts the principle that a claim for mesne profits is an incident to a legal claim to the land has been carried so far that the successful demandant in the writ of entry may be awarded damages for mesne profits, including rent and waste, although no specific demand for them appears in the writ. Provident Sav. Inst. *v.* Burnham, 128 Mass. 458; Raymond *v.* Andrews, 6 Cush. (Mass.) 265.

In some cases under these statutes the older doctrine still prevails to the extent of denying a recovery, under the writ itself, for mesne profits, unless they have been explicitly demanded in the writ. Larrabee *v.* Lambert, 36 Me. 440; Pierce *v.* Strickland, 25 Me. 440.

61. Betterments or improvements generally see BETTERMENTS, 5 Cyc. 684; EJECTMENT, *ante*, p. 218 *et seq.*; REAL ACTIONS.

62. The defendant's possession must have been under a claim of title "which he could in good faith have had reason to believe good." Daggett *v.* Tracy, 128 Mass. 167, 168; Bellows *v.* Copp, 20 N. H. 492.

A paper title to the premises is not required, but any species of title which if valid would be legal. Wendell *v.* Moulton, 26 N. H. 41.

If he took his title while the demandant's writ of entry was pending, compensation for improvements made by defendant cannot be awarded. Haven *v.* Adams, 8 Allen (Mass.) 363.

The possession must have been adverse. Peabody *v.* Hewett, 52 Me. 33, 83 Am. Dec. 486; Pratt *v.* Churchill, 42 Me. 471.

The improvements must have been made by the occupant himself, acting personally or through others, or those under whom he claimed. Bellows *v.* Copp, 20 N. H. 492; Flanders *v.* Davis, 19 N. H. 139.

Equitable nature of the right to betterments.— A defendant's right to betterments has been recognized as resting on broad principles of justice; it will be protected by the court as far as may be, in the conduct of the trial. Cutler *v.* Rice, 14 Pick. (Mass.) 494; Bellows *v.* Copp, 20 N. H. 492. *Compare* Corbett *v.* Norcross, 20 N. H. 366.

Limits of the doctrine.— In the absence of a statute expressly permitting it, the right to betterments does not extend beyond the limits of the premises demanded by plaintiff. So in the case of a sidewalk built by defendant or for fences built many years before and not shown to be of value. Curtis *v.* Gray, 15 Gray (Mass.) 36. Nor will it extend to compensation for taxes paid on the demanded premises. Curtis *v.* Gray, 15 Gray (Mass.) 36.

of a writ of entry; the demandant must show seizin in himself or in those under whom he claims.[63]

2. In Modern Law. But it is to be remembered that in modern law the deed of one who is actually seized passes an actual seizin.[64] And it has been said that if a demandant has title and a right of entry, his allegation that he was himself seized will be maintained in law upon the supposition that he has entered and become seized according to his title, although he may never have had actual seizin of the land.[65] The prevailing presumption of modern law is that seizin follows the title and that they correspond.[66] This seizin must appear as being in the right of the claim asserted.[67]

B. Legal Title — 1. As Against One in Possession Under Color of Title. The demandant must show in himself a subsisting legal title with seizin good as against the tenant.[68]

2. As Against One in Possession Having No Title. The demandant in a writ of entry who shows a possession prior in time to the tenant's possession is entitled to recover as against this tenant if the latter shows no title to the premises but merely possession at the time of suit brought, and this although the demandant may himself be a wrong-doer as against the true owner.[69]

63. See Brediman's Case, 6 Coke 56*b*, 57*b*, where Lord Coke remarks: "Till he hath seisin all is *labor et dolor, & vexatio spiritus*; but when he hath seisin, he may *sedere & acquiescere*." And see Tebbetts *v.* Estes, 52 Me. 566; Nichols *v.* Todd, 2 Gray (Mass.) 568; Hurd *v.* Cushing, 7 Pick. (Mass.) 169, 175; Poignard *v.* Smith, 6 Pick. (Mass.) 172; Wells *v.* Prince, 4 Mass. 64; Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491. And *compare* the remarks of Perley, C. J., in Tappan *v.* Tappan, 36 N. H. 98, 120.

64. Highbee *v.* Rice, 5 Mass. 344, 352, 4 Am. Dec. 63 ("a conveyance by deed, duly acknowledged and registered, is by our statute of enrolments equivalent to livery of seizin"); Pidge *v.* Tyler, 4 Mass. 541; Bailey *v.* March, 3 N. H. 274.

So a grant by an act of the legislature vests an actual seizin in the grantee. Enfield Tp. *v.* Permit, 8 N. H. 512, 31 Am. Dec. 207. But see Bell *v.* Peabody, 63 N. H. 233, 242, 56 Am. Rep. 506.

65. Tappan *v.* Tappan, 36 N. H. 98.

66. In the absence of other evidence a deed of land duly acknowledged and recorded raises a presumption that the grantor had sufficient seizin to enable him to convey, and also vests the legal seizin in the grantee. Farwell *v.* Rogers, 99 Mass. 33; Ward *v.* Fuller, 15 Pick. (Mass.) 185.

Instances of seizin.— Hammond *v.* Reynolds, 72 Me. 513; Wiley *v.* Williamson, 68 Me. 71; Woodman *v.* Bodfish, 25 Me. 317; Austin *v.* Stevens, 24 Me. 520; Swamscott Mach. Co. *v.* Perry, 119 Mass. 123; Farwell *v.* Rogers, 99 Mass. 33; Brewer *v.* Stevens, 13 Allen (Mass.) 346; Green *v.* Chelsea, 24 Pick. (Mass.) 71; Tuttle *v.* Brown, 14 Pick. (Mass.) 514; Poignard *v.* Smith, 6 Pick. (Mass.) 172; Knox *v.* Jenks, 7 Mass. 488; Willington *v.* Gale, 7 Mass. 138; Porter *v.* Perkins, 5 Mass. 233, 4 Am. Dec. 52; Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491; Ladd *v.* Dudley, 45 N. H. 61; Edmunds *v.* Guffin, 41 N. H. 529; Melcher *v.* Flanders, 40 N. H. 139; Rand *v.* Dodge, 17 N. H. 343; Straw *v.* Jones, 9 N. H. 400. And *compare* the remarks of Perley, C. J., in Tappan *v.* Tappan, 36 N. H. 98, 120.

67. Peabody *v.* Hewett, 52 Me. 33, 83 Am. Dec. 486; Evans *v.* Osgood, 18 Me. 213; Shumway *v.* Holbrook, 1 Pick. (Mass.) 114, 11 Am. Dec. 153.

68. Legal title is required. Day *v.* Bishop, 71 Me. 132; Wilson *v.* Soper, 44 Me. 118; Howe *v.* Bishop, 3 Metc. (Mass.) 26; Sherman *v.* Abbot, 18 Pick. (Mass.) 448; Andover First Baptist Soc. *v.* Hazen, 100 Mass. 322; Tilton *v.* Stanyan, 57 N. H. 489.

Legal title must be good as against tenant. Rowell *v.* Mitchell, 68 Me. 21, holding, where a mortgage is still undischarged, the mortgagor cannot maintain a writ of entry against the mortgage in possession. *Compare* Bailey *v.* Metcalf, 6 N. H. 156.

69. "A bare possession is sometimes called the first degree of title, and constitutes a valid right to real property, except as against the true owner. 2 Greenleaf Cruise, §§ 123, 126. It follows, that a prior naked possession is a sufficient title, against all persons claiming only by a possession subsequently acquired, because, both titles being in their origin of equal validity, that which is prior in point of time must prevail." Hubbard *v.* Little, 9 Cush. (Mass.) 475, 476, per Bigelow, J. *Compare* Com. *v.* Rourke, 10 Cush. (Mass.) 397, 401, where it is said: "It is fundamental in, our own, and in all other laws of property, that the possession of one is good against all others, who cannot show a better right of possession." See Currier *v.* Gale, 9 Allen (Mass.) 522 (a possessory title to land, although for less than twenty years, is good against one who subsequently enters, claiming by no higher title); Thoreau *v.* Pallies, 1 Allen (Mass.) 425. And see Percival *v.* Chase, 182 Mass. 371, 65 N. E. 800; Wishart *v.* McKnight, 178 Mass. 356, 59 N. E. 1028, 86 Am. St. Rep. 486; Perry *v.* Weeks, 137 Mass. 584; Litchfield *v.* Scituate, 136 Mass. 39; Simpson *v.* Dix, 131 Mass. 179; Cram *v.* Ingalls, 18 N. H. 613.

C. Immediate Right of Possession. Besides a legal title the demandant in a writ of entry must be able to show as against the tenant an immediate right to possess the land.[70]

D. Equitable Title. When the demandant has only an equitable title or a mere beneficial interest, the writ of entry must fail at common law.[71] The principle holds not merely in case of a formal transfer of the legal title to one in trust for another, but generally to all cases in which the legal title is elsewhere than in the demandant, whether through accident or design.[72]

VII. NATURE OF THE DEFENSE.

A. Defendant's Possession of the Land. As plaintiff in the modern writ of entry can recover only on the strength of his own title, and not on the weakness of defendant's,[73] the mere possession by defendant is sufficient as against everyone who cannot show a better right in himself.[74]

B. Ultimate Legal Title in Defendant. Originally the scope of the defense in the writ of entry was limited to the entry alleged; the tenant could not plead higher up and rely on an ultimate title to himself. But under the modern development of the writ of entry, the existence of a legal title in defendant is a permissible defense.[75]

C. A Defeasible Legal Title in Defendant. It is not necessary when the tenant shows a legal title in himself that this shall be an absolute title in fee simple; it may as to some third person be subject to a possible defeasance.[76]

D. Title Acquired by Defendant Pendente Lite. Some cases have recognized the sufficiency of a legal title in the tenant, notwithstanding the fact that the tenant has acquired it only *pendente lite* and without the concurrence of the demandant.[77] But in the older doctrine, which still shows the greater number of

For a discussion of the underlying principle see Pollock & W. Possession, § 17.

For an instance of the waiver of this possessory right see Blaisdell *v.* Martin, 9 N. H. 253.

70. Thus one who is entitled to an estate in remainder only, subject to a subsisting life-estate in another, cannot maintain a writ of entry against one rightfully in possession under the life-estate. Sylvester *v.* Sylvester, 83 Me. 46, 26 Atl. 783, referring to Me. Rev. St. c. 104, § 5.

So at common law, when a woman seized in fee married, and her husband conveys the land to another, she could not in her husband's lifetime bring a writ of entry against this alienee. Day *v.* Bishop, 71 Me. 132.

71. A church building was conveyed to four trustees of a voluntary association "in trust for the stock-holders of the association," *habendum* "to the said stock-holders, their heirs and assigns": the stock-holders cannot bring a writ of entry, their estate being equitable and not legal. Chapin *v.* Chicopee First Universalist Soc., 8 Gray (Mass.) 580. A deed of land was made to "A B, treasurer" of a corporation named, "and his successors in office," and expressed to be in trust; the corporation cannot maintain a writ of entry, after A B's death, on the ground of a mere beneficial interest as *cestuis que trustent.* Andover First Baptist Soc. *v.* Hazen, 100 Mass. 322. And see Nugent *v.* Cloon, 117 Mass. 219.

72. A conveys the land to B by deed duly executed and delivered; B attempts to mortgage the land to A to secure the purchase-money, but the mortgage being defectively executed is inoperative. A cannot maintain a writ of entry. Rundlett *v.* Hodgman, 16 N. H. 239. So, where a mortgage was made by B to T as guardian of A and for his benefit, A cannot maintain a writ of entry against B for possession of the mortgaged premises. Somes *v.* Skinner, 16 Mass. 348.

73. See cases cited *supra*, note 2.

74. Atherton *v.* Johnson, 2 N. H. 35. Against the tenant's possession therefore it avails the demandant nothing to show a better right in a third person. See Goulding *v.* Clark, 34 N. H. 148.

75. Lund *v.* Parker, 3 N. H. 49. See also Me. Rev. St. (1903) c. 106, § 8.

76. Hoxie *v.* Finney, 11 Gray (Mass.) 511, where it is said: "A mortgagee, whether an entry into the possession of the premises has or has not taken place, has no occasion to disclaim an absolute fee, or set out the nature of his interest. His seizin in fee and mortgage is quite sufficient title to constitute a good defence and entitle him to a general verdict."

So a deed by an administrator of the real estate of his intestate, under a license from the court of probate, although defeasible by the heirs, may convey a good title to hold the property until the administration of the estate is closed. Berquin *v.* McFarland, 26 N. H. 533.

77. "Where the tenant has unjustly and without title entered and turned the demandant out of the possession of the land, it is

cases, such a title in the tenant is not recognized as a valid defense.[78] The reason assigned is that the judgment in a writ of entry must be rendered upon the title as it stood at the date of the writ. As it is the right of the tenant that he shall not be subjected to the expense of litigation because of a title which the demandant has acquired *pendente lite*;[79] so it is the right of the demandant that the tenant shall not fortify his wrong by means of a title acquired since the bringing of the suit, and thus avoid the payment of costs for which he might otherwise be liable.[80] If, however, the subsequently acquired title was immediately acquired by the tenant from the demandant himself, or if its acquisition by the tenant was in some other way consented to by the demandant, the validity of the title as a good defense is not open to question.[81]

E. A Right of Action in Defendant. If one who has been disseized neglects to reënter within the statutory limit, an entry by him thereafter cannot in itself be justified. But in the later development of the writ of entry the tenant in such a case is not wholly without a defense. If he still has a right of action, although his right of entry is barred, he may set up this right of action as a defense.[82]

F. Outstanding Title in Third Person — 1. Not Per Se a Defense. The mere fact that the naked title to the land is in someone other than the demandant or those under whom he claims is not in itself a good defense against a showing of seizin in the demandant.[83]

2. A Good Defense When Tenant Holds Thereunder. An outstanding title in a third person is a good defense when the tenant holds thereunder.[84]

3. A Good Defense When It Disproves Demandant's Seizin. Although a tenant does not claim under the title in the third person, still the existence of this title is a good defense if it disproves or tends to disprove the seizin of the demandant.[85]

unjust to permit the tenant to purchase in the title, and by that means protect himself from the expense of an action, rightfully commenced against him, and throw the costs upon the demandant. On the other hand, if the tenant has actually acquired a better title to the land than the title of the demandant, there seems to be no sound reason why he should not be permitted to hold the land. . . . [But] the demandant will be entitled to costs up to the time of the plea pleaded." Bailey *v.* March, 3 N. H. 274, 276. And see Bergin *v.* McFarland, 26 N. H. 533.

78. Powers *v.* Patten, 71 Me. 583; Gammon *v.* Huff, 67 Me. 184; Clark *v.* Pratt, 55 Me. 546; Parlin *v.* Haynes, 5 Me. 178; Hooper *v.* Bridgewater, 102 Mass. 512; Curtis *v.* Francis, 9 Cush. (Mass.) 427; Andrews *v.* Hooper, 13 Mass. 472.

79. See Reed *v.* Crapo, 133 Mass. 201.

80. See Reed *v.* Crapo, 133 Mass. 201; Andrews *v.* Hooper, 13 Mass. 472.

81. Note the distinction in Parlin *v.* Haynes, 5 Me. 178. And see Everenden *v.* Beaumont, 7 Mass. 76.

82. Wade *v.* Lindsey, 6 Metc. (Mass.) 407.

Reason for the rule.— The rule does not rest on any doctrine that a tenant who thus comes again into possession is remitted to his ancient title. His entry, it is assumed, is unlawful; a tenant thus entering cannot in the strict rule of the common law claim to be remitted. But the rule rests upon the broad principle of preventing circuity of action. Wade *v.* Lindsey, 6 Metc. (Mass.) 407.

83. It must appear that the tenant holds under this title, or that its existence tends to disprove the demandant's seizin. Gammon *v.* Huff, 67 Me. 184; Parlin *v.* Haynes, 5 Me. 178; Bell *v.* Ham, 16 N. H. 302; Goodall *v.* Rowell, 15 N. H. 572. In a considerable number of cases, of which Clark *v.* Marshall, 62 N. H. 498, is a type, the statement of the court that it is sufficient to show title in a third person is wider than the real decision, which is to the effect that title in a third person may be shown, in order to disprove the demandant's seizin. See *infra*, VII, F, 3.

84. The principle finds its application when the tenant, in possession at the time the writ is brought, claims under a deed from one who had been disseized of the land in question and was out of possession when the deed is delivered. For many purposes such a deed is void; but it is not wholly void. If the grantee obtains possession of the land he may unite that possession to the title acquired by the deed, and defeat a writ of entry brought by the disseizor. Rawson *v.* Putnam, 128 Mass. 552; Cleaveland *v.* Flagg, 4 Cush. (Mass.) 76. *Compare* Edes *v.* Herrick, 61 N. H. 60.

85. Hewes *v.* Coombs, 84 Me. 434, 24 Atl. 896. *Compare* Chaplin *v.* Barker, 53 Me. 275, on the general range of the principle. And see Morse *v.* Sleeper, 58 Me. 329; Stanley *v.* Perley, 5 Me. 369; Hall *v.* Stevens, 9 Metc. (Mass.) 418; King *v.* Barns, 13 Pick. (Mass.) 24, 28, where Wilde, J., said: "This evidence [of a deed to a third person] was clearly inadmissible to show a title in a third party under whom the tenant did not claim; but for the purpose for which it was admitted, namely, to rebut the demandant's evidence of seisin, it was unquestionably competent evi-

And this on the general principle that "any evidence which disproves the seizin of the demandant is admissible on the part of the tenant."[86] The demandant counts on his own seizin, and his action fails if he has no evidence tending to prove that material fact; for the same reason, if the demandant introduces *prima facie* evidence of his seizin, whatever will disprove this *prima facie* case is a good defense.[87] The rule holds even when the deed to the third person has been executed, delivered, and recorded *pendente lite*.[88] The rule reaches its limits when it appears that the demandant has had actual possession of the land, or holds a conveyance from one who was in actual possession under color of title.[89]

G. That Defendant Is Not Tenant of a Freehold. That tenant is not a tenant of the freehold is a good defense at common law.[90]

H. Equitable Title in Defendant. In the absence of a statute authorizing it a mere equitable title cannot be set up in a writ of entry as a defense to the demandant's legal title, even when the equity arises on a trust declared by deed or other writing and does not depend on any disputed questions of fact.[91]

I. An Easement in Defendant. An easement in the tenant is no defense.[92]

VIII. PARTIES.

A. In Whose Name the Writ Should Be Brought. A writ of entry is to be brought in the name of the party having the legal title to the cause asserted.

dence"); Kenniston *v.* Hannaford, 55 N. H. 268; Cheswell *v.* Eastham, 16 N. H. 296; Berry *v.* Brown, 5 N. H. 156; Bailey *v.* March, 2 N. H. 522, 3 N. H. 274.

86. Hall *v.* Stevens, 9 Metc. (Mass.) 418, 421.

87. Accordingly the tenant may show a seizure and sale on execution of the right in equity of the demandant's grantor to redeem the land, and a deed thereof from a purchaser to a third person previous to the execution of the deed under which the demandant claims title. Cutler *v.* Lincoln, 3 Cush. (Mass.) 125.

88. Rowell *v.* Hayden, 40 Me. 582, and the tenant may successfully plead in bar to the further maintenance of the action.

89. Here evidence of title in a third person has no tendency to disprove the demandant's seizin. Bailey *v.* March, 2 N. H. 522, 3 N. H. 274.

So if the demandant after action brought mortgages the land to a third person, this is no impediment to his recovery. Woodman *v.* Smith, 37 Me. 21. For as between a mortgagor and third persons he is considered as still having the legal estate in himself. Blaney *v.* Bearce, 2 Me. 132.

90. Properly a writ of entry lay at common law only against a tenant of the freehold. If a tenant for years is sued in a writ of entry he may by proper pleading set up that he is not tenant of the freehold and defeat the writ. Gibson *v.* Bailey, 9 N. H. 168. See *supra*, V, B.

Qualification of the rule.— The rule was subject to an important qualification, akin in its nature to the old doctrine of the elective disseizin; if a tenant for years or at will has actually ousted the demandant or withheld the possession of the premises, this tenant cannot qualify his wrong by alleging that he is seized of a less estate than a freehold. Gregory *v.* Tozier, 24 Me. 308, applying the rule as declared by Me. Rev. St. c. 145, § 10. See also Township No. 6 *v.* McFarland, 12 Mass. 325; Wheeler *v.* Bates, 21 N. H. 460; Wilson *v.* Webster, 6 N. H. 419. And *compare* Rickard *v.* Williams, 7 Wheat. (U. S.) 59, 5 L. ed. 398.

91. Thus it is no defense to a writ of entry that the demandant's grantor, as the demandant knew, while seized of the land, made an oral agreement to hold it in trust for him. Essex Co. *v.* Durant, 14 Gray (Mass.) 447. For earlier cases permitting an equitable title to be set up as a defense to the demandant's legal title see Cutting *v.* Pike, 21 N. H. 347; Hadduck *v.* Wilmarth, 5 N. H. 181, 20 Am. Dec. 570; Scoby *v.* Blanchard, 3 N. H. 170. And *compare* Ela *v.* Pennock, 38 N. H. 154.

Nor is it a defense that the demandant holds the land subject to a resulting trust in favor of the tenant. Crane *v.* Crane, 4 Gray (Mass.) 323. So the tenant cannot defend against the demandant's legal title by proving that he entered under a written agreement with the demandant for the purchase of the premises, and since the entry had paid the stipulated price, and was entitled by performance of the agreement to a conveyance of the legal estate. Ela *v.* Pennock, 38 N. H. 154.

92. As the right of the tenant to an easement in the premises does not affect but may subsist with the right of the demandant to the fee, the existence of an easement, however clearly defined, is no defense to the writ. Skowhegan First Nat. Bank *v.* Morrison, 88 Me. 162, 33 Atl. 784 (easement for a passageway); Blake *v.* Ham, 50 Me. 311; Blake *v.* Clark, 6 Me. 436; Hancock *v.* Wentworth, 5 Metc. (Mass.) 446. So the fact of the existence of an easement in the tenant does not amount to a disseizin by him. Cole *v.* Eastham, 124 Mass. 307.

The fact that others are severally interested with him or that he holds as trustee will not prevent his suing in his own name alone.[93] And where the legal holder of the title is defined, a subsequent change in the geographical name of the subject-matter of the action — the land — works no change in the name of the proper party plaintiff.[94]

B. Joinder of Parties — 1. Who May Join — a. Joint Tenants. As a rule those claiming the land as joint tenants must join in their writ of entry; they have a unity of title and of interest as well as of possession.[95]

b. Tenants in Common. Those who claim as tenants in common, however, cannot at common law join in a writ of entry.[96]

2. Disability in a Co-Demandant. If two or more appeared as joint claimants, a disability in one abated the writ as to all, whether the disability existed at the date of the writ or arose afterward.[97]

C. Amendments as to Parties. In some jurisdictions the strictness of the common law as to the joinder of parties in a writ of entry was supposed to forbid an amendment of the writ by striking out the name of one improperly joined.[98] Under modern statutes and a more liberal tendency in judicial construction, the strictness of the common law as to the joinder of parties in a writ of entry has been greatly moderated.[99]

93. Thus a trustee holding the legal title to land may sue in his own name without stating in the writ that he is a trustee. Simpson *v.* Dix, 131 Mass. 179. And see Gilson *v.* Gilson, 2 Allen (Mass.) 115, where a father conveyed his land to his son and as part of the same transaction took back from his son an instrument under seal, whereby the son agreed to support his father and his mother during their natural lives, and also as security for the performance of this agreement conveyed to them "each and severally a life lien or dower or lien of maintenance for life" in the real estate. It was held that the father might bring a writ of entry in his own name alone, for the obligation to support him was one which might be enforced as a separate duty to him.

94. Sunapee *v.* Eastman, 32 N. H. 470. In this case a tract of land, a "town," was granted in 1768 to certain individuals, who divided part of it and left part in common. By this act the territory granted was given the name of Saville. In 1804 the name was changed to Wendell, and part of the tract was thereafter annexed to New London. In 1850 the name was changed to Sunapee. The owners sue as "Proprietors of Sunapee." It was held that the demandants must be nonsuited. The action should have been brought as "Proprietors of Saville." Nor was the fault merely a question of misnomer; there was no such corporation as Proprietors of Sunapee.

95. The rule has been extended to the claim by a husband and wife to recover land conveyed to them both during their natural lives, although such a conveyance does not strictly create a joint tenancy. Wentworth *v.* Remick, 47 N. H. 226, 90 Am. Dec. 573 [*distinguished* in Clark *v.* Clark, 56 N. H. 105].

96. The possession claimed by them was in a measure a joint possession; but their estates and titles might be wholly different. It was possible if tenants in common could join in a real action that the issues raised would involve titles to which some of the parties were entire strangers. It was therefore a well settled rule of the common law that tenants in common must sever in a writ of entry and sue severally for their undivided rights. Coke Litt. 195*b*. See Rehoboth *v.* Hunt, 1 Pick. (Mass.) 224, *dictum*. And *compare* Daniels *v.* Daniels, 7 Mass. 135; Stevenson *v.* Cofferin, 20 N. H. 150; Rand *v.* Dodge, 12 N. H. 67.

97. Cutts *v.* Haskins, 11 Mass. 56; Oxnard *v.* Kennebeck Purchase, 10 Mass. 179.

But by statute in Maine and in Massachusetts joint tenants or tenants in common may all or any two or more join in the suit; or in Massachusetts any one may sue alone. Me. Rev. St. (1903) c. 106, § 9; Mass. Rev. Laws (1902), c. 179, § 7.

98. Treat *v.* McMahon, 2 Me. 120; Rand *v.* Dodge, 12 N. H. 67; Pickett *v.* King, 4 N. H. 212.

Contra, apparently in Massachusetts, as a common-law doctrine see Thayer *v.* Hollis, 3 Metc. (Mass.) 369; Rehoboth *v.* Hunt, 1 Pick. (Mass.) 224. But it is remarked by the court in Pickett *v.* King, 4 N. H. 212, that this practice was peculiar to Massachusetts.

But even at common law a mere clerical mistake in the body of the writ might be corrected by inserting the name of one who had been served and had annexed as a party without objection from other parties. Johnson *v.* Abbott, 60 N. H. 150.

99. The death of one of several demandants no longer works an abatement as to all. In Maine it has been held in such a case that the court may allow an amendment striking out the name of the deceased and permitting the action to continue as if commenced by the survivor. Treat *v.* Strickland, 23 Me. 234. See Abatement and Revival, 1 Cyc. 56 note 89.

In Massachusetts by express enactment the heir or devisee of the deceased co-demandant may be admitted upon motion to prosecute

IX. PROCESS.

In modern law the rules of process in the writ of entry are those laid down by general statutes applying equally to all real actions.[1] In general the action is regularly begun by a summons, served upon defendant, or if he is absent from the state, then upon one in possession of the land. But the action may also begin by a writ of attachment.[2] The tendency has been to require the summons to be very explicit, and to correspond with exactness to the writ itself.[3]

X. THE PLEADING.

A. In General. The distinctions between the different writs of entry recognized at common law[4] required a very high degree of care on the part of the pleader. Even when it was certain that some writ of entry lay, the selection of the particular writ was often a difficult matter and a mistake was fatal. The pleading also in any given writ was highly technical and precise. On the other hand the pleadings in the writ of entry were as a rule brief and direct, in marked contrast with the circuitous procedure and the fictions of the action of ejectment.[5] In America the tendency from the first, especially in the New England states, was to simplify the pleadings and the procedure in the writ of entry. Many of the characteristics of the old English writ of entry never appeared in our courts.[6] The same tendency is marked in the American statutes which bear upon the pleading and procedure of the writ.[7]

B. Demandant's Statement of His Cause — 1. Its Name. The demandant's statement of his cause of action in a writ of entry was customarily known in our later law as a declaration. In earlier cases the term "count" still appears as the name for the whole pleading.[8]

2. Its Elements — a. In General. The elements of defendant's statement of his cause were four: (1) A statement of the estate or interest claimed by the demandant; (2) a description of the property demanded; (3) a statement of seizin on the part of the demandant within a certain period; (4) a statement of disseizin by the tenant.[9]

b. Statement of Demandant's Estate or Interest. At common law the demandant in a writ of entry was required to set up his legal title as it was,

the action jointly with the survivors. Mass. Rev. Laws (1902), c. 171, § 10. And so when several persons bring a writ of entry to recover an undivided interest in land, and one of them dies, leaving a widow, who takes his interest in fee, she may come in and prosecute jointly with the other demandants, in the same manner as if she had originally joined with them in the suit; and the fact that her right to rents and profits would not be the same as that of the original demandants is immaterial, as such right is merely an incident to a recovery of the land. Butrick *v.* Tilton, 155 Mass. 461, 29 N. E. 1088.

1. See, generally, PROCESS.

2. Maine Charity School *v.* Dinsmore, 20 Me. 278. *Compare* Wilbur *v.* Ripley, 124 Mass. 468; Rand *v.* Sherman, 6 N. H. 29; Clement *v.* Clement, 18 N. H. 611.

3. Lyman *v.* Dodge, 13 N. H. 197. Demandants in a writ of entry declared as administrators, and alleged seizin, etc., in their capacity as administrators, within twenty years. The summons described the demandants as administrators, and the action as a plea of land, wherein plaintiffs demanded the tract of land, but contained nothing further to show what seizin demandants relied upon. It was held that the writ was abated by force of the statute of Jan. 2, 1829, providing that the summons, etc., shall briefly give the same information to defendant which the declaration gives more at large, and shall contain the substance thereof; otherwise the writ shall abate. Wendell *v.* Moulton, 14 N. H. 573.

4. See *supra*, III, A.

5. For forms of the different pleadings in the earlier practice see 3 Chitty Pl. (ed. 1847) 1339 *et seq*; Booth Real Act. *passim*; Jackson Real Act. *passim*. And see 2 Am. Jur. 181 *et seq*.

6. See 2 Am. Jur. 181. But *compare* Witherow *v.* Keller, 11 Serg. & R. (Pa.) 271.

7. See in particular the statutes of Maine and Massachusetts. Me. Rev. St. (1903) c. 106; Mass. Rev. Laws (1902), c. 179.

8. 3 Chitty Pl. (15th Am. ed.) 620; Stephen Pl. 64 note 59.

9. Wyman *v.* Brown, 50 Me. 139. See also *infra*, X, B, 2, b, e.

whether in fee simple or in some other estate of freehold.[10] But where a legal title to the freehold is stated in the demandant it is not necessary that an attaching equity should be shown.[11]

e. Description of the Land. A general description of the lands is sufficient if it is so definite that possession could be delivered by the sheriff without reference to any description outside the writ; nor can a defect be covered by reference to a deed on record.[12] If the land can be definitely located from the description found in the writ it is good against demurrer, although the usual terms of description are lacking.[13]

d. Statement of Seizin in Demandant. The declaration should show not only a freehold title in the demandant but a seizin, by him or those under whom he holds, within a certain time preceding the writ.[14] If, however, the declaration in a writ of entry does not expressly allege seizin in the demandant within the legal limit but does allege his disseizin by the tenant within this period, the court after verdict will regard the defect as cured on the general doctrine of fair and reasonable intendment.[15]

For forms of different writs of entry used in the earlier practice see Booth Real Act. *passim*; Chitty Pl. (15th Am. ed.) 620 *et seq.*

For a form in actual use see Waldo *v.* Mitchell, 24 N. H. 229, where the pleadings in a writ of entry are given in full. See also Baker *v.* Bessey, 73 Me. 472, 40 Am. Rep. 377; Troy *v.* Haskell, 33 N. H. 533.

10. Flagg *v.* Bean, 25 N. H. 49.

Sufficiency of allegation.— Where the declaration in a writ of entry alleged that plaintiff was seized in "fee," it was not demurrable under a statute requiring plaintiff "to set forth the estate he claims in the premises whether in fee simple, fee tail," etc. "Fee" describes the same quantity of estate as "fee simple." Jordan *v.* Record, 70 Me. 529. In a writ of entry the allegation in the declaration that demandants were seized "in their demesne as of fee" is a sufficient allegation that they were seized in fee simple. Butrick *v.* Tilton, 141 Mass. 93, 6 N. E. 563.

11. Thus a trustee holding the legal title to the land need not set out in his writ of entry that he holds as trustee. Simpson *v.* Dix, 131 Mass. 179.

12. Baker *v.* Bessey, 73 Me. 472, 40 Am. Rep. 377; Willey *v.* Nichols, 59 Me. 253; Atwood *v.* Atwood, 22 Pick. (Mass.) 283; Miller *v.* Miller, 16 Pick. (Mass.) 215; Flagg *v.* Bean, 25 N. H. 49. But see Elliot *v.* Heath, 6 N. H. 426.

A declaration in a writ of entry is not demurrable for uncertainty of description, unless it fails to describe any premises whatever. Bragg *v.* White, 66 Me. 157.

A general description of the land demanded may be restricted and restrained by a further description in the writ. Woodman *v.* Lane, 7 N. H. 241.

Instances of sufficient descriptions.— "A certain parcel of land, with the buildings thereon, situate in Boston, and bounded southerly by Eliot Street, twenty feet; westerly on a passage way six feet and nine inches in width, sixty-one feet eleven inches; northerly on a passage way three feet wide, nineteen feet nine inches; and easterly by a line through the center of the brick partition wall, sixty-one feet two inches; with the appurtenances thereto belonging." Riley *v.* Smith, 9 Allen (Mass.) 370, 371. Beginning at the intersection of C and S streets; "thence northerly on said Southbridge Street three hundred and forty feet to the river, thence easterly on said river, forty-eight and one-half feet to a willow tree, thence southerly on the land of the tenants, three hundred and sixty-five feet to the first mentioned bounds." Howard *v.* Holy Cross College, 116 Mass. 117. Where the declaration described the demanded premises, without metes and bounds, as "the mill and mill-dam, with the appurtenances, and the land under and adjoining them and used therewith," a general description of the locality of the premises being added. Baker *v.* Bessey, 73 Me. 472, 40 Am. Rep. 377. In a writ of entry the number of a lot actually run out and numbered is a sufficient designation of the lot; but the writ must so describe the demanded premises that any reference to papers and records *dehors* the writ would be surplusage. Willey *v.* Nichols, 59 Me. 253.

Insufficient description.—The writ described the land as "lot No. 4 in said fifth range, excepting six acres and a passage-way thereto out of the same." The description was insufficient. Smith *v.* Sanders, 56 N. H. 339.

13. It has been held to be unnecessary, although proper, to allege that the land is in the county. Martin *v.* Martin, 51 Me. 366. Nor is it necessary to refer to the register of deeds when the location of the land is otherwise sufficiently shown. Bragg *v.* White, 66 Me. 157. But see Witherow *v.* Keller, 11 Serg. & R. (Pa.) 271.

14. Where it was declared by statute that no action shall be maintained for land unless on a seizin within twenty-five years, an averment of seizin within sixty years was held open to demurrer. Bockee *v.* Crosby, 3 Fed. Cas. No. 1,593, 2 Paine 432. The demurrer here was to a plea in abatement; yet the court held that the defect in the count was searched out by it.

15. Ward *v.* Bartholomew, 6 Pick. (Mass.) 409; Elliot *v.* Heath, 6 N. H. 426. *Compare* Lyon *v.* Mottuse, 19 Ala. 463, 467, where it

e. Statement of Disseizin by Tenant. The cardinal feature of the common-law writ of entry was its allegation of a disseizin by the tenant.[16] The fact of disseizin in some way is still to be pleaded; but it may now be alleged in a very general form.[17]

C. Tenant's Statement of His Defense[18] — **1. Pleas in Abatement.** Any defect in the form or service of a writ of entry which is amendable or which can be waived by the adverse party is matter of abatement and, except when a motion is authorized by statute, can be taken advantage of only through a plea in abatement, filed in due season.[19]

2. Plea of Nul Disseisin. A frequent plea in the writ of entry was that of *nul disseisin*. It passed as a general issue, but its scope was very narrow. It put in issue the question whether the demandant was ever seized of the premises,[20] and the question of the legal title to the land.[21] It admitted that the tenant was in possession claiming a freehold.[22] The effect might be of serious practical con-

is said: "We therefore think that the allegation of disseizin is sufficient after verdict in a writ of entry, which is founded on the disseizin, and not upon the mere right of the demandant, and that the count is good considered as a count in a writ of entry, but that it is insufficient as one in a writ of right."

Alleging the value of the esplees.— In connection with the averment of the seizin of the demandant the older declarations in the writ of entry customarily alleged that the demandant was seized "by taking the profits of the land to the value of six shillings and eight pence." The omission of this phrase of art was regarded as fatal by the supreme court of Pennsylvania as late as 1824. See Witherow *v.* Keller, 11 Serg. & R. (Pa.) 271, 274.

16. See *supra*, IV, A.

The fact was at first pleaded with a painstaking degree of certainty. The nature of the alleged disseizin was precisely marked in the pleading; for it was held that the defect of the tenant's possessory title, whether arising from his own wrongful entry, or the wrongful entry of some one under whom he claimed, was always to be set forth. Thus if the action was against the disseizor himself, the writ alleged that the claim was for land into which the tenant "had no entry but by the intrusion which he himself made." If it was against a tenant to whom the original disseizor had conveyed the land, the writ alleged that the claim was for land into which the tenant had not entry save by (*per*) X "who intruded himself on it and demised to the tenant." If there had been a second alienation, this fact also appeared in the writ, through its averment that the demandant's claim was for land into which the tenant had not entry save by (*per*) Y, to whom (*cui*) X, who had intruded himself upon it, had demised it. This particularity in pleading the disseizin gave rise to the ancient doctrine of the degrees in the writ of entry. After the original wrongful entry, the first stage was in the *per*; the second in the *per* and *cui*. See 3 Blackstone Comm. 181–182; Jacob L. Dict.; 2 Pollock & M. Hist. Eng. L. 64.

17. The more common averment in the later common law was merely that the tenant within twenty years last past [the period fixed by the statute of limitations] "has unjustly and without judgment disseised him, the said plaintiff," of the land in question. See 2 Chitty Pl. (16th ed.) 118.

18. **For forms of plea** see Truro *v.* Freeman, 123 Mass. 187; Troy *v.* Haskell, 33 N. H. 533.

For form of plea in abatement see Waldo *v.* Mitchell, 24 N. H. 229.

19. Richardson *v.* Rich, 66 Me. 249.

Instances of matter of abatement.— If pending the writ the demandant's right to recover the land has been taken away by the recovery of a stranger from the tenant, or by a valid levy upon it in an execution against the demandant, the suit may be defeated by a plea in abatement filed as early as possible after the facts have occurred, although there has been a continuance of the action. Burnham *v.* Howard, 31 Me. 569. And see Walcutt *v.* Spencer, 14 Mass. 409. In a writ counting on a disseizin by the tenant the objection that it was committed by his grantor under whose deed he entered should be taken in abatement. Gordan *v.* Peirce, 11 Me. 213; Porter *v.* Cole, 4 Me. 20. When the writ is against a mortgagee who has not entered on the premises or made any claim of ownership, a plea in abatement should be filed by defendant. Lyman *v.* Hibbard, 18 N. H. 233. But a plea in abatement of a writ of entry that an execution had been levied on a part of the land without more is insufficient. Waldo *v.* Mitchell, 24 N. H. 229. See Abatement and Revival, 1 Cyc. 56 note 89; and *supra*, VIII, C.

20. Martin *v.* Wood, 6 Mass. 6.

21. Green *v.* Kemp, 13 Mass. 515, 7 Am. Dec. 169. *Compare* Russell *v.* Lewis, 2 Pick. (Mass.) 508.

22. Gibson *v.* Norway Sav. Bank, 69 Me. 579; Gammon *v.* Huff, 67 Me. 184; Colburn *v.* Grover, 44 Me. 47; Treat *v.* Strickland, 23 Me. 234; Stevens *v.* Winship, 1 Pick. (Mass.) 318, 11 Am. Dec. 178; Highbee *v.* Rice, 5 Mass. 344, 4 Am. Dec. 63; Hale *v.* Glidden, 10 N. H. 397; Gibson *v.* Bailey, 9 N. H. 168; Gibson *v.* Brockway, 8 N. H. 465, 31 Am. Dec. 200; Mills *v.* Peirce, 2 N. H. 9.

sequence when the tenant was in fact a tenant for years or at a will.[23] It was not necessary that the plea if made should go to the whole of the premises demanded; a plea of *nul disseisin* as to an undivided part was good.[24]

3. PLEA OF NON-TENURE — a. Different Forms of the Plea. If the tenant wished to deny that he was in possession as charged his proper plea was non-tenure.[25] This plea had two forms: if the tenant would deny that he had possession in any form he pleaded non-tenure general;[26] if in fact he had been in possession but only as a tenant for years or for a term of years he pleaded non-tenure special.[27] In this form the plea alleged that a third person was seized of the premises, in fee or freehold as the case might be, that he had leased to the tenant for a term of years or at will, and that the tenant had nothing in the premises except as such tenant of the third person lessor.[28] The demandant at common law was not permitted to traverse the freehold estate thus set up in the third person; but to maintain his writ he was obliged to reply that the tenant was tenant of the freehold.[29]

b. Nature of the Plea. It was a moot question whether the plea of non-tenure was in abatement or in bar.[30] In England it was apparently always deemed to be in abatement. In America the early cases went both ways.[31] The later doctrine of the American courts, enforced by statutes to some extent, is in line with the English doctrine; the plea of non-tenure is deemed to be in abatement and not in bar.[32] The practical result, where this view prevails, is threefold: (1) The

The legal effect of a plea of nul disseisin, since Mass. St. (1836) c. 273, is an admission of everything except the demandant's title; and a specification by the tenant that he is not in the actual possession of the demanded premises, but is the legal owner thereof under a deed to him, does not modify the admission contained in the plea. Johnson *v.* Boardman, 6 Allen (Mass.) 28. And see Cocheco Mfg. Co. *v.* Whittier, 10 N. H. 305.

In a real action defendant's possession must be denied by a plea of non-tenure or disclaimer; the general issue admits his possession. Graves *v.* Amoskeag Mfg. Co., 44 N. H. 462.

23. In such a case, under a plea of *nul disseisin*, the tenant could not show the true character of his tenancy or that it had not been terminated; his plea admitted that he was in possession claiming a freehold. Wiggin *v.* Smith, 54 N. H. 213. And see Tappan *v.* Tappan, 36 N. H. 98.

24. Hazen *v.* Wright, 85 Me. 314, 27 Atl. 181.

25. Mills *v.* Peirce, 2 N. H. 9.

26. Mills *v.* Peirce, 2 N. H. 9.

For the proper form see the opinion of Richardson, C. J., in Pike *v.* Bagley, 4 N. H. 76, giving Rastel's "very ancient but very correct form" of the plea, and criticizing a defective form.

27. Bacon Abr. tit. "Pleading," J, 9; Booth Real Act. 28; Jackson Real Act. 91; Stearns Real Act. 202, 207. And see Whidden *v.* Proctor, 17 N. H. 90; Mills *v.* Peirce, 2 N. H. 9.

28. For the form in full of non-tenure special see Jackson Real Act. 95; Stearns Real Act. 460.

29. Whidden *v.* Proctor, 17 N. H. 90. If the case went to trial upon this issue, however, it did not necessarily follow that the demandant failed if it appeared that the tenant had in fact entered only as a tenant at will or for a term of years; if the tenant had resisted the lawful entry of the demandant this wrong could not be qualified by showing the tenancy for years or at will. See the doctrine of the elective disseizin *supra*, IV, C, 2, c. And *compare* Whidden *v.* Proctor, 17 N. H. 90.

30. "The plea of non tenure, either of the whole or part, though usually called a plea in abatement, concluding with praying judgment of the writ, is not strictly a plea in abatement, although dilatory; for so far from giving the demandant a better writ, the plea is that the tenant is not liable to the action, inasmuch as he does not hold the land in any shape; and, besides, it is frequently pleaded, as to part, along with a plea in bar to the rest." Note to William *v.* Gwyn, 2 Saund. 42*o*, 44*b*. And see the remarks of Jackson, J., in Prescott *v.* Hutchinson, 13 Mass. 439, 440.

31. **Non-tenure a plea in bar.**—See Fosdick *v.* Gooding, 1 Me. 30, 10 Am. Dec. 25 (in dower); Dewey *v.* Brown, 5 Pick. (Mass.) 238 (in bar or in abatement); Otis *v.* Warren, 14 Mass. 239 [*criticizing* Keith *v.* Swan, 11 Mass. 216]; Prescott *v.* Hutchinson, 13 Mass. 439; Hunt *v.* Sprague, 3 Mass. 312. *Compare* Rhoden *v.* Graham, 4 Blackf. (Ind.) 517, where a denial of defendant's possession was held to amount to the general issue.

Non-tenure a plea in abatement.— See Keith *v.* Swan, 11 Mass. 216 (*dictum*); Brown *v.* Miltimore, 2 N. H. 442.

32. See cases cited *infra*, notes 33, 34, 35.

In Massachusetts, however, it has been held that non-tenure may be pleaded either in abatement or in bar. Dewey *v.* Brown, 5 Pick. 238. And see Rev. Laws (1902), c. 179, § 9, declaring that non-tenure is pleadable in abatement.

plea of non-tenure, whether general or special, must be made within the limited time allowed for pleas in abatement;[33] (2) the plea of non-tenure is properly to be verified by affidavit as to all matters of fact stated in it;[34] (3) the plea of non-tenure must at common law be strictly accurate in form or it will fall before a demurrer.[35]

4. Disclaimer — a. When Proper. If defendant in a writ of entry would admit both plaintiff's title to the land described in the writ and his right to its possession a so-called plea of disclaimer was proper.[36] The disclaimer might go to the whole of the tract demanded or to any part of it.[37]

b. Nature and Operation — (I) *In General.* In brief a disclaimer is a renunciation by defendant of title and right of possession in the land described in the writ.[38] Its general effect, as between the parties and their privies, was similar to the effect of a conveyance of the title by defendant to plaintiff. A disclaimer therefore could be made as a rule only by one who was capable of conveying the land.[39]

(II) *Effect of a Disclaimer by a Sole Defendant.* If a sole defendant disclaimed, whatever estate he had was in effect passed to and vested in plaintiff.[40]

(III) *Effect of a Disclaimer by a Co-Defendant.* If the writ of entry was brought against two, a disclaimer by one inured as a release to pass all his estate to his co-defendant.[41]

By statute in Maine (Rev. St. (1903) § 6) defendant may plead non-tenure in abatement or he may plead it by a brief statement under the general issue, filed within the time allowed for pleading in abatement.

33. A plea of non-tenure being in abatement and not in bar cannot avail unless seasonably filed. Hatch *v.* Brier, 71 Me. 542. The statute required non-tenure to be pleaded in abatement; and a defendant who neglects so to plead cannot avail himself of that defense by joining with another defendant in a plea of *nul disseisin*. Wyman *v.* Brown, 50 Me. 139. A plea of non-tenure and disclaimer, in the form of the brief statement provided by statute, is filed too late five terms after the entry of the action. Colburn *v.* Grover, 44 Me. 47. A plea of non-tenure to a writ of entry, being a plea in abatement, must be filed within the time prescribed by the rules of the court for such pleas. Newbegin *v.* Langley, 39 Me. 200, 63 Am. Dec. 612. Non-tenure must, by Me. St. (1846) c. 221, be pleaded within the time required for filing pleas in abatement. Young *v.* Tarbell, 37 Me. 509.

It is in the discretion of the court to allow a plea of non-tenure to be filed at the fourth term after the entry of the action. Tappan *v.* Tappan, 31 N. H. 41.

34. Under a rule of court requiring pleas in abatement, if containing matter of fact not appearing of record, to be verified by oath or affirmation, a plea of non-tenure to a writ of entry, under Me. St. (1846), c. 221, providing that "the defendant may plead that he is not tenant of the freehold in abatement, but not in bar," must be verified by positive affidavit as to every matter of fact therein stated, or it will be held bad on special demurrer. Fogg *v.* Fogg, 31 Me. 302.

35. Accordingly when a plea of non-tenure did not conclude by praying judgment of the writ, but concluded, "and this she is ready to verify, etc., wherefore, etc.," it was held **that the plea was bad on demurrer.** "No adjudged case has ever settled it, that 'wherefore, etc.' implies praying judgment of the writ." Pike *v.* Bagley, 4 N. H. 76, 78.

36. Tappan *v.* Boston Water Power Co., 157 Mass. 24, 31 N. E. 703, 16 L. R. A. 353; Oakham *v.* Hall, 112 Mass. 535; Prescott *v.* Hutchinson, 13 Mass. 439.

37. For an illustration see Prescott *v.* Hutchinson, 13 Mass. 439.

For the degree of certainty required when the disclaimer was of a portion of the land demanded see Pettingell *v.* Boynton, 139 Mass. 244, 29 N. E. 655; and *infra*, X, C, 4, c, (IV).

38. Oakham *v.* Hall, 112 Mass. 535.

39. Oakham *v.* Hall, 112 Mass. 535. "An infant could not disclaim; nor a husband who held only in right of his wife. So an abbot, bishop, dean, or other like sole corporation, could not disclaim, to the prejudice of the convent or church." Prescott *v.* Hutchinson, 13 Mass. 439, 440, per Jackson, J.

40. Plaintiff might enter immediately, and would become seized according to the title set forth in the writ; and the tenant would afterward be estopped from disputing that title. Tappan *v.* Boston Water Power Co., 157 Mass. 24, 31 N. E. 703, 16 L. R. A. 353; Prescott *v.* Hutchinson, 13 Mass. 439.

Discontinuance of action.— Upon the filing of a disclaimer by a sole defendant, plaintiff could discontinue his action, so far as a question of title between them was involved. If, however, he did not discontinue, the further prosecution of the action affected only such questions as remained outside the title; for by the disclaimer the title had ceased to be in issue between the parties. Tappan *v.* Boston Water Power Co., 157 Mass. 24, 31 N. E. 703, 16 L. R. A. 353; Esty *v.* Currier, 98 Mass. 500; Johnson *v.* Rayner, 6 Gray (Mass.) 107.

41. Oakham *v.* Hall, 112 Mass. 535; Prescott *v.* Hutchinson, 13 Mass. 439; Jackson Real Act. 98; Stearns Real Act. 222.

c. How Pleaded — (I) *Whether in Abatement or Bar.* This common-law character of the disclaimer,[42] as being in the nature of a plea in abatement, was preserved in the early doctrine of some American states, and to-day is its prevailing character whenever the disclaimer is formally pleaded.[43] In at least two American jurisdictions, however, Maine and Massachusetts, there was a time when the disclaimer in a writ of entry was commonly treated by the practitioners as a plea in bar.[44] The effect of this is shown in the frequent appearance in the cases of a disclaimer in conjunction with the plea of non-tenure and with the plea of *nul disseisin*.[45] Its effect is also shown in the present statutory provision permitting matter in disclaimer to be presented under the general issue.[46]

(II) *When to Be Pleaded at the Threshold.* The disclaimer, when formally pleaded, being regarded as in abatement, it follows that such a defense cannot be interposed with effect after the time limited for dilatory pleas.[47]

(III) *Disclaimer Without Formal Pleading.* On the other hand there is a marked tendency in our later legal doctrine to dispense with the formal pleading of a disclaimer.[48]

(IV) *Certainty of Description.* When the disclaimer goes to all the land demanded, a general description will suffice; but a partial disclaimer must describe the portion disclaimed with the same particularity that is required of plaintiff in his declaration, who must make his description so certain that seizin thereof may be delivered by the sheriff without reference to any description *dehors* the writ.[49]

The reason was that strictly the action against two lay only on the theory that they were either joint tenants or coparceners. If they were so in fact a renunciation of title by one and its consequent extinguishment would of itself clothe the other with the whole title, leaving him sole tenant of the land so held. If they were in fact joint disseizors, still they were in theory joint tenants by disseizin, and the same result followed a disclaimer by one, so far as their estate by disseizin was concerned. "By joining them in the action, the demandant avers them to be joint tenants. . . . If either of them has any estate or title, in sole tenancy or several tenancy, by right, the renunciation of such title by disclaimer would simply extinguish it." Oakham *v.* Hall, 112 Mass. 535, 541 [*citing* Jackson Real Act. 72; Stearns Real Act. 204], per Wells, J.

42. In the stricter common law, a disclaimer was never considered as a pleading in bar of the action. "So far from showing that the demandant had no right to the demanded premises it was an acknowledgment of his title." But on the other hand the disclaimer was not formally treated as a plea in abatement. It did not give plaintiff a better writ; it contained no prayer for judgment. Rather it was in effect an offer by defendant to yield to the claim of the demandant and admit his title. This in many cases gave the demandant the benefit of a judgment in his favor. If made by a sole tenant it was an immediate end to the suit so far as the question of title was concerned. See remarks of Jackson, J., in Prescott *v.* Hutchinson, 13 Mass. 439, 440.

43. Hazen *v.* Wright, 85 Me. 314, 27 Atl. 181; Tappan *v.* Tappan, 31 N. H. 41. And see Me. Rev. St. (1903) c. 106, § 6; Mass. Rev. Laws (1902), c. 179, § 9.

44. Hazen *v.* Wright, 85 Me. 314, 27 Atl. 181; Prescott *v.* Hutchinson, 13 Mass. 439.

45. Porter *v.* Rummery, 10 Mass. 64. *Compare* Prout *v.* Libby, 14 Mass. 151, where counsel insisted that a plea of non-tenure without disclaimer, "though good in England, . . . is not a good plea here"; but the court held that "the statute does not require a disclaimer; and the plea is sufficient at common law." See Tappan *v.* Boston Water Power Co., 157 Mass. 24, 31 N. E. 703, 16 L. R. A. 353, for an illustration of the effect of *nul disseisin* with a disclaimer. See also Prescott *v.* Hutchinson, 13 Mass. 439, for a defense of such pleading.

46. See *infra*, X, C, 4, c, (III).

47. If not filed in due season it may be treated as not setting up a legal defense, and therefore is subject to demurrer; or it may be disregarded by the court, or be stricken out and judgment entered as for want of plea. The different modes of treating a disclaimer, when filed out of season, are illustrated in Hazen *v.* Wright, 85 Me. 314, 27 Atl. 181; Hathorn *v.* Corson, 77 Me. 582, 1 Atl. 738; Hatch *v.* Brier, 71 Me. 542; Ayer *v.* Phillips, 69 Me. 50; Putnam Free School *v.* Fisher, 38 Me. 324.

48. Thus under the present statute of Massachusetts a disclaimer need not be set forth in a pleading but may be given in evidence under the general issue. Mass. Rev. Laws (1902), c. 179, § 9.

In Maine a disclaimer may be pleaded either formally in abatement, or "by a brief statement under the general issue, filed within the time allowed for pleas in abatement, unless by leave of court the time therefor is enlarged." Me. Rev. St. (1903) c. 106, § 6.

49. Pettingell *v.* Boynton, 139 Mass. 244, 29 N. E. 655, where the description of the

d. Effect of a Disclaimer on Costs and Damages. As the common law awarded no costs in any action, and permitted no damages in a real action, defendant's disclaimer could work no hardship on plaintiff. Accordingly the common law permitted no replication to a disclaimer. But with the statutory allowance of costs to the party prevailing in a civil action, it apparently followed that costs should be allowed the successful plaintiff as against a disclaiming defendant in a writ of entry. If, however, defendant in truth never had possession and relinquished all claim to the land there was no sound reason why he should pay costs. By his disclaimer he showed that the action ought never to have been brought, and that it could not be maintained against him. On the other hand plaintiff should not in consequence of a disclaimer be held to pay costs if his action was rightly brought against defendant.[50] The question was early met by a statute which permitted plaintiff to falsify the disclaimer, by showing that defendant was nevertheless a tenant of the freehold.[51] So also when plaintiff was permitted to recover damages notwithstanding the character of the writ as a real action, he might avoid the effect of a disclaimer by replying that defendant was tenant of the freehold.[52]

D. Replication. The third pleading in fact in the writ of entry was a replication. The principles governing it were and are those which apply in general to the replication or the reply in pleading.[53]

XI. EVIDENCE, TRIAL, JUDGMENT, AND REVIEW.

A. In General. Questions of evidence, trial, judgment, and review have been frequent under the writ of entry, even in modern law. To a considerable extent they involve no principle which is peculiar to the writ of entry itself but

land disclaimed was held to be too vague and uncertain for any effect.

50. See, generally, COSTS. And *compare* Mudgett *v.* Emory, 38 Me. 255; Society for Propagation of the Gospel *v.* Hall, 2 N. H. 416.

51. Merrimack River Locks, etc. *v.* Nashua, etc., R. Co., 104 Mass. 1, 6 Am. Rep. 181, where it was held that the disclaimer was falsfied by proof of occupation of the demanded premises by defendant with a permanent building, although such occupation was by a mistake of boundary and without intention to disseize. Prescott *v.* Hutchinson, 13 Mass. 439. And *compare* Parlin *v.* Macomber, 5 Me. 413. For an insufficient falsification of a disclaimer see Favour *v.* Sargent, 6 Pick. (Mass.) 5. To a plea of disclaimer the demandant replied that at the time of the purchase of the writ the tenant claimed title by virtue of a deed from a collector of taxes; the tenant demurred specially because it was not alleged that he ever had possession. It was held that the replication was bad, and the tenant entitled to costs. *Compare* Field *v.* Hawley, 126 Mass. 327. If one who was otherwise capable of disclaiming had in a previous suit pleaded *nul disseisin*, and thus technically claimed the land, he was not thereby estopped from disclaiming in a suit by a different plaintiff. "When a man comes with a better title than the former demandant, the tenant may well plead a disclaimer as to him, though he had previously set up his right to the land, against the claim of another." Owen *v.* Bartholomew, 9 Pick. (Mass.) 519, 528.

52. Prescott *v.* Hutchinson, 13 Mass. 439.

53. See, generally, PLEADING. See also Parlin *v.* Macomber, 5 Me. 413; Twomey *v.* Linnehan, 161 Mass. 91, 36 N. E. 590; Everenden *v.* Beaumont, 7 Mass. 76; Wilson *v.* Webster, 6 N. H. 419.

One occasion for a replication in a writ of entry is especially worthy of note. Although defendant could not under the general issue give in evidence a title under which he did not claim, except for the purpose of rebutting plaintiff's evidence of seizin, yet defendant could plead in bar a conveyance by plaintiff to a third person, although defendant did not claim under it; "for if the tenant have no right, yet if the demandant have no right, he cannot in law draw into question the tenant's seizin, whether acquired by right or by wrong." But it may be, notwithstanding the execution by plaintiff of a deed purporting to be a conveyance of his right, that no right has in fact passed by the deed. In such a case defendant's plea in bar could be met by a replication that nothing passed by the deed. This allegation could be traversed by defendant, and an issue to the country be joined and tried; and if the verdict was for plaintiff he was entitled to judgment. Wolcot *v.* Knight, 6 Mass. 418, 419. *Compare* Knox *v.* Kellock, 14 Mass. 200.

For the use of a replication to meet a disclaimer see *supra*, note 51; and in particular Parlin *v.* Macomber, 5 Me. 413; Favour *v.* Sargent, 6 Pick. (Mass.) 5.

For the use of a replication as against an equitable defense allowed by statute see Twomey *v.* Linnehan, 161 Mass. 91, 36 N. E. 590.

belong rather to the general doctrines which relate to evidence,[54] trial,[55] judgment,[56] and review.[57]

B. Evidence as to Demandant's Title. It is not required of a demandant that his evidence show a freehold title good to all intents; he may recover on showing a good title as against the tenant.[58] On the other hand it is necessary that the evidence establish some title in the demandant or show a sufficient adverse possession.[59] And when the demandant claims title through a corporation, the existence of the corporation, it has been held, must be shown.[60]

C. Evidence as to Demandant's Seizin. Possession is *prima facie* evidence of seizin, and on the question of possession the evidence may take a wide range.[61]

54. See, generally, EVIDENCE.

Instances of this appear in Worthing *v.* Worthing, 64 Me. 335; Warren *v.* Kimball, 59 Me. 264; Hall *v.* Bean, 12 Me. 134; Worthy *v.* Warner, 119 Mass. 550; Somes *v.* Skinner, 16 Mass. 348.

55. See, generally, TRIAL.

Instances of this appear in Peabody *v.* Hewett, 52 Me. 33, 83 Am. Dec. 486; Bucknam *v.* Bucknam, 30 Me. 494; Pejepscot Proprietors *v.* Nichols, 10 Me. 256; Holmes *v.* Turner's Falls Co., 142 Mass. 590, 8 N. E. 646; McCormick *v.* Carroll, 103 Mass. 151; Chandler *v.* Simmons, 97 Mass. 508, 93 Am. Dec. 117; Blake *v.* Sawin, 10 Allen (Mass.) 340; Johnson *v.* Rayner, 6 Gray (Mass.) 107; Curtis *v.* Francis, 9 Cush. (Mass.) 427; Laflin *v.* Brown, 7 Metc. (Mass.) 576; Saunders *v.* Farmer, 62 N. H. 572; Tappan *v.* Tappan, 31 N. H. 41; Cilley *v.* Bartlett, 19 N. H. 312.

56. See, generally, JUDGMENTS.

Instances of this appear in Ayer *v.* Phillips, 69 Me. 50; Hotchkiss *v.* Hunt, 56 Me. 252; Russell *v.* Brown, 56 Me. 94; Spaulding *v.* Goodspead, 39 Me. 564; Gilman *v.* Stetson, 16 Me. 124; Cutts *v.* King, 5 Me. 482; Butrick, Petitioner, 185 Mass. 107, 69 N. E. 1044; Butrick *v.* Tilton, 155 Mass. 461, 29 N. E. 1088; Kelley *v.* Meins, 135 Mass. 231; Currier *v.* Esty, 116 Mass. 577; Oakham *v.* Hall, 112 Mass. 535; Holyoke *v.* Haskins, 9 Pick. (Mass.) 259; Somes *v.* Skinner, 3 Pick. (Mass.) 52; Dewey *v.* Brown, 2 Pick. (Mass.) 387; Adams *v.* Frothingham, 3 Mass. 352, 3 Am. Dec. 151; Stevens *v.* Morse, 47 N. H. 532; Odlin *v.* Gove, 41 N. H. 465, 77 Am. Dec. 773; Hall *v.* Dodge, 38 N. H. 346; Tappan *v.* Tappan, 36 N. H. 98; Wood *v.* Cheshire County, 32 N. H. 421; Smyth *v.* Carlisle, 16 N. H. 464; George *v.* Sargent, 12 N. H. 313.

57. See, generally, APPEAL AND ERROR.

Instances of this appear in Peabody *v.* Hewett, 52 Me. 33, 83 Am. Dec. 486; Knox *v.* Lermond, 3 Me. 377; Parker *v.* Parker, 106 Mass. 82; Silloway *v.* Hale, 8 Allen (Mass.) 61.

58. Pettingell *v.* Boynton, 139 Mass. 244, 29 N. E. 655; Howard *v.* Holy Cross College, 116 Mass. 117; Mara *v.* Pierce, 9 Gray (Mass.) 306. The demandant in a real action may support his title by a deed recorded since the date of his writ, if no intervening title is relied on by the tenant. Howland *v.* Crocker, 7 Allen (Mass.) 153.

A title in the demandant's ancestors is sufficient, without further proof of title, if there has been no subsequent adverse possession. Osgood *v.* Coates, 1 Allen (Mass.) 77.

A writ of entry is sustained by proof of a mortgage to the demandant, an entry for foreclosure thereof, and a quitclaim deed to him of the equity of redemption before such entry for foreclosure, if the tenant relies on a title derived from the mortgagor since such entry. Whitcomb *v.* Jacobs, 9 Gray (Mass.) 255.

For instances of insufficient evidence of title as against the tenant see Douglass *v.* Libbey, 59 Me. 200; Osgood *v.* Coates, 1 Allen (Mass.) 77; Everenden *v.* Beaumont, 7 Mass. 76; Wilson *v.* Webster, 6 N. H. 419. *Compare* Butrick *v.* Tilton, 141 Mass. 96, 6 N. E. 563.

59. In a writ of entry by a town to recover land claimed by defendants under a grant from the town to their predecessors, the ownership of the town is not in the absence of other evidence established by evidence that after the execution of the alleged deed to defendants' predecessors the town voted to require the occupants of the land to build a bridge and highway over a stream situated on the land, and that such vote had been accepted by the occupants, and that the town had given its consent to the erection by them of a sawmill over such stream. Hadley *v.* Hadley Mfg. Co., 4 Gray (Mass.) 140. Where a demandant in a writ of entry claims title under a person who was in possession six years prior to the treaty of Aug. 9, 1842, between the United States and Great Britain, providing that all equitable possessory claims arising from the possession and improvement of any lot or parcel of land by the person actually in possession, or by those under which such person claims for more than six years before the date of the treaty, shall be held valid, vague and uncertain testimony which does not show the demandant's necessary connection with the claim of such person is insufficient to sustain his claim. Day *v.* Bishop, 71 Me. 132.

A lost deed, never recorded, and whose contents are in dispute, and which cannot be proved by witnesses who saw and read it, is not sufficient evidence upon which to base a judgment of title to real estate not in the possession of any grantee under it. Day *v.* Philbrook, 85 Me. 90, 26 Atl. 999.

60. Goulding *v.* Clark, 34 N. H. 148; Lumbard *v.* Aldrich, 6 N. H. 269.

61. The possession may be by the demandant in person, or by an agent or by one hav-

But in the absence of all evidence of seizin, within the statutory limit, the action fails; and to disprove the demandant's seizin the tenant may show deeds to third persons.[62]

D. Evidence as to Location of the Land. To establish the location of the demanded premises the recitals in ancient deeds are competent evidence, as are also grants of adjacent lands between strangers.[63] So the testimony of living witnesses has been admitted to prove that at the earliest period of living memory there was a tract of land answering to the description in an ancient grant.[64] But where the location is described by a certain distance from a given line, it must appear that this line is a fixed, definite, and known line, otherwise the description in the deeds, however precise, is immaterial.[65]

E. Evidence of Disseizin by Tenant. Evidence of an actual ouster is not always necessary; in many cases the disseizin may be constructive or elective.[66] But evidence of mere interference is not evidence of disseizin, nor is evidence of the existence of an easement in the tenant.[67]

F. Evidence of Disclaimer. Where the issue arises on the tenant's disclaimer, it was vital at common law that the evidence shall exclude all the land disclaimed.[68]

ing a license to enter upon the land. The written or spoken declaration or admission made by one in possession that he held in subordination to a certain title is evidence of seizin in favor of one holding that title, in an action against a third person. Rand *v.* Dodge, 17 N. H. 343.

62. When the demandant claims under a deed received from the owner more than twenty years before the filing of the writ, any evidence which shows that he parted with this title to anybody before the twenty years began to run is admissible as tending to disprove plaintiff's seizin. Hewes *v.* Coombs, 84 Me. 434, 24 Atl. 896. See also Poor *v.* Larrabee, 58 Me. 543; Williams' College *v.* Mallett, 16 Me. 84; Snow *v.* Orleans, 126 Mass. 453; Farrar *v.* Fessenden, 39 N. H. 268.

On certain bearings of this doctrine see Barry *v.* Adams, 14 Allen (Mass.) 208. There A, being a tenant in common of land, conveyed his title to B, his cotenant, who afterward conveyed to C, who sued to recover possession of the premises from D, who was in by disseizin, but failed to maintain the action, by reason of proof that B was disseized at the time of making the conveyance. A and B thereupon sued D; but it appeared that A had conveyed to B before D's disseizin was defeated. B thereupon sued alone. It was held that the former judgments and the grounds on which they were given were admissible against D to show that his disseizin commenced after the conveyance from A to B, and before the conveyance from B to C, and that the action might therefore be maintained by B.

63. Sparhawk *v.* Bullard, 1 Metc. (Mass.) 95.

64. In Gloucester *v.* Gaffney, 8 Allen (Mass.) 11, the demandants claimed under a vote of proprietors of common lands, passed in 1732, granting all the common land between two designated houses; proof of the position of the houses, and that at the earliest period within the memory of living witnesses there was a lot between them lying open and in common, was sufficient to authorize a jury to find that it was the lot granted by the ancient vote.

65. "All that the deeds had any tendency to prove was that the lands granted . . . extended a certain number of feet from a line which was not itself a fixed and definite line. . . This rendered the contents of these deeds immaterial. . . . As to the other deeds, [locating the land a certain number of feet from a fixed line] there can be no doubt that they were competent evidence." Devine *v.* Wyman, 131 Mass. 73, 76, per Lord, J., who delivered the opinion of the court.

66. Thus in modern cases proof that the tenant has occupied the land with a permanent building, although because of a mistake of boundaries, and without intent to disseize, is sufficient to establish a disseizin by him. Merrimack River Locks, etc. *v.* Nashua, etc., Co., 104 Mass. 1, 6 Am. Rep. 181. So the fact that the tenant took and recorded a deed of the premises from a tax-collector is sufficient *prima facie* to establish a disseizin under a plea of *nul disseisin*, with a specification of non-tenure. Johnson *v.* Boardman, 6 Allen (Mass.) 28. So on a plea of disclaimer proof that defendant remained in possession after the levy of plaintiff's execution authorizes a verdict for the latter. Merrill *v.* Gould, 16 N. H. 347. And see Walker *v.* Wilson, 4 N. H. 217, where the act of remaining in possession, although under a disclaimer of possession, was held to be a disseizin.

67. See *supra*, IV, C, 3, b; V, C. And *compare* Jordan *v.* Sylvester, 7 Me. 335; Field *v.* Hawley, 126 Mass. 327; Crandell *v.* Taunton, 110 Mass. 419; Cilley *v.* Bartlett, 19 N. H. 312.

68. If it appeared that the tenant was in possession of any part of the land disclaimed his plea was falsified and the demandant prevailed. Stearns Real Act. 470. And see Putnam Free School *v.* Fisher, 34 Me. 172, referring to Me. St. c. 145, § 9.

ENUMERATE. To designate, or specifically mention; to mention in detail, or reckon up singly, to tell, to recount, to relate.[1]

ENUMERATED MOTIONS. See MOTIONS.

ENUMERATED POWERS. Certain powers mentioned in the federal constitution which are granted to the various departments of the national government.[2] (See, generally, CONSTITUTIONAL LAW.)

ENUMERATIO INFIRMAT REGULAM IN CASIBUS NON ENUMERATIS. A maxim meaning "Enumeration disaffirms the rule in cases not enumerated."[3]

ENUMERATIO UNIUS EST EXCLUSIO ALTERIUS. A maxim meaning "Specification of one thing is an exclusion of the other."[4]

ENVOY. See AMBASSADORS AND CONSULS.

EODEM LIGAMINE QUO LIGATUM EST DISSOLVITUR. A maxim meaning "A bond is released by the same formalities with which it is contracted."[5]

EODEM MODO QUO ORITUR, EODEM MODO DISSOLVITUR. A maxim meaning "By the same mode or means by which a thing originates, by the same mode or means it is dissolved."[6]

EODEM MODO QUO QUID CONSTITUITUR, EODEM MODO DESTRUITUR. A maxim meaning "In the same way in which anything is constituted, in that way is it destroyed."[7]

EO INSTANTI. At that instant; at the very or same instant; immediately.[8]

EO QUOD IPSI BASTARDUS SIT NATUS ANTE MATRIMONIUM MATRIS IPSORUM. A writ, based upon the Statute of Merton, issued from the Kings Court to the Archbishop directing an inquiry whether any one being born before matrimony may inherit in like manner as he that is born after matrimony.[9] (See, generally, BASTARDS.)

EPHEMERIS ANNUA PARS LEGIS ANGLICANAE. A maxim meaning "An annual diary is a part of the English Law, i. e. the law that takes notice of the annual calendar."[10]

EPICURE. A devotee of sensual enjoyment; a voluptuary; a gourmand.[11]

EPIDEMIC. See HEALTH.

EPILEPSY. A disease of the brain, which may be either idiopathic or symptomatic, spontaneous or accidental, and which occurs in paroxysms, with uncertain intervals between.[12] (See, generally INSANE PERSONS.)

1. San Francisco *v.* Pennie, 93 Cal. 465, 469, 29 Pac. 66, distinguishing "to enumerate" from "to number," where it was held that in a statute requiring an assessor to list in an assessment book the various descriptions of property, their value, kind, and amount, and quality, the word does not mean merely to "number," and that a failure to enumerate in detail such property shall not invalidate the assessment. *Compare* Wolff *v.* U. S., 71 Fed. 291, 292, 18 C. C. A. 41. And see Cutting *v.* Cutting, 20 Hun (N. Y.) 360, 365 [*affirmed* in part in 86 N. Y. 522].

2. Bloomer *v.* Todd, 3 Wash. Terr. 599, 617, 19 Pac. 135, 1 L. R. A. 111 [*citing* U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588; Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 187, 6 L. ed. 23.

3. Black L. Dict. [*citing* Bacon Aph. 17].

4. Adams Gloss.

Applied in Ware *v.* State, 35 N. J. L. 553, 557; McCann *v.* Gerding, 29 Misc. (N. Y.) 283, 287, 60 N. Y. Suppl. 467; Matter of Washburn, 4 Johns. Ch. (N. Y.) 106, 114, 8 Am. Dec. 548.

5. Wharton L. Lex. [*citing* Coke Litt. 212*b*].

Applied in Sibree *v.* Tripp, 15 L. J. Exch. 318, 323, 15 M. & W. 23.

"Eo ligamine quo ligatur dissolvitur" is the wording of the maxim as applied in Den *v.* Vancleve, 5 N. J. L. 589, 636 [*citing* Noy Max. 11].

6. Adams Gloss.

Applied in Raymond *v.* Smith, 5 Conn. 555, 559.

7. Wharton L. Lex.

Applied in Dyer *v.* Brannock, 2 Mo. App. 432, 444; Rutland's Case, 6 Coke 52*a*, 53*b*.

8. Bouvier L. Dict. [*citing* 1 Blackstone Comm. 196, 249]. See also Chudleigh's Case, 1 Coke 119*b*, 138*a*.

9. Doe *v.* Vardill, 5 B. & C. 438, 453, 11 E. C. L. 531 [*affirmed* in 9 Bligh N. S. 32, 5 Eng. Reprint 1207, 7 Cl. & F. 895, 926, 7 Eng. Reprint 1308, 4 Jur. 1076, West 500, 9 Eng. Reprint 578, and *cited* in Miller *v.* Miller, 18 Hun (N. Y.) 507, 518]. See also Doe *v.* Vardill, 9 Bligh N. S. 32, 5 Eng. Reprint 1207, 7 Cl. & F. 895, 926, 7 Eng. Reprint 1308, 4 Jur. 1076, West 500, 9 Eng. Reprint 578].

10. Adams Gloss. [*citing* Halkerston Max. 43].

11. Beadleston *v.* Cooke Brewing Co., 74 Fed. 229, 232, 20 C. C. A. 405.

12. Dunglison Med. Dict. [*quoted* in Aurentz *v.* Anderson, 3 Pittsb. (Pa.) 310, 312].

EPISCOPACY. A government of a church by bishops or prelates.[13] (See, generally, RELIGIOUS SOCIETIES.)

EPISCOPUS ALTERIUS MANDATO QUAM REGIS NON TENETUR OBTEMPERARE. A maxim meaning "A bishop needs not obey any mandate save the king's."[14]

EPITHET. See LIBEL AND SLANDER.

EQUAL.[15]. As an adjective, being in just proportion;[16] uniform.[17] As a verb, to make equivalent to; to recompense fully; to answer in full proportion;[18] to make equal, cause to be equal in amount or degree as compared.[19]

EQUALITY. Likeness in possessing the same rights, privileges, and immunities, and being liable to the same duties.[20] A word which conveys the idea of identity in size and form.[21] (Equality: Of Protection, see CONSTITUTIONAL LAW. Of Taxation, see TAXATION.)

EQUALIZE.[22] To make equal,[23] to cause to correspond, or be like in amount or degree as compared;[24] to take a number of objects and select one of such number for the standard, and make all the others conform to it.[25] The word

"**Epilepsy, . . . may be considered, whilst it lasts, as a state of insanity,** during which the patient is deprived of reason and judgment; but he is at the same time deprived of sense and consciousness, and is wholly incapable of doing any thing." Lawton *v.* Sun Mut. Ins. Co., 2 Cush. (Mass.) 500, 517.

"**Epilepsy**" **as used in an application for life insurance** see Gridley *v.* Northwestern Mut. L. Ins. Co., 11 Fed. Cas. No. 5,808, 14 Blatchf. 107.

"**Epileptic fury**" is a term descriptive of the temporary insanity which in some cases follows the paroxsyms of epilepsy, varying in different instances from the slightest alienation to most violent mania. 2 Wood Pr. Med. 748 [*quoted* in Aurentz *v.* Anderson, 3 Pittsb. (Pa.) 310, 313].

13. It is that form of ecclesiastical government in which diocesan bishops are established as distinct from and superior to priests or presbyters; government of the church by three distinct orders of ministers, bishops, priests, and deacons. Webster Dict. [*quoted* in Central New York Diocese *v.* Colgrove, 4 Hun (N. Y.) 362, 366].

14. Wharton L. Lex. [*citing* Coke Litt. 134].

15. "**Equal among**" see Kelley *v.* Vigas, 112 Ill. 242, 245, 54 Am. Rep. 235.

"**Equal degree of consanguinity**" **distinguished from** "**next of kindred**" see Fidler *v.* Higgins, 21 N. J. Eq. 138, 162.

"**Equal division**" see Butler *v.* Butler, 97 Ky. 136, 30 S. W. 4, 17 Ky. L. Rep. 129.

"**Equal facilities**" see Little Rock, etc., R. Co. *v.* St. Louis Southwestern R. Co., 63 Fed. 775, 778, 11 C. C. A. 417, 26 L. R. A. 192.

"**Equal footing**" see Boyd *v.* Nebraska, 143 U. S. 135, 175, 12 S. Ct. 375, 36 L. ed. 103 [*reversing* 31 Nebr. 682, 48 N. W. 739, 51 N. W. 602].

"**Equal moieties**" see Stetson *v.* Eastman, 84 Me. 366, 371, 24 Atl. 868.

"**Equal partner**" see Richards *v.* Fraser, 136 Cal. 460, 464, 69 Pac. 83.

"**Equal parts**" see Fidler *v.* Higgins, 21 N. J. Eq. 138, 156.

"**Equal quantity**" **or** "**equal distance**" **used in transportation** see Hines *v.* Wilmington, etc., R. Co., 95 N. C. 434, 441, 59 Am. Rep. 250.

"**Equal shares**" see Daggett *v.* Slack, 8 Metc. (Mass.) 450, 454; Hoch's Estate, 154 Pa. St. 417, 420, 26 Atl. 610.

"**Equal to**" see Stewart *v.* Lehigh Valley R. Co., 38 N. J. L. 505, 518; U. S. *v.* Potter, 56 Fed. 83, 92; Nichol *v.* Godts, 10 Exch. 191, 193, 23 L. J. Exch. 314.

"**Just and equal proportions**" see Cheever *v.* Imlay, 7 Serg. & R. (Pa.) 510, 514.

16. Webster Dict. [*quoted* in Fry *v.* Hawley, 4 Fla. 258, 279]. *Compare* People *v.* Hoffman, 116 Ill. 587, 599, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793.

"**What is meant by being equal,** must have reference to its effect. If circumstantial evidence satisfies the mind, then it is equal to positive evidence, because it produces the same effect." People *v.* Vanderpool, 1 Mich. N. P. 264, 269.

17. Crawford *v.* Linn County, 11 Oreg. 482, 485, 5 Pac. 738.

18. Webster Dict. [*quoted* in Fry *v.* Hawley, 4 Fla. 258, 279].

19. Century Dict. [*quoted* in Bardrick *v.* Dillon, 7 Okla. 535, 542, 54 Pac. 785].

20. Black L. Dict. [*quoted* in Bardrick *v.* Dillon, 7 Okla. 535, 542, 54 Pac. 785]. *Compare* San Mateo County *v.* Southern Pac. R. Co., 13 Fed. 722, 8 Sawy. 238, 252.

21. Stewart *v.* Lehigh Valley R. Co., 38 N. J. L. 505, 517, where it is said: "It always, I think, excludes the idea of inferiority, and therefore when we assert that two things are equal to each other, we give it more of mathematical accuracy, because we deny the inferiority of either to the other; but when we say that one person or thing is equal to another, we do not necessarily nor ordinarily deny its superiority to that other."

22. **Distinguished from** "**discharge**" see State *v.* Ormsby County Com'rs, 7 Nev. 392, 397.

23. Wallace *v.* Bullen, 6 Okla. 757, 759, 54 Pac. 974.

24. Webster Int. Dict. [*quoted* in Bardrick *v.* Dillon, 7 Okla. 535, 542, 54 Pac. 785].

25. Wallace *v.* Bullen, 6 Okla. 757, 759, 54 Pac. 974.

has also been construed to mean to secure equality.[26] (See EQUAL; EQUALITY; and, generally, TAXATION.).

EQUALLY.[27] Alike.[28]

EQUIPAGE. As used in shipping, a term sometimes applied to the crew of a vessel.[29] (See, generally, SHIPPING.)

EQUIPMENT.[30] The act of equipping or fitting, or the state of being equipped.[31] As applied to transportation, the necessary adjuncts of a railway.[32]

EQUIPMENT OF A COAL MINE. All the necessary adjuncts of such a mine.[33] (See, generally, MINES AND MINERALS.)

EQUITABLE. Marked by a due consideration for what is fair, unbiased, or impartial.[34] (Equitable: Action, see ACTIONS; EQUITY. Assets, see EXECUTORS AND ADMINISTRATORS; MARSHALING ASSETS AND SECURITIES. Assignment, see ASSIGNMENTS. Attachment, see GARNISHMENT. Construction, see STATUTES. Conversion, see CONVERSION. Defense, see ACTIONS; COMMERCIAL PAPER; EJECTMENT; JUDGMENTS. Ejectment, see EJECTMENT. Estoppel, see ESTOPPEL. Interpretation, see STATUTES. Lien, see LIENS. Maxims, see EQUITY. Mortgage, see CHATTEL MORTGAGES; MORTGAGES. Relief, see EQUITY. Separate Estate, see HUSBAND AND WIFE. Set-Off, see RECOUPMENT; SET-OFF AND COUNTER-CLAIM. Title, see EJECTMENT. Waste, see WASTE.)

EQUITABLE ELECTION. A rule in equity that where two inconsistent or alternative rights or claims are presented to the choice of a party by a person who manifests the clear intention that he should not enjoy both, then he must accept or reject one or the other; and so, in other words, that one cannot take a benefit under an instrument, and then repudiate it.[35] (See, generally, DESCENT AND DISTRIBUTION; DOWER; WILLS.)

EQUITABLE ESTATE. An estate acquired by operation of equity, or cognizable in a court of equity.[36] A term applied to the collateral obligations of trust which were not known at law as interests in land.[37] (Equitable Estate: In General, see MORTGAGES; TRUSTS. Jurisdiction of Equity, see EQUITY.)

26. Chamberlain *v.* Walter, 60 Fed. 788, 792.

27. **Not synonymous with "likewise"** see Gulf, etc., R. Co. *v.* Warlick, 1 Ind. Terr. 10, 16, 35 S. W. 235.

"Equally credible" see Collins *v.* Stephens, 58 Ala. 543, 545. And see, generally, WITNESSES.

"Equally interested" see Connolly *v.* Davidson, 15 Minn. 519, 2 Am. Rep. 154.

"Evidence equally with the originals thereof" see Campbell *v.* Laclede Gas-Light Co., 119 U. S. 445, 449, 7 S. Ct. 278, 30 L. ed. 459.

28. Kimball *v.* Kimball, 16 Mich. 211, 215; Loveacres *v.* Blight, Cowp. 352, 357.

29. Falconer Marine Dict. [*quoted* in U. S. *v.* Winn, 28 Fed. Cas. No. 16,740, 3 Sumn. 209].

30. **Personal equipment** see Choctaw, etc., R. Co. *v.* Zwirtz, 13 Okla. 411, 415, 73 Pac. 941.

31. Choctaw, etc., R. Co. *v.* Zwirtz, 13 Okla. 411, 415, 73 Pac. 941 [*citing* Century Dict.]; Webster Dict. [*quoted* in Metz *v.* California Southern R. Co., 85 Cal. 329, 330, 24 Pac. 610, 20 Am. St. Rep. 228, 9 L. R. A. 431, where the word is compared with "luggage"]. See also Baltimore City Appeal Tax Ct. *v.* St. Peter's Academy, 50 Md. 321, 346; Gleim *v.* The Belmont, 11 Mo. 112, 113.

As defined under an army act see 56 & 57 Vict. c. 4, § 4.

32. Rubey *v.* Missouri Coal, etc., Co., 21 Mo. App. 159, 169 [*quoting* Webster Dict., and *quoted* in People *v.* St. Louis, etc., R. Co., 176 Ill. 512, 522, 52 N. E. 292].

"Equipment of railroad" see Chicago, etc., R. Co. *v.* Hoyt, 89 Wis. 314, 326, 62 N. W. 189; St. Louis, etc., R. Co. *v.* Sandal, 3 Tex. App. Civ. Cas. § 379.

33. Rubey *v.* Missouri Coal, etc., Co., 21 Mo. App. 159, 169.

34. New Albany Gas Light, etc., Co. *v.* New Albany, 139 Ind. 660, 677, 39 N. E. 462. *Compare* Tillson *v.* U. S., 100 U. S. 43, 46, 25 L. ed. 543.

35. Peters *v.* Bain, 133 U. S. 670, 695, 10 S. Ct. 354, 33 L. ed. 696 [*quoted* in Barrier *v.* Kelly, 82 Miss. 233, 248, 33 So. 974, 62 L. R. A. 421], where it is said: "The doctrine of election rests upon the principle that he who seeks equity must do it." See also Cooper *v.* Cooper, L. R. 7 H. L. 53, 67, 30 L. T. Rep. N. S. 409, 22 Wkly. Rep. 713; Pomeroy Eq. Jur. § 463 [*quoted* in Barrier *v.* Kelly, 82 Miss. 233, 248, 33 So. 974, 62 L. R. A. 421, where it is said: "The doctrine of equitable election is, in our judgment, not founded on intention"].

36. Brown *v.* Freed, 43 Ind. 253, 256 [*quoting* Burrill L. Dict.; 1 Stephen Comm. 216, 285, 328]. And *compare* Avery *v.* Dufrees, 9 Ohio 145, 147, where the term is distinguished from "legal interest or estate."

37. McIlvaine *v.* Smith, 42 Mo. 45, 56, 97 Am. Dec. 295.

EQUITABLE EXECUTION. A term which has been applied to the appointment of a receiver with power of sale.[38]

EQUITABLE INTEREST. Such an interest as a court of equity can pursue and appropriate to the discharge of debts.[39]

EQUITABLE JETTISON. In admiralty, a term applied in the adjustment of losses, where there is an ejection of cargo in case of a common peril threatening the destruction of a vessel and cargo.[40]

EQUITABLE LEVY. The filing of a creditor's bill and the service of process which creates a lien, in equity upon the effects of the judgment debtor.[41] (See, generally, CREDITORS' SUITS.)

EQUITABLE TITLE. The right in the party to whom it belongs to have the legal title transferred to him.[42]

EQUITABLY. Fairly;[43] justly, and impartially.[44]

38. Hatch *v.* Van Dervoort, 54 N. J. Eq. 511, 518, 34 Atl. 938 [*citing* 1 High Rec. § 2]. And see Kirk *v.* Burgess, 15 Ont. 608, 609, where an equitable execution is described as being "a mode of obtaining payment of a judgment debt by the appointment of a receiver of property of a defendant, which the sheriff is by reason of the imperfection of the statutes respecting executions unable to reach or deal with." See also Croshaw *v.* Lyndhurst Ship Co., [1897] 2 Ch. 154, 66 L. J. Ch. 576, 76 L. T. Rep. N. S. 553, 45 Wkly. Rep. 570; Norburn *v.* Norburn, [1894] 1 Q. B. 448, 63 L. J. Q. B. 341, 70 L. T. Rep. N. S. 411, 10 Reports 10, 42 Wkly. Rep. 127.

Equitable execution is not like legal execution; it is equitable relief, which the court gives because execution at law cannot be had. It is not execution but a substitute for execution. *In re* Shephard, 43 Ch. D. 131, 137, 59 L. J. Ch. 83, 62 L. T. Rep. N. S. 337, 38 Wkly. Rep. 133 [*quoted* in *Re* Craig, 18 Ont. Pr 270, 273].

39. Leathwhite *v.* Bennet, (N. J. Ch. 1887) 11 Atl. 29, 30.

As used in an agreement for a sale, the term "cannot be said to be ambiguous, because it may mean one or another description of equitable interest." Ashworth *v.* Mounsey, 2 C. L. R. 418, 9 Exch. 175, 187, 23 L. J. Exch. 73, 2 Wkly. Rep. 41.

"An equitable interest in land" is "such an interest only as might furnish a ground for equitable relief against the trustee to enforce the execution of the trust, or 'an equitable chose in action.'" McIlvaine *v.* Smith, 42 Mo. 45, 55, 97 Am. Dec. 295.

40. Slater *v.* Hayward Rubber Co., 26 Conn. 128, 136.

41. Miller *v.* Sherry, 2 Wall. (U. S.) 237, 239, 17 L. ed. 827 [*quoted* in Huneke *v.* Dold, 7 N. M. 5, 15, 32 Pac. 45]; George *v.* St. Louis Cable, etc., R. Co., 44 Fed. 117, 120. See also Beck *v.* Burdett, 1 Paige (N. Y.) 305, 308, 19 Am. Dec. 436; Bayard *v.* Hoffman, 4 Johns. Ch. (N. Y.) 450, 458.

42. Thygerson *v.* Whitbeck, 5 Utah 406, 408, 16 Pac. 403. And see Beringer *v.* Lutz, 188 Pa. St. 364, 365, 41 Atl. 643; Barrows *v.* Keene, 15 R. I. 484, 487, 8 Atl. 713.

43. Warnock *v.* Thomas, 48 Ala. 463, 465; New York, etc., R. Co. *v.* Dennis, 40 N. J. L. 340, 358; Hackett *v.* U. S. Equitable L. Assur. Soc., 50 N. Y. App. Div. 266, 271, 63 N. Y. Suppl. 1092.

44. Hackett *v.* U. S. Equitable L. Assur. Soc., 50 N. Y. App. Div. 266, 271, 63 N. Y. Suppl. 1092.